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GENERAL AGREEMENT ON TARIFFS AND TRADE

Contracting Parties

Second Session

THE STATUS OF THE AGREEMENT AND PROTOCOLS

Statement by the Indian Delegation in reply to the Statement by the representative of South Africa (GATT/CP.2/14).

The Indian Delegation have not had adequate notice of this item which was not included in the Provisional Agenda circulated to Governments, like the South African Delegation; however, the Indian Delegation also have consulted the best legal opinion available in their country, and have advised that the validity of the Protocols adopted at the First Session of the Contracting Parties held at Havana is beyond question.

Before discussing the legal position, the Indian Delegation would like to stress the practical aspects of this matter. The South African Delegate has described it as a startling position to amend at the discretion of a few countries which become Contracting Parties in advance of others, an agreement in respect of which a larger number of countries have signed a Final Act. The position is that the Protocols of Amendments to which the South African delegate has taken objection have already been approved and signed by 21 out of 23 countries which signed the Final Act at Geneva. The particular amendment in the Protocol which has caused difficulty for South Africa is the one relating to the new Article XXXV which permits a Contracting Party to withhold his consent to the Agreement being applied between itself and any other contracting party with which it has had no negotiations. Of the 22 countries which have become contracting parties to the Agreement, only 2, namely India and Pakistan, have taken advantage of the right conferred by the new Article and they have done so for political reasons of utmost gravity to them which are well-known to all the countries present here. These two facts show the practical implications of the procedure adopted by the 21 out of the 23 signatories to the Geneva Final Act.

The South African Delegate has maintained that it would cause a degree of uncertainty which would be ruinous to world trade and development, if an international instrument once established were subjected to frequent amendments. The Indian Delegation considers that this argument assumes a finality in human wisdom and a perfectly static condition in human affairs. Amendments are inevitable, if the Agreement is to develop as a dynamic instrument capable of meeting changing circumstances and new points of view as and when they emerge.

The legal argument put forward by the Delegate of South Africa may be briefly summarized as follows: The Final Act of Geneva and the Protocol of Provisional Application taken together confer upon the signatories to the Final Act a right to subscribe to the Agreement any time before the 30th June 1948 in terms agreed. No amendment to the text established by the Final Act, can, therefore, be contemplated before the 30th June 1948 except by the unanimous consent of all the signatories to the Final Act. The South African Delegation have made a distinction between the rights of the contracting parties applying the agreement on a provisional basis and those applying it on a definitive basis. They have maintained that Article XXX which provides for the amendment procedure can come into effect only when the Agreement enters definitively into force, because so far as Article XXX is concerned, there are at present no contracting parties. On this ground, the South African Delegation hold that the Protocols adopted at Havana are null and void, unless they receive the consent of all the signatories to the Geneva Final Act.

The Indian Delegation maintains that if the South African contention is held valid, we shall be reduced to the extremely anomalous position that any country which has signed the Final Act, but has no intention of becoming a party to the Agreement, can veto an amendment which the parties to the Agreement wish to carry out. The signatories of the Final Act do not, by the terms of that instrument, incur any obligation whatever. To confer a veto on them would amount to conferring rights without obligations. Equity demands that rights and obligations should go together, unless the parties to the Agreement have themselves decided, in the terms of the Agreement itself, to give away rights without prescribing obligations, which is certainly not the case here. The distinction drawn by the South African Delegation between Contracting Parties applying the agreement provisionally and those applying it definitively is also without substance. Under Article XXXII, contracting parties applying the Agreement provisionally and those applying it definitively have exactly the same rights. Under Article XXV, Para. 1, it has been agreed that the contracting parties should meet from time to time for the purpose of giving effect to "those provisions of this agreement which involve joint action and generally with a view to facilitating the operation and furthering the objectives of this Agreement". One of the provisions of the Agreement which involves joint action is Article XXX dealing with amendments. If the South African contention that Article XXX does not apply, until the Agreement enters definitively into force, was to have any validity, Article XXX should have been specifically excluded from the joint action which the contracting parties are authorized to take under Paral of Article XXV. If, moreover, it were intended that the contracting parties should postpone such action until after the 30th June 1948, the provision contained in Para. 2 of Article XXV for the first meeting of the Contracting Parties to be held in March 1948 would have been qualified to make that intention clear. Even if, therefore, for the sake of argument and argument alone, it were assumed that the signatories to the Geneva Final Act are entitled to subscribe to the Agreement in terms agreed at Geneva, we must conclude that the right of the Contracting Parties to amend the agreement is part of the terms agreed. The claim put forward by the Delegate for South Africa, therefore, that the contracting parties have no right to amend the agreement has no legal validity.

