

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

TRE/W/18

1 October 1993

Special Distribution

Group on Environmental Measures and International Trade

AGENDA ITEM 1: TRADE PROVISIONS CONTAINED IN EXISTING MULTILATERAL ENVIRONMENTAL AGREEMENTS VIS-VIS GATT PRINCIPLES AND PROVISIONS

Note by the Secretariat

1. The note responds to the Group's request, made at the meeting of 5-7 July 1993, for a note summarizing the experience with Article XXV and indicating the potential of its existing provisions, and of the modifications resulting from the Uruguay Round draft Understanding on the Interpretation of Article XXV. This note was prepared based, in large part, on existing GATT documentation, particularly the Analytical Index and a note prepared for the Uruguay Round Negotiating Group on GATT Articles, MTN.GNG/NG7/W/18, of 4 September 1987.

Brief historical background

2. In 1946 the United States published a "Suggested Charter" (UN document EPCT/33, Annexure 11, pp.52ff) which provided for a waiver, by two-thirds vote, for the obligations in Chapter IV of the Charter which dealt with general commercial policy. When the United Nations Economic and Social Council met for the first time it established a Preparatory Committee to elaborate a draft convention on trade. This Committee produced a report in October 1946 which included The London Draft Charter (The London Report, UN Document EPCT/33, pg. 22). The waiver provision was extended to any obligation in the Charter.

3. This Session also appointed a Drafting Committee of technical experts which prepared a further draft, the New York Draft Charter (UN document EPC/T/34, March 1947). Article XII of this Charter, on the functions and structure of the Interim Trade Committee, included the waiver provision of any obligation by two-thirds vote. The Second Session of the Preparatory Committee was held in Geneva and it produced the Geneva Final Act (UN Sales No. 1947.II/10, October 1947) which reformulated the waiver provision as Article 74:3, to provide that the exceptional circumstances in which a waiver may be granted are those "not elsewhere provided for" in GATT. The Havana Charter (E/Conf. 2/78, April 1948) included an almost identical text on waivers in Article 77:3.

4. The present text of Article XXV:5 is almost identical to that of the Havana Charter (sub-paragraph (ii) was later added), and has not been altered since it was agreed in 1948. Article XXV:5 defines the waiver power given to CONTRACTING PARTIES and reads as follows:

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. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph.

5. The CONTRACTING PARTIES have never made use of the provision in Article XXV to "define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations" (sub-paragraph 5(i)) nor to "prescribe such criteria as may be necessary for the application of this paragraph" (sub-paragraph 5 (ii)).

6. In considering the question of whether Article XXV:5 voting requirements are a sufficient proxy for a multilateral consensus, it may be interesting to note the differentiation between Article XXV:5 requirements and those of Article XXX, which require acceptance by all contracting parties (the unanimity provision) of amendments to Part I, Article XXIX or Article XXX of the General Agreement.

7. The rationale behind this differentiation is not explicitly clear. However, a secretariat document (L/403, 7 September 1955) points out that the original Article XXX in the "Suggested Charter" was different from the Article XXX that went to the Second Session Preparatory Committee in Geneva in 1947 in that the original required a two-thirds acceptance for any amendment. During the Geneva meeting, there was a lengthy discussion on the unanimity provision in the revised Article XXX and its relationship to those other provisions under which obligations in Part I might be modified without a unanimous vote. Document L/403 states:

"The Committee [in the Geneva Preparatory Committee] rejected a proposal that any inconsistency ... be removed by permitting the amendment of any part of the [General Agreement] upon two-thirds acceptances, as in the draft Charter ... The solution that was adopted by the Committee, and accepted without dissent, was the inclusion of the initial phrase ... in paragraph 1 of Article XXX 'Except where provision for modification is made elsewhere in this Agreement ...'"

"There was no reference during the above discussion in the Committee to the waiver provision ... 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".

Scope of Article XXV:5

8. The waiver provision contained in Article XXV:5 can waive any and all obligations of the General Agreement. Its intent was to cover cases for which no other exceptions nor "escapes" exist in the General Agreement, and to be a last-resort provision for exceptional circumstances, "involving hardship to a contracting party". This is reflected in the report of the First Session of the Preparatory Committee in London which states:

"In discussing the powers of the Conference to suspend, in exceptional circumstances, obligations undertaken by members under the general commercial policy provisions, it was suggested that this power might 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".

9. During the discussion at this session, the delegation which proposed this extension (the United States), when asked about the purpose of the provision, stated:

"... it was the thought of the U.S. in drafting this section that members would take advantage of such escapes as exist in the rest of the charter first, and this was meant merely to cover cases which were exceptional and caused particular hardship to any particular member and were not covered by the other escapes provided in the charter. This is to cover cases which are not covered elsewhere".

10. This complete coverage was further confirmed by the Report of the first Working Party to deal with the issue of the scope of waivers, the Working Party on The European Coal and Steel Community, adopted in November 1952 (BISD 1S/85). It states:

"... 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 limitation on the exercise of that right ..."

