

GENERAL AGREEMENT ON
TARIFFS AND TRADE

RESTRICTED

L/5188

25 September 1981

Limited Distribution

Original: Spanish

SPAIN - MEASURES CONCERNING DOMESTIC
SALE OF SOYABEAN OIL

Spain: Observations on the Comments by the
United States to the Report of the Panel

The following communication, dated 14 September 1981, has been received from the Spanish authorities, with the request that it be circulated to the contracting parties.

Document L/5161, which was circulated to the contracting parties at the request of the United States delegation, deals with the report of the Panel established by the Council of Representatives in January 1980 to examine the complaint of the United States concerning measures taken by Spain with regard to sales of soyabean oil on the Spanish domestic market (document L/5142).

The United States delegation, which in its document expresses disagreement with the interpretation given by the Panel (whose conclusions were adopted by its members unanimously) to certain points examined in the dispute, and requests the CONTRACTING PARTIES not to limit themselves to taking note of United States disagreement but to carefully examine the issues raised in document L/5161.

The Spanish delegation wishes to put forward some considerations of a general nature concerning this matter and to analyse in some detail the issues referred to in the document submitted by the United States.

1. General considerations

Firstly, the Spanish delegation would like to reiterate its support for the philosophy underlying the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD, 26th Supplement). As stated in paragraph 9 of the Understanding, the use of dispute settlement procedures "should

not be intended or considered as contentious acts", and, what is more, the practice of GATT abounds in instances showing that disputes must be considered on a case-by-case basis. That is logical since, in all questions which may present apparent similarities, there are details and aspects which make them different and which must be taken into account by a panel.

Secondly, it should be remembered that panels function on the basis of the good faith and technical expertise of its members. For that reason and because of the unquestionably good results achieved, many countries have taken the view that reports by panels should be adopted (see, for example, minutes of meetings of the Council C/M/139 and C/M/143, inter alia).

That view has also been supported on various occasions by the United States and Spanish delegations themselves. The Spanish delegation has qualified the matter by pointing out that the Council should take into account only whatever new elements of judgement might be contributed to the dispute, as indicated in paragraph 16 of the Understanding, but not opinions already examined by the Panel.

The Spanish delegation wishes to draw the attention of the contracting parties to the fact that document L/5161 contains no new elements and that the arguments presented by the United States delegation were known and duly considered and evaluated by the Panel in its report. The arguments would thus not add those new elements which, in the view of the Spanish delegation, could justify their special consideration by the Council.

Lastly, document L/5161 cites certain earlier cases in a way which the Spanish delegation does not consider a very apt interpretation of the Understanding - based, as it is, on examination of each individual case.

Clearly, document L/5161 calls for ample and detailed re-reading of the Panel's report, since the report contains numerous details which document L/5161 ignores.

2. Specific considerations

2.1 Regarding Article III:1 (item III, A of document L/5161)

These arguments were presented to the Panel, which summarized the points of view of the United States in paragraph 3.2 of its report (document L/5142) and those of Spain in paragraph 3.3.

With a view to brevity, as in the case of document L/5161 with regard to the position of the United States, the Spanish delegation has pointed out that the application of the rule in Article III:1 to spheres which do not relate to international trade but to domestic products regulated in a country's internal market would mean:

- a grave restriction of national sovereignty over the country's own resources;
- making impossible the limiting of domestic production in certain sectors where logical reasons of exhaustion (mining resources, for example) made such limitation necessary;
- not being able to adjust output to changing circumstances, which might make it impossible to limit production of national products which are obsolete or non-competitive owing to the fact that they can be produced under better conditions in other countries.

The position argued by the United States delegation in document L/5161 is a broad and extensive application of the thesis that the principles contained in Article III:1 always apply, whether or not the measures have effects on international trade. The Spanish delegation cannot share such a thesis, which holds that the General Agreement is not only an instrument regulating trade between nations but must also apply to the internal commerce of the contracting parties, including cases in which there is no international trade in the products concerned.

Spain considers that, if as a consequence of a measure applied in the internal market, negative effects are produced for international trade, it is logical that GATT's precepts should come into play, but that if there are no such negative effects, it is wrong to invoke the principles of the General Agreement and to defend them by the instruments established therein, especially Article XXIII, created for the purpose of protecting "benefits" or "concessions" (which, of course, presupposes the presence of international trade, i.e. benefits for the trade of another contracting party).

Although as already stated, the Spanish delegation considers that the Panel performed its task of examining this specific case perfectly, the cases referred to by the United States delegation in document L/5161 deserve some comment:

(a) Discriminatory tax by Brazil (BISD II, pp. 181 et seq). This case dealt with taxes which discriminated between imported and domestic products. In the case of Spain's measures, which affect sales of soyabean oil in its internal market, the Spanish delegation pointed out that there was no

discrimination, since what was being questioned in this case was basically the establishment of a consumption quota on domestically-produced soyabean oil.

