

# GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

G/59

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General Distribution

## WORKING PARTY 2 ON ARTICLE I

### Report to the CONTRACTING PARTIES

1. Before addressing itself to the detailed proposals of the United Kingdom, the Working Party discussed the form of the United Kingdom request as set out in L/115. Some members felt that it would be much more acceptable to them if it took the form of a request for a specific waiver relating to named products with the possibility for the United Kingdom to request further specific waivers as the need might arise. A general waiver left other contracting parties completely uncertain as to the scope of the tariff increases which might follow from the granting of it, and they felt it difficult to give facilities which might lead to results which they considered contrary to the objectives of the General Agreement. The United Kingdom representative said that, for reasons explained by the President of the Board of Trade in Plenary Session, to proceed by way of a series of specific waivers would not solve the problem confronting the United Kingdom. The need of the United Kingdom was not merely to be free to exercise their right to make changes in some of the duties which had for some time been the subject of applications for increased protection but, as explained in L/115, generally to be in a position to exercise - subject to the procedures and safeguards proposed - the same freedom as all countries enjoyed, to make changes in unbound rates of duty. A number of the members of the Working Party felt that they must reserve their position on this basic issue, but were prepared nevertheless to participate in a discussion of the more detailed proposals submitted by the United Kingdom in W.8/10 and W.8/10/Rev.1. The principal points arising in the course of the discussion are set out in the following paragraphs.

2. The majority of the Working Party felt that it would not be accurate to suggest that the United Kingdom did not, under the General Agreement, enjoy the same freedom as other contracting parties to modify unbound rates of duty. The situation from which the United Kingdom was seeking relief arose from the traditional policy of the United Kingdom to accord free entry of most goods imported from other Commonwealth countries, and the difficulty of seeking and securing a general modification of existing tariff legislation which would be necessary to enable the United Kingdom to modify such free entry. It was therefore agreed to delete from paragraph I of the draft waiver the following phrase: "and thus enable the Government of the United Kingdom to enjoy the same freedom as other contracting parties to modify rates of protective duty on products not now described in the schedules annexed to the Agreement". The United Kingdom agreed to this omission on the

understanding that delegations representing contracting parties at the Eighth Session would inform their governments that the request for the waiver had been put forward for the purpose of enabling the Government of the United Kingdom to exercise that same freedom which had been referred to in the phrase deleted.

3. Some members of the Working Party urged the insertion in the preamble to the waiver of a reference to the statement, in the United Kingdom memorandum L/115, that the United Kingdom had no intention of embarking on a comprehensive or widespread upward revision of its protective tariffs, so that this assurance would be a condition of the granting of the waiver. They felt that such an assurance would be in line with the objectives of the General Agreement and thus make the waiver more acceptable. The representative of the United Kingdom maintained however that it would be improper for the CONTRACTING PARTIES to seek to make a request, concerned with the preferential aspect of proposed tariff changes conditional upon the assumption of obligations in respect to its unbound rates of duty which applied to no other contracting party. The United Kingdom representative pointed out that the levels of duty were relevant only to the likelihood of substantial diversion. He added that there was a distinction between incorporating in the preamble words that might seem to imply any such undertaking and statements made in the United Kingdom memorandum or by the President of the Board of Trade in explanation of the intended tariff policies of the United Kingdom. He pointed out that it would be open to any contracting party, when explaining to its own public why it had felt able to support the United Kingdom request, to refer to the statements made by the President of the Board of Trade to the plenary session of the CONTRACTING PARTIES.

4. Some members of the Working Party thought that an addition should be made to the preamble as follows:-

"Noting further the declaration by the United Kingdom that the granting of these facilities will not at any time be considered by them as an impairment of the principles contained in Article I:4 of the Agreement and that it is not their intention to impede the attainment of the objectives of Article I".

They suggested this addition in order to establish quite clearly that it was not the intention of the United Kingdom to use the granting of the waiver as a basis for seeking at a later date a departure from the substance of Article I. The representative of the United Kingdom replied that the intentions of the United Kingdom were made clear in the third paragraph of the preamble and that it seemed to the United Kingdom that it was for the CONTRACTING PARTIES, if they so wished, to indicate that the granting of the waiver should not be regarded as impairing the attainment of the objectives of Article I nor serve as a precedent for any future request by any contracting party with this object. The Working Party felt that the final paragraph of the United Kingdom draft waiver should be expanded to cover this point so that the CONTRACTING PARTIES, including the United Kingdom, would make a declaration in the following terms:

"DECLARE that, in deciding as aforesaid, it is not their intention to impede the attainment of the objectives of Article I of the General Agreement and that in no circumstances shall the present decision be construed as impairing the principles of that Article."

