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URUGUAYAN RECOURSE TO ARTICLE XXIII

Statement by the Representative of Brazil[1]

The report of the Panel on the Uruguayan recourse to Article XXIII is a document of the greatest significance to the furthering of the objectives of the General Agreement and, therefore, of major interest to contracting parties.

It is not the first time that a country has invoked Article XXIII to obtain redress for the impairment or nullification of benefits accruing to it under the General Agreement. However, apart from the Netherlands versus the United States and Chile versus Australia, there are very few of these cases of any interest as precedents.

It is quite clear that, so far, contracting parties have refrained from making use of the protective procedure built into Article XXIII. This might be because of lack of clear, official interpretation of this Article, lack of knowledge of the requirements to be fulfilled in order to invoke it, or, conceivably, because of doubt as to whether a country's bargaining power in relation to that of another applying the measure causing nullification would, even with the sanction of the CONTRACTING PARTIES behind it, be sufficient to result in withdrawal of the measure or adequate compensation.

Last week, we heard a contracting party express the opinion that recourse to Article XXIII could degenerate into a general downward scaling of concessions and, ultimately, end in erosion of the basis the General Agreement stands on.

We cannot side with that view for various reasons. We believe that the General Agreement takes its strength from the purpose of the contracting parties to live by a set of principles, of main objectives, coupled with the acceptance of the reality of certain practical rules and facts of life. The closer the adherence to the basic principles, the stronger stands GATT. On the other hand, it is the tendency to put the exceptions above the rules that undermines the Agreement. One of the foundations of this organization is the notion of the value of trading positions that bring economic benefits, which are furthered through concessions and protected through bindings.

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[1] Made at the plenary meeting of the twentieth session on 16 November 1962 in connexion with the Report of the Panel on Uruguayan Recourse to Article XXIII (L/1923).

We see nothing destructive in a country acting in the legitimate protection of benefits accruing to it under the Agreement. Article XXIII is nothing but a defensive provision meant for the specific protection of concessions and advantages, against harm resulting from measures applied by other contracting parties, no matter whether consistently or not with the Agreement.

It would be strange indeed, if unilateral action impairing or nullifying such benefits could be accepted, without the Organization, as a body, with a collective conscience, acting to redress the balance through the weight of its opinion and through the only active means open to it, i.e. the authorization of compensatory action by the country being affected. Anyway, a balancing downward of mutual obligations and benefits can only occur in the ultimate phase of the application of Article XXIII when the country causing nullification refuses to bow to the Decision of the CONTRACTING PARTIES and withdraw the harmful measure or provide concessions in substitution.

The distinguished representative of France stressed, last week, in referring to the requirements for invoking Article XXIII, the significance of preserving a balance. The action authorized under Article XXIII is nothing more than an effort to restore a balance that has been destroyed and to preserve benefits of economic value.

This balance can be upset in a number of different ways. We shall not try to enumerate all the possibilities of nullification and impairment. Human ingenuity is boundless. In the many individual cases which have been examined by the CONTRACTING PARTIES in the light of Article XXIII, including those under examination now, nullification and impairment has been established in connexion with measures compatible with the General Agreement but which upset an existing relationship, and, in this connexion, we refer to the case of Chile versus Australia, as well as measures which infringe the provisions of the General Agreement and constitute, therefore, prima facie cases of action adversely affecting benefits existing or expected under the Agreement. In the first case, recommendations under Article XXIII tend to re-establish the balance. In the second case, which involves not only damage, actual or potential, to a country's interests, but also infringement and, why not say it, damage to the principles of GATT, compliance with these basic principles is stressed, as a prerequisite to the restoration of equilibrium.

There are cases, and we shall not specify them, in which insult is added to damage, through the continued maintenance of measures unfairly affecting the trade of other countries and which are openly recognized as incompatible with GATT.

And yet, without recourse to Article XXIII, the affected countries have themselves to comply with the General Agreement and continue to guarantee concessions that have no equivalent counterpart. The authorization to withdraw or modify these concessions is the least the CONTRACTING PARTIES can do to increase the bargaining power of the affected country and put it into a position where it is provided with an effective defense, through action tending to re-establish the precarious balance of advantages and, at the same time, furthering compliance with the rules.

Moreover, the continued existence of measures clearly inconsistent with the Agreement, such as, for instance, the remaining quantitative restrictions, gives added significance to the use of Article XXIII as the only contractual provision that permits contracting parties to defend actively their interests and seek compensation for damage suffered.

