

RESTRICTED
LIMITED B

GATT/CP.2/14
20 August 1948

Original: ENGLISH

GENERAL AGREEMENT ON TARIFFS AND TRADE
CONTRACTING PARTIES
SECOND SESSION

NOTE ON THE STATUS OF THE AGREEMENT AND PROTOCOLS

Statement by Mr. A.J. Norval, Representative
of the Union of South Africa at the Seventh
Meeting held on 20 August 1948

1. As you are no doubt aware, the Government of the Union of South Africa informed the Secretary-General of the United Nations on 16 July, that they are unable to accept this protocol as an instrument modifying the General Agreement on Tariffs and Trade, either in its provisional application, or in its final application under Article 26. The South African Delegation would like to take this opportunity of explaining the reasons for this attitude.
2. Let us take, first of all, the agreement in its provisional application, i.e., the agreement as applied in pursuance of the Protocol of Provisional Application, of 30 October, 1947. The provisional agreement came into force, as a legally binding agreement, on 1 January, 1948.
3. As we all know, in terms of Par. 6 of this Protocol, the original thereof was deposited with the Secretary-General of the United Nations, and it was agreed to be kept open for signature by other Governments, signatories to the Final Act, until 30 June, 1948.
4. By signing the Final Act, the Governments concerned authenticated not only the text of the agreement, but also the text of the Protocol, and agreed that the Protocol, if signed by 15 November, 1947, was to be released, together with the Agreement and the Final Act, by the Secretary-General, for publication on 18 November, 1947. By this undertaking in Par. 6 of the Protocol, the authentication, and the agreement to have this Protocol released by the Secretary-General, the first signatories to the Protocol and the other signatories to the Final Act must be taken to have agreed that all signatories to the Final Act, would have the right to sign the Protocol before the 30 June, 1948.
5. They did not, of course, thereby become bound to sign the Protocol, but they became entitled to do so, as of right, before 30 June, 1948. This, in the view of our Government, was a right of which no signatory to the Final Act, could be deprived without its own consent.

6. What, then, did this right comprise? Was it the right to become a party to a particular agreement, in the form authenticated and deposited with the Secretary-General? If it was not such a right, was it then merely the right to become a party to an altogether uncertain agreement, in whatever form the first signatories, or the contracting parties for the time being, may be pleased to give it, by amendments, however sweeping and far-reaching, which may be made by them at their own discretion, without the consent of the other signatories to the Final Act?

7. In our respectful submission, there can be no doubt as to the answer to these questions. What the first signatories agreed in clear and unambiguous terms, to keep open for signature until 30 June, 1948, and what the other signatories to the Final Act were entitled to accept, would remain open for signature until that date, was the provisional agreement in the terms agreed upon, authenticated, deposited and published. It was that particular agreement and no other. And the signatories to the Final Act had the right, for the specific period which they were allowed, to become parties to that particular agreement, in those terms, without any amendments.

8. Amendments, if they are to bind subsequent signatories of the provisional protocol, could have one effect only, i.e., to substitute for the authenticated agreement, another agreement, in other terms, terms which may be radically different in regard to the most fundamental of the principles upon which the signatories to the Final Act had agreed only after long and arduous negotiations, and not without inconvenience and considerable expense to all concerned.

9. To adopt a different interpretation would be to sanction what might have amounted to a stultification of the protracted labours of the previous conferences, and to sweep aside, as of no real account, the clear understanding which had emerged from those labours. When the delegations parted at Geneva in 1947, it was mutually understood that they had succeeded in arriving at a formulation of an agreement, which all the signatories to the Final Act regarded as suitable for consideration by their Governments, which their Governments would be entitled to accept, and upon the terms of which their Governments could rely in making such anticipatory adjustments in their domestic legislation as may be required in accordance with their constitutional procedures.

10. An interpretation of the provisional agreement, which would allow the contracting parties for the time being to the provisional agreement, to amend its terms before the expiry of the period allowed for signature, and without the consent of all the other signatories to the Final Act, would undo all this, and would create a precedent which would introduce a most undesirable element of uncertainty into future negotiations of a similar nature. We would certainly not be promoting international co-operation, if we were to reduce such a definite understanding, to so precarious a basis.

