

WTO S and D Rules Relevant to EPAs

Dr Francis Mangeni

I. Part IV of GATT

Introduced in 1965 following the Haberler report¹ and the 1964 UNCTAD proceedings, with the aim of providing for developing countries a special regime for policies and programmes to promote economic development, Part IV has featured in Article XXIV agreements and other projects for economic integration involving developing countries, which have come before working parties. Part IV provides for co-operation between developed and developing countries, and among developing countries, through individual or joint action, which could very well take the form of RTAs²; such as the Lome Conventions between the European Union and African Caribbean and Pacific countries. These conventions provided some products of the latter countries preferential access to the European markets.

Part IV introduced the principle of non-reciprocity, that is, developing countries were not to be expected to make concessions in return for advantages offered by developed countries.³ So, regarding RTAs involving developed and developing countries, developing countries would not eliminate their trade barriers, on the basis of the Part IV non-reciprocity principle. The problem was that Article XXIV would not be considered complied with in absence of reciprocal concessions from all parties including developing countries. Part IV, it was argued, was not an exception to Article XXIV reciprocity requirements. Even invoking both Article XXIV and Part IV yielded no consensus, for instance in *Lome II*⁴ and the *EEC-Yugoslavia agreement*⁵.

The problem pre-dates Part IV, when it was argued that infant industries were to be protected, and that developing countries needed to retain revenue charges. Thus in the examination of the *EEC treaty*, before the addition of Part IV to GATT, the provisions for association with overseas territories, in purporting to create a FTA between the EEC and the territories, were found by the majority of the sub-group to be in violation of the elimination-requirement on the ground that the territories were not required to eliminate their duties and could protect their infant industries by new duties.⁶ When Part IV was added, the argument to counter the elimination requirement under Article XXIV was the non-reciprocity principle. Thus *Lome I* in June 1976 passed

¹ Please see, *Trends in International Trade* [GATT, 1958].

² Articles XXXVI:1(d); XXXVI:9; XXXVII:4,2(b)(ii); and XXXVIII:1

³ Article XXXVI:8

⁴ BISD29S/119 paragraphs 9, 17, 24

⁵ BISD paragraphs 9-10

⁶ BISD 6S/68 at p. 94 paragraphs 15-16, and p.96 paragraph 21

through quietly, its all-embracing nature found to fall squarely within Part IV.⁷ On the other hand, however, Article XXIV had been invoked in support of reverse preferences obtained from developing countries, by the very EEC for instance in October and November 1970 in *Yaounde II*⁸ and in May and October 1971 in the *agreement of association between EEC and certain non-European countries and territories*⁹. There was no consistency in the working parties on this matter. But Article XXIV provisions would apply in their entirety to agreements between developed and developing countries if the developing country concerned decided to waive its right not to have to give concessions or reduce tariffs.

In the mid-1970s support for Part IV non-reciprocity drew on the drive towards the new international economic order and this might explain why that support waned in the face of increasing economic liberalism. Working parties expressed sympathy for arrangements between developed and developing countries, which incorporated Article XXIV agreements while fully involving financial and technical cooperation. Thus *the EC-Algeria*¹⁰, *EC-Morocco*¹¹ and *EC-Tunisia*¹² *agreements* generally went down well with working parties; but still raised the issue of the exact nature of the relation between Part IV and Article XXIV, and of whether in fact Part IV permitted developed countries to grant preferences to some developing countries other than under a generalised system.

In the *EEC-Egypt*¹³, *EEC-Syria*¹⁴, *EEC-Jordan*¹⁵, and *EEC-Lebanon*¹⁶ *agreements*, it was further argued that the non-reciprocity principle did not apply to Article XXIV agreements because ad Article XXXVI:8 [explaining the application of Article XXXVI:8 which provides for non-reciprocity], did not include Article XXIV among those indicated. But Article XXIV can be considered included by the provision in ad Article XXXVI:8 for "any other procedure under this agreement". Also, inclusion of the Articles on modification of schedules [XXVIII and XXVIII bis] can be understood to incorporate

⁷The *ACP-EEC Convention of Lome*, BIDS 23S/46. But the subsequent renewals faced criticism, and eventually an Article XXV waiver was requested for *Lome IV*.

