

PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT

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I. TEXT OF THE PROTOCOL OF PROVISIONAL APPLICATION

1. The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM (in respect of its metropolitan territory), CANADA, the FRENCH REPUBLIC (in respect of its metropolitan territory), the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS (in respect of its metropolitan territory), the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (in respect of its metropolitan territory), and the UNITED STATES OF AMERICA, undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than 15 November 1947, to apply provisionally on and after 1 January 1948:

(a) Parts I and III of the General Agreement on Tariffs and Trade, and

(b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

2. The foregoing Governments shall make effective such provisional application of the General Agreement, in respect of any of their territories other than their metropolitan territories, on or after 1 January 1948, upon the expiration of thirty days from the day on which notice of such application is received by the Secretary-General of the United Nations.

3. Any other government signatory to this Protocol shall make effective such provisional application of the General Agreement, on or after 1 January 1948, upon the expiration of thirty days from the day of signature of this Protocol on behalf of such Government.

4. This Protocol shall remain open for signature at the Headquarters of the United Nations (a) until 15 November 1947, on behalf of any government named in paragraph 1 of this Protocol which has not signed it on this day, and (b) until 30 June 1948, on behalf of any other Government signatory to the Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment which has not signed it on this day.

5. Any government applying this Protocol shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations.

6. The original of this Protocol shall be deposited with the Secretary-General of the United Nations, who will furnish certified copies thereof to all interested Governments.

IN WITNESS WHEREOF the respective Representatives, after having communicated their full powers, found to be in good and due form, have signed the Protocol.

DONE at Geneva, in a single copy, in the English and French languages, both texts authentic, this thirtieth day of October one thousand nine hundred and forty-seven.

II. NOTES ON PROVISIONAL APPLICATION

A. GENERAL

Pending its entry into force under the provisions of Article XXVI:6, the General Agreement ("GATT 1947") has been applied provisionally. Contracting parties listed in the Preamble apply the General Agreement under the provisions of the Protocol of Provisional Application (PPA). Contracting parties which have acceded since 1948 apply the Agreement under the provisions of their protocols of accession. A government becoming a contracting party under Article XXVI:5(c) does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question, including those in the PPA or accession protocols.¹ For these reasons, not only the governments signatory to the PPA, but also the governments that became contracting parties through accession under Article XXXIII or succession under Article XXVI:5(c), have the right to apply the General Agreement only to the fullest extent not inconsistent with their existing legislation, and to cease to apply the General Agreement on sixty days' notice.

The CONTRACTING PARTIES have on a number of occasions considered the question of whether provisional application under the PPA and protocols of accession should be replaced by definitive application under Article XXVI.²

The WTO Agreement provides in its Article II:2 that the agreements and associated legal instruments included in Annexes 1A, 2 and 3 are integral parts of that Agreement and binding on all Members. A Member that has accepted or acceded to the WTO Agreement is thus bound definitively by "GATT 1994", as defined in Annex 1A of the WTO Agreement. On 8 December 1994, at their Sixth Special Session, the CONTRACTING PARTIES adopted a Decision on "Transitional Co-existence of the GATT 1947 and the WTO Agreement", which provides *inter alia*:

"The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year."³

A. INTERPRETATION AND APPLICATION OF PROVISIONS ON PROVISIONAL APPLICATION

1. Paragraph 1 of the Protocol of Provisional Application and corresponding provisions in accession protocols

(1) "Part II of that Agreement"

(a) Part II of the original General Agreement

The "grandfather clause" for existing legislation was intended to apply provisionally pending the entry into force of the Havana Charter. Article XXIX:2 of the General Agreement text as of 30 October 1947 provided that

¹L/1545, Working Party Report on "Article XXXV - Application to Japan", adopted on 7 December 1961, 10S/69, 73, para. 19; see also the chapter on Article XXVI.

²See 3S/48, 3S/247-250 (1955 Review Session); SR.12/16, p. 123-124; L/2375 (1965); 24S/61, CG.18/W/20 (1977); MTN/GNG/NG7/W/70, MTN/GNG/NG7/W/71 (1990).

³PC/12, L/7583.

“On the day on which the Charter of the International Trade Organization enters into force, Article I and Part II of this Agreement shall be suspended and superseded by the corresponding provisions of the Charter”.

During the Geneva session of the Preparatory Committee, the Tariff Negotiations Working Party requested delegations to inform it of the steps which would be necessary to put the General Agreement into force.⁴ A number of delegations stated that definitive entry into force might take substantial time.⁵ To avoid undue delay in application of the tariff concessions, and provide “early proof ... to the world of the benefits accruing from the present negotiations”, the full draft of the General Agreement produced by the Tariff Negotiations Working Party included an Article XXXII on provisional application.⁶ The working party stated in this respect:

“It will be noted that application of Part II is to take place ‘to the fullest extent not inconsistent with existing legislation’. The position of governments unable to put Part II of the Agreement fully into force on a provisional basis without changes in existing legislation is, therefore, covered.”⁷

The Panel on “Norway - Restrictions on Imports of Apples and Pears” examined whether Norway’s system of restrictive licensing for apples and pears was consistent with the existing legislation clause.

“The Panel began its examination by analysing the historical origin of the Protocol and relevant decisions of the CONTRACTING PARTIES relating to the existing legislation clause.

“The Panel noted in the first place that paragraph 1(b) of the Protocol served a well determined purpose in a particular historical situation. It was to enable, in 1947, governments to accept the obligations of Part II of the General Agreement without having to adjust their domestic legislation. The drafters of the Protocol expected the General Agreement to be superseded soon by the ITO Charter and they felt that legislative changes should not be required at that time because such changes would have delayed the acceptance of the obligations under the General Agreement and could have prejudged the outcome of the negotiations on the Charter. ... In the light of this purpose of the existing legislation clause, the Panel considered that it would not be justified to give this clause four decades after the entry into force of the Protocol an interpretation that would extend its functions beyond those it was originally designed to serve.”⁸

The Note *Ad Article I:1* provides that “The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2(b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.” This provision was intended to reserve legislation regarding preferential internal taxes until definitive application of the General Agreement.⁹ Protocols of accession contain a similar standard provision; see under Article XXXIII.

