

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)  
Negotiating Group on Dispute Settlement

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COMMUNICATION FROM NICARAGUA

The following communication has been received on 3 November 1987 from the delegation of Nicaragua with the request that it be circulated to members of the Group.

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With a view to contributing to achievement of the objectives of the Declaration of the Punta del Este in regard to dispute settlement, Nicaragua is hereby submitting to the Negotiating Group on Dispute Settlement some considerations and concrete proposals concerning aspects of the GATT dispute settlement process which, in its view and on the basis of its experience, ought to be strengthened or improved during the negotiations.

NICARAGUA'S EXPERIENCE IN REGARD TO DISPUTE SETTLEMENT

Nicaragua is among the few less-developed countries that have invoked the GATT dispute settlement mechanism in recent years.

It first did so in 1983, after its sugar export quota for the United States market had been drastically reduced<sup>1</sup> and, subsequently, in 1985 to seek a satisfactory solution to the trade embargo which the United States had imposed on it.

In both cases, the experience has been disappointing.

In the first case, concerning reduction of the sugar quota, the dispute settlement process functioned satisfactorily. The time-limits for holding consultations and those for the establishment and composition of the panel were respected and the panel drew up its report promptly. No more than ten months elapsed between Nicaragua's request for the opening of bilateral consultations and the adoption of the panel's report.<sup>2</sup>

Regrettably,<sup>3</sup> the recommendations of the CONTRACTING PARTIES were never implemented.

The case concerning the embargo is still before the Council. Nevertheless, developments to date show clearly that the GATT dispute settlement procedure is not flawless, that its time-limits are not respected, and that its rules are not duly applied. We explain this statement below.

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<sup>1</sup> Nicaragua's sugar quota for the fiscal year 1983/84 was reduced from 61,950 short tons to 6,000 short tons. The difference - 55,959 short tons - was shared out between El Salvador, Honduras and Costa Rica.

<sup>2</sup> Nicaragua requested consultations under Article XXII on 11 May 1983, a few days after the United States Government had announced the reduction of the import quota for sugar from Nicaragua. The consultations took place on 8 June, but no agreement was reached. By a communication dated 27 June, Nicaragua requested the establishment of a panel. The decision to establish a panel was adopted by the Council at its meeting on 12 July, and the panel was formally set up on 18 October. The panel's report was put before the CONTRACTING PARTIES, which adopted it on 13 March 1984.

<sup>3</sup> The panel concluded that in allocating for the fiscal year 1983/84 an import quota of 6,000 short tons the United States had failed to carry out its obligations under the General Agreement. Consequently, the CONTRACTING PARTIES recommended that the United States promptly allocate to Nicaragua a sugar import quota consistent with the criteria set out in Article XIII:2.

On 1 May 1985, the President of the United States announced a total trade embargo against Nicaragua with effect from 7 May 1985. Immediately following publication of the relevant Executive Order, Nicaragua asked for a special meeting of the Council to examine those measures. The meeting took place on 29 May 1985.

On 11 July, Nicaragua asked the United States to hold bilateral consultations within the framework of the GATT dispute settlement mechanism. Those consultations could not take place because the United States did not agree to them.

Accordingly, Nicaragua wishes first to refer to Article XXII of the General Agreement, and in particular to the interpretation to be given to paragraph 1 thereof which reads: "each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement". Nicaragua interprets the provisions of Article XXII:1 as constituting a right for the complainant and an obligation for the party which is the subject of the the complaint, and considers that the Understanding of 1979 allows for no doubt in this respect. More particularly, in paragraphs 4 and 5 the contracting parties undertake to respond to requests for consultations promptly and to carry them out expeditiously, while giving special attention to the problems and interests of less-developed contracting parties.

Following the United States' refusal to hold bilateral consultations under Article XXII, Nicaragua requested the establishment of a panel at the Council meeting of 19 July 1985. The United States objected to such action. In principle, the Council approved the establishment of a panel at its meeting of 10 October. In practice, however, such establishment was conditional on approval of a limited mandate precluding full implementation of the GATT rules regarding dispute settlement.<sup>1</sup> The Panel was formally set up on 4 April 1986. In this connection, we would like to submit the following considerations:

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<sup>1</sup>The terms of reference approved by the Council were as follows:

"To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD 29S/13-16), 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" (C/M/196, page 7).

1. Paragraph 10 of the Understanding reads: "it is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice". That same paragraph lays down the sole condition that such requests would be granted "only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES".

Furthermore, under the customary practice of GATT referred to in the above-mentioned paragraph, the CONTRACTING PARTIES "are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter, as appropriate".

It is the interpretation of Nicaragua that, pursuant to the above-mentioned provisions:

- (a) no contracting party may oppose the establishment of a panel;
- (b) the CONTRACTING PARTIES are obliged to investigate the matter and to make recommendations or give a ruling thereon.

2. The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2, and this is defined clearly in paragraph 16 of the Understanding. Their principal task is to make an objective assessment of the facts and to reach clear conclusions regarding the applicability of the GATT and compliance with it. In addition, if so requested by the CONTRACTING PARTIES, panels may make such other findings as will assist the CONTRACTING PARTIES in making recommendations or giving rulings on the matter concerned. In subscribing to the Ministerial Declaration of November 1982, the CONTRACTING PARTIES agreed 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 and impairment of benefits. In terms of paragraph 16 of the Understanding, and after reviewing the facts of the case, the applicability of GATT provisions and the arguments advanced, the panel should come to such a finding. Where a finding establishing a contravention of GATT provisions or nullification and impairment is made, the panel should make such suggestions as appropriate for dealing with the matter as would assist the CONTRACTING PARTIES in making recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate".

