

ARTICLE XXXV

NON-APPLICATION OF THE AGREEMENT BETWEEN PARTICULAR CONTRACTING PARTIES

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I. TEXT OF ARTICLE XXXV

Article XXXV

Non-application of the Agreement between particular Contracting Parties

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

- (a) the two contracting parties have not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

I. INTERPRETATION AND APPLICATION OF ARTICLE XXXV

A. SCOPE AND APPLICATION OF ARTICLE XXXV

1. Paragraph 1

(1) “entered into tariff negotiations”

At the Second Session in September 1948, in answer to a question whether the two conditions, in (a) and (b) of paragraph 1, were meant to be independent or cumulative, the Chairman of the CONTRACTING PARTIES replied that “according to the paragraph, if two countries, one of which was a contracting party and the other of which was acceding to the General Agreement, had not entered into negotiations, either of them,

the contracting party or the acceding party, could decide that the Agreement or Article II should not apply between them when the second party became a contracting party”.¹

The Chairman of the CONTRACTING PARTIES ruled on 31 May 1949 during the round of trade negotiations held at Annecy that “delegations should be deemed to have entered into negotiations when they had held a first meeting scheduled by the Tariff Negotiations Working Party at which they had exchanged lists of offers”.² It was stated during the discussions leading to this ruling that “Article XXXV would only apply when negotiations had not been entered into. Any contracting party could avail itself of paragraph 5(b) of Article XXV when negotiations had been entered into but not satisfactorily concluded, and its case would be considered by the CONTRACTING PARTIES, acting jointly”.³

A 1965 Note by the Director-General on “The Application of Article XXXV in Relation to the Present Trade Negotiations” refers to the 1949 Chairman’s ruling, and notes that “In the case of two contracting parties which are not applying the GATT to each other by virtue of an earlier invocation of Article XXXV by one of them, the procedure in the past has been that the latter, unless it intended to withdraw its invocation of the Article, would not submit offers to the other. The ruling and the procedure ... are based on the earlier technique of tariff negotiation under which offers are made by each participant to other individual participants”. The Note discusses the application of Article XXXV in the Kennedy Round negotiations.⁴

The Torquay Protocol of 1951 included the Philippines as an acceding government. The United States invoked Article XXXV with respect to the Philippines, noting that it had not entered into tariff negotiations with the Philippines at Torquay, and citing US legislation which provided that no trade agreement should be concluded by the United States under the Trade Agreements Act so long as a 1946 agreement on trade and other matters between the two countries was in force.⁵ However, the Philippines did not sign the Torquay Protocol and acceded to the GATT in 1979.

The Report of the Working Party on “Accession of Romania” notes that “The representative of the United States said that under the legislation in force in his country, his Government would have to invoke Article XXXV of the General Agreement with regard to Romania. The United States could therefore not take part in negotiations on the Romanian import commitment; if the legislative situation changed, his Government might, however, at a later stage, after the accession of Romania to GATT, enter into negotiations with that country”.⁶

On 23 March 1994, the Council adopted the following Decision on “Interpretation of Article XXXV”:

“The CONTRACTING PARTIES,

“*Having* regard to the linked provisions of paragraph 1 of Article XXXV of the General Agreement on Tariffs and Trade;

“*Noting* that by invoking Article XXXV a contracting party on the one hand, or a government acceding to the General Agreement on the other, declines to apply the General Agreement, or alternatively Article II of that Agreement, to the other party;

“*Desiring* to ensure that tariff negotiations between contracting parties and a government acceding to the General Agreement are not inhibited by unwillingness to accept an obligation to apply the General Agreement as a consequence of entry into such negotiations;

¹GATT/CP.2/SR.18, p. 4. The immediate context was the possibility of invoking Article XXXV in order to solve problems created for certain contracting parties by the insertion of the present text of Article XXIX:1.

²II/35; see also GATT/CP.3/SR.19, p. 8.

³GATT/CP.3/SR.15 p. 5. Concerning Article XXV:5(b), which was deleted by the Protocol Amending the Preamble and Parts II and III of the GATT, see at page 1038 below.

⁴TN.64/60, paras. 3-4.

⁵GATT/CP/109, dated 13 April 1951.