(b) *Subsequent amendments to Part II*

In the “Resolution of 7 March 1955 Expressing the Unanimous Agreement of the CONTRACTING PARTIES to the Attaching of a Reservation on Acceptance pursuant to Article XXVI”, the contracting parties unanimously agreed, *inter alia*,

“that an acceptance pursuant to Article XXVI shall be valid even if accompanied by a reservation to the effect that Part II of the General Agreement will be applied to the fullest extent not inconsistent with legislation which existed on 30 October 1947 or, in the case of a contracting party which since 30 June 1949 has acceded to the Agreement, the date of the Protocol providing for such accession”.¹⁰

⁴EPCT/100.

⁵See EPCT/TAC/SR 1, 2, 6.

⁶EPCT/135 p. 8-9, 63-65.

⁷*Ibid.*, p. 9.

⁸L/6474, adopted on 22 June 1989, 36S/306, 319, para. 5.4-5.5.

⁹EPCT/TAC/PV.26, p. 10.

¹⁰3S/48; see also 3S/247-248. For examples of such reservations, see Status of Legal Instruments at p. 2-8.3ff.

In a Declaration of 15 November 1957 on “Statements which Accompanied the Acceptance of the Protocol Amending the Preamble and Parts II and III”, the CONTRACTING PARTIES declared

“that the statements which accompanied the signatures or acceptances by certain contracting parties of the Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade are accepted on the understanding that they confirm the legal situation existing under the instrument by which each of these governments became a contracting party. Consequently, each of those contracting parties continues to apply Part II of the General Agreement on Tariffs and Trade (as revised) to the fullest extent not inconsistent with legislation which existed on the date mentioned in the instrument by which it became a contracting party; following acceptance pursuant to Article XXVI, any contracting party will have the right to apply Part II, subject to any reservation accompanying such acceptance in the terms provided for in the Resolution approved by the CONTRACTING PARTIES on 7 March 1955”.¹¹

Consequently, Part II of the General Agreement, as revised by the Protocol Amending the Preamble and Parts II and III, applies to the fullest extent not inconsistent with “existing legislation” on the relevant date.

The three Panel reports on income tax practices maintained by Belgium, France and the Netherlands note the argument by the United States that the language of the Review Session amendments to the General Agreement introducing Article XVI:4, the 1960 Declaration giving effect to Article XVI:4, and the Standstill Declaration, meant that the contracting parties adhering to the 1960 Declaration had an obligation to cease granting any subsidies whether or not the subsidies were granted pursuant to legislation existing in 1947, unless a specific reservation was made. The Panel reports state in this respect:

“The Panel considered that the fact that these arrangements might have existed before the General Agreement was not a justification for them and noted that Belgium [France, Netherlands] had made no reservation with respect to the standstill agreement or to the 1960 Declaration”.¹²

(I) “not inconsistent with existing legislation”

(a) Date of reference for the phrase “existing legislation”

On the question whether the phrase “existing legislation” in paragraph 1(b) of the Protocol of Provisional Application refers to legislation existing on the date of the Protocol or on that of signature of the Protocol by the government concerned, the Chairman ruled on 11 August 1949 that it refers to legislation existing on 30 October 1947, the date of the Protocol as written at the end of its last paragraph.¹³ It was stated, however, that “particular attention should be given to the special and exceptional circumstances of Pakistan, i.e. those attendant upon the coming into existence of the new state”.¹⁴

The 1984 Panel Report on “United States Manufacturing Clause” “noted that, according to paragraph 1(b) of the Protocol, Part II of the General Agreement is to be applied ‘to the fullest extent not inconsistent with existing legislation’, that is, mandatory legislation in force on 30 October 1947”.¹⁵

For contracting parties applying the General Agreement under the provisions of a protocol of accession, the relevant date is that specified in the protocol of accession. The standard text of protocols of accession provides that the government in question will apply “Part II of the General Agreement to the fullest extent not inconsistent with the relevant legislation of [the acceding government] existing on the date of this Protocol”.¹⁶ The report of

¹¹6S/13.

¹²Reports adopted on 7 December 1981: L/4423, 23S/114, 126, para. 56; L/4424, 23S/127, 136, para. 43; L/4425, 23S/137, 146, para. 43.

¹³Discussion at GATT/CP.3/SR.40 p. 4-7; decision text at II/35-36.

¹⁴“Pakistan became a state on August 14th, 1947 and when the Protocol was opened for signature, there was no Pakistan legislation as such. The Pakistan Parliament did not meet until 1948 at which time it proceeded to enact legislation to replace the legislation previously applicable to the whole continent of India. This in some cases differed from the previous existing legislation. [The Chairman] felt that if any case ever arose out of these circumstances, the contracting parties should give special attention and sympathetic consideration to such a case.” GATT/CP.3/SR.40 p. 5.

¹⁵L/5609, adopted on 15 May 1984, 31S/74, 88, para. 35.

