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UNITED STATES - TRADE MEASURES AFFECTING NICARAGUA

Communication from Nicaragua

The Permanent Mission of Nicaragua has in a communication to the secretariat, dated 23 October 1986, requested that the following letter addressed by Ambassador Gustavo A. Vargas to the Chairman of the Panel on the United States Trade Measures affecting Nicaragua be circulated as a working paper for the Council meeting on 5 and 6 November 1986.

I have the honour to write you in order to transmit the comments of Nicaragua regarding the report of the Panel¹ of which you are Chairman.

First of all, we wish to express to you our gratitude, which we extend also to Mr. D. Salim and Mr. H. Villar, for having accepted this delicate task and having at all times demonstrated dedication and great conscientiousness.

While Nicaragua agrees with a number of the conclusions contained in the report and with the questions raised therein, it regrets that the Panel was not able to fully comply with its terms of reference, which were "to examine ... the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter".

As the last sentence of paragraph 5.11 of the report states, "the Panel decided not to propose a ruling in this case on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party". The Panel supports its decision by arguing that "this question raised basic interpretative issues relating to the concept of non-violation, nullification and impairment which had neither been addressed by the drafters of the GATT nor decided by the CONTRACTING PARTIES". In such circumstances, the Panel adds, "it would only be appropriate for it to propose a ruling on these issues if such a ruling would enable the CONTRACTING PARTIES to draw practical conclusions from it" - which in its view was not the case. In this connection, paragraph 5.11 of the report states "even if it were found that the embargo

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nullified or impaired benefits accruing to Nicaragua ... the CONTRACTING PARTIES could ... take no decision under Article XXIII:2 that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo".

In Nicaragua's opinion, establishment of nullification or impairment of benefits accruing to Nicaragua in the sense of the provision in sub-paragraph (b) of Article XXIII:1 constitutes a central element of the terms of reference laid down by the Council.

We therefore believe that as the Panel did not examine the measures imposed by the United States under sub-paragraph (a) of Article XXIII:1 because it considered that the terms of reference did not allow it to examine the validity of the invocation of Article XXI by the United States, the Panel would have had to comply with its terms of reference by ruling on nullification or impairment in terms of sub-paragraph (b) of Article XXIII:1.

In that regard, the Decision of 30 November 1982 concerning Article XXI of the General Agreement clearly states that "recourse to Article XXI could ... affect benefits accruing to contracting parties ..." and consequently the CONTRACTING PARTIES decide that "When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement".

Item (v) of the Dispute Settlement Procedures contained in the Ministerial Declaration of November 1982 states that "the terms of reference of a panel should be formulated so as to permit a clear finding with respect to any contravention of GATT provisions and/or on the question of nullification or impairment of benefits". It also indicates that "the panel should come to such a finding" in terms of paragraph 16 of the Understanding.

Nicaragua had recourse to Article XXIII because, in its judgement, benefits accruing to it under the General Agreement with respect to the United States had been nullified or impaired. It considers that it has given the detailed justification required by paragraph 5 of the Agreed Description of the Customary Practice of GATT. Consequently, it regrets that the Panel did not rule on that question, which is of fundamental importance.

With all due respect, Nicaragua wishes to point out that to link establishment of nullification or impairment of benefits to whether "such a ruling would enable the CONTRACTING PARTIES to draw practical conclusions from it" seems to it to be outside the terms of reference and contrary to GATT practice.

The terms of reference specifically instruct the Panel to examine the embargo "in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired ..." and nowhere does it suggest that such a ruling should not be made unless it "would enable the CONTRACTING PARTIES to draw practical conclusions from it".

In Nicaragua's opinion, what is involved are two separate stages, which although related are independent and successive. The first consists of establishing the extent of nullification or impairment of benefits accruing to Nicaragua. The second consists, once that question is settled, of making "such findings as will assist the CONTRACTING PARTIES in further action in this matter".

The first stage is independent of the second and must be completed in either case, whether or not practical conclusions can be drawn. In fact, if the Panel found that the embargo nullified or impaired benefits accruing to Nicaragua under the General Agreement and that there were no practical solutions for restoring the balance of benefits existing prior to the embargo because its terms of reference prevented it from examining the validity of the United States invocation of Article XXI, it could nevertheless comply with the second injunction of its terms of reference, for example by coming to the conclusion that the CONTRACTING PARTIES should present a formal interpretation of Article XXI, as mentioned in paragraph 5.18 of its report.

What also troubles Nicaragua is that the Panel did not make any concrete recommendation and, in particular, that it did not recommend the withdrawal of the embargo or the need to compensate Nicaragua for the damage caused by it.