11. We would submit, therefore, that the first signatories to the Protocol of Provisional Application, and indeed, all the signatories to the Final Act authenticating this Protocol, must be taken to have contemplated that the power of the contracting parties for the time being, to amend the provisional agreement under Article 30, the only Article under which it could be amended, would be suspended until 30 June, 1948, the date upon which it would be known who all the contracting parties to the provisional agreement were; or that, at the least, the power to amend the provisional agreement under this Article, would not be exercised in such a way as to prejudice the right of any signatory to the Final Act, as against all other signatories, to become a party to the provisional agreement in the form agreed upon and authenticated.

12. It is significant that the Protocol was to be open for signature up to this specific date. Had no date been specified, the position might very well have been different. It could then have been argued that the signatories could not have contemplated a state of affairs in which the contracting parties for the time being would be precluded from making any amendments, for an indefinite period, and until the possibility of further signatures had been eliminated. But that is not the case here. Here there is no such indefinite period to negative the right to become a party to this agreement in an unmodified form. The language used, and the surrounding circumstances, point to a particular agreement. It is that agreement, and no substituted amended form of it, to which every signatory to the Final Act was entitled, as against all other signatories to that Act, to become a party within the stipulated period.

13. In our submission, therefore, the operation of Article 30, was suspended until the 30 June, 1948. It could not, before that date, be applied (except with the consent of all) in such a way as to violate the right to become a party to the provisional agreement, in the form given to it by the consent of all. It is for these reasons that the Union Government have put forward the view that the modifying protocol is inoperative, in so far as it purports to amend the agreement in regard to its provisional application.

14. This modifying protocol, however, does not merely purport to amend the agreement in regard to its provisional application. It seems to go much further. It also purports, if we understand it correctly, to amend the agreement in relation to its final application under Article 26.

15. Now, as we all know, the agreement has not yet entered into force under that Article. For the purposes of that Article, we have, as yet, no more than an agreed text, which may or may not be put into operation. What is in force at present, is merely the agreement in its provisional application, i.e., a provisional agreement. For the purposes of this provisional agreement, the text intended for the ultimate agreement, was modified in certain respects, in order to facilitate its provisional application, as will appear inter alia from Par. 1(b) of the provisional protocol, and the interpretative notes to Articles 1 and 2. To that extent, the provisional agreement is not the same agreement as the agreement in the terms in which it was intended finally to come into force. The parties,

also, need not be, and quite probably will not be, the same parties. Because of these differences, in regard to date of commencement, substantive content, and possible parties, one could hardly speak here of a single agreement. In reality, we have two separate instruments, one, the provisional agreement, containing one set of rights and obligations, operative as from a certain date, between certain parties, and another, the text of the agreement as it was intended finally to enter into force, containing a somewhat different set of rights and obligations, which will be operative as from a different date, and quite probably between different parties.

16. The point here is, that in relation to the agreement, as it is to be finally applied, Article 30 is not in operation at all. It cannot be in operation, for the simple reason, that the final agreement itself has not entered into force under Article 26, and there can, therefore, as yet be no contracting parties under Article 26, who could be competent to amend the final agreement. All we have, in this regard, is the agreed and authenticated text for a final agreement. There is, in fact, no operative provision under which this text, i.e., the text which is lying with the Secretary-General for acceptance, could be amended.

17. How, then, can amendments be made to this text? In our submission, such amendments can be made in one way only, i.e., by the consent of all the signatories to the Final Act, who agreed upon and authenticated this text, in order that it may be deposited with the Secretary-General for acceptance by their respective Governments, thereby conferring upon the Government of every signatory, as against the Governments of all other signatories, the right to accept this particular text, and to insist that no other text be substituted for this text, and for this same purpose of acceptance, by a process of amendments or otherwise, without its consent.

18. The only alternative to this as we see it would be to say that the contracting parties to the provisional agreement, i.e., the signatories to the protocol of provisional application, have the power, under Article 30 as provisionally applied, to amend the agreement also in relation to its final application under Article 26. That would mean, that the signatories to the protocol of provisional application, some of whom may never become parties to the final agreement at all, may, at their discretion (provided they are unanimous, where necessary) validly amend every single provision of the final agreement, Schedules and all, before it has entered into force as a final agreement. It would further mean that every signatory to the Final Act would have to accept such amendments as have been made unanimously, should he not desire to be excluded from the final agreement altogether.