(b) EEC measures on animal feed proteins (BISD, 25th supp., pp. 53 et seq.). In its argumentation, the United States delegation has forgotten to mention to the contracting parties that the contested Spanish regulation is a rule applicable in practice exclusively to a Spanish product (as the Panel has recognized). On this point, one cannot disregard the fact that another panel stated (BISD 7th supp., pp. 60-65) that Article III:1 is a precept having as its intention "to treat the imported products in the same way as the like domestic products once they had been cleared through customs".

The Spanish measures give equal treatment, without any discrimination, to imported and domestically-produced soyabeans, to imported and domestically-produced oil, to imported and domestically-produced cakes, etc.

Therefore, it is hard to understand the United States claim that Article III:1 is applicable, whether or not there has been injury to imports from internal commercial rules not affecting international trade. If such an interpretation were to prevail, the Parties would be obliged to assume new obligations which many of them (including Spain) had not contemplated when acceding to the GATT.

2.2 Regarding Article III:5 (III,B of document L/5161)

The arguments advanced by the parties to the dispute are summarized in paragraphs 3.4, 3.5 and 3.6 of document L/5142. Document L/5161 adds nothing new to what was examined by the Panel, whose conclusions on the subject are contained in paragraph 4.5 of document L/5142.

Again, for the sake of brevity, since Spain's arguments on the matter are well known, it is enough to stress the following points:

1. The processing of the bean into oil is not merely a matter of processing, since: (a) it involves a change in the sub-heading, heading, chapter and even section of the customs tariff; (b) as the Spanish delegation once demonstrated, it has involved more than 35 per cent of value added. Such a percentage of value added confers origin on a product, including perhaps for the United States.

It would have been desirable, in this connexion, if document L/5161 had explained just what kind of processing confers origin.

2. As regards the utilization of soya, there are at present three principle forms: beans, meal and cakes, and oil (in the past there were other forms). In its negotiating relations with Spain, the United States recognized this when it negotiated on beans in 1963 (accession of Spain), on cakes in the Kennedy Round, on meal in negotiating efforts during the Tokyo Round, while oil (with a realistic view of Spain's negotiating possibilities) was never negotiated.

Now the United States delegation is arguing that when beans were negotiated, all of its presently known processed products (oil, cake and meal) (and why not future products?) were also negotiated. If such a dangerous thesis were to be accepted, any negotiation of a raw material would carry with it the negotiation of all of its processed products, which is absurd.

3. A concession - to the mind of the Spanish delegation and also the Panel - refers to the commodity itself and to products processed therefrom that do not confer new origin, and not to heavily processed products. Thus, steel may imply a concession for ingots and perhaps sections, but not for ships and automobiles. Cotton may imply perhaps a concession for yarn not put up for retail sale, but it certainly does not extend to made-up clothing, etc.

Naturally, the argumentation of the United States has always tried to assimilate soya beans and oil, but it would seem clear that they are not the same product, as already explained.

2.3. Regarding Article III:4 (point III,C of document L/5161)

The arguments presented by the parties to the dispute appear in paragraphs 3.7 to 3.9 of document L/5142. As in the previous cases, the document submitted by the United States delegation in document L/5161 contributes nothing new to those already contained in the report of the Panel, whose opinion is given in paragraph 4.7 thereof.

It is true that the General Agreement does not contain a definition of "like product" and each panel has had to establish one in the case before it. That only confirms what Spain has pointed out, namely that panels have to work on specific cases.

It is also true that the panel dealing with the Spanish-Brazilian case concerning tariff treatment of unwashed Arabica coffee held that coffees are like products (document L/5135), but it is not logical to deduce from that, that soya bean and oil are like products, or to apply to this case the solution adopted by the panel on animal feed protein.

Such deductions are not logical because bean and oil differ in their organoleptic characteristics, the methods by which they are obtained, differences in price, different uses, etc. That does not mean that oil is not one of the products obtained from the processing of beans, but it is obtained by a processing method involving a considerable percentage of added value in the final product.

Acceptance of such an extensive thesis concerning what are like products would apply also to olives and olive oil, wheat and bakery products; grapes and wine, etc. and even cotton or wool and cotton or wool made-up goods - something that would lead to renegotiation of the General Agreement. For the time being, the contracting parties have confined themselves to noting - precisely in the case of the Spanish-Brazilian dispute concerning coffee cited by the United States - that this is a concept which requires careful examination by the Parties.

3. Final considerations

The Spanish delegation believes that the United States has the right to differ with its contentions, and even with the criteria established by the Panel, which examined with all due care the specific circumstances of this case.

As both parties have recognized, the members of the Panel made a tremendous effort to reconcile the greatly conflicting points of view. In arriving at its conclusions, it did so on the basis of technical and realistic criteria, fulfilling to perfection the terms of the Understanding regarding Dispute Settlement.

The Spanish delegation considers that, as concerns adoption of the Panel's report, the usual practice of GATT and its recognized pragmatism should be adhered to. It does not believe that the arguments set out in document L/5161 contribute new facts or elements or impair the criteria on which the Panel based its conclusions.