Brazil has considered with great sympathy the recourse of Uruguay to Article XXIII. This is the case of a less-developed country struggling to expand its exports by fair competition in international markets and finding the access to them unduly limited by a great number of restrictions, many of which are quite compatible with the General Agreement, others of which are of very doubtful compatibility and some of which constitute clear infringement of its provisions.

We stress the fact that the country adversely affected in this case is one of the less developed, as this makes it clear that it has reduced bargaining power and, therefore, that the concessions impaired or nullified have been obtained for its limited range of exportable products, mostly through direct negotiation at a high cost in equivalent concessions to a great number of industrial products, extensible to the various industrialized countries. The third report of Committee II stresses an aspect of this view, stating that:

> "The scope for increased tariff concessions by some agricultural exporting countries in favour of industrial exporters has been significantly narrowed by the inability of the former countries, whose economies are highly or mainly dependent on agricultural exports, to see sufficient incentive to offer concessions when non-tariff devices prevent them from securing meaningful access to agricultural markets."

In this connexion, the Committee did not fail to notice, in passing, that little if any action had been taken by contracting parties to seek redress (under Article XXIII) for impairment or nullification resulting from the use of non-tariff measures.

And yet, in this case, the less-developed agricultural exporting country is deprived of the limited benefits it enjoys, because of restrictions the withdrawal of many of which it had every reason to expect long ago.

This was a test case for GATT and the Brazilian delegation believes that, within the bounds of the legal limitation of the Panel, constructive recommendations have been made.

We believe that, as the Panel stressed, if the recommendations are complied with, an important contribution will have been made towards solution of the difficulties faced by Uruguay. In the Panel's report, there are many instances in which measures which clearly affect in an adverse way the trade of Uruguay have not been established as cases of nullification or impairment. Recommendations have been made, however, mostly in the sense that the country applying such measures give consideration to concrete representations that may be made by Uruguay, to look into the possibility of changing them, or administering them in such a

way as to reduce their adverse effects. Thus, without prejudice to the rights of these contracting parties, the situation of the country affected and its interest in the products suffering limitation have been duly considered in the interest of equity and of the objectives of the General Agreement.

We expect the contracting parties concerned to give careful consideration to these exhortations, since they prove that even the exercise of a right may cause serious damage to others.

However, the wording of this section of the report does not preclude, in our view, the right of Uruguay to appeal again to the CONTRACTING PARTIES in order to establish nullification and impairment based on prima facie cases of the upsetting of balance, or to have legal recourse to obtain from the CONTRACTING PARTIES a clear definition of the incompatibility or otherwise of some measures, leading to recommendations based on nullification and impairment.

This might be the case for measures the status of which the Panel found itself unable to judge, and the general application of which may result in an increase of existing barriers to trade and disruption of equilibrium: we refer to the variable levies.

In this connexion, I wish to refer to paragraph 15 of the main report and reiterate our point of view that the cases of nullification or impairment, such as characterized in the first part of this paragraph and in the recommendations of Section 4(c) of the country reports, are not the only possible ones.

Nullification or impairment is not limited to measures incompatible with GATT as proved in the case of Chile versus Australia, and there are prima facie cases of it which must necessarily lead to recommendations under Article XXIII:2 for the suspension or withdrawal of the measures causing recourse to this Article, appropriate compensation if this cannot be effected, or, in the case of simple non-compliance, the authorization of retaliation.

In any case, if the country concerned fails to comply by the date set by the CONTRACTING PARTIES, swift action is called for, to authorize the country affected to protect itself by effective retaliation, because, so long as this is not done, it is forced to remain in a position of definite, unfair disadvantage vis-à-vis the other, being as it is, bound to formal rules that the other just refuses to follow.

Therefore, establishment of non-compliance should result in immediate authorization of the suspension of concessions or obligations, as proposed by the affected country, subject to the judgement, as to appropriateness, by the competent organ of GATT, acting on the authority delegated by the CONTRACTING PARTIES.

Before concluding these remarks, I wish to mention the possibility that Article XXIII might become a more effective instrument for the protection of benefits enjoyed by contracting parties if the procedures provided in it were to be interpreted, clarified and systematized. This might be done by a body of experts, a sort of legal or quasi legal Panel. This is not a formal proposal just a suggestion to be borne in mind for future consideration that might be found convenient in the interest of strengthening the General Agreement.

Finally, I wish to repeat that Brazil supports the main report of the Panel and the fifteen attached country reports, and we expect that, by 1 March 1963 compliance with the recommendations based on nullification and impairment will lead to a favourable result, in the interest of all contracting parties.