¹⁶The two exceptions are in the accession protocols of Switzerland and Israel, in which cases the reference dates are the dates of the

the 1949 Working Party on "Accession at Annecy" which first considered the subject of accession to the General Agreement notes that "It was considered that, although there were arguments for applying the same limitation to the exception for existing legislation - namely, that existing at the date of the Protocol of Provisional Application - this might in fact be a considerable obstacle to accession. It might require an acceding government to amend legislation enacted prior to the formal completion of the negotiations, which had not been the case for the present contracting parties at Geneva".¹⁷

(b) *Mandatory character of "existing legislation"*

During the discussions in the Tariff Agreement Committee at Geneva, it was stated that:

"... the intent is that it should be what the executive authority can do -- in other words, the Administration would be required to give effect to the general provisions to the extent that it could do so without either (1) changing the existing legislation or (2) violating existing legislation. If a particular administrative regulation is necessary to carry out the law... that regulation would, of course, have to stand; but to the extent that the Administration had authority within the framework of existing laws to carry out these provisions, it would be required to do so".¹⁸

In 1949 at the Third Session, a working party considered notifications of pre-existing measures under paragraphs 6 or 11 of Article XVIII, which at that time permitted maintenance of certain measures if they had been notified and had received the concurrence of the CONTRACTING PARTIES. It was argued that this notification process was unnecessary in the case of measures permitted by the Protocol of Provisional Application. The 1949 Working Party report on "Notifications of Existing Measures and Procedural Questions" states:

"The Working Party directed its attention to the question of whether a government is obliged to notify [under Article XVIII:6 or XVIII:11] if the measure in question is permitted during the period of provisional application by virtue of sub-paragraph 1(b) of the Protocol of Provisional Application or sub-paragraph 1(a)(ii) of the Annecy Protocol of Terms of Accession. The working party agreed that a measure is so permitted, provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character -- that is, it imposes on the executive authority requirements which cannot be modified by executive action."¹⁹

In the discussion when this report was adopted, the United States representative suggested the addition of the words "without departing from the intent of a measure embodied in the legislation" to the last sentence cited, so as to cover the case of legislation which was mandatory in intent but couched in permissive terms. The representative of Brazil "inquired whether [this] proposed ... wording would cover the case of specific measures taken by the executive power in pursuance of a general authorization of the legislature". The Chairman felt that this interpretation would be contrary to the conclusion reached by the Working Party as the sentence states: 'imposes on the executive authority requirements which cannot be modified by executive action'. It was agreed that the United States position would be met by the insertion of the wording "by its terms or expressed intent". In response to a further inquiry, the Chairman stated that "The proposed amendment by the United States only broadened the concept of mandatory legislation to include legislation which was mandatory by its expressed intent. Any further interpretation would depend on the particular cases".²⁰

The 1949 Working Party Report on "Brazilian Internal Taxes" examined Brazilian law 7404 of 1945, which imposed taxes which discriminated between products of national origin and like products supplied by other contracting parties, in the light of Article III and the Protocol of Provisional Application. The report notes that the "Brazilian delegate informed the working party that any change in the rates of tax established by this law could not have been effected by administrative action, but would have required amending legislation to be enacted by the Brazilian Congress. The working party therefore concluded that in view of the mandatory nature of law 7404 the taxes imposed by it, although discriminatory and hence contrary to the provisions of Article III, were

preceding declarations providing for provisional accession.

¹⁷GATT/CP.3/37, adopted on 9 June 1949, II/148, 151, para. 19.

¹⁸EPCT/TAC/PV/5, p. 20.

¹⁹GATT/CP.3/60/Rev.1, adopted on 10 August 1949, II/49, 62, para. 99.

²⁰GATT/CP.3/SR.40, p. 6-7.

permitted by the terms of the Protocol of Provisional Application and need not be altered so long as the General Agreement was being applied only provisionally by the Government of Brazil”.²¹

The 1950 “Report on the Use of Quantitative Restrictions for Protective and Other Commercial Purposes” notes that “during the period of provisional application of the Agreement contracting parties may be entitled under paragraph 1 of the Protocol of Provisional Application ... to maintain certain export restrictions required by existing legislation which are not consistent with Part II of the Agreement”.²²

In the 1952 Panel report on “Belgian Family Allowances”

“The Panel noted ... that, in another case, the CONTRACTING PARTIES agreed that the Protocol of Provisional Application had to be construed so as to limit the operation of the provisions of paragraph 1(b) of the Protocol to those cases where ‘the legislation on which [the measure] is based is, by its tenor or expressed intent, of a mandatory character - that is, it imposes on the executive authorities requirements which cannot be modified by executive action’ (Volume II, page 62). The Panel, although recognizing that the relevant provisions of the Belgian royal decree appeared to be of a mandatory character, noted that, as pointed out by the Danish and the Norwegian representatives and admitted by the Belgian representative, it had been possible for the Belgian executive authorities to grant an exemption to a country whose system of family allowances did not meet fully the requirements of the law. Even if it might be difficult for the Belgian authorities to take similar action in similar cases, the Panel did not feel that it had been proved to its satisfaction that the Belgian legislation fulfilled all the conditions laid down by the CONTRACTING PARTIES to justify an exception under the Protocol of Provisional Application”.²³

In the report of the Review Session Working Party on “Organizational and Functional Questions”, the Working Party noted:

“it is plain from the wording of the Protocol of Provisional Application that the exception can only be applicable to legislation which is, by its terms or expressed intent of a mandatory character, that is, it imposes on the executive authority requirements which cannot be modified by executive action. The representatives of Cuba and Chile reserved their positions on this interpretation of the Protocol of Provisional Application”.²⁴

In 1957, the Working Party on “Import Restrictions of the Federal Republic of Germany” examined certain residual restrictions maintained after disinvocation of Article XII.

“a number of delegations ... were unable to accept the claim that the German Marketing Laws were covered by the qualifying clause in the Torquay Protocol relating to existing legislation. These Laws seemed to them to require that the goods in question (cereals, meat, fat and sugar) be imported under State monopoly, not that imports be restricted. Under paragraph 1(a)(ii) of the Torquay Protocol contracting parties are required to apply Part II of the General Agreement, including Article XI, ‘to the fullest extent not inconsistent with the legislation existing’ on 21 April 1951. In their view, this provision applied only in respect of legislation which was of a mandatory character, i.e. which imposed on the executive authority requirements which could not be modified by executive action. This meant that if ‘existing legislation’ left the German Government no discretion but to act contrary to Article XI the German Government would be entitled to suspend the application of the provisions of that Article to the extent necessary to conform to that legislation. On the other hand, where ‘existing legislation’ gave the Federal Government discretion between action which was in conflict with that Article and action which was consistent with it, then action in accordance with Article XI would not be inconsistent with its national legislation; there would thus be no ground for deviating from Article XI”.²⁵

²¹GATT/CP.3/42, adopted on 30 June 1949, II/181, 182, para. 5.