⁸BIDS 18S/133, 139 paragraphs 20-21

⁹BIDS 18S/143 paragraph 13

¹⁰BIDS 24S/80 paragraphs 5, 8, 10, 12, 26

¹¹BIDS 24S/88 paragraphs 5, 8, 10, 12, 28

¹²BIDS 24S/97 paragraphs 5, 8, 10, 12, 27

¹³BIDS 25S/114 paragraphs 5, 10-13, 18, 20-23, 37

¹⁴BIDS 25S/123

¹⁵BIDS 25S/133

¹⁶BIDS 25S/142

Article XXIV agreements calling for such modification.¹⁷ So, ad Article XXXVI:8 cannot be ground for excluding the non-reciprocity principle from Article XXIV agreements.

If Article XXIV is to apply, developing countries need to comply especially with the rule that the resulting duties and other regulations of commerce be no higher nor more restrictive than the general incidence before the arrangements for the customs union or the FTA. This could be consistent with non-reciprocity in the exceptional circumstances that the resulting duties and regulations are no higher or more restrictive though developing countries did not eliminate or start to eliminate barriers to their trade. Also, the requirement for inclusion of substantially all the trade could be satisfied under non-reciprocity if the developed party has most of the trade. In *the Australia-Papua New Guinea agreement*, though Papua-New Guinea did not give reverse preferences, 82 percent of the two-way trade was covered, including Australia's imports of over 90 percent for the 3 succeeding years.¹⁸

Developing countries may eliminate duties and other restrictive regulations of commerce, if they voluntarily waive their non-reciprocity right under Part IV, but they should not be required to do so. If the requirements under Article XXIV are not satisfied, and developing countries do not waive their non-reciprocity right, the waiver power under paragraph 10 could be resorted to. Paragraph 10 empowers the CTG to approve agreements not complying with the rules in Article XXIV provided that the agreements lead to formation of customs unions or FTAs.

The rather mandatory provisions of paragraph 1 of the Understanding on Article XXIV, that customs unions, FTAs, and the interim agreements, in order to be consistent with Article XXIV must conform to paragraphs 5, 6, 7, and 8 of Article XXIV, do not affect the rights under Part IV, for those paragraphs only apply when the agreement is a proper one for, and brought under, Article XXIV. The mandatory provisions of the Understanding, could be understood as addressing the controversy on the relation between paragraph 4 and those succeeding paragraphs of Article XXIV. The position taken here is that Article XXIV is inapplicable due to the non-reciprocity principle unless waived. Such a waiver would have to be explicit, for it is in part due to lack of express waivers by developing countries that these inconclusive debates have been generated.

The problematic application of Part IV led to decisions to clarify issues. In 1971, the CONTRACTING PARTIES adopted the Decision on the Generalised System of Preferences [GSP Decision] and in 1979 the Enabling Clause. The GSP Decision waived Article 1 of GATT, permitting the according of advantages to developing countries without extending them to all contracting parties as otherwise required under the MFN principle.¹⁹

¹⁷ Article XXIV:6 provides that XXVIII applies to the modifications.

¹⁸ BISD 24S/62 paragraphs 6, 16

¹⁹ Please see the next Part.

II. The Enabling Clause

The Enabling Clause put on a firm basis the Decision on the Generalised System of Preferences, which had taken the form of a temporary waiver for 10 years expiring in 1981²⁰, and generally preferential treatment granted by developed countries [within the wide scheme of more favourable treatment for developing countries] then understood by developed countries as meant only to be temporary in nature²¹. The Enabling Clause contains a completed regime for RTAs among developing countries.²²

Some of the conditions for the differential and more favourable treatment under the Clause, the treatment having been defined to include RTAs among developing countries²³, are the following. The treatment "shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of other contracting parties".²⁴ This echoes the principles of paragraph 4 of Article XXIV, and the rules in paragraph 5. The treatment "shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis".²⁵ This is in line with the general design of Article XXIV, to preserve the primacy of the multilateral system, but more directly in point, it echoes paragraphs 5(c), 6, 7 and 8 of Article XXIV, which are designed to prevent abuse of the exception for RTAs, by attaching the stringent requirements for, a plan and schedule in the case of interim agreements, consultation, notification, and very wide coverage of the liberalisation. The Enabling Clause expressly provides for notification²⁶ and consultation²⁷. Thus just like Article XXIV, the Clause addresses the major concerns, though with relatively less rigour, for in the Clause the detailed obligations specified regarding plan and schedule and trade coverage, are lacking. Those were troublesome provisions.