19. What is more, for all that was known at the time, there might never have been any more than the eight original signatories to the protocol of provisional application, representing 65% of the total external trade of all the signatories to the Final Act instead of the 85% provided for in Article 26. If it is competent for the signatories to this Protocol, under Article 30 as provisionally applied, to amend the agreement for the purposes of its final application, it would then have been competent for these eight signatories, to

amend the final agreement in advance, before it has come into operation, in whatever way they considered expedient, not merely for the purposes of its application as between themselves, but also for the purposes of its application as between all other signatories to the Final Act, who may wish to become parties to the final agreement. In other words, the eight provisional parties would then have had the power to brush aside the results of all the painstaking negotiations which have occupied the 23 delegations for such a long time, and to dictate to the final parties, the terms of the final agreement. Prospective final parties would either have had to accept these terms, or to stay out of the final agreement. Now, that, you will agree, is such an unacceptable, such a startling proposition, that one need hardly say that that could never have been the intention. That, certainly, was not the sense in which the South African delegation understood what had been done. And it is hard to believe that any other delegation could have had in mind, the surrender of the final text they had solemnly agreed upon, to a discretionary power of amendment by the first signatories to the Protocol of Provisional Application, or for that matter, by the full eventual number of those signatories, at a time when it could not have been known whether or not all the signatories to the Final Act or even a substantial majority of them, would become signatories to the Protocol.

20. It is submitted, therefore, that the contracting parties to the agreement as provisionally applied, are not automatically contracting parties for the purposes of the agreement as it is to be finally applied. They have no such overriding power of anticipatory amendment of the agreement in its final application, regardless of the wishes of any signatory to the Final Act. In relation to the final application of the agreement, there are as yet no contracting parties, and no amendments can be made under Article 30.

21. As already pointed out, there is at present no more than a text of the final agreement, which is lying for acceptance under Article 26. This text is a text agreed upon, as a text for an agreement, by all the signatories to the Final Act. Everyone of them is entitled to claim that this text, and no other text to be substituted for it by a process of amendments, is to be open for acceptance. It is only, therefore, with the consent of every signatory that this text can be amended. This may be regarded by some as inconvenient. It is not, however, more inconvenient than the lengthy process by which agreement was reached on the full text. And in any case, convenience cannot override the rights of a signatory to the Final Act.

22. It is for these reasons that the Government of the Union of South Africa hold the view that the agreement, as provisionally applied, could not, before 30 June, 1948, and that the agreement, as it is to be finally applied, cannot at any time before it has entered into force under Article 26, be amended in such a way as to derogate from the rights to which we have referred, except by the unanimous decision of all the signatories to the Final Act.

23. This, we may add, also appears to have been the view upon which the signatories to the Final Act have themselves acted in seeking to effect amendments of the agreement. In the modifying protocol, of the 24 March, 1948, now under discussion, the signatures were sought, not only of the contracting parties to the agreement as provisionally applied, but also of the other signatories to the Final Act. As set forth in this Protocol, there were two sets of parties, one acting in their capacities as contracting parties, and another acting in their capacities as signatories to the Final Act. Together, these two sets of parties, in the specific terms of the preamble, were stated to agree to the modifications contained in this Protocol. By Par. 5 of this Protocol, its signature by any Government which is not at the time of signature a contracting party to the agreement, is to serve as authentication of the texts of the modifications. Had it been recognised that the contracting parties for the time being to the provisional agreement, were at that time competent to amend, either the provisional agreement or the final agreement, it would have been quite superfluous to have these modifications authenticated in this way by other signatories to the Final Act. This authentication seems to have proceeded from the well-founded assumption that the co-operation of all the signatories was necessary.

24. A similar procedure was followed in the Special Protocol Modifying Article 14. It is true that in terms of Par. 5 of that Protocol, it was to enter into force on the day on which it had been signed by all the governments which were at that time contracting parties to the General Agreement. But that cannot alter the legal position or the fact that notwithstanding this, the signatures also of other signatories to the Final Act, were sought and obtained, presumably because it was felt that what was being done could not be validly done, as far, at any rate, as the agreement in its final application is concerned, without the consent of the other signatories to the Final Act.