²²GATT/CP.4/33.

²³G/32, adopted on 7 November 1952, 1S/59, 61, para. 6-7.

²⁴L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 249, para. 58.

²⁵L/768, adopted on 30 November 1957, 6S/55, 60, para. 12.

The same report also notes the same delegations' observation that "Should the view be accepted that all action under existing legislation was *ipso facto* exempt from the rules of Part II of the Agreement, most contracting parties would be entitled to claim the right to apply or maintain quantitative restrictions irrespective of their balance-of-payments position, and to take many other measures contrary to the provisions of the GATT; this would mean that Part II of the Agreement would have no binding force, and *inter alia*, the tariff concessions could therefore be completely nullified with impunity, a situation which would lead to a complete breakdown of the General Agreement".²⁶ Some other delegations disagreed with this interpretation. Similar differences of view are recorded in the second Working Party report, adopted on 2 May 1958, on "Import Restrictions Maintained by the Federal Republic of Germany".²⁷ The waiver granted on 30 May 1959 to the Federal Republic of Germany for maintenance of certain import restrictions contains the following *considerandum*:

"The Federal Republic contends that it is entitled to maintain restrictions on imports of products specified in the Agricultural Marketing Laws because (a) the German Marketing Laws impose on the German executive mandatory requirements for the application of restrictions on imports and (b) in any case this legislation does not need to impose a mandatory requirement in order to be covered by paragraph 1(a)(ii) of the Torquay Protocol; but most contracting parties do not accept this contention ...".²⁸

The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies" examined a claim by Canada that the Importation of Intoxicating Liquors Act 1928 constituted "existing legislation" under paragraph 1(b) of the PPA. "The Panel noted that the CONTRACTING PARTIES had decided in August 1949 that this paragraph only referred to legislation of a mandatory character The Panel *concluded* that the Importation of Intoxicating Liquors Act did not make mandatory restrictions on points of sale and discriminatory listing requirements."²⁹

The 1989 Panel on "Norway - Restrictions on Imports of Apples and Pears" examined a seasonal restriction programme for apples and pears operated by Norway under a licensing scheme. According to Norway, the system of restrictive licensing was covered by the "existing legislation" clause in the Protocol of Provisional Application because it implemented parliamentary acts predating the Protocol.

"The Panel further recalled that paragraph 1(b) of the Protocol had in various circumstances in the past been interpreted by the CONTRACTING PARTIES so as to further the full application of the General Agreement. ...

"(a) In a report approved by the CONTRACTING PARTIES on 10 August 1949, a Working Party agreed that the existing legislation clause applied only to:

'legislation which is of a mandatory character by its terms or expressed intent - that is, it imposes on the executive authority requirements which cannot be modified by executive action' (BISD II/49, paragraph 99, at 62).

"This position was on several occasions reconfirmed by the CONTRACTING PARTIES ... The Panel noted that the parties to the present dispute agreed that this interpretation applied in the present case.

"(b) [The Panel referred to the Panel report on the Manufacturing Clause, as cited below.]

"It follows from the foregoing that to be eligible as "existing legislation" under the Protocol, such legislation must:

"(a) be legislation in a formal sense,

²⁶*Ibid.*, 6S/61, para. 13.

²⁷L/821, adopted on 2 May 1958, 7S/99, 104-107, paras. 14-22.

²⁸8S/31, para. 2. The 1990 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" notes that "Germany had obtained a waiver for the restrictions but nevertheless insisted that they were covered by the existing legislation clause in the protocol by which it acceded to the General Agreement". 37S/228, 260 para. 5.19.

²⁹L/6304, adopted on 22 March 1988, 35S/37, 91, para. 4.28.

“(b) predate the Protocol and

“(c) be mandatory in character by its terms or expressed intent.

“The Panel then proceeded to examine the 1934 Act and the other declarations cited by Norway in the light of these criteria.

“The Panel recalled that Norway argued that, under the constitutional system of Norway, the executive authorities had no option but to restrict imports of apples and pears on the basis of the 1934 Act, after the agricultural policies to be followed by the executive authorities had been defined in the Common Political Programme of 1945 and the Government’s principles of agricultural policies had been endorsed in the Storting in 1947. ...

“In relation to the legislative measures relied upon by Norway, the Panel noted that the application of the 1946 Act (Annex II), which had prohibited all imports save those for which the King had granted express dispensation, was discontinued on the occasion of the introduction of a revised system of import licensing in 1958. The 1934 Act (Annex I) was then revived as the basis for import licensing. The relevant part of the 1934 Act provided that the ‘King can decide that ... it should be prohibited to import from abroad ... articles or goods, indicated by the King ...’. Under the terms of this Act, the King had discretion to prohibit the import of any commodity. The Panel found nothing in the text of the 1934 Act expressing the intent of rendering the institution of such restrictions mandatory. The Panel recalled that in fact no import restrictions relating to apples and pears had been based on the 1934 Act before the year 1958, restrictions in force before that period having resulted from the 1946 Act. According to its terms, the 1934 Act is enabling, not mandatory in character and can for this reason not be considered as being covered by the existing legislation clause.

“As for the Common Political Programme of 1945 (Annex III) and the Government’s White Paper No. 10 (Annex IV), endorsed by the Storting on the occasion of the adoption of the National Budget in 1947, the Panel concluded from the documents and from the explanations provided by Norway that these documents and the discussions which ensued in the Storting had in fact no bearing on import restrictions as such and contained no reference to the subject matter of the present dispute, i.e. import restrictions to be imposed on apples and pears. Though political guidelines could possibly be inferred from them, they could not be considered to be legislation conforming to the criteria enumerated in paragraph 5.7 above, and therefore could not fall within the meaning of the Protocol.