Regarding Part IV principles, the Enabling Clause is principally about providing a basis for the

²⁰ Paragraph (a) of GSP Decision, dated 25 June 1971, BISD 18S/24

²¹ Paragraph 5 of preamble to GSP Decision

²² Paragraph 2(c)

²³ Paragraph 2

²⁴ Paragraph 3(a)

²⁵ Paragraph 3(b)

²⁶ Paragraph 4(a)

²⁷ Paragraph 4(b)

preferential treatment, now called differential and more favourable treatment. The non-reciprocity principle is provided for.²⁸ However, there is evident in the manner the principle is provided for that difficulties exist about the extent of this exemption.²⁹ It is not a blank exemption²⁹ but relative to the ability and needs of the developing country, and subject to graduation of developing countries first from the category of least developed and then that of developing. Thus the first sentence of paragraph 5 interprets non-reciprocity in the sense that "developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs". Paragraph 6 of the Clause then provides for "utmost restraint" by developed countries in seeking concessions or contributions from least developed countries.

In practice, therefore, where concessions are reckoned an appropriate policy to promote economic development, the non-reciprocity principle will be derogated from. Indeed, the era of deregulation since the early 1980s, has increasingly seen pressure on developing countries by the developed and by international financial institutions, for removal of barriers to trade and for liberalisation as policies designed to promote economic recovery. Granting of concessions has been forced upon developing countries on arguments that would appear to be consistent with the qualification in the non-reciprocity principle. In substance, though, the pressure is a derogation from the non-reciprocity principle, at least to the extent that developed countries have demanded the concessions as conditions for funding development programmes, but that is a matter for practical international politics and economics, and not about the niceties of hortatory legal undertakings and principles which Part IV has turned out to be, the reference in the Clause to the general objectives of GATT and principles of Part IV³⁰ notwithstanding. So the Enabling Clause is a whole instrument for RTAs among developing countries, drawing on the traditional rules in Article XXIV and on Part IV considerations for developing countries, though the rigorous requirements about a plan and schedule and trade coverage are absent. These two might be points for further development of the Clause.

²⁸ Paragraph 5

²⁹ The interpretative note, ad Article XXXVI: 8, qualified the flat exemption in Article XXXVI: 8

³⁰ Paragraph 7

III. Article XXV waivers

A number of RTAs were notified under Article XXV, using the paragraph 5 waiver. These agreements did not aim for customs unions or FTAs as such, but involved reduction or elimination of barriers to products from developing countries. They in addition had provisions generally on trade, finance and development. Perhaps the most notable of these agreements are the Lome conventions between the EC and African Caribbean and Pacific countries³¹, and the US laws granting preferential treatment to Caribbean³² and ANDEAN countries³³. In the case of those involving only developed countries, there did not seem to be a consistent theme, the aims ranging from strategic cooperation³⁴, to efficiency considerations³⁵.

Article XXV, headed "joint action by the contracting parties", has two aspects. The first regards meetings of contracting parties to apply or implement provisions for joint action, and generally for the operation and furtherance of the objectives of GATT 1947.³⁶ The upper case for contracting parties [CONTRACTING PARTIES] is used in provisions for this joint action.³⁷ The second aspect is provision for waivers from obligations under GATT. The waiver is available in "exceptional circumstances not elsewhere provided for in this Agreement", and where the decision is approved by a majority of two-thirds of the contracting parties³⁸ if a consensus is not forthcoming³⁹. The Enabling Clause introduced a further aspect to Article XXV, by providing in

³¹ *Guide to GATT Law and Practice, Analytical Index*, volume 2, 1995, p. 905

³² BISD 31S/180

³³ BISD 39S/384 and 40S/186

³⁴ *The European Coal and Steel Community*, BISD 1S/85

³⁵ *The Canada-US FTA agreement on trade in automobiles*.

³⁶ Article XXV: 1

³⁷ *Ibid.* CONTRACTING PARTIES as a body has been replaced by the Ministerial Conference under the WTO Agreement.

³⁸ GATT 1947 has been modified and included in the WTO Agreement, renamed GATT 1994. For instance, Article XXV: 5 of GATT 1947 provided for a majority of two thirds for waivers, but this majority has been amended to three-fourths by Article IX:3 of the WTO Agreement.