5. It was suggested that the possibility of increased imports of like or directly competitive products from a preferential area should be covered in the relevant paragraphs of the decision and of the procedures. The countries suggesting this felt that if, in fact, there was a diversion of trade in favour of like or substitutable products from the preferential area, this would upset the balance of advantage which they had expected to enjoy when they accepted the compromise on preferences which is embodied in Article I of the Agreement. The United Kingdom representative maintained, however, that this question was not relevant. If, as the result of action taken under the waiver to increase the rate of duty on a particular product, there was an increase in imports of other products, this would happen whether or not a corresponding duty was imposed on any imports from the preferential area. It would then in no way be due to the incidental increase in the margin of preference, but would be due entirely to the increase in the rate of duty.
6. There was some discussion in the Working Party as to whether paragraph 5(a) of Article XXV was the appropriate provision under which this decision should be taken. Some members of the Working Party expressed concern at the tendency which had developed to give a very broad application of this provision. In this case they felt considerable doubt about the existence of "exceptional circumstances" within the meaning of that provision. The Working Party considered that if the CONTRACTING PARTIES felt that the necessary flexibility ought to be given to the application of Article I in order to meet the difficulties described by the United Kingdom, the most appropriate provision to which to relate such a decision would be paragraph 5(a) of Article XXV.
7. It was the general view of the Working Party that the United Kingdom should be asked to furnish an annual report which should consist of a list of tariff changes made under the decision with references to the consultations etc., provided for in the procedures, but should not necessarily include statistical data relating to the particular items of trade concerned. It was suggested that in addition to requiring an annual report of action taken under the waiver, it would be desirable in the decision to make provision for the decision itself and the procedures to be reviewed by the CONTRACTING PARTIES in the light of the report submitted. The Working Party felt, however, that such a requirement would be unnecessary as it was clear that the CONTRACTING PARTIES could - if the report and experience indicated that the procedures operated unsatisfactorily - consider their revision. Similarly, the decision itself, like any other decision of the CONTRACTING PARTIES, except those for which a term of validity is prescribed, could be reviewed by them at any time.
8. The Working Party felt that it would also be unnecessary to state in the decision that it would be reviewed in connection with the general review of the General Agreement which it was intended to carry out in 1954. At that time,

any provisions of the Agreement could come under consideration, and such consideration of any particular provision would necessarily extend to any decision affecting its interpretation or application.

#### Comments on the Draft Procedures

9. There was some discussion in the Working Party as to whether in order to qualify for consultations under paragraph (b), the contracting party concerned would first have to establish the fact of a substantial interest. The Working Party felt that it would be sufficient that the contracting party asserted a substantial interest since if there was any dispute as to the right of a contracting party to claim consultation, both the question of the interest of the contracting party and the likelihood of diversion affecting the trade of that contracting party would be dealt with in accordance with the procedures referred to in paragraph (d).

10. Some members of the Working Party felt that it was unsatisfactory to qualify the word diversion in paragraph (b) by the word "substantial", the meaning of which could not be satisfactorily defined. Moreover, in some cases, whilst the contracting parties concerned might be able to demonstrate that diversion was likely to occur, it might be extremely difficult to establish what the extent of the diversion would be. The representative of the United Kingdom pointed out that if the United Kingdom were to be able to exercise the freedom that was the object of the waiver, it must be protected from claims based upon minimal or marginal diversion. The Working Party recognised that the word "substantial" was vague and difficult of definition, but pointed out that it is used in various articles of the Agreement in order to define contracting parties which have a legitimate interest in, and therefore a right to be consulted about, the modification of tariff rates, e.g. in Article XIX and in Article XXVIII.

11. There was discussion as to the period during which contracting parties should have an opportunity to request consultation. The Working Party accepted the view of the United Kingdom that a period of thirty days was reasonable, provided that, if there was a dispute, there should be a further reasonable period of time thereafter before the matter was dealt with by the procedures described in paragraph (d). As regards this further period of time, they did not think it would be necessary to specify any particular period since the normal procedure would be that the party seeking a determination under the procedures would approach the Executive Secretary who would then consult the other parties concerned and fix a date which was mutually convenient and acceptable. In this connection the representative of the United Kingdom pointed out that in cases where it would be clear that no problem of diversion could arise, it should be possible to deal with the matter in a very much shorter period than the thirty days proposed.