“As for the various developments in the field of agricultural policy which took place after 1947, such as the ‘Basic Agricultural Agreement’ concluded in 1950 and supplemented since by periodic medium-term agreements, several White Papers presented by the Government and recommendations of a Storting Committee, which have been relied upon by Norway (see Annexes V, VI, VII and XII), the Panel noted that these could have no relevance to the application of the existing legislation clause, since they occurred after the date of the Protocol.

“For the reasons stated above, the evidence presented by Norway on the state of the legislation that existed on 30 October 1947 did not show that the Norwegian system of restrictive licensing of the import of apples and pears was based on legislation eligible under the paragraph 1(b) of the Protocol”.³⁰

The Panel on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” examined whether Thailand’s Protocol of Accession exempted measures taken under Section 27 of the Tobacco Act from the application of Article XI:1. Thailand argued that the intent of the Tobacco Act was to restrict imports of cigarettes and that it was therefore mandatory. Section 27 of the Tobacco Act provided that “the importation ... of tobacco is prohibited except by licence of the Director-General”.

“The Panel noted that, while the Tobacco Act was legislation in the formal sense and predated the Protocol of Accession of Thailand, it did not, by its terms or expressed intent, impose on the Thai executive

³⁰L/6474, adopted on 22 June 1989, 36S/306, 319-322, paras. 5.6-5.7 and 5.10-5.13.

authorities a requirement to restrict imports that could not be modified by executive action. On the contrary, Section 27 of the Act explicitly gives the Thai executive authorities the power to grant import licences. The Panel therefore found that the existing legislation clause in Thailand's Protocol of Accession did not exempt the restrictions on the importation of cigarettes from Thailand's obligations under the General Agreement."³¹

The 1992 Panel on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" examined, *inter alia*, the argument of Canada that the authorization of private sale of domestic beer in Ontario was covered by paragraph 1(b) of the Protocol. The Ontario Liquor Control Act, which had been in effect on 30 October 1947, restricted the sale of beer in Ontario to sales by the liquor board and sales by federally-licensed Canadian brewers "duly authorized by the dominion of Canada". In Canada's view, this legislation made mandatory a prohibition on authorizing foreign brewers to sell beer in Ontario except through the liquor board.

"The Panel noted that the Ontario Liquor Control Act in effect on 30 October 1947 had been the legal basis for authorizing the on-site brewery outlets in Ontario, of which there were now 23 The legal basis for authorizing the brewers' retail stores, of which there were now 473 ... was Section 3(e) of the Liquor Control Act introduced in 1980, which empowered the liquor board to authorize Brewers Warehousing Company Limited 'to operate stores for the sale of beer to the public'. The Panel concluded from this that Canada's arguments relating to the Protocol of Provisional Application could apply only to the on-site outlets but not to the brewers' retail stores. The Panel further noted that it had been determined by the CONTRACTING PARTIES that a measure was covered by paragraph 1(b) of the Protocol of Provisional Application only if "the legislation on which it is based is by its terms or expressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action". (II/62) The Ontario Liquor Control Act, as amended to July 1947, provided in Section 46 that

'The [Liquor Control Board of Ontario] *may*, with the approval of the Minister and subject to the provisions of this Act, and to the regulations made thereunder *grant a license* to any brewer duly authorized by the Dominion of Canada authorizing such brewer or any lawfully appointed agent of such brewer, ...

(c) to keep for sale and sell beer under the supervision and control of the Board and in accordance with this Act and the regulations.' (emphasis supplied).

"The Panel noted that the Liquor Control Act, by its terms, enabled the Dominion of Canada to authorize Canadian brewers to sell beer but it did not mandatorily require it to do so and that Canada had not claimed that the Act, by its terms or expressed intent, prevented the liquor board from withdrawing the authorizations granted. The Panel therefore found that the Act did not require the executive authority to accord domestic beer treatment more favourable than that accorded to imported beer and that the discriminatory restrictions on access to points of sale imposed by Canada in Ontario were consequently not covered by paragraph 1(b) of the Protocol of Provisional Application."³²

The 1992 Panel on "United States - Measures Affecting Alcoholic and Malt Beverages" examined, *inter alia*, the United States contention that the state distribution requirements of certain states, even if inconsistent with Article III, were covered by the "existing legislation" clause of the Protocol of Provisional Application. After a recital of the decisions listed above,

"The Panel then proceeded to examine the contention of the United States that existing mandatory legislation in the United States included legislation at the state level. The Panel first considered whether, in view of the fact that the United States had accepted the PPA as a federal Executive Agreement, the state distribution requirements concerned could be considered 'mandatory legislation' in the sense of the PPA. The Panel noted in this respect that both parties agreed that under United States constitutional law GATT law is part of United States federal law and, being based on the Commerce Clause of the Constitution,

³¹DS10/R, adopted on 7 November 1990, 37S/200, 226-227, paras. 82-83.

³²DS17/R, adopted on 18 February 1992, 39S/27, 76-77, para. 5.9.

overrides, as a general matter, inconsistent state law. This was also the view of two eminent writers on the law of the GATT, Professors John Jackson and Robert Hudec. ...

“The Panel considered that assuming that United States federal law, including the GATT as part of federal law, in general overrides inconsistent state legislation, it was still necessary in the present case to examine whether United States federal law, including the GATT, overrides inconsistent state liquor laws based on the Twenty-first Amendment of the United States Constitution which grants substantial regulatory powers to the states in respect of alcoholic beverages. Based on the submissions of the parties, the Panel found that there is evidence supporting the conclusion that this is the case: that is, the Twenty-First Amendment grants broad police powers to the states to regulate the distribution and sale of alcoholic beverages but does not grant the states powers to protect in-state producers of alcoholic beverages against imports of competing like products.