⁶L/3557, adopted on 6 October 1971, 18S/94, 97, para. 16. See also discussion of Romanian accession under Article II.

“Decide as follows:

“A contracting party and a government acceding to the General Agreement on Tariffs and Trade may engage in negotiations relating to the establishment of a GATT schedule of concessions by the acceding government without prejudice to the right of either to invoke Article XXXV in respect of the other.”⁷

(2) “or alternatively Article II of this Agreement”

All past invocations of Article XXXV have related to the non-application of the General Agreement and not only of its Article II under the alternate clause of Article XXXV:1.

2. Paragraph 2: “review the operation of this Article”

When Article XXXV was drafted at the First Session of the CONTRACTING PARTIES in 1948, the second paragraph of Article XXXV was proposed by the United Kingdom representative.⁸ It was stated in the course of the discussion that “the draft was designed to provide for those cases where a party felt it had received inequitable treatment at the hands of another”.⁹

In 1961 the CONTRACTING PARTIES reviewed the operation of Article XXXV with respect to Japan¹⁰ and in December 1961 adopted the Report of the Working Party on “Article XXXV - Application to Japan”.¹¹ The extent of invocation of Article XXXV with respect to Japan was discussed on many occasions by the contracting parties during the decade following the accession of Japan.

3. Relationship between Article XXXV and other GATT Articles

(1) Article XXXIII

In 1951, Cuba declared that it was voting for the accession of several countries but invoking Article XXXV against them.¹² Also in 1951, the United States voted in favour of the accession of the Philippines while invoking Article XXXV.¹³ Although 14 of the 33 contracting parties in 1955 invoked Article XXXV with respect to Japan, Japan obtained a two-thirds majority in favour of its accession.

During Council discussion of Romania’s application of accession to GATT in October 1971, “The Chairman confirmed that there was nothing in the rules of the GATT which would prevent a contracting party from voting in favour of a decision pursuant to Article XXXIII, even if it did not consent to apply the General Agreement to the newly acceding country in accordance with Article XXXV”.¹⁴

(2) Article XXVI:5

In a number of instances, governments have invoked or disinvoked Article XXXV in respect of territories for which they had international responsibility at the time and in respect of which they had agreed to apply provisionally the General Agreement under paragraph 2 of the Protocol of Provisional Application.¹⁵

The Report of the Working Party on “Article XXXV - Application to Japan” discussed the question of the invocation of Article XXXV by governments assuming in their own right the status of contracting parties pursuant to Article XXVI:5(c). The Report provides that “... if Article XXXV had been invoked in respect of

⁷L/7435, Decision of 23 March 1994; see also in C/M/240, C/M/241, C/M/243, C/M/268, SR.49/1, C/M/270, C/M/271, and C/W/775.

⁸GATT/1/42.

⁹GATT/1/SR.11, p. 2.

¹⁰See L/1432, L/1531.

¹¹L/1545, adopted on 7 December 1961, 10S/69.

¹²CP/111.

¹³GATT/CP/109, dated 13 April 1951.

¹⁴C/M/73, p.2.

¹⁵See, e.g., L/3396 (disinvocation of Article XXXV by the United Kingdom in respect of certain territories for which it had international responsibility) and lists below.

that territory (or if that territory had not been specifically excluded from such an invocation), it would continue to be valid unless expressly disinvoked by the succeeding government".¹⁶

(3) Part IV

At the Second Special Session of the CONTRACTING PARTIES in 1964, the representative of Japan informed the CONTRACTING PARTIES that his Government would not be in a position to assume legally any obligations arising from Part IV with respect to those contracting parties which, through the invocation of Article XXXV, were not applying the General Agreement to Japan.¹⁷

B. INVOCATIONS OF ARTICLE XXXV

1. Continuing invocations of Article XXXV

According to the records of the Secretariat, the following invocations of Article XXXV continue to be operative as of 15 May 1995:

Invoked by	In respect of	Reference	Date
Botswana	Japan	Succession	August 1987
Haiti	Japan	L/405	August 1955
Lesotho	Japan	Succession	January 1988
Morocco	Israel	L/6192	June 1987
Tunisia	Israel	L/6712	July 1990
United States	Hungary	L/3911	September 1973
	Romania	L/3619	November 1971