11. Waivers generally apply to specific measures since GATT obligations apply to measures. The specificity can be further defined through the question and answer process in the working party and in the drafting of the waiver decision (see para 13 below). The term "in exceptional circumstances" in Article XXV:5 has never been defined. However, wherever the term has been discussed it has been indicated that it was meant to limit the use of the waiver provision to individual problems for which the General Agreement does not provide solutions. Each contracting party, when voting, must make its own individual judgement as to what would constitute an exceptional circumstance.

12. A secretariat document (L/403, 7 September 1955), in which the Executive Secretary gave his legal opinion regarding Article XXV:5, states that:

"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."

Procedures for granting a waiver

13. In 1956 the CONTRACTING PARTIES adopted a Decision on Article XXV procedures, entitled "Article XXV - Guiding Principles to be followed by the CONTRACTING PARTIES in Considering Applications for Waivers From Part I or other Important Obligations of the Agreement." It provides as follows:

"(a) Applications for waivers from Part I or other important obligations of the General Agreement should be considered only if submitted with at least thirty days' notice. It is recognized, however, that in exceptional cases calling for urgent action this requirement may, by general agreement, be relaxed.

(b) In the interval afforded by such notice, the applicant contracting party should give full consideration to representations made to it by other contracting parties and engage in full consultation with them.

(c) The CONTRACTING PARTIES when examining an application should give careful consideration to any representations that such consultations had proved unsatisfactory, and in general should not grant an application in cases where they are not satisfied that the legitimate interests of other contracting parties are adequately safeguarded.

(d) Any decision granting a waiver should include procedures for future consultation on specific action taken under the waiver and, where appropriate, for arbitration by the CONTRACTING PARTIES or through appropriate intercessional machinery if the matter should arise while the CONTRACTING PARTIES are not in session.

(e) Any such decision should also provide for an annual report and, where appropriate, for an annual review of the operation of the waiver".

14. The decision to grant a waiver has several steps. First, one or more contracting party(ies) makes a formal request for the waiver. A decision is taken by consensus on whether to establish a working party to examine the request and draft the waiver decision. The working party defines its own tasks, is open to all contracting parties which wish to participate, and examines the measure(s) for which the waiver is sought, generally through a question and answer process. The working party is basically a forum for discussion and negotiation in which contracting parties can ask any questions, for example relating to the waiver's potential commercial impact. Adoption of the report of the working party by the working party itself and, subsequently, by the Council is by consensus. Waivers are granted by a decision of the CONTRACTING PARTIES; this power has never been delegated to the Council. Whenever a waiver vote takes place between the annual sessions of the CONTRACTING PARTIES, it is done through a postal ballot of the CONTRACTING PARTIES.

15. It is at the discretion of the contracting party concerned to decide whether to seek a waiver for a measure; the CONTRACTING PARTIES consider only whether the case merits a waiver, not whether it was the appropriate action to seek a waiver under Article XXV:5 as opposed to other possible procedures the contracting party could have used. This interpretation was given in the Report of the Working Party on "United States Caribbean Basin Economic Recovery Act" (CBERA), adopted on 6-8 and 20 November 1984 (L/5708). Paragraph 62 states:

"The Working Party recognized that ... each case must be analyzed on the basis of all the circumstances peculiar to it ... it was acknowledged that a decision on whether to request a waiver for the CBERA could only be made by the United States. The United States therefore requested that the draft waiver ... be submitted to the CONTRACTING PARTIES for a vote."

16. Experience with waivers shows that the majority of waiver requests are made after a contracting party has introduced a measure into its domestic legislation, although this cannot be confirmed by interpretative statements and some cases do exist to the contrary. Experience also shows that the majority of waivers have been granted before a measure is challenged or, in other words, outside the context of a challenge, although there have been a few cases to the contrary.

There has also been one adopted Panel report which recommended a waiver for a disputed measure which was not covered by any other provision of the General Agreement.¹

Experience with waivers

17. As of 31 July 1993, 105 waivers had been granted. Only eight have been granted for measures of more than one contracting party, and of those only one, the waiver given to participants in the "Protocol Relating to Trade Negotiations Among Developing Countries", is still in effect and has no expiry date (BISD 18S/26). However, the measures formally taken under the Protocol are now based legally on the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause").

18. A majority (84) of the 105 waiver decisions were granted for obligations under Part I of the GATT (26 for Article I, 55 for Article II, and 3 for both Articles). Of the waivers for Article II, 40 were granted for implementation of a modified Schedule in advance of completion of negotiations under Article XXVIII concerning implementation of the Harmonized System, renegotiation or new establishment of tariff schedules.

19. All waiver decisions contain some qualifications or conditions such as expiry dates or reporting requirements. An expiry date was fixed in eighty-three cases of which twenty-four are still in effect. No expiry dates were fixed in twenty-two cases and eighteen of those are still theoretically in effect, although in practice the majority of them appear to be obsolete. Twenty-five cases have annual reporting requirements; two waivers for negotiations under Article XVIII:1 required reporting on the negotiations²; four waivers which relieve obligations under Article XV:6 have no regular reporting requirements but require reporting of any measure which would have been required to be reported had these contracting parties signed the special exchange agreement; and one waiver of Article II for establishment of a new Schedule requires regular reporting. Other conditions attached to waiver decisions may include, *inter alia*, specific parameters within which the measure may be taken, the obligation that the measure should not create barriers to trade or unduly burden other contracting parties, an obligation to notify any changes in the legislation or measure, and the ability for other contracting parties to consult on any matter or difficulty that may arise.