25. There is reason to suppose, therefore, that the view we have put to you, is the view which has been acted upon by the parties themselves. If that view is the right view, as the Union Government take it to be, this modifying protocol cannot enter into force, as an amendment, either of the provisional agreement or of the text of the final agreement, until it has been agreed to by all the signatories to the Final Act. It is in this light that, in our submission, we should judge the status of these protocols.

26. I have endeavoured, Mr. Chairman, to explain to the CONTRACTING PARTIES the reasons why we regard this Protocol as invalid. I shall now proceed to present to you the considerations which have made it impossible for my Government to sign the Protocol, and I think it will be helpful to my colleagues better to appreciate our attitude to the provisions of the proposed Article XXXV if I were to describe the background of South Africa's participation in the discussions and negotiations of last year.

27. South Africa came to Geneva in 1947 with the sincere determination to help to establish a new framework for international trade within which the peaceful economic development of all nations could be achieved. We fully realised and realise it now, that if we are to build a new world freed from the shackles of the past and from the continual threat of war, then sacrifices would have to be made. Nations would have to be willing to surrender part of the economic security which they thought they could gain through building up high tariff walls, i.e., they would have to be willing to surrender part of their complete tariff autonomy. Nations would have to see their national economies in terms of the larger whole - the world economy for the sake of the larger humanity. This situation South Africa has all along fully appreciated and not only was she willing to make sacrifices but actually did so. For the sake of promoting a new spirit in world trade South Africa did not negotiate on a strictly quid-pro-quo basis. In a few instances South Africa actually entered into agreements whereby tariff concessions were granted without asking or getting anything in return.

28. Mr. Chairman, we one and all accepted throughout our discussions the fundamental and sacred principle of unconditional most-favoured-nation treatment. This guiding concept was enshrined in the Geneva text of the General Agreement as authenticated by the Final Act. This, Mr. Chairman, was the basis on which we agreed to enter into contractual relationships with one another and on which all the concessions granted and received at Geneva were made.

29. There can be no doubt that there is full agreement on the significance of this principle in all our constructive effort. Surely, Mr. Chairman, any unilateral departure therefrom is foreign to the whole spirit of our common aims.

30. You will notice that we do not rest our case merely on legal niceties. If we are to build a new world, which South Africa believes we have set out to build, then we need to be inspired by a constant desire for mutual understanding, and of this, Mr. Chairman, as I said the other day, I personally was privileged to have ample experience during my Delegation's tariff negotiations last year. We believe that any other approach, if not also pursued in regard to the fundamental principle I have been talking about, is foredoomed to failure. The sooner we recognise this fact, the better for us all.

31. South Africa's attitude is that any action taken without regard to the rights and obligations embodied in Articles I, XI and XIII is entirely incompatible with the whole spirit of the Agreement. The right to such unilateral action can be claimed under the proposed Article XXV which, as you will appreciate, is to us wholly objectionable and my Government accordingly are not prepared to set their hands to it.

32. We realise, Mr. Chairman, that there are certain difficulties which Article XXXV was designed to meet. We recognise that it may sometimes be necessary to adjust even a basic principle to reasonable and equitable eventualities. But where such a necessity does exist, we should be careful not to exceed the strict requirements of the position with which we are faced. In the present case, the legitimate requirements which have to be met, relate to situations which may arise where there have been no tariff negotiations. For this purpose, it may be necessary to relax as much of the agreement as is inseparably connected with tariff negotiations, but there is no need to go further than that. There can be no justification in such circumstances, for putting the whole Agreement out of operation, merely because there have been no tariff negotiations, as can be done under the new Article XXXV in its present form. We would propose, therefore, that this Protocol be resubmitted for signature with Article XXXV, redrafted in the following form:-

- 35(1) Without prejudice to the provisions of paragraph 5(b) of Article XXV or to the obligations of a contracting party pursuant to paragraph 1 of Article XXIX, Article 2 of this Agreement shall not apply as between any contracting party and any other contracting party if -
- (a) the two contracting parties have not successfully concluded tariff negotiations with each other; and
 - (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.
- (2) The CONTRACTING PARTIES may, at any time before the Havana Charter enters into force, review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.