2. Former invocations of Article XXXV

Article XXXV has been invoked and the invocation has subsequently been withdrawn in respect of:

In respect of	Invoked by	Invocation	Date	Withdrawal	Date
Austria	Cuba	GATT/CP/111	April 1951	L/2322	November 1964
Bangladesh	Pakistan	L/3784	December 1972	L/4146	January 1975
Cuba	Korea	L/2783	April 1967	L/3580	September 1971
Czecho-slovakia	Korea	L/2783	August 1967	L/3580	September 1971
Denmark	Cuba	GATT/TN.1/33	August 1949	L/5431	November 1982
Finland	Cuba	GATT/CP/TN.1/33	August 1949	L/2332	December 1964
Ghana	Portugal	L/1764	May 1962	L/6272	November 1987
Greece	Cuba	GATT/CP/TN.1/33	August 1949	L/5433	November 1982
India	Portugal	L/1764	May 1962	L/4178	December 1974
Israel	Egypt	L/3386	May 1970	L/4929	January 1980

¹⁶L/1545, adopted on 7 December 1961, 10S/69, 73, para. 19.

¹⁷2SS/SR.2, p.7.

In respect of	Invoked by	Invocation	Date	Withdrawal	Date
Japan	Australia	L/405	September 1955	L/2228	May 1964
"	Austria	L/405	September 1955	L/4428	October 1976
"	Barbados	Succession (UK)	November 1966	L/2754	February 1967
"	Belgium	L/405	September 1955	L/2308	October 1964
"	Benin	Succession (F)	September 1963	L/3709	June 1972
"	Brazil	L/405	September 1955	L/670	August 1957
"	Burundi	Succession (B)	March 1963	L/3738	August 1972
"	Cameroon	Succession (F)	May 1963	L/4079	August 1974
"	Central African Republic	Succession (F)	May 1963	L/4041	April 1974
"	Chad	Succession (F)	July 1963	L/3517	March 1971
"	Congo	Succession (F)	March 1963	L/3920	August 1973
"	Cuba	L/405	September 1955	L/1694	December 1961
"	Cyprus	Succession (UK)	July 1963	L/6998	April 1992
"	France	L/405	September 1955	L/2129	January 1964
"	Gabon	Succession (F)	May 1963	L/3959	November 1973
"	Gambia	Succession (UK)	February 1965	L/3642	November 1971
"	Ghana	Succession (UK)	October 1967	L/1744	March 1962
"	Guyana	Succession (UK)	July 1966	L/2671	July 1966
"	India	L/405	September 1955	L/952	October 1958
"	Ireland	L/2954	December 1967	L/4215	September 1975
"	Ivory Coast	Succession (F)	December 1963	L/3429	August 1970
"	Jamaica	Succession (UK)	December 1963	L/3788	November 1972
"	Kenya	Succession (UK)	February 1964	L/4475	March 1977
"	Kuwait	Succession (UK)	May 1963	L/3444	August 1970
"	Haiti	L/405	September 1955	L/952	November 1958
"	Luxembourg	L/405	September 1955	L/2308	October 1964
"	Madagascar	Succession (F)	September 1963	L/2331	December 1964
"	Malaysia	Succession (UK)	October 1957	L/1281	August 1963
"	Maldives	Succession (UK)	April 1983	L/6346	April 1988
"	Mali	Succession (F)	June 1960	L/7235	May 1993
"	Malta	Succession (UK)	November 1964	L/3099	October 1968
"	Mauritania	Succession (F)	September 1962	L/4144	October 1968
"	Netherlands	L/405	September 1955	L/2308	October 1964
"	New Zealand	L/405	September 1955	L/1744	March 1962
"	Niger	Succession (F)	December 1963	L/3421	July 1970
"	Nigeria	Succession (UK)	December 1960	L/4236	October 1975
"	Portugal	L/1764	May 1962	L/3690	March 1972
"	Rhodesia and Nyasaland	L/405	September 1955	L/2054	August 1963

