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Contracting Parties
Second Session

GENERAL AGREEMENT ON TARIFFS AND TRADE

THE STATUS OF THE AGREEMENT AND PROTOCOLS

STATEMENT BY THE CHAIRMAN ON THE QUESTION RAISED BY
SOUTH AFRICA

I now wish to revert to the questions raised by the representative of the Union of South Africa with reference to the communication addressed by his government to the Secretary General of the United Nations.

In his statements before the Contracting Parties, the South African representative raised two questions, both of which are closely related to each other. One question was the legal validity of the Protocol modifying certain provisions of the General Agreement on Tariffs and Trade. The other question was the proposal to approve at this Session a Protocol similar to the Protocol drawn up at our First Session, but with certain words in the first paragraph of Article XXXV deleted.

We have had a very full exchange of views on the question of the legal validity of the Protocol drawn up at our last Session in Havana. I have considered carefully the arguments advanced on both sides and I have consulted with the Legal Adviser of the Secretariat.

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. Our duty has been to hear and weigh the arguments and then to decide if a case has been made out to invalidate on legal grounds action taken by the Contracting Parties on a previous occasion. I have reached the conclusion that the South African representative has not established his case to the satisfaction of the Contracting Parties.

Weighty arguments have been advanced by other representatives to support the legal validity of what was done at Havana.

In coming to my conclusion, I have considered carefully what in fact was done at Geneva. The signature of the Final Act at Geneva was not an agreement between the signatories. It was an authentication of a text drawn up by the participants but not necessarily agreed to by all of them. Their agreement to it was meant to depend upon subsequent acceptance.

At any time before this text of the Agreement is accepted in accordance with its provisions, the same signatories could meet together to vary the text, again

without implying that all of them would agree with all of the text. But if the majority do agree on a varied text, then it appears to me logical that this text should be the one which is then open for acceptance, otherwise you would get the absurd position that there would be open for acceptance a text to which only a minority could be expected to agree and which, therefore, only a minority could be expected ultimately to accept or apply. If some of the signatories object to a variation which a majority wish to introduce, their acceptance of the original text would in effect be an acceptance of the revised text lying for acceptance with a reservation. It would then be for the Contracting Parties, i.e. the signatories who have accepted the revised text, to consider the effect of the reservation and they could either agree to admit the government concerned notwithstanding its reservation or regard the acceptance as not being directed to the text lying for acceptance.

In the same way, as regards the Protocol of Provisional Application, at Havana the then Contracting Parties and the Geneva signatories who were still considering becoming Contracting Parties by signing the Protocol before 30 June, met together and by a large majority agreed to vary the text to which the Protocol should apply.

A number of governments thereafter, by signing the Protocol of Provisional Application indicated their willingness to apply and proceeded to apply the Agreement as revised. South Africa, which dissented from the Havana variation, signed the Protocol of Provisional Application in the knowledge of the variation and now asks the Contracting Parties to accord to South Africa the rights which it would have had if the text to which the Protocol applies had not been varied. In effect this would mean calling upon all the signatories of the Protocol subsequent to Havana to accept obligations which derive from a text to which it had been agreed between them and between the prior signatories that the Protocol should not apply. I feel that the logical conclusion is that South Africa could not by a signature affixed in these circumstances acquire rights from other signatories which arise from a text which the others did not accept. On the other hand, I do not think that we should go to the length of saying that South Africa by her signature which took place on one construction of the circumstances should be held to have accepted a provision which she has not accepted or at least did not intend to accept. I think we should adopt a less legalistic position and try to settle this matter more or less on the following lines. We should not try to force Article XXXV on South Africa but at the same time, we could not impose on the Contracting Parties obligations which they had not accepted. Would it not therefore be best that we note that South Africa cannot accept Article XXXV but at the same time we determine the obligations of other Contracting Parties to South Africa in accordance with the obligations which they have accepted by agreeing to apply provisionally the revised text?

Of course if we then accept South Africa as a contracting party, it is open to her to introduce an amendment which would then be dealt with in accordance with the relevant provisions of the GATT.