

GENERAL AGREEMENT ON

RESTRICTED

GPR/W/114

12 June 1992

TARIFFS AND TRADE

Special Distribution

Committee on Government Procurement

ADDITION OF THE GOVERNMENT OF LIECHENSTEIN TO THE ENTITY LIST OF SWITZERLAND

Note by the Secretariat

1. On 27 April 1992 the Committee on Government Procurement was informed that Switzerland had added the "Government of the Principality of Liechtenstein" to its list of covered entities under the Agreement. In doing so, it had invoked the simplified procedure for the rectification or modification of entity lists set out in Article IX:5(a). At the 13 May Committee meeting, some signatories asked whether the legally correct procedure in this case might not be the more elaborate one set out in Article IX:5(b), which requires the agreement of the Parties to proposed modifications. The Committee has asked the secretariat to provide a legal opinion on this issue.

Issue

2. The narrow procedural¹ issue is whether Switzerland is entitled to add the Government of the Principality of Liechtenstein to its covered entity list by means of the simplified procedure of Article IX:5(a), or whether it should use the more elaborate procedure of Article IX:5(b).

Opinion

3. Article IX:5(a) permits a simplified modification procedure in the following terms:

"Rectifications of a purely formal nature and minor amendments relating to Annexes I-IV to this Agreement shall be notified to the Committee and shall become effective provided there is no objection within thirty days to such rectifications or amendments." (emphasis added)

4. The addition of a new covered entity such as the Government of Liechtenstein to the coverage list is clearly not a "rectification of a

¹The right of Switzerland to add the Government of Liechtenstein to its list of covered entities is not in question. The Agreement defines "entity" very broadly as "entities under the direct or substantial control of Parties and other designated entities" (Article I:1(c)).

purely formal nature". A simple rectification in the text of an Annex would be understood to imply no change in the rights and obligations of the parties to the Agreement. Typically, such modifications would be simple changes to, or correction of errors in, the names of entities.²

5. However, the subparagraph also refers to "minor amendments". Could the addition of a new covered entity in certain circumstances be considered a "minor amendment"? The secretariat's view is that it could be so considered in cases involving no increase in the obligations of third Parties. This view is based upon consideration of the apparent purposes of subparagraphs (a) and (b) of Article IX:5.

6. Subparagraph (a), in providing that rectifications and minor amendments become effective after thirty days in the absence of objection, with no requirement for discussion in the Committee, clearly assumes that these changes would normally entail no alteration of the balance of rights and obligations under the Agreement. Subparagraph (b) appears to deal with cases where there is a change in the balance of rights and obligations. It reads as follows:

"Any modifications to lists of entities other than those referred to in sub-paragraph (a) may be made only in exceptional circumstances. In such cases, a Party proposing to modify its list of entities shall notify the Chairman of the Committee who shall promptly convene a meeting of the Committee. The Parties shall consider the proposed modification and consequent compensatory adjustments, with a view to maintaining a comparable level of mutually agreed coverage provided in this Agreement prior to such modification. In the event of agreement not being reached on any modification taken or proposed, the matter may be pursued in accordance with the provisions contained in Article VII of this Agreement, taking into account the need to maintain the balance of rights and obligations at the highest possible level." (emphasis added)

The more elaborate procedure in this subparagraph is clearly designed to ensure that the original balance of rights and obligations is maintained or re-established, if necessary by recourse to the dispute settlement provisions of Article VII. The operational difference between the two subparagraphs may therefore be said to be that invocation of (a) is appropriate where there is a presumption that no action by the Committee to re-establish the balance of rights and obligations is likely to be required. The Agreement provides no other route; it does not deal explicitly with the case where a modification is substantive, but does not require the re-establishment of the balance of rights and obligations. The proposed addition of the Government of Liechtenstein to the Swiss entity list would appear to be in this category, since Switzerland has stated that

²Cf. Vienna Convention on the Law of Treaties, Article 79 on "Correction of errors in texts or in certified copies of treaties"

it does not seek compensation from other Parties for the extension of its entity list, if it is true that the modification increases the substantive obligations of one Party (Switzerland) without imposing obligations on other Parties.

7. Is it therefore true that the proposed modification creates no new obligations, with respect to products and product suppliers of Liechtenstein, for other Parties to the Agreement? With respect to the products of Liechtenstein, it is clear that Parties to the Agreement have existing obligations. The MFN and national treatment obligations set out in Article II:1 of the Agreement apply expressly to "products ... originating within the customs territories (including free zones) of the Parties". Since 1924 Switzerland and Liechtenstein have formed a customs union, a fact which has been recognized in the paragraph 3 of the Swiss Protocol of Accession to the GATT (1966):

"For the purposes of the territorial application of this Protocol, the customs territory of Switzerland shall be deemed to include the territory of the Principality of Liechtenstein as long as a customs union treaty with Switzerland is in force."

8. The question then arises whether, with respect to the suppliers of Liechtenstein, the Parties also have existing obligations under the Agreement. The MFN and national treatment obligations set out in Article II of the Agreement refer to suppliers "of other Parties". It is not clear from this formulation whether the origin rule for suppliers should be related strictly to the territory of the Party or, as for products, to the customs territory of the Party. However, since treatment related to products is closely related to treatment accorded to suppliers of products, it is most unlikely that the intention of Article II is to create different origin rules with respect to products and product suppliers. And if the same origin rule applies, suppliers originating within the customs territory of a Party are entitled to benefits under the Agreement.

9. Accordingly, Parties have existing obligations under the Agreement with respect to the products and product suppliers of Liechtenstein. The proposed addition of the Government of Liechtenstein to the Swiss list of covered entities would not appear therefore to add new obligations for other Parties, only new rights. Consequently, although the modification is substantive, no re-establishing of the balance of rights and obligations is necessary. Since the essential difference between subparagraphs (a) and (b) relates to procedures designed to re-establish the balance of rights and obligations, this type of case would more appropriately fit under the simplified procedures of subparagraph (a).

10. This interpretation also accords with practice under the General Agreement. Where a contracting party is prepared to add to, or improve, a tariff concession under its Schedule without requiring compensation from other contracting parties, such a change can be made through the simplified

certification procedure.³ This procedure stipulates that in such cases the additional or improved concession enters into force ninety days after notification to other contracting parties, unless a party objects within that period.

11. In order to clarify the treatment of this category of modification to entity lists, the Committee may wish to take a decision whereby procedures under Article IX:5(a) are deemed to apply to those cases, such as the present, where a proposed modification to Annex I of the Agreement merely adds to the existing rights of other Parties. This would mean that any addition to a national entity list for which no compensation was requested would be notified under Article IX:5(a). Negotiators of a new or revised Agreement may also wish to take into account in their drafting this category of modification - in other words, may wish to consider the inclusion of a specific provision or reference dealing with such cases.

Question

How could any addition to the list of entities create new obligations to other Parties? Does this argumentation imply that some additions might add to obligations, or are we merely saying that additions to the list, per se, will always fall under 5(a)?

³A recent example is contained in a Communication from Macau (L/7023 of 9 June 1992) requesting certification of its Schedule of Concessions. The concessions contained in the Schedule did not require a re-establishment of the balance of rights and obligations between the parties since products from Macau already benefited, through Portugal's membership in the EEC, from rights under the General Agreement.