³⁹ The practice developed under GATT was to adopt decisions by consensus regardless of provision for majorities. Article IX: 3(a) and (b) of WTO Agreement require the waiver decision to be taken by consensus and failing that by three-fourths majority.

footnote 2, which is on paragraph 2, that “it would remain for CONTRACTING PARTIES to consider on an ad hoc basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph”.

Three questions raised concern, the meaning of exceptional circumstances, whether that footnote refers to action under paragraph 1 or 5 of Article XXV⁴⁰, and whether in fact Article XXV is still necessary given the provisions of Article IX of the WTO Agreement and of the Understanding in respect of waiver of obligations under GATT 1994.

A. Exceptional circumstances

“Exceptional circumstances” falling within the scope of paragraph 5, are those not expressly covered by other provisions of GATT. Where other provisions of GATT permitting a waiver or a derogation from obligations assumed under GATT, govern the exceptional circumstances at hand, paragraph 5 does not apply⁴¹, but action would have to be taken under those express provisions by the contracting parties acting jointly. Exceptional circumstances, ordinarily meaning unusual or extra-ordinary circumstances, refer, as used in article XXV:5, to exceptions to the primary obligations under GATT, for which no directly applicable or enabling provisions are available. Exceptional circumstances will therefore be of a legal character, though arising out of economic, political or other considerations.⁴²

Under the WTO, however, “exceptional circumstances”, because no reference is made to absence of provisions to govern the proposed derogation, may carry a different meaning - probably the ordinary one of unusual or extra-ordinary economic, political or other factors. Article IX of the WTO Agreement governs waiver of “... an obligation imposed on a member by this Agreement or any of the Multilateral Trade Agreements ...”⁴³. Regarding RTAs, “exceptional circumstances” under Article XXV: 5 of GATT 1947, in practice, arose in respect of agreements involving developing and developed countries, for then neither Article XXIV nor the Enabling Clause - when it came into effect, were applicable and it was a situation clearly not governed

⁴⁰This question was raised in the proceedings on the request by the US for a waiver in respect of the Caribbean Basin Economic Recovery Act, and, with respect, not satisfactorily answered. [BISD 31S/180]

⁴¹If the applicable provision under which the derogation is sought, requires a request from the CONTRACTING PARTIES, the contracting parties will have to act in accordance with article XXV: 1, that is jointly.

⁴²US request in respect of the CBERA, BISD 31S/180 paragraph 30

⁴³Article IX: 3

by an express GATT provision. Under the WTO, it will most likely be the same case that "exceptional circumstances", in respect of RTAs, will refer to agreements involving developing and developed countries.⁴⁴ But there may well be circumstances for use of waiver provisions, that do not involve developed and developing countries forming a RTA.

Belgium, France, the Federal Republic of Germany, Italy, Luxemburg and the Netherlands, in order to proceed with the formation of the *European Coal and Steel Community* requested for a waiver of their GATT obligations.⁴⁵ The community was to promote close integration through elimination of barriers to free movement of coal and steel products within the territories of the parties, and to lead to improvement and expansion of production which would benefit all the contracting parties. The working party considered and granted the request under article XXV:5(a), applying the following principles. Paragraph 5(a) "is general in character, allowing the CONTRACTING PARTIES to waive any obligations imposed upon the contracting parties by the Agreement in exceptional circumstances not provided for in the Agreement, and places no limitations on the exercise of that right", but the objectives to be pursued under the waiver are to be consistent with those of GATT⁴⁶, and the parties' intentions and commitments to pursue constructive trade policies towards others are a relevant consideration⁴⁷. Just like for interim agreements leading to customs unions or FTAs, annual reports on measures taken have to be made to the CONTRACTING PARTIES till the end of the transitional period.⁴⁸

The purpose of *Australia's request for a waiver* in order to accord advantages in respect of certain products from Papua New Guinea⁴⁹, was promotion of the latter's economic development through encouraging substantial investment in selected sectors. Access to Australia's market was a way to encourage investment because Papua New Guinea was backward and lacked an internal market. In the working party, several alternatives were explored. A customs union was considered and rejected by Australia on the policy grounds that there would be a dispersal of effort whereas Australia wanted to target certain key sectors for

⁴⁴ Article XVI:1 of the main WTO Agreement provides that the WTO is to be guided by decisions, procedures and customary practices under GATT. On this basis interpretations adopted under GATT may guide application of waiver provisions by the WTO.

