GENERAL AGREEMENT ON
TARIFFS AND TRADE

CONTRACTING PARTIES
Tenth Session

WAIVER GRANTED BY THE CONTRACTING PARTIES

Voting Requirements under Article XXV:5(a)

Statement by the Representative of Cuba at the meeting of the
CONTRACTING PARTIES on 30 November 1955

In submitting this problem for the consideration of the CONTRACTING PARTIES it is not the intention of the Government of Cuba to disturb in any way the situation existing under the provisions of the several waivers of obligations which have been granted on former occasions. Though the Government of Cuba opposed strongly the granting of these exceptional measures on the grounds that they would contribute to weaken severely the structure of the General Agreement, it understands that it would not be sound policy to request from the CONTRACTING PARTIES decisions which could be contradictory to their previous criteria.

Nevertheless, the Government of Cuba considers it desirable that these problems be studied further by the Organisation with a view to controlling more effectively situations which might arise in the future. The decisions that have been adopted on waivers have not had a general character. Each application of a measure of this kind has been examined carefully by the CONTRACTING PARTIES and solved on its own merits. In view of the existence of this practice it is obvious that nothing can prevent the CONTRACTING PARTIES, whenever an application for a waiver is presented in the future, from taking into consideration some aspects or elements of Article XXV:5(a) which have been ignored up to this moment, without following necessarily the implication of affecting decisions which had been adopted in the past to deal with cases of a similar nature.

The problem raised by Cuba, to which Item 23 of the Agenda refers, necessitates a more careful application by the CONTRACTING PARTIES of the provisions of Article XXV:5(a). The thesis of our Government does not reject the possibility that the provisions of this Article could be applied to Part I of the General Agreement. On this point we agree with what is expressed in paragraph 3 of document L/403, which has been circulated by the secretariat. The question is that the CONTRACTING PARTIES are approving all the waivers requested by a two-thirds majority vote, without considering that in some cases the obligations waived are included in Part I of the Agreement and that the suspension of obligations granted is rather a modification of the provisions inserted in that part of the instrument.
In other words, we are not questioning that Article XXV:5(a) can be applied to Part I of the General Agreement or that the obligations of this Part cannot be waived or suspended as the obligations of Parts II and III of the Agreement. Our contention is that the voting system used by the CONTRACTING PARTIES to grant waivers affecting the provisions of Part I, and which imply a modification of those provisions, is not correct.

The Government of Cuba feels that the CONTRACTING PARTIES should formulate criteria which would enable them to distinguish clearly between a waiver of an obligation and a modification of the provisions of the General Agreement, and to determine whether or not in some cases a suspension of an obligation implies a modification of these obligations in the sense of Article XXX. Up to this moment, the decisions adopted by the CONTRACTING PARTIES on waivers have overlooked the need of making such a distinction.

There are cases in which, in the view of our Government, a modification of the obligations of Part I of the Agreement has been confused with a suspension of obligations. Or better expressed, the CONTRACTING PARTIES have taken decisions waiving certain obligations of Part I which have implied a modification of those obligations.

