PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT

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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.

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"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the International Trade Organization enters into force, Article I and Part II of this Agreement shall be suspended and superseded by the corresponding provisions of the Charter".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.
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> "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 The drafters of the Protocol expected the General Agreement to be superseded soon by the ITO Charter and they felt that legislative changes should not be required at that time because such changes would have delayed the acceptance of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]

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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 (7.02 0 0 1.5(etion e84240.2058(o4c 0 0 10.2)-6

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 -

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"

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 "(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

> 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
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>> '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, …
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>> (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).
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> "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."

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] …

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