⁴⁵ BISD 1S/85

⁴⁶ BISD 1S/85 at p. 86 paragraphs 2-4

⁴⁷ BISD 1S/85 at p. 87 paragraph 7

⁴⁸ BISD 1S/85 at p. 87, paragraph 13

⁴⁹ BISD 2S/93

promotion. A one-way FTA, preferred by Australia, failed the requirements of Article XXIV of GATT in not covering substantially all the trade as Australia meant to grant duty free treatment only to chosen primary products. Whereas in the case of the European Coal and Steel Community waiver, a list of products covered was submitted⁵⁰, here Australia declined the suggestion, retaining the discretion on products to be granted duty free treatment⁵¹.

A waiver was recommended, regard being had to the "special circumstances involved", and the assurances given, namely to apply the waiver for the economic development of Papua New Guinea without causing material injury to others and not for protection of Australia's domestic production.⁵² The procedure set for protecting the interests of others, was that there was to be prior notification and prior consultation before action under the waiver, that where consultations were unsuccessful the question of whether there would be substantial injury or disproportionate protection could be referred to the CONTRACTING PARTIES, and that the waiver would be reviewed in the event of a change in the factors affecting the trade and production of Papua New Guinea.⁵³

According to the *Guiding Principles* adopted on 1 November 1956⁵⁴, "applications for waivers from part I or other important obligations" are considered after not less than 30 days' notice.⁵⁵ This period affords opportunity for full consultation⁵⁶, and the waiver is not to be granted if the legitimate interests of other members are not adequately safeguarded.⁵⁷ The decision must provide for procedures for future consultation and reporting or reviews.⁵⁸

The trend these early decisions set, was that though the CONTRACTING PARTIES had a

⁵⁰ BISD 1S/85 at p. 89 paragraphs 15-16

⁵¹ At the review of the second annual report submitted by Australia, and at which Australia made another request in respect of some forestry products, however, a list of the products was included in the working party's draft decision. See BISD 4S/82.

⁵² BISD 2S/93 at p. 95 paragraph 10.

⁵³ BISD 2S/93 at p. 95 paragraph 11.

⁵⁴ BISD 5S/25

⁵⁵ *Ibid*, paragraph (a)

⁵⁶ *Ibid*, paragraph (b)

⁵⁷ *Ibid*, paragraph (c)

⁵⁸ *Ibid*, paragraphs (d) and (e)

general power under article XXV:5(a) to waive any GATT obligation, the waiver was subject to certain conditions. Its application would have to conform to the GATT objectives and not injure the trade of others. Arrangements for the protection of the trade of others included notification and consultation requirements, and provisions for dispute settlement and reviews.

B. The Enabling Clause, footnote 2

Because of the general and hortatory nature of Part IV provisions, and of lack of precise and detailed provisions on the manner of implementing the commitments, decisions for specific programmes followed, such as the GSP Decision and the Enabling Clause. These decisions, though following from GATT provisions and GATT-based action, could stand by themselves and be the basis for measures taken by developed countries for differential and more favourable treatment for developing countries. But the ultimate source of these decisions - GATT provisions, remained available for further and new decisions, and for other action. So the effect of the second footnote on paragraph 2 of the Enabling Clause, was to make an alternative or additional provision to GATT 1947. All GATT provisions for joint action, as defined in Article XXV: 1, remained available as and when applicable, as well as the waiver provisions under paragraph 5 thereof.

The role played by the footnote is that action for differential and more favourable treatment, will not have to be based on instruments taking the form of temporary waivers, such as the GSP Decision⁵⁹, for the Clause has unlimited duration, and a blanket waiver from obligations under Article I is provided for such action⁶⁰. With the Enabling Clause, there can be no doubt that derogations from Article I can be made in any situations where differential and more favourable treatment is considered appropriate. There are provisions for joint action under GATT which do not specify that such action is for differential and more favourable treatment for developing countries, for instance Article XXV:1 makes provision for joint action "with a view to facilitating and furthering the objectives of this Agreement". Proposals can be, and appear to have been, made under Article XXV:1 for differential and more favourable treatment. For instance, the provision is the basis for Part IV, as well as for Rounds of negotiations on matters broadly GATT - in addition of course to provisions on negotiations for tariff reductions⁶¹, is this provision. Thus though Article XXV: 1 does not specify that it is a basis

⁵⁹The GSP Decision was to be in force for a period of only 10 years

⁶⁰Paragraph 1 of the Enabling Clause

⁶¹Articles XXVIII and XXVIII bis. In practice, however, it has not been that straightforward in commencing

for differential and more favourable treatment, reference in the footnote to joint action has the effect of putting differential and more favourable treatment within its scope.

