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GENERAL AGREEMENT ON TARIFFS AND TRADE

CONTRACTING PARTIES
Twentieth Session

ARTICLE XXIV, PARAGRAPH 5(a)

Interpretation of the word "applicable"

(Note by the Executive Secretary)

1. The question of the proper interpretation of the word "applicable" as used in paragraph 5(a) of Article XXIV was first presented to the CONTRACTING PARTIES at their eighteenth session in a report by the Tariff Negotiations Committee (L/1479). The Committee had been instructed to examine the common external tariff of the European Economic Community in the light of the provisions of paragraph 5(a) of Article XXIV, but the Committee had been unable to present a definitive report because, among other reasons, there was an important difference of opinion among the members as to the correct interpretation of the word "applicable" as it occurs in the following phrase in paragraph 5(a):

> "with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties.....imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher ..... than the general incidence of the duties ..... applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement".

2. The Committee recorded the divergent views on this question in paragraph 7 of its report, which reads as follows:

> "..... there was a division of opinion in the Working Party on the interpretation of the word "applicable" ("en vigueur" in the French text) in paragraph 5(a). The European Economic Community held, on the basis of the text itself of paragraph 5 of Article XXIV, that the expression "applicable" must be read, in contrast to the term "imposed" used elsewhere in Article XXIV, as referring to a rule of law which is applied or capable of being applied, and that it is for each contracting party constituting a customs union or a free-trade area to interpret its own legislation with regard to the duties which should be regarded as being applicable. According to the national legislation of the member States of the EEC the term "applicable" can only refer to conventional (bound) and legal

> customs duties. Several members of the Working Party, on the other hand, held that "applicable" must in this context mean rates actually applied since the purpose of Article XXIV:5(a) was to prevent the institution of a customs union being used as an opportunity to increase the protective duties actually encountered by exporters. In particular it was held by these delegations that the use as a basis for the computation of the common tariff of tariffs which were in fact never levied (i.e. the Italian tariff) did not give a true indication of the protective régime existing before the formation of the customs union."

3. In paragraph 15 of its report the Committee states that its conclusions are "necessarily tentative" since:

> "it was not able to reach agreement on one question which materially affects any attempt to compare tariff rates of the member States of the EEC before its formation and the Common Tariff, i.e. the question whether, in the case of the former, legal or bound rates on the one hand, or, on the other, rates actually applied should be used."

4. This matter was discussed when this report was presented to the CONTRACTING PARTIES at the eighteenth session (SR.18/4). It was further discussed by the Council at its meeting in September 1961 (C/M/8) and at the nineteenth session (see SR.19/6 and 7). It was on this last occasion that the CONTRACTING PARTIES agreed that the item should be retained on the agenda for the twentieth session in order to deal with the interpretation of paragraph 5(a) in the light of "an objective juridical opinion" by the Executive Secretary.

5. There appears to be very little recorded history of the drafting of paragraph 5(a). If the word "applicable", its significance and possible alternative formulations were discussed at the meetings held in 1946-48, these discussions were not recorded. If the matter had been the subject of argument, the opposing views would surely have been reflected in the reports of working parties and committees, but in fact no mention of the matter is made in such reports. In the English language texts, which emerged from the meetings held during that period, the word "applicable" was used consistently. In the French language texts, on the other hand, there was some alternation between the two expressions "applicables" and "en vigueur"; in the Havana Charter and in the General Agreement, in the final French texts drawn up in 1948, the word "applicables" was used, but during the review of the GATT at the ninth session in 1955, this was changed (by means of the Protocol of Rectification to the French text) to "en vigueur". Thus drafting history throws no light on the choice of words which were used and no definition of them has been provided.

6. In these circumstances one must explore the probable intentions of those who drafted the provisions of Article XXIV. It is clear, in the light of the general principle set out in paragraph 4 of Article XXIV, that the drafters were seeking to ensure that the creation of a customs union, as an exception to the most-favoured-nation rule, would not in practice lead to a raising of barriers to international trade. In paragraph 4, the CONTRACTING PARTIES recognize that the purpose of a customs union should not be "to raise barriers to the trade of other contracting parties" with the constituent territories. Thus the words (in paragraph 5(a)) "shall not on the whole be higher than the general incidence of duties ..... applicable in the constituent territories prior to the formation of /a customs/ union ....." must be understood as an effort to spell out the implications of paragraph 4 and to satisfy the requirements of that paragraph.

7. It can therefore be accepted, against the background of the general philosophy of the GATT and in the context of Article XXIV itself, that the intent of those who drafted the provisions governing the establishment of a common external tariff of a customs union was that the formation of such a union should not, on the whole, result in higher tariff barriers against trade than existed previously in the constituent territories of the union.

8. Against this background of the purposes and intent of paragraph 5(a) the two different interpretations of the word "applicable", (see paragraph 2 above) should be examined. It seems that the intentions of the drafters are not fully covered by either interpretation, and yet when the two interpretations are reconsidered from the point of view of reasonableness and logic the gap between them narrows. On the one hand, if the word were interpreted in the sense of "applied" duties, it would be reasonable, in the computation of a common external tariff, to permit the use of the duties inscribed in the tariff in those cases where duties had been temporarily lowered or suspended to meet particular circumstances of an economic nature or because other types of barriers were being used. On the other hand, if the word were interpreted in the sense of "applicable" duties, it would be reasonable, in the computation of a common external tariff, to disallow the customs duties of a legal tariff if these duties had never actually been applied and there was no reasonable expectation that they ever would be applied.