In respect of	Invoked by	Invocation	Date	Withdrawal	Date
Japan	Rwanda	Succession (B)	January 1966	L/3448	September 1970
"	Senegal	Succession (F)	September 1963	L/4288	December 1975
"	Sierra Leone	Succession (UK)	May 1961	L/3931	September 1973
"	South Africa	L/405	September 1955	L/5873	September 1985
"	Spain	L/3352	February 1970	L/3646	December 1971
"	Swaziland	Succession (UK)	September 1968	L/7321	December 1993
"	Tanzania	Succession (UK)	December 1961	L/4070	July 1974
"	Togo	Succession (F)	March 1964	L/4061	July 1974
"	Trinidad & Tobago	Succession (UK)	October 1962	L/2665	June 1966
"	Uganda	Succession (UK)	October 1962	L/3466	November 1970
"	United Kingdom	L/405	September 1955	L/1992 (for UK customs territory only); L/2208, L/2896, L/3396 (for UK overseas territories)	April 1963 March 1964 (L/2208) November 1967 (L/2896) May 1970 (L/3396)
"	Upper Volta	Succession (F)	May 1963	L/3484	November 1970
Korea	Czechoslovakia	L/2783	April 1967	L/6551	July 1989
"	Romania	L/3626	November 1971	L/6678	May 1970
Nicaragua	Cuba	GATT/CP/TN.1/33	August 1949	L/4810	November 1979
Nigeria	Portugal	L/1764	May 1962	L/6448	December 1988
Peru	Cuba	GATT/CP/111	April 1951	L/5430	November 1982
Poland	Korea	L/2874	October 1967	L/3580	September 1971
Portugal	Egypt	L/3386	May 1970	L/4937	January 1980
"	Ghana	L/1764	May 1962	L/6272	November 1987
"	India	L/1764	May 1962	L/4178	December 1974
"	Nigeria	L/1764	May 1962	L/6448	December 1988
South Africa	Egypt	L/3386	May 1970	L/7414	February 1994
"	India	GATT/CP.2/4	January 1948	L/7547	October 1994
"	Morocco	L/6192	June 1987	L/7498	June 1994
"	Pakistan	GATT/CP.2/4	July 1948	L/610	December 1956
"	Tunisia	L/6713	July 1990	L/7443	April 1994
Sweden	Cuba	GATT/TN.1/33	August 1949	L/5429	November 1982
Turkey	Cuba	GATT/CP/111	April 1951	L/5432	November 1982
Yugoslavia	Korea	L/2783	April 1967	L/3580	September 1971
Zimbabwe	Egypt	L/3386	May 1970	L/6360	Independence of Zimbabwe

Notes: (1) In cases of invocation by succession, the contracting party originally invoking Article XXXV has been indicated as B (Belgium), F (France), or UK (United Kingdom). The date indicated for "invocation" is the date of independence of the country in question.

(2) Dates indicated for invocations or withdrawals are the effective date indicated in the document in question. Where the document does not indicate any effective date for withdrawal of invocation of Article XXXV, the date indicated is the date of circulation of the document.

The Declaration of 27 September 1951 on “Suspension of Obligations between Czechoslovakia and the United States under the Agreement”¹⁸, which does *not* refer to Article XXXV, provided that the CONTRACTING PARTIES declare “that the Governments of the United States and Czechoslovakia shall be free to suspend, each with respect to the other, the obligations of the General Agreement on Tariffs and Trade”, and “*Affirm* that any measures which may be taken either by the United States or by Czechoslovakia shall not in any way modify the obligations of that Government under the General Agreement towards the other contracting parties”.¹⁹ At the Council meeting of November 1992:

“The representative of the Czech and Slovak Federal Republic ... recalled that in their Declaration of 27 September 1951 ... the CONTRACTING PARTIES had stated that the Governments of Czechoslovakia and the United States were free to suspend, with respect to each other, obligations under the General Agreement. Since the reasons for the suspension of obligations between the two Governments had ceased to exist, his Government believed that the suspension was no longer desirable. The Czech and Slovak Federal Republic would therefore consider GATT obligations between the two Governments as being fully restored from 3 November, which would be confirmed by an exchange of letters between them. He expressed his Government's satisfaction that after more than forty years this abnormal situation had finally been resolved, and that normal trade relations respecting the GATT would be restored between the two countries. He asked the Council to take note that the 1951 Declaration was no longer in effect.