The nature, then, of the relation between footnote 2 and GATT provisions is as follows. The footnote refers generally to GATT provisions for joint action by the CONTRACTING PARTIES, that is, the footnote permits ad hoc action, or action in given circumstances, under any applicable provisions for joint action, if the action is for differential and more favourable treatment. The first port of call in GATT has to be Article XXV which deals specifically with joint action. The two arms of joint action in Article XXV will be available for differential and more favourable treatment. First, there will be treatment which comes under the express provisions of GATT for joint action. In such cases, those express provisions can be used. And second, there will be treatment which cannot fall under the express GATT provisions, save Article XXV. In these cases Article XXV will be used, and in absence of other express provisions, the paragraph 5 waiver will be the appropriate provision under which the treatment falls. But if the treatment falls under the sub-paragraphs in paragraph 2 of the Enabling Clause, resort to GATT will be unnecessary in the first place, and likewise if other instruments, other than GATT provisions, apply.

The relation between Article XXV, Part IV, and the Enabling Clause, regarding agreements between a developed country and some developing countries for purposes of promoting economic development in the latter, was addressed in *the US request for a waiver for the "United States Caribbean Basin Economic Recovery Act", of 1983.*⁶² The US brought the request for a waiver under both footnote 2 to paragraph 2 of the Enabling Clause and paragraph 5 of Article XXV. During the proceedings of the working party, various alternative provisions under which the agreement could have been brought were considered by delegations, such as the GSP Decision, Article XXIV or the paragraph 10 waiver thereof, the SPARTECA approach, and footnote 2 in conjunction with either Article XXV:1 or XXXVIII.⁶³ However, jettisoning all rigour of analysis, several members of the working party came down with the view that a paragraph 5 waiver would better provide "adequate guarantees to all contracting parties that their rights would not be impaired"⁶⁴. This, to the extent that there is a presumption that action under other provisions such as XXV:1 and XXXVIII would lack adequate guarantees, is perhaps

the Rounds, and the Uruguay Round got off to a particularly problematic start - John Croome, *Reshaping The World Trading System, A History Of The Uruguay Round*, 1995, pp. 12-13

⁶² BISD 31S/180

⁶³ Paragraph 27

⁶⁴ Paragraph 32

unfortunate, for the basic and essential guarantees for consultation and against impairment of benefits and protectionist results, are fully provided for under all the alternative provisions which were mentioned by delegations. The basis for choice, then, had to be some other ground, and preferably the choice should have depended on a determination of the provisions which best covered the situation at hand. The development aims of the agreement were those under Part IV, and the most appropriate provisions were therefore Article XXV:1 in conjunction with Articles XXXVI, XXXVII and XXXVIII:1, under which a contracting party can move the CONTRACTING PARTIES to take action in pursuance of the general objectives of GATT.

According to the legal advisor to the GATT Director-General, the intention of the drafters was that footnote 2 refer to the waiver provision - Article XXV:5. But his view was that the footnote should refer to paragraph 1, and that it does not refer to Article XXXVIII. Indeed if it referred to paragraph 1's joint action, then the supporting GATT provisions would have had to be found, and if to the general GATT objectives, then Part IV would have covered the development objectives in respect of developing countries. And in either case Article XXXVIII [on implementation of Part IV objectives] would have applied. However, Article XXXVIII: 2(a) applies where joint action [by the CONTRACTING PARTIES] is to be taken. In cases of action by a contracting party, as here, Article XXXVIII: 2(a) is inapplicable, but resort can be had, say under Article XXXVIII:1, to moving the CONTRACTING PARTIES to act under the second arm of Article XXV:1, that is in furtherance of GATT objectives with reference in this case to Article XXXVI. And that is how Article XXXVIII could be applicable. So then, the legal advisor's opinion seems valid in respect of paragraph 1 of Article XXV, but perhaps questionable in respect of Article XXXVIII.