20. The Working Party on "United States Andean Trade Preference Act" (L/7190, adopted 24 March 1993) noted that establishment of the working party should take place prior to the granting of the waiver, and any subsequent changes to the measure or instrument for which the waiver is sought would require a new waiver request. In its Report it noted the view that "working party examination of the appropriateness of a waiver and its terms should take place prior to the granting of a waiver. It was noted that any extension of the [Andean Trade Preference Act] to additional beneficiary countries and to additional products would require a new waiver request".

21. The Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions" (L/6631, adopted 7 November 1990) includes the finding that:

¹See Jamaica - Margins of Preference, Report of the Panel adopted on 2 February 1971 (BISD 18S/183).

²These two are also, for practical purposes, obsolete.

"... The power of the CONTRACTING PARTIES to grant waivers under Article XXV:5 implies the power to withdraw or modify the waivers granted."

Relationship between Article XXV:5 and Article XXIII

22. The 1956 Procedures include a paragraph on the relationship between Article XXV:5 waivers and Article XXIII which provides that "Any decision granting a waiver should include procedures for future consultation on specific action taken under the waiver, and, where appropriate, for arbitration by the CONTRACTING PARTIES ..." Some waiver decisions explicitly provide for the possibility of recourse to Article XXIII³. Others include special consultation and dispute settlement provisions without explicit reference to Article XXIII⁴.

23. Article XXIII:1 provides for dispute settlement not only in the case of "the failure of another contracting party to carry out its obligations under this Agreement", under Article XXIII:1(a), but also in the case of "the application of another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement", under Article XXIII:1(b). In the dispute in 1989 on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions" one issue was how dispute settlement applied to measures under a waiver. The Panel found, *inter alia*, that:

"... a decision by the CONTRACTING PARTIES to waive an obligation for a particular measure does not constitute a ruling by the CONTRACTING PARTIES that the measure is inconsistent with the General Agreement";

"... the imposition of the restrictions in conformity with the Waiver cannot constitute a 'failure of [the United States] to carry out its obligations under this Agreement' within the meaning of Article XXIII:1(a)"; and

"... the fact that the restrictions found to be inconsistent with Article XI:1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII:1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or impairment of benefits accruing to it under the General Agreement has resulted from these restrictions."⁵

24. In other words, the Panel found that if a waiver should be granted for measures of a contracting party, such as measures implementing a multilateral environmental agreement, if the measures are within the terms of the waiver they do not constitute a "failure to carry out obligations" and therefore under GATT practice a panel may not recommend that these measures be withdrawn (although the CONTRACTING PARTIES may decide to modify or withdraw the waiver itself; see paragraph 19). Nevertheless, measures consistent with a waiver can constitute "non-violation" nullification or impairment of tariff concessions. In "non-violation" nullification or impairment cases the complaining party must provide a detailed justification of its claim and must meet the burden of proof on this issue.

³See e.g. BISD 3S/32, 35; 8S/31, 33.

⁴See e.g. BISD 7S/37, 39; 8S/29, 31; 10S/51, 53.

⁵L/6631, adopted on 7 November 1990, 37S/228, 260-261, paras. 5.18, 5.19, 5.20.

Modifications to Article XXV:5 under the Uruguay Round "Understanding on the Interpretation of Article XXV of the General Agreement on Tariffs and Trade"(MTN:TNC/W/FA, pg.V.1)

25. The Decision on Article XXV:5 proposed in the 1991 Draft Final Act of the Uruguay Round reflects an effort to tighten the conditions on which a waiver may be granted and to impose more regular monitoring once the waiver is granted by subjecting it to annual review. It reads as follows:

"1. It is agreed that a request for a waiver shall describe the measures which the contracting party proposes to take, the specific policy objectives which the contracting party seeks to pursue and the reasons which prevent the contracting party from achieving its policy objectives by measures consistent with its obligations under the General Agreement.

2. A decision by the CONTRACTING PARTIES granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate.

3. Any waiver granted for a period of more than one year shall be reviewed by the CONTRACTING PARTIES not later than one year after it was granted, and thereafter annually until it terminates. In each review, the CONTRACTING PARTIES shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The CONTRACTING PARTIES, on the basis of the annual review, may extend, modify or terminate the waiver.

4. Any waiver in effect on the date of this Decision shall terminate, unless extended in accordance with the procedures above, on the date of its expiry or [] year(s) from the date of this Decision, whichever is earlier.

5. Any contracting party considering that benefit accruing to it under the General Agreement is being nullified or impaired as a result of

(a) the failure of the contracting party to whom a waiver was granted to observe the terms or conditions of the waiver, or

(b) the application of a measure consistent with the terms and conditions of the waiver may invoke the provisions of Article XXIII."