“The representative of the United States confirmed that the United States and the Czech and Slovak Federal Republic had agreed to exchange letters stating that they no longer desired to invoke the suspension of GATT obligations in respect of each other. Accordingly, the United States considered that the CONTRACTING PARTIES' Declaration of 27 September 1951 allowing the two Governments to suspend with respect to each other obligations under the General Agreement, was no longer operative. It was unfortunate that circumstances had been such that for more than forty years it had been necessary to engage in a mutual suspension of GATT obligations. The United States was gratified that it was now in a position to restore GATT relations with the Czech and Slovak Republic, and asked the Council to take note of the end of this suspension of GATT obligations. This action was without prejudice to whether either Government would, in the future, maintain GATT obligations with respect to new states emerging from each other's current territories.

“The Council took note of the statements and also that the CONTRACTING PARTIES' 1951 Declaration on the suspension of obligations between the United States and Czechoslovakia ... was no longer operative.”²⁰

III. PREPARATORY WORK

The text of the General Agreement as of 30 October 1947 provided for accession by unanimous vote, and consequently contained no provision equivalent or similar to Article XXXV.

At the First Session of the CONTRACTING PARTIES, which took place during the Havana Conference in early 1948, it was agreed to amend Article XXXIII to change the unanimity rule for accession to a two-thirds majority, and to add Article XXXV.

The substance of paragraph 1 appeared first as a proviso in the new draft for Article XXXIII.²¹ It was stated that the amendment of Article XXXIII from unanimity to a two-thirds majority “gives rise to certain problems of relations between the new contracting party and those old contracting parties with which no negotiations have taken place, and to meet these difficulties alternative provisos have been inserted”.²² It was also pointed out that such a safeguard was necessary, otherwise “two thirds of the contracting parties would

¹⁸II/36.

¹⁹II/36.

²⁰C/M/260, p. 61-62, 39S/302.

²¹GATT/1/21, pp.3, 10.

²²GATT/1/SR.6, p. 2.

oblige a contracting party to enter a trade agreement with another country without its consent".²³ A new draft was then suggested to become a new Article XXXV.²⁴

In the same discussions, it was also agreed to add Article XXV:5(b) through (d), which permitted the CONTRACTING PARTIES to authorize one contracting party to withhold the benefit of concessions in its Schedule from another contracting party in certain circumstances; see *supra* Article XXV.²⁵ These changes were summarized by one of their drafters during discussions on accession at Annecy:

"It had been realized at Havana that the original Article XXXIII of GATT, which required a unanimous decision with respect to accession had actually given a veto power to each of the contracting parties. This was remedied by the adoption of the provision for a decision by a two-thirds majority. However, the effect of this amendment could have been to coerce a contracting party to reach a trade agreement against its will. The balance had been redressed by the insertion of the new Article XXXV and by the ability of a contracting party to utilize paragraph 5(b) of Article XXV".²⁶

These changes were implemented by the 1948 Protocol Modifying Certain Provisions of the General Agreement, which entered into force on 24 March 1948.

At the 1955 Review Session, it was agreed to delete Article XXV:5(b), which had never been invoked, and as a consequential amendment to delete the words "without prejudice to the provisions of paragraph 5(b) of Article XXV" from Article XXXV.²⁷ This deletion was effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, which entered into force on 7 October 1957.

IV. RELEVANT DOCUMENTS

CONTRACTING PARTIES (1948-51)

Discussion: GATT/1/SR.6, 7, 10, 11
GATT/CP.2/SR.18
GATT/CP.3/SR.18, 19
GATT/CP.5/SR.24, 25
GATT/TN.1/HDel/1
GATT/TN.1/SR.4

Reports: GATT/1/21, 42
GATT/TN.1/18, 33
GATT/TN.1/A/14
GATT/TN.1/A/W/7
GATT/CP.2/4,
GATT/CP.5/9
GATT/CP.6/20/Rev.1
GATT/CP/109, 111

Review Session

Reports: W.9/212, L/327 (3S/231)
Other: L/189, L/261/Add.1, L/273

²³GATT/1/SR.7, p. 5.

²⁴For a discussion of this draft see GATT/1/SR.7, pp. 4-7.

²⁵Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, 24 March 1948.

²⁶GATT/CP.3/SR.15 p. 4.

²⁷3S/216, para. 25.