According to a representative of the GATT secretariat, the footnote referred to situations not covered by paragraph 2 of the Enabling Clause, which the CONTRACTING PARTIES might wish to cover under the GATT provisions for joint action, but such provisions were not those of Part IV, not even Article XXXVIII, because these did not provide authority for preferential treatment; the joint action had to be for a paragraph 5 waiver.⁶⁵ That action under Part IV must be for the benefit of developing countries generally and not for only some of them, that is that Part IV does not authorise this kind of preferential treatment, is the case only on the face of it; for properly interpreted Part IV provides for such selective treatment. There are provisions for collaboration of contracting parties - not of "the CONTRACTING PARTIES"⁶⁶, for special treatment of the specific circumstances of some developing countries such as over dependence

⁶⁵ Paragraph 31

⁶⁶ Articles XXXVI: 9 and XXXVIII: 1

on a limited range of products⁶⁷, and for action by groups of developing countries among themselves provided the interests of developing countries as a whole are taken into account⁶⁸. So broadly speaking, the footnote could lead to action under XXV:5 on the ground that no specific GATT provision exists to govern the situation, but also under XXV:1 in conjunction with Part IV provisions for joint action or moving the CONTRACTING PARTIES, and in either case the waiver could be for preferential treatment.

When *Lome III* came up, the parties had not proceeded under the paragraph 5 waiver on the ground that the convention was in full conformity with GATT including Part IV⁶⁹, but no consistency was subsequently maintained and *Lome IV* was brought under the paragraph 5 waiver. After the *Caribbean Basin Economic Recovery Act*, the US again requested for a waiver under footnote 2 in respect of the *ANDEAN Preference Trade Act*, and this time the waiver was granted by the CONTRACTING PARTIES before a working party had examined the request.⁷⁰ This procedure came in for heavy criticism during the working party proceedings, the preferred being that examination by the working party should precede the grant of the waiver⁷¹, naturally one would have thought.

The practice so far, then, seems to be constrained under an interpretation of Article XXV that is not entirely comprehensive in that paragraph 1 has hardly been used for the RTAs, paragraph 5 waivers being preferred instead.

C. A new regime for waivers

The other question was about the changes introduced by the WTO Agreement, which were largely at the instigation of the European Community.⁷² The Understanding in respect of waivers of obligations under GATT 1994, provides that a waiver in existence at the entry into force of the WTO Agreement will terminate at its expiry or 2 years after the entry into force of

⁶⁷ Article XXXVI: 4

⁶⁸ Article XXXVII: 4

⁶⁹ BISD 35S/321

⁷⁰ The waiver was granted by a decision dated 19 march 1992 [BISD 39S/384]

⁷¹ BISD 40S/186

⁷² John Croome, *Reshaping the World Trading System*, pp. 101, 220 - 221

the agreement, whichever is earlier⁷³, unless renewed according to the new procedures⁷⁴ which require among other things that the request must describe the proposed measures, the policy objectives, and reasons why these cannot be attained in a way consistent with the member's obligations. A request for a waiver is now made to the Ministerial Conference which has up to 90 days to grant the request by consensus, failing which the decision is to be taken by a three fourths majority.⁷⁵ But in the case of GATT 1994, GATS and TRIPs, the request is first made to the relevant Council.⁷⁶ A waiver granted is to state the exceptional circumstances, terms and conditions, and the date of termination. Waivers for more than one year are to be subject to exacting annual reviews, when it is considered whether the exceptional circumstances still obtain and whether the terms and conditions have been complied with; and are liable to be terminated where the exceptional circumstances cease, or to be extended or modified.⁷⁷

These extensive provisions alter Article XXV of GATT 1947 in material respects. The majority required is different and there are more specific rules as has just been indicated.⁷⁸ The basic procedure on consultation and the primacy of the multilateral system, however, will continue to be part of the terms and conditions required to be stated in the waiver decision, and decisions under Article XXV will likely be of valuable guidance. The terms and conditions regarding RTAs are likely to reflect the standard considerations. The institutional framework of the WTO has meant the end of reference to joint action and to CONTRACTING PARTIES in whose place now designated organs function.⁷⁹

⁷³ Paragraph 2

⁷⁴ Paragraph 1

⁷⁵ Article IX: 3(a) of WTO Agreement

⁷⁶ Article IX: 3(b)

⁷⁷ Article IX: 4

⁷⁸ Article XXV: 5(i) and (ii) made provision for other voting requirements in categories to be specified, and prescription of criteria for application of paragraph 5.

⁷⁹ GATT 1994 explanatory notes [paragraph 2], and Article IV of WTO Agreement