

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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ARTICLE XXV:5(a)

Applicability of the Provisions of Article XXV:5(a) to Obligations defined in Part I of the General Agreement

1. In Review Working Party II at the Ninth Session the representative of Cuba asked for a legal opinion as to whether the CONTRACTING PARTIES could grant, by the majority specified in paragraph 5(a) of Article XXV, a waiver of obligations which a contracting party has assumed under Part I of the Agreement. The Executive Secretary gave his opinion that the CONTRACTING PARTIES could grant such a waiver by a two-thirds majority. (See the last section of paragraph 6, Third Supplement, page 208). At the request of Cuba the Working Party recommended that the Legal and Drafting Committee be asked to consider this question, but it was later agreed that the matter should be included as an item on the Agenda of the Tenth Session.
2. In order to facilitate the discussion at the Tenth Session there are presented below references to the relevant material and an explanation of the facts which led the Executive Secretary to the conclusion referred to above. The relevant considerations, discussed below, fall under three headings:

Analysis of the text of paragraph 5(a) of Article XXV
and of paragraph 1 of Article XXX;

Legislative history of these provisions; and

History of the application of these provisions by the
CONTRACTING PARTIES.

Analysis of Texts

3. Article XXV:5(a) - The relevant portion of this paragraph reads:

"In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties ..."

(a) In the absence of any other qualification the words "may waive an obligation" must refer to any obligation under the Agreement. If the drafters had intended this power to be limited to Parts II and III of the Agreement it would have been a simple matter to include such a qualification. This was not done.

(b) The phrase "not elsewhere provided ..." could not have been intended to exclude those provisions that can only be amended by unanimity. Any such interpretation of the phrase would necessarily exclude as well those provisions of the Agreement that are subject to amendment by a two-thirds vote, and the waiver provision would for practical purposes be inoperative.

(c) The words "in exceptional circumstances not elsewhere provided for in this Agreement" are clearly designed to limit the use of the waiver provision to individual problems to which the agreement as written does not provide an adequate solution and where an amendment would result in a modification both broader in its application and more permanent than is required.

4. Article XXX:1 - Paragraph 1 of Article XXX reads:

"Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or to the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it."

The phrase "Except where provision for modification is made elsewhere..." provides a clear exception for action taken under the provisions of Article XXV: 5(a), for -

- (i) if the waiver of an obligation in Part I is not considered to represent a "modification" it can hardly be a change that would require the application of the amendment procedure; and
- (ii) if such a waiver is considered to be a "modification", this phrase provides an explicit exception from the unanimity requirement for amendment of Part I.

Legislative History

5. The report of the First Session of the Preparatory Committee for the ITO shows that the application of the waiver provision to all the provisions of the Charter, was not accidental but the result of careful deliberation. The discussion that took place is recorded in the report of the First Session on page 22, as follows:

"In discussing the powers of the Conference to suspend, in exceptional circumstances, obligations undertaken by members under the general commercial policy divisions of the Charter, it was suggested that this power may be extended to cover all obligations under the Charter. It was stressed that the waiving of such obligations was intended to apply only in cases

of an exceptional nature, involving hardship to a particular member, which were not covered by specific escape clauses. It was finally agreed that all the obligations undertaken by members, pursuant to the Charter, should come within the purview of this general provision."

6. The relevant part of Article XXV:5(a) was adopted by the Tariff Agreement Committee at the Second Session of the Preparatory Committee in Geneva in September 1947 and was taken directly from the corresponding provision in the draft ITO Charter (paragraph 3 of Article 77 in the final Charter) without any change in substance. Article XXX, however, represents a very substantial change from the amendment article of the Charter (Article 100 in the final Charter), which required only a two-thirds vote for any amendment-

7. These facts suggest the possibility that the drafters of the General Agreement, in taking over the waiver provision from the Charter, overlooked the fact that it had become inconsistent with the new and tighter amendment provision. The legislative history, however, does not support such a thesis.

(a) In the Tariff Agreement Committee there was a lengthy discussion on the unanimity provision in the new amendment article and its relationship to those other provisions under which obligations in Part I might be modified without a unanimous vote. This discussion is recorded on pp.4 - 33 of document E/PC/T/TAC/PV/15.

- (i) Because the schedules were to be made an integral part of Article II of the Agreement it was generally agreed that any change in a schedule could have the effect of modifying the provisions of Part I. Therefore specific attention was paid to the relation between the provisions of Articles XIX, XVIII, and XXIII on the one hand and the unanimity requirement for amendment of Part I.
- (ii) The Committee rejected a proposal that any inconsistency between these provisions be removed by permitting the amendment of any part of the agreement upon two-thirds acceptances, as in the draft Charter.
- (iii) Specific suggestions were made that Article XXX should contain an explicit exception to cover the various articles of the Agreement under which provision was made for altering the schedules of the Agreement. Others argued that the list of exceptions might not be sufficiently complete.
- (iv) The solution that was adopted by the Committee, and accepted without dissent, was the inclusion of the initial phrase that appears in paragraph 1 of Article XXX "Except where provision for modification is made elsewhere in this Agreement ...".