“The Panel noted that this conclusion is supported by various decisions of the United States Supreme Court, to which Canada and the United States referred in their submissions.³³ ...

“Judging from the evidence submitted to this Panel, and in particular that of the various cases before the United States Supreme Court, the Panel considered that the United States has not demonstrated that its state laws inconsistent with Article III impose requirements which the United States could not change, or indeed has not already overruled, by executive action, including, in this case, acceptance by the United States of the obligations under the General Agreement as part of United States federal law. The Panel thus found that the record does not support the conclusion that the inconsistent state liquor legislation at issue in this proceeding is ‘mandatory existing legislation’ in terms of the PPA.”³⁴

During consideration of this Panel Report at the June 1992 Council meeting, the representative of the United States stated that “While the United States would not oppose adoption of the Panel report, it would enter for the record a formal reservation” regarding these paragraphs.³⁵

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.³⁶

(c) *Modification of “existing legislation”*

The Working Party report, adopted on 30 June 1949, on “Brazilian Internal Taxes” recognized that legislation inconsistent with Part II of the General Agreement could be modified without losing its status of “existing legislation” provided the degree of inconsistency with the General Agreement was not increased. The prevailing view was “that the Protocol of Provisional Application limited the operation of Article III only in the sense that it permitted the retention of an absolute difference in the level of taxes applied to domestic and imported products, required by existing legislation, and that no subsequent change in legislation should have the effect of increasing the absolute margin of difference”.³⁷

The Panel report on “United States Manufacturing Clause” noted that

“... the central point of difference between the two parties to the dispute related to whether the Manufacturing Clause, despite the postponement by legislation of July 1982 of the expiry date of 1 July 1982 inserted in the Clause in 1976, could still qualify as ‘existing legislation’ under the Protocol of Provisional Application.

³³The footnotes to this paragraph provide citations to *Hostetter v. Idlewild*, 337 U.S. 324, 331 (1964); *Bachus Imports, Ltd. v. Dias, Director of Taxation of Hawaii*, 486 U.S. 263, 276 (1984); *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 476 U.S. 573, 585 (1986); *Healy v. Beer Institute, Inc.*, 109 S.Ct. 2491, 2500-03 (1989).

³⁴DS23/R, adopted on 19 June 1992, 39S/206, 284-287, paras. 5.45, 5.46, 5.48.

³⁵C/M/257.

³⁶DS32/R, dated 3 June 1993, paras. 346-349.

³⁷GATT/CP.3/42, adopted on 30 June 1949, II/181, 183, para. 12. The analysis of the margins of difference applied the definition of “margin of preference” in Article I:4.

“... The Panel, noting that the Manufacturing Clause had been amended on 13 July 1982, first asked itself whether the mere fact that the Clause had been amended after 30 October 1947 meant that it had lost the cover of the ‘existing legislation’ provision of the Protocol of Provisional Application. ... The Panel ... noted that one of the basic purposes of the provisional application of Part II of the GATT had been to ensure that the value of tariff concessions was not undermined by new protective legislation. To permit changes to ‘existing legislation’ that did not increase the degree of inconsistency of such legislation with the General Agreement would thus be in accordance with this purpose of the Protocol of Provisional Application. The Panel therefore considered that changes to the Manufacturing Clause that did not alter its degree of inconsistency with the General Agreement, or which constituted a move towards a greater degree of consistency, would not cause it to cease to qualify as ‘existing legislation’ in terms of paragraph 1(b) of the Protocol of Provisional Application. In this regard, the Panel noted with satisfaction that certain of the amendments made by the United States since 1947 to the Manufacturing Clause had reduced its degree of inconsistency with the General Agreement.

“The Panel then asked itself whether or not the legislation of 13 July 1982 postponing the expiry date of the Manufacturing Clause had merely amended the Manufacturing Clause without increasing its degree of inconsistency with the General Agreement. The Panel considered that the answer to this question depended on whether the introduction by the United States in 1976 of an expiry date of 1 July 1982 for the Manufacturing Clause had constituted a move towards GATT conformity, which had been reversed by the 1982 legislation, or whether the 1976 amendment had represented only an announcement of the possibility of a future move. The Panel considered that the response to this question depended in turn on whether, in the circumstances of the particular case, the insertion of the expiry date could justifiably have been considered by trading partners as a change in United States policy (with delayed implementation) or merely as the announcement of the possibility of a future change in policy. After a careful evaluation of the evidence before it, in particular of the evidence in paragraphs 24-29, and having regard to the fact that the expiry date inserted in the Clause in 1976 was the first such provision introduced since the legislation came into force in 1891, the Panel found that the European Communities had been justified in reaching the conclusion that the expiry date inserted in 1976 had constituted a policy change. The Panel therefore found that the insertion of the expiry date of 1 July 1982 for the Manufacturing Clause by Public Law 94-553 had represented a move towards greater GATT conformity. In consequence, the Panel further found that the legislation of 13 July 1982 postponing this expiry date had, in the circumstances of this particular case, constituted a reversal of this move towards greater GATT conformity and, therefore, increased the degree of inconsistency with the General Agreement of the Manufacturing Clause.

“The Panel then considered whether this increase in the degree of inconsistency with the General Agreement of the Manufacturing Clause could be justified in terms of paragraph 1(b) of the Protocol of Provisional Application because the postponement of the expiry date had not increased the degree of inconsistency to a level in excess of that which had existed on 30 October 1947. The Panel was of the view that the basic issue in this respect was whether the ‘existing legislation’ provision of the Protocol of Provisional Application should be interpreted as opening a ‘one-way street’ permitting only movements from the situation on 30 October 1947 to the situation required by Part II of the GATT or a ‘two-way street’ permitting also movements back towards the 1947 situation.