12. An earlier draft of paragraph (h) of the procedures proposed by the United Kingdom provided that if the CONTRACTING PARTIES or the appropriate intersessional body should determine in any particular case that there was a likelihood of substantial diversion, this waiver would not apply, and in that event it would be open to the United Kingdom to seek a specific waiver in respect of the item in question; to this was added a proviso, however, that it would be open to the United Kingdom to increase the duty if, in critical circumstances where imports were causing or threatening serious injury to domestic producers, the increase was necessary to prevent or remedy the injury, and in that event it would be open to contracting parties whose interests were affected by any substantial diversion which actually took place to suspend such substantially equivalent obligations or concessions the suspension of which the CONTRACTING PARTIES did not disapprove. Some members of the Working Party felt that this escape clause should be omitted. They thought that, in the event of a determination of the CONTRACTING PARTIES or of an intersessional body that substantial diversion was likely to take place, the opportunity for the United Kingdom to seek a specific waiver should be sufficient, and that the escape clause proposed by the United Kingdom was too broad in scope. The United Kingdom, on the other hand, maintained that some alternate form of escape clause was both necessary and reasonable; and with a view to meeting the criticisms that had been made, they presented a revised draft of paragraph (h), which is now incorporated in the draft procedures. The Working Party felt that this revised draft, which provides also for negotiations and consultations with interested contracting parties with a view to the grant of compensation, might prove more satisfactory than the earlier text. At the same time, however, some members felt that by agreeing to it, the CONTRACTING PARTIES might be giving way on important principles, especially as regards the unconditional character of the obligations under Article I: 4; they therefore recorded a specific reservation on this point.

#### Conclusions

13. Owing to the difference of views reflected in the foregoing paragraphs which the Working Party was unable to resolve, it has not been possible to arrive at an agreed recommendation. The majority of the Working Party agreed, however, that if the CONTRACTING PARTIES should decide in favour of granting a waiver along the lines requested by the United Kingdom, the following text would be appropriate from the technical point of view to give effect to that decision.

#### DRAFT DECISION

HAVING RECEIVED from the Government of the United Kingdom of Great Britain and Northern Ireland a request for facilities, consistent with the objectives of the General Agreement, to relieve them of the requirements prescribed in paragraph 4(b) of Article I of the Agreement as regards maximum margins of

preference when they have occasion hereafter to impose or increase a most-favoured-nation rate of protective duty in respect of any class or description of goods, which has traditionally been admissible free of protective duty when imported into the United Kingdom from the territories listed in Annex A to the General Agreement, and for which they have negotiated no tariff concessions,

APPREHENDING that the establishment or increase of a margin of preference incidental to the imposition or increase of a most-favoured-nation rate of protective duty in respect of a class or description of goods might have the effect of increasing imports into the United Kingdom of such goods from the territories listed in Annex A at the expense of imports of such goods from other sources so as to constitute a substantial diversion of trade; and that such diversion would be contrary to the objectives of Article I and would therefore constitute a nullification or impairment of benefits due to accrue to other contracting parties under that Article,

CONSIDERING however the explanations given by the Government of the United Kingdom regarding the circumstances which prevent them from resolving their difficulties by a general modification of existing tariff legislation to enable them to impose protective duties on products imported into the United Kingdom from the territories listed in Annex A,

TAKING NOTE, moreover, of the assurance of the Government of the United Kingdom that it is not their intention to use the aforesaid facilities in order to increase the advantage enjoyed in the United Kingdom market by products imported from the territories listed in Annex A over products imported from other sources; and of the declaration of the Government of the United Kingdom that they remain desirous of contributing to the objectives of the General Agreement through arrangements directed to the reduction of trade barriers including tariffs and that the grant of the facilities sought by them will not affect their continued readiness to participate in action by the CONTRACTING PARTIES to secure further reduction of tariffs,

NOTING, furthermore, the assurances given by the Government of the United Kingdom with regard to the procedures for consultation to be followed before using the aforesaid facilities, as approved concurrently with, and as an integral part of, the present decision, and their agreement to make annual reports to the CONTRACTING PARTIES of all action taken by them in the use of these facilities,

The CONTRACTING PARTIES, pursuant to paragraph 5(a) of Article XXV and in consideration of the assurances recorded above,

DECIDE that the provisions of paragraph 4(b) of Article I shall not be so applied that, when the Government of the United Kingdom impose or increase a most-favoured-nation rate of protective duty in respect of a given class or description of goods for which they have not as of this date negotiated tariff concessions, they shall be required to impose a duty on goods of that class or

description when imported from any of the territories listed in Annex A to the General Agreement; provided that protective duty has at no time since 1 January 1939 been chargeable in respect of that class or description of goods when imported into the United Kingdom from the aforesaid territories;

DECLARE that, in deciding as aforesaid, it is not their intention to impede the attainment of the objectives of Article I of the General Agreement and that in no circumstances shall the present decision be construed as impairing the principles of that Article.