This abnormality occurs, for example, with the criteria prevailing in the CONTRACTING PARTIES, which accept that, by a two-thirds majority waiver granted under the provisions of Article XXV:5(a), any contracting party concerned is able to establish a new preferential system. Paragraph 2 of Article I of the Agreement, which is inserted in Part I, specifies and limits the number of preferential systems that are able to exist within the framework of GATT. As will easily be understood, if by a waiver a contracting party is authorized to establish a new preferential system, what is in fact being done is a modification of that important provision of the General Agreement, by a two-thirds majority vote. Nobody could think that the creation of a new preferential regime is carried out with a transitory purpose. It would then be, by the nature of the measure, rather a modification than a suspension of obligations, or as has been suggested before, a suspension of obligations which involves a modification of these obligations. Something similar happens with the facilities to increase the rates of duties of the products bound in the Schedules of the Agreement, which have been granted recently in connection with a waiver under the provisions of Article XXV:5(a) by a two-thirds majority vote. The rates of duties bound in the Schedules of the Agreement may be modified on the occasions and through the procedure which is laid down in Article XXVIII. Outside of this procedure during the intersessional periods the CONTRACTING PARTIES have permitted certain adjustments of the tariff items included in the Schedules but have always required the consent of all the contracting parties, because it was understood that as the obligations of Article II, which belong to Part I, were being modified, the requirement of unanimity was necessary to comply with the provisions of Article XXX. But recently, as has been said, the criterion
accepted is that it is possible to modify a tariff item bound in a GATT Schedule by virtue of an authorization granted under the provisions of Article XXV:5(a) by a two-thirds majority vote. The Government of Cuba considers that this position is not correct because it is not possible to disregard the fact that the increase of a bound rate, even if it is made with a temporary character, is a modification of the obligations of Article II of the Agreement, and that this action cannot be authorized by a two-thirds majority vote but only by the unanimous consent of the CONTRACTING PARTIES.

The problem is not, in consequence, to deny that the obligations in these cases can be suspended. Article XXV:5(a) may be applied to all the provisions of the Agreement. But the Cuban Government considers that it is not legitimate, when a waiver of obligations implies at the same time a modification of the obligations of Part I of the General Agreement, that it could be granted by a two-thirds majority vote. In this eventuality, the suspension of the obligations should be decided by unanimity, to comply with the provisions of Article XXX of the General Agreement.

The criterion which has just been expressed is not incompatible with the provisions of Article XXV:5(a). On the contrary it conforms perfectly to the said provisions. The text of Article XXV:5(a) is 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 sub-paragraph."

By the reading of this Article it is possible to observe that it is not necessary to grant all the waivers by a two-thirds majority vote. According to what is stipulated in sub-paragraph (i) of that paragraph, the CONTRACTING PARTIES might prescribe in certain cases different voting requirements for the granting of these waivers. And there is no doubt that the waivers which modify at the same time the obligations of Part I of the Agreement should be included in the category of those which require a special voting system, which ought to be, in the alternative that we are considering, the unanimous vote of the contracting parties.

In the preceding paragraphs the case has been explained of waivers suspending the obligations of Part I of the Agreement and which imply, at the
same time, a modification of these obligations. We are going to examine a kind of waiver, theoretically possible, which suspends the obligations of Part I without modifying those obligations. In the General Agreement this distinction has been established clearly, since in Article XXX are considered the modifications of the provisions of this instrument and in Article XXV:5(a) the so-called waivers of obligations.

In the CONTRACTING PARTIES the criterion has prevailed that as Article XXV:5(a) is applicable to all the provisions of the Agreement, the obligations of Part I may be suspended by a two-thirds majority vote. It is difficult for the Government of Cuba to accept this generalization, because besides the fact that in the article mentioned, as was expressed before, the possibility is recognized of establishing other voting requirements, there are a great number of practical and commonsense reasons which contradict this superficial interpretation.

It is well known that the obligations included in Part I of the Agreement have a very special and fundamental character. They are obligations which might be considered as the basic obligations of the instrument. In that part are to be found the most-favoured-nation clause, the provisions limiting the preferential systems and the margin of preferences which are able to exist within the framework of the Agreement, and especially, the tariff concessions which are for the time being the only important practical achievement of the Agreement.

It can be stated with certainty that in the General Agreement the exceptional character of the obligations of Part I of this instrument has been clearly admitted, and this explains why in Article XXX, where the procedure for the modification of the obligations referred to was stipulated, the requirement of unanimity is established. This being the situation governing the modification of the provisions of the Agreement, we ask ourselves how it is possible that in the case of waivers of obligations affecting Part I, the CONTRACTING PARTIES could admit that those obligations might always be suspended by a two-thirds majority vote, that is to say, by a number of votes equal to those required to suspend obligations which have not the same fundamental nature. In our judgment, this is an illogical conception, contrary to the laws of commonsense.