(b) There was no reference during the above discussion in the Committee to the waiver provision. But the reasoning that led the Committee to the solution referred to above would be equally applicable to any provision in the Agreement that involved the modification of an obligation in Part I. In any event, the discussion that took place shows that the Committee was well aware of the possible effect of the unanimity provision on other provisions in the Agreement and adopted the exception in Article XXX specifically to prevent any conflict from arising.

History of Application

8. The CONTRACTING PARTIES have previously considered the issue discussed in this memorandum and have decided that the waiver provisions of Article XXV do apply to Part I of the Agreement. The Working Party which considered the waiver relating to the European Coal and Steel Community included the following discussion in its report, which was approved by the CONTRACTING PARTIES on 10 November 1952 (Basic Instruments and Selected Documents, 1st Supplement, page 86):

"The Working Party considered, in particular, whether it would be appropriate to grant a waiver under paragraph 5(a) of Article XXV, in order to permit the six countries to participate in the European Coal and Steel Community without violating their obligations under the General Agreement. The Working Party concluded, after consideration of the contentions of the Czechoslovak representative, that such action would be appropriate. The Working Party is of the view that the text of paragraph 5(a) of Article XXV is general in character; it allows the CONTRACTING PARTIES to waive any obligations imposed upon the contracting parties by the Agreement in exceptional circumstances not provided for in the Agreement, and placed no limitations on the exercise of that right."

9. The CONTRACTING PARTIES, invoking in each instance the provisions of Article XXV:5(a), have granted the following waivers of obligations under Part I of the Agreement:

Waivers granted by the CONTRACTING PARTIES

Document references

<u>Decision of</u>	<u>Title or subject matter</u>	<u>Text of the Decision</u>	<u>Approval or voting by the CONTRACTING PARTIES</u>
(1) 20 March 1948	Formation of a customs union between France and Italy	GATT/CP/1, p. 27	GATT/1/SR.14
(2) 7 Sept. 1948	Request of the Government of Brazil for withdrawal of concessions	GATT/CP/1, p. 29	GATT/CP.2/SR.20

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Document references

<u>Decision of</u>	<u>Title or subject matter</u>	<u>Text of the Decision</u>	<u>Approval or voting by the CONTRACTING PARTIES</u>
(3) 8 Sept. 1948	United States Trust Territory of the Pacific Islands	Vol. II, p. 9	GATT/CP.2/SR.21
(4) 3 April 1950	An item in United States Schedule	GATT/CP/61, p. 10	GATT/CP.4/SR.20
(5)(a) 26 Oct. 1951	Special customs treatment by Italy to products of Libya	Vol. II, p. 10	GATT/CP.6/SR.27
(b) 9 Oct. 1952	"	1st S. p. 14	SR.7/5
(c) 17 Nov. 1954	"(amendment)	3rd S. p. 21	SR.9/19
(6) 10 Nov. 1952	European Coal and Steel Community	1st S. p. 17	SR.7/17
(7) 24 Oct. 1953	Australian treatment of products of Papua-New Guinea	2nd S. p. 18	SR.8/20
(8)(a) 24 Oct. 1953	Items traditionally admitted free of duty by United Kingdom from countries of the Commonwealth	2nd S. p. 20	SR.8/21
(b) 5 March 1955	"(amendment)	3rd S. p. 25	SR.9/45
(9) 5 March 1955	United Kingdom dependent overseas territories	3rd S. p. 21	SR.9/45

10. In four of the cases listed in the foregoing paragraph (numbers 3, 6, 8(b) and 9), votes were recorded against the granting of the waiver. In no case did the CONTRACTING PARTIES record a vote by "all the contracting parties". In cases 2, 3, 6 and 8(b) Cuba, and in cases 3 and 6 Czechoslovakia, questioned the legality of the procedure followed; in the other cases the procedure was not challenged.

Conclusion

11. From the above analysis it appears -

(a) that the CONTRACTING PARTIES intentionally made a distinction in the Agreement between an amendment and a waiver granted in exceptional circumstances;

(b) that they made an effort to avoid the possibility of conflict between Article XXX and other Articles by writing an exception in Article XXX;

(c) that they explicitly decided that the provisions of Article XIV:5(a) may be applied to any obligation under the Agreement; and

(d) that they have, in many cases, granted waivers of obligations of Part I by less than a unanimous vote.