#### PROCEDURES

(a) The United Kingdom, before taking action under the waiver, will simultaneously, in strict confidence, notify (i) contracting parties which appear to the United Kingdom likely to have a substantial interest in the trade in the item in question, and (ii) the GATT secretariat of their desire to act under the waiver in respect of that item. The United Kingdom will give figures for past trade in the product and, in the case of seasonal duties, will state the period in which it has been decided that the increased duty should operate. The GATT secretariat will immediately pass this information to all contracting parties, so that any contracting party not directly approached by the United Kingdom which might claim a substantial interest in the trade in the item may know what is proposed.

(b) The United Kingdom will enter into consultations with any contracting party which requests consultation within 30 days of notification under (a) on the grounds both (i) that it has a substantial interest in the trade in an item and (ii) that the increase in the margin of preference incidental to an increase in the most-favoured-nation rate of duty would involve likelihood of substantial diversion of trade in that item from the aforesaid contracting party to suppliers within the preferential area as defined in Annex A. In the absence of any such request for consultation, the United Kingdom shall automatically be free to put the increased duty into effect after the expiry of 30 days from the date of notification under (a).

(c) Consultations under (b) shall, if the United Kingdom or one or more of the countries with which it is consulting so requests, take place at meetings organised and serviced by the GATT secretariat.

(d) In the event that a contracting party requests consultations on grounds which do not appear to the United Kingdom to satisfy the terms of (b) above, it shall be open to the United Kingdom to seek a speedy determination on the matter from the CONTRACTING PARTIES, through appropriate intersessional machinery if the case arises while the CONTRACTING PARTIES are not in session.

(e) If the United Kingdom enters into consultation under paragraph (b) above with any contracting party, or if the CONTRACTING PARTIES determine under paragraph (d) above that the grounds on which consultation is requested by any contracting party satisfy the terms of paragraph (b) above, the United Kingdom will inform, in strict confidence, such contracting party of the proposed rate of duty.

(f) The United Kingdom shall automatically be free to put the proposed increase of duty into effect if in consultation with any contracting party or parties it is agreed that there is no likelihood of substantial diversion of trade in the sense defined in paragraph (b) above.

(A) (g) Failing such agreement, it shall be open to the United Kingdom to seek arbitration by the CONTRACTING PARTIES, (through appropriate intersessional machinery if the matter should arise while the CONTRACTING PARTIES are not in session) as to the likelihood of substantial diversion. If the CONTRACTING PARTIES or the appropriate intersessional body determine that there is no likelihood of substantial diversion the United Kingdom shall automatically be free to put the proposed duty into effect.

(h) If the CONTRACTING PARTIES or the appropriate intersessional body determine that there is likelihood of substantial diversion, the waiver shall not apply. In this event, the maximum margin of preference permissible under paragraph 4(b) of Article I would be regarded as if it were instead an obligation specifically provided for in the United Kingdom's schedule; and apart from requesting a specific waiver, the only recourse open to the United Kingdom in respect of that obligation, if the situation was causing or threatening serious injury to its interests, would be as follows:

- (1) The United Kingdom could have recourse to the procedures of paragraph 1 of Article XXVIII to the same extent as they were available in respect of concessions recorded in the Schedules to the Agreement.
- (2) If the product was being imported into the United Kingdom in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers, the United Kingdom would be free to suspend the obligations so as to be able to increase the most-favoured-nation rate of duty on that product to the extent necessary to prevent or remedy such injury, without being required to impose a duty on that product when imported from the preferential area. In such a case the procedures of paragraph 2 and 3 of Article XIX would be applied.

(i) It is recognised to be essential that there should be no disclosure of a proposed modification of duty before such modification is publicly announced by the United Kingdom. Accordingly, the CONTRACTING PARTIES agree to make provision for the observance of the utmost secrecy at every stage of the procedures set forth above.