Our contention is that in the case of waivers affecting Part I of the Agreement which are considered not to constitute a modification of the provisions of that part, in the sense of Article XXX, it is absurd to think that the said obligations can be suspended by a two-thirds majority vote as any other common obligations, without taking into account their special character and the exceptional category of circumstances that could exist therein. We feel that in most cases when a waiver of obligations of Part I is requested a stricter voting system should be the general rule.

It could be said that the CONTRACTING PARTIES have not yet given a ruling declaring that the obligations of this part of the Agreement could be
waived always by a two-thirds majority vote. But it could be answered that Article XXV:5(a) has been applied with such amplitude and generosity that has in practice been the situation. I would like to recall also to the CONTRACTING PARTIES that although we have envisaged here very difficult waivers still the last two sub-paragraphs of Article XXV:5(a) have never been utilized by the CONTRACTING PARTIES.

These problems should, on the other hand, be considered not only from a juridical point of view. It is necessary that the contracting parties understand that any alteration which affects the obligations of Part I of the Agreement, and which is not a regular modification made under the provisions of Article XXX but a situation of exceptional privilege created by a decision under Article XXV:5(a), destroys completely the equilibrium of the General Agreement and creates obligations which are more onerous for some contracting parties than for others, and this not in connection with obligations of secondary importance but in relation to the basic obligations of the instrument. Let us conceive, for example, a waiver which affects the obligations of the most-favoured-nation clause, and which authorizes a contracting party to introduce discrimination in its trade with the other contracting parties. This example is, of course, the most extreme that could be envisaged but we mention it because it illustrates clearly what we wish to explain. It will be easily understood that the fact that the contracting parties affected are able to request compensations through Article XXIII does not solve the problem, because the question is not that the individual interests of a country may be injured but that a basic principle of the instrument, whose unanimous observance could be considered as a sine qua non condition to participation therein, is broken. We should examine also the degree of prejudice that could be inflicted on other contracting parties and reflect whether it is possible to accept in all cases that the obligations of Part I may be suspended by a two-thirds majority vote.

In the view of the Government of Cuba, this problem has not been studied with sufficient care by the CONTRACTING PARTIES. The serious implications which may result demand, however, that these questions be examined with close attention in the future, in order that they are not ignored as has hitherto been the case. It would be sound policy on the part of this Organization to admit that the application of Article XXV:5(a) requires a closer investigation by the CONTRACTING PARTIES, and that such investigation should be carried out during some session of GATT.

Even the original drafters of the General Agreement understood that the application of this article was complex and difficult, and that the CONTRACTING PARTIES, in applying it, would need to "define certain categories of exceptional circumstances to which other voting requirements shall apply", and that to achieve this purpose the CONTRACTING PARTIES would need also to "prescribe such criteria as may be necessary". I am quoting again the last two sub-paragraphs of Article XXV:5(a).
Let us then follow the advice of the Agreement and recognize that unless we make this serious investigation, and examine all the complicated issues involved in the text of this article, we are applying it in a rather irresponsible way, without due regard for the tremendous repercussions that may follow in the whole structure of the Agreement.

We know that the rule of unanimity is bothering some contracting parties for political reasons. But perhaps after a frank discussion of this question, in which not only the juridical angles will be considered, all of us may arrive at the conclusion that in some cases we cannot stick to this rule. However, we may also find other cases in which there will be general consent to stick to this unanimity rule. Let us also discuss other things which are involved in the application of this article and that we have never considered carefully.

The Government of Cuba is raising these problems on this occasion not with the desire of obtaining from the CONTRACTING PARTIES a concrete decision at this stage. We are merely putting forward our ideas, pointing out questions that preoccupy us, with the purpose of awakening the interest of the Organization in their study of these difficulties. We would like to know only if, in the opinion of the other contracting parties, the present item of the Agenda merits the further consideration of this Organization.