“Since the text of the Protocol itself and previous decisions of the CONTRACTING PARTIES concerning the Protocol are not clear on this point, the Panel examined which of these two interpretations would be in accordance with the purposes of the Protocol of Provisional Application and of the General Agreement. It noted that the Protocol had been conceived of as providing a temporary dispensation to enable contracting parties to apply Part II of the General Agreement without changing existing legislation or acting inconsistently with it. Given this purpose of the Protocol, the Panel believed that, once a contracting party had reduced the degree of inconsistency of ‘existing legislation’ with the General Agreement, there could be no justification for a subsequent move to increase the degree of GATT inconsistency of such legislation, albeit to a level not exceeding that which had existed on 30 October 1947. The Panel further noted that one of the basic aims of the General Agreement was security and predictability in trade relations among contracting parties. The Panel believed that it would not be consistent with this aim if contracting parties were free to reverse steps that had brought legislation inconsistent with GATT and justified under the Protocol of Provisional Application into line with the provisions of the General Agreement. The Panel

therefore found that the Protocol of Provisional Application did not authorize contracting parties to enact legislation increasing the degree of GATT inconsistency of 'existing legislation', even if that degree of inconsistency remained not in excess of that which had obtained on 30 October 1947. The Panel therefore found that the United States legislation of 13 July 1982 postponing the expiry date of the Manufacturing Clause could not be justified under the Protocol of Provisional Application."³⁸

The Panel Report on "Norway - Restrictions on Imports of Apples and Pears" notes, regarding the "Manufacturing Clause" panel:

"... In a Panel report adopted by the CONTRACTING PARTIES on the Manufacturing Clause in the US copyright legislation, the scope of paragraph 1(b) of the Protocol was extensively considered. The basic issue before that Panel was whether the existing legislation clause should be interpreted as opening a one-way street permitting only movements from the situation on 30 October 1947 to the situation required by Part II of the General Agreement or a two-way street permitting also movements back to the 1947 situation. The Panel decided in favour of the "one-way street" principle arguing that the Protocol was designed to provide only a temporary dispensation from Part II, that the basic aim of the General Agreement was security and predictability in trade relations and that it would be inconsistent with that aim if contracting parties were free to reverse, at any time and at their discretion, the steps they had taken to bring their legislation into conformity with the General Agreement ...".³⁹

(d) *Notification of "existing legislation" and other claims*

The 1949 Report on "Notifications of Existing Measures and Procedural Questions" states that "there is no obligation on the part of a contracting party to notify a measure permitted by sub-paragraph 1(b) of the Protocol of Provisional Application", even if, in the absence of the Protocol, the measures could only be justified under a GATT provision requiring notification (such as Article XVIII).⁴⁰

In 1955, a request was made to contracting parties for information on their existing mandatory legislation which was not in conformity with Part II of the GATT. Of the thirteen that replied, seven countries indicated they had such legislation.⁴¹ At the time it was understood that this list was not exhaustive and that respondents were not bound by the list.

The Panel Report on "Norway - Restrictions on Imports of Apples and Pears" notes that "when in 1955 and 1958 the CONTRACTING PARTIES requested notification of legislation eligible under paragraph 1(b) of the Protocol, six contracting parties (Canada, Denmark, Germany, the United Kingdom, the United States and the Union of South Africa) notified legislative acts, whereas seven contracting parties (Australia, Ceylon, Finland, Japan, Pakistan, Rhodesia and Nyasaland) declared that they had no such legislation (see document L/2375/Add.1). Although the Panel recognized that there was no legal obligation to make such notification, it did note that Norway did not avail itself of the opportunity to notify on that occasion the Acts and declarations cited in the present dispute".⁴²

The Panel report, adopted on 16 November 1962, on "Uruguayan Recourse to Article XXIII" shows that out of the fifteen countries against which Uruguay had directed its complaints, six countries argued that certain measures were permitted under their respective Protocols of Accession or Provisional Application.⁴³ Also, during an examination of residual import restrictions in 1962, four countries stated that they considered that certain restrictions they applied to certain agricultural products were covered by their respective Protocols of Provisional Application or Accession.⁴⁴

³⁸L/5609, adopted on 15 May 1984, 31S/74, 88-90, paras. 35-39.

³⁹36S/306, 320, para. 5.6.

⁴⁰II/62, para. 100.

⁴¹See L/309 and Addenda, L/2375.

⁴²36S/306, 321, para. 5.9.

⁴³II/95, 102-148; countries included Belgium (mixing regulation on wheat), Canada (import licensing on grain items), Denmark (mixing regulation on bread grains), Federal Republic of Germany (import permits and quotas on meat and edible oils), Italy (State trading on wheat and wheat flour), and the United States (quotas on wheat and wheat flour to the extent inconsistent with XI:2(c)).

⁴⁴L/1769; Australia (prohibition on butter substitutes), Italy (restrictions on wheat and meslin, wheat flour, bananas and tobacco), Sweden (various measures in meat, dairy, grains, sugar and fish sectors) and United States (import quotas on wheat, wheat flour, and sugar).

e) *Burden of proof with respect to “existing legislation”*

The 1957 Working Party Report on “Import Restrictions of the Federal Republic of Germany” notes the following view of a number of delegations: “Should the Federal Government seek to maintain its claim that the Marketing Laws in fact require the maintenance of restrictions inconsistent with GATT provisions, the German delegation should produce the text of the Laws and particulars of the parliamentary discussions and explanatory material relating to the legislation in question to bear out its contention”.⁴⁵ See the examination of legislative provisions and intent cited above in the 1989 Panel Report on “Norway - Restrictions on Imports of Apples and Pears”.