In fact, the contracting parties at the meeting in Havan did not rely entirely on their legal rights but gave the other signatories to the Geneva Final Act fullest possible opportunities to participate in their deliberations. As already stated, the amendments in question were duly approved by 21 out of the 23 signatories to the Geneva Final Act.

Where the Contracting Parties have not resorted to the amendment procedure laid down in the Agreement, they have stipulated the unanimous consent of the Contracting Parties for any amendment to be effective. It is the inherent right of the parties to an agreement to amend the agreement in any way they please by unanimous consent - a right which is too obvious to need a specific provision in the agreement itself.

If the Protocols contained in the new Article XXXV were held null and void, it is not merely that Article but the whole lot of the other amendments contained in that Protocol that will go by the board. One of these other amendments is the one which provides for accession by new countries with the approval of two thirds majority was, as pointed out by the Delegate for the United States, part of one of the key agreements concluded at Havana with the Latin American and other countries. It was considered imperative to carry out this amendment immediately in order to give satisfaction to a large number of countries represented at Havana. If we are to go back on it we shall not merely be breaking faith with those countries but also create a situation which will imperil the success of the new tariff negotiations on which we are about to embark.

The Delegate for South Africa has expressed his particular objection to Article XXXV and, despite his antipathy to amendments which, according to him, cause uncertainty, has suggested an amendment to that article restricting its scope to Article II only. In doing so he has warned us of the inadvisability of permitting unilateral action and has reminded us that we must all be prepared to sacrifice some measure of our national autonomy in the interest of the common good. How we wish that South Africa had herself set an example by practicing the noble principles which she preaches with such eloquence at international conferences. If the Government of South Africa had not disregarded the clear mandate given by the United Nations on the particular issue which is the cause of dispute between South Africa and India, all this trouble would have been saved.

The action permitted by Article XXXV would not appear "unilateral" if it is considered in its proper context. In fact, the special situation between India and South Africa was implicitly recognized by both the countries, neither of which ever expressed any desire to enter into negotiations with the other. The proposal of South Africa to make Article 1 (most-favoured-nation treatment) applicable between India and South Africa has its roots in much deeper political circumstances and cannot be affected by any legalistic quibbling about the virtue of this Agreement. The South African Delegate has stated that his Government could never

think of setting its hand to the General Agreement with Article XXXV in it. So far as the Indian Delegation is concerned, all the benefits accruing from the General Agreement are as nothing to that government when compared with the serious implications with the application of the Agreement between India and South Africa has for India's national prestige.

India has concluded satisfactory tariff arrangements with many of the countries present at this table and, as pointed out by the Delegate for the United States, it will be a pity if all those arrangements have to be scrapped merely because of the purely formal difficulties experienced by only one country, namely, South Africa. So long as there is no trade between India and South Africa, any attempt at applying agreement between them will be ipso facto fruitless and will not be worth the sacrifice, which it is bound to involve, of the concessions granted by India (and I dare say, Pakistan, which is in the same position as India) to a large number of other contracting parties. As already stated, only two Contracting Parties, namely India and Pakistan, have so far exercised their right under Article XXXV. There has so far been no evidence of any frivolous or arbitrary use of this right. In order to meet the fears expressed at Havana that the right may be unjustifiably used by some countries, the Indian Delegation was the first to suggest the existing Para.2 of that Article, which provides for a review of the operation of the Article by the Contracting Parties. The statement made by the South African Delegation contains no evidence of any arbitrary or unjustifiable use of that Article which would warrant such a review by the Contracting Parties at this time.