A recommendation by the Panel to that effect would have assisted the CONTRACTING PARTIES in finding an appropriate solution and one consistent with international law. In Nicaragua's opinion, if the CONTRACTING PARTIES do not make such a recommendation, they would be invalidating the Decision of the International Court of Justice when it unambiguously states "Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to essential (United States) security interests ..., the Court is unable to find that the embargo was necessary to protect those interests".

They would thereby be placing GATT outside of international law and, what is even more serious, in opposition to it. They would even be weakening the multilateral trading system and be depriving it of all credibility by endorsing an interpretation of Article XXI which, as the Panel itself recognizes in paragraph 5.17 of its report, permits its invocation in whatever circumstances and for whatever purposes. The case under consideration constitutes the clearest example of an abusive invocation of Article XXI.

Nicaragua reiterates that the GATT is an integral part of the complex of laws which govern relations between States.

The historical background and jurisprudence of the GATT clearly show that there is a direct relationship between the General Agreement and the Havana Charter, and between the latter and the Charter of the United Nations. It is enough to point out that Article XXIX of the General Agreement is entitled "The Relation of this Agreement to the Havana Charter" and that, in turn, Article 86 of the Havana Charter bears the title "Relations with the United Nations". Article XXI(c) itself reflects

the relationship that exists between GATT law and international law. It would be inconsistent to accept that paragraph (c) of Article XXI authorizes the taking of action contrary to the General Agreement "in pursuance of obligations under the United Nations Charter ..." and at the same time allow the non-pursuance of those obligations to be justified through other provisions of that same Article.

Nicaragua is further concerned by the lack of concrete recommendations because it is not in keeping with GATT practice in the matter of dispute settlement or with the terms of reference laid down by the Council for the examination of the case in question.

According to paragraph 16 of the Understanding, the function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. The report states that the Panel was unable to make any recommendation in the light of those provisions, first because its terms of reference prevented it from establishing whether or not the United States was complying with its obligations under the General Agreement, and secondly because it considered that determination of nullification or impairment of benefits accruing to Nicaragua would not lead to any practical result.

The terms of reference, however, included, as the Panel itself recognizes in paragraph 5.16 of its report, "the wider task of assisting the CONTRACTING PARTIES in further action in this matter". In that connection, the Panel chose not to make specific recommendations, considering that existing GATT rules and procedures limited the Panel's action in that respect.

Notwithstanding the above, Nicaragua recognizes that the Panel has made a series of findings and raised a number of questions of a general nature which, if clarified, would enable the CONTRACTING PARTIES to satisfactorily resolve the issue under consideration. Nicaragua's doubts relate to how and by whom these questions should be answered.

If, on the basis of the findings arrived at by the Panel, the Council considers that it can make recommendations which would serve to resolve the issue satisfactorily and which, in our view, should seek to compensate Nicaragua for the damage caused by the embargo, then the Panel will have fulfilled its function of assisting the CONTRACTING PARTIES to take a decision on the question.

If, on the contrary, the Council considers that in order to make recommendations it would be necessary to have clearer conclusions, then the Panel will have to propose a way for the questions raised in this report to be resolved so that the CONTRACTING PARTIES may arrive at a meaningful decision.

For Nicaragua the situation is as follows:

The Panel has found that the embargo runs counter to basic aims of the General Agreement, that it has brought the trade between two contracting parties to a standstill and has upset the competitive relationship of

Nicaraguan products on the United States market, and that it is having a severe impact on a developing contracting party.

The terms of reference assigned to the Panel recognize that there has been nullification or impairment of benefits accruing to Nicaragua under the General Agreement and requires determination of the extent of such nullification or impairment as well as such findings as will assist the CONTRACTING PARTIES in further action in the matter.

In paragraphs 5.15 and 5.16, the Panel's report raises the following questions which, in its opinion, it is prevented from resolving because of the narrowness of its terms of reference and the limitations of certain GATT rules and procedures:

1. What is the relationship between the GATT and international law?
2. If it is accepted that the interpretation of Article XXI is reserved entirely to the contracting party invoking it, how can the CONTRACTING PARTIES ensure that it is not invoked excessively?
3. In cases involving an Article XXI invocation, can the CONTRACTING PARTIES limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2?
4. Are the powers of the CONTRACTING PARTIES under Article XXIII:2 sufficient to provide redress for the damage caused by a two-way trade embargo?

There are various ways of clarifying these questions put to the Council by the Panel, including extension of the terms of reference of the Panel, establishing a new panel or a working party, or directly undertaking to provide a formal interpretation of Article XXI.

The Panel recommends that the CONTRACTING PARTIES resolve these questions in the framework of the Decision concerning Article XXI, adopted on 30 November 1982.

This recommendation would be acceptable to Nicaragua provided that it is placed and interpreted within the framework of paragraph 21 of the Understanding.