The Panel on “United States - Measures affecting Alcoholic and Malt Beverages” examined, *inter alia*, the United States contention that certain requirements were covered by the “existing legislation” clause of the Protocol of Provisional Application. In this connection, the panel “noted that the United States, as the party invoking the PPA, has the burden of demonstrating its applicability in the instant case”.⁴⁶

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.⁴⁷

2. Paragraph 2 of the Protocol of Provisional Application: Provisional application of the General Agreement in non-metropolitan territories

Paragraph 2 provides that the governments named in paragraph 1 shall make effective provisional application of the General Agreement in respect of any of their territories other than their metropolitan territories after giving notice thereof to the Secretary-General of the United Nations.⁴⁸ Notices under paragraph 2 were received from Australia (on behalf of Papua New Guinea), Belgium (on behalf of the Belgian Congo), France (on behalf of all overseas territories of the French Union listed in Annex B except Morocco), the Netherlands (on behalf of its overseas territories), and the United Kingdom (on behalf of Newfoundland, the Mandated Territory of Palestine, all territories for the international relations of which it is responsible except Jamaica, and later on behalf of Jamaica).⁴⁹ Statements concerning provisional application to specific territories also appear in certain accession protocols e.g. of Japan⁵⁰, Portugal⁵¹ and Spain.⁵²

Lists of territories in respect of which the General Agreement has been made effective were periodically compiled.⁵³ See also the material in this Index under Articles XXIV:1 and XXVI:5.

3. Paragraphs 3 and 4 of the Protocol of Provisional Application: Acceptance by other governments signatory to the Geneva Final Act

Acceptances under paragraph 3 were received from Brazil, Burma, China, Cuba, Czechoslovakia, India, Lebanon, New Zealand, Norway, Pakistan, South Africa, Sri Lanka, Syria and Zimbabwe.⁵⁴

⁴⁵L/768, adopted on 30 November 1957, 6S/55, 61, para. 13.

⁴⁶DS23/R, adopted on 19 June 1992, 39S/206, 284, para. 5.44.

⁴⁷DS32/R, dated 3 June 1993, paras. 336-339.

⁴⁸Concerning territorial application of the General Agreement to territories for which the United States has international responsibility other than the customs territory of the United States, see discussion at GATT/CP.3/SR.5 p. 5, and note by the United States dated 13 September 1949, GATT/CP/33.

⁴⁹Status of Legal Instruments, p. 1-2.2. See also discussion at CP.3/SR.5 p. 4. Concerning the notification by the United Kingdom in 1962 that the General Agreement was to be applied provisionally in respect of Jamaica (L/1809), see also L/3485, Report of the Panel on “Jamaica - Margins of Preference”, adopted on 2 February 1971, 18S/183. See also L/3800, notice by the United Kingdom concerning its continuing representation of Hong Kong after UK accession to the EC 1 January 1973; and MTN.GNS/W/159/Corr.1 of 4 March 1993, concerning the legal régime governing relations between the European Economic Community, the Netherlands and Aruba.

⁵⁰4S/7, para. 1(d) (exception from the application of GATT under certain circumstances for islands referred to in the Treaty of Peace with Japan).

⁵¹11S/20, 24, para. 11 (acceptance “in respect of all Portugal’s separate customs territories”).

⁵²12S/27, 28 para. 3 (acceptance in respect of the customs territories listed in Annex B to the Protocol (not reproduced in the BISD); these territorial units into which the National Territory is divided are considered customs territories for the sole purpose of the General Agreement).

⁵³7S/12, 10S/7, 12S/5, 14S/1, 16S/3.

⁵⁴Status of Legal Instruments, p. 1-2.3.

On 7 September 1948 the CONTRACTING PARTIES decided that “a government signatory of the Final Act of October 30, 1947 on behalf of which the Protocol of Provisional Application was not signed by June 30, 1948 shall not be considered to be a ‘party’ within the meaning of Article XXXIII of the General Agreement in its provisional application and consequently that any such government may accede to such Agreement pursuant to the provisions of Article XXXIII”.⁵⁵ The first government to accede to the General Agreement was Chile, which applies the General Agreement under the provisions of the Protocol for the Accession of Signatories of the Final Act of 30 October 1947.⁵⁶ The provisions of this special Protocol are similar to and refer to those of the Protocol of Provisional Application.

The General Agreement does not contain provisions which specifically address the admissibility of reservations. Nevertheless, some countries accepted the 1947 Protocol of Provisional Application under paragraph 3 subject to reservations, which have in due course lapsed or been withdrawn.⁵⁷

4. Paragraph 5 of the Protocol of Provisional Application and corresponding provisions of accession protocols: withdrawal of provisional application

It was stated at the Geneva session of the Preparatory Committee that the phrase “free to withdraw such application” meant “freedom to withdraw the whole arrangement and not part of it”, so that countries could not withdraw portions of their schedules.⁵⁸ Four contracting parties have notified their withdrawal of provisional application.⁵⁹ See also above under Articles XXVII and XXXI.

B. TERMINATION OF PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT

On 8 December 1994, at their Sixth Special Session, the CONTRACTING PARTIES adopted a Decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”, which provides *inter alia*:

“The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.”⁶⁰

III. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/TAC/PV.1, 2, 5, 6, 17, 26
 EPCT/TAC/SR.1, 2, 5, 6, 17, 26
 Documents: EPCT/100, 135, 196
 Reports: EPCT/100
 EPCT/W/301

CONTRACTING PARTIES (1948-49)

Discussion: GATT/1/SR.1, 14
 GATT/CP.2/SR.11
 GATT/CP.3/SR.5, 40
 Reports: GATT/CP.3/60/Rev.1
 GATT/TN.2/42
 GATT/CP.2/11
 GATT/CP/22, 33
 G/5, Add.1-3, G/10

⁵⁵GATT/CP/1 p. 36.

⁵⁶Signed at Geneva and entered into force on 14 September 1948; *Status of Legal Instruments*, 3-1.1.

⁵⁷See *Status of Legal Instruments*, p. 1-2.3-1.2-4.

⁵⁸EPCT/TAC/PV/17, p. 8.

⁵⁹China, notification of withdrawal 5 May 1950 (GATT/CP/54), Lebanon, 25 February 1951 (GATT/CP/91/Corr.1), Liberia, 13 June 1953 (G/45), Syria, 6 August 1951 (GATT/CP/118).

⁶⁰PC/12, L/7583.