The background paper concerning customary GATT practice in regard to dispute settlement states that the terms of reference of a panel "are discussed and approved by the Council. Normally, these terms of reference

are to examine the matter in the light of the relevant GATT provisions and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in Article XXIII:2".

In Nicaragua's opinion, the above-mentioned provisions should be interpreted as meaning that:

- (a) no contracting party may prevent a panel from carrying out its functions in full;
- (b) the terms of reference of panels must cover the entire matter raised by the complainant;
- (c) the Council must ensure that no terms of reference are such as to prevent examination of the applicability of the General Agreement and compliance therewith;
- (d) any investigation must reach a clear conclusion regarding nullification or impairment of benefits accruing under the General Agreement.

The Panel's report was communicated to the interested parties on 9 September and was examined by the Council at its meeting of 5-6 November 1986. Given its limited terms of reference, the Panel did not arrive at any conclusion as to whether or not the trade embargo was justified under Article XXI or had nullified or impaired benefits accruing to Nicaragua under the General Agreement, in terms of Article XXIII. (As regards this later aspect, nevertheless, it should be noted that the Panel's terms of reference clearly specified that the purpose of examining the measures was to "establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired".) Consequently, the Panel did not make any recommendation. To date, the Council has still not taken any decision on adoption of the report nor on measures to be taken to resolve the matter.

In this connection, paragraph 21 of the Understanding stipulates that: "The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of less-developed contracting parties concerned".

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Note: For the Panel's report, see document L/6053.

In this regard, the Ministerial Declaration of November 1982 states that: "the parties to a dispute would fully participate in the consideration of the matter by the CONTRACTING PARTIES, ... including the consideration of any rulings or recommendations the CONTRACTING PARTIES might make pursuant to Article XXIII:2 of the General Agreement, and their views would be fully recorded". Furthermore, the CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes; nevertheless, they agreed that obstruction in the process of dispute settlement is to be avoided, and this without prejudice to the provisions on decision-making in the General Agreement.

It follows from the above-mentioned provisions that the CONTRACTING PARTIES have an inescapable obligation to make recommendations and take measures conducive to the solution of any matter raised under Article XXIII. In considering such matters, the CONTRACTING PARTIES are furthermore committed to give special attention to the problems of less-developed contracting parties by facilitating and speeding up decisions affecting them and seeking to minimize any injury caused to their economies.

As regards the method to be used for resolving disputes, the provisions mentioned confirm the traditional principle of GATT, in that it is clearly established that contracting parties must not impede the dispute settlement process and that the GATT rules on decision-making are likewise applicable in this area.

Accordingly, Nicaragua infers that:

- (a) in a dispute settlement process, opposition by one of the parties concerned should not constitute an obstacle to reaching a consensus;
- (b) in respect of any matter raised by a less-developed contracting party, the period between submission of a panel's report and the formulation of recommendation or a ruling by the CONTRACTING PARTIES should be limited (to a maximum of 60 days);
- (c) in making recommendations or giving rulings, the CONTRACTING PARTIES should take due account of any injury caused to the economies of less-developed contracting parties and, when circumstances so warrant, recommend adjustment measures including compensation for such injury.

Lastly, both the matter of the embargo and that of the cut-back in the sugar quota raise aspects that fundamentally concern the limited capacity for retaliation of less-developed countries.

The existing GATT provisions regarding dispute settlement take account of some concerns and suggest time-limits for implementing the recommendations of the CONTRACTING PARTIES.

For example, the Decision of 5 April 1966 stipulates that:

"Within a period of ninety days from the date of the decision of the CONTRACTING PARTIES or the Council, the contracting party to which a recommendation is directed shall report to the CONTRACTING PARTIES or the Council on the action taken by it in pursuance of the decision", and it adds that in the event that a recommendation to a developed country by the CONTRACTING PARTIES is not applied within the time-limit prescribed, the CONTRACTING PARTIES are to consider what measures, further to suspension of application of any concession or any other obligation considered warranted, "should be taken to resolve the matter".

Furthermore, paragraph 22 of the Understanding stipulates: "If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution". Paragraph 23 of that same Understanding states that if the matter is one which has been raised by a less-developed contracting party, "the CONTRACTING PARTIES shall consider what further action they might take which would be appropriate to the circumstances".

In the opinion of Nicaragua, the coverage of Article XXIII:2 should be extended<sup>1</sup> in respect of matters raised by less-developed contracting parties. In the event that restoration of the balance of benefits under the General Agreement cannot be achieved through suspension of concessions or any other obligation under the General Agreement, the CONTRACTING PARTIES should take other measures, including measures of a collective nature, in order to afford an adequate remedy to the injury caused to the less-developed party.

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<sup>1</sup> In November 1984 a proposal in this regard was put before the Council by Nicaragua. See document L/5731.

## PROPOSALS

On the basis of the foregoing, Nicaragua is making the following proposals for consideration during the negotiations:

### I. Consultations

1. No contracting party may refuse to hold consultations when these have been requested under Article XXII and concern a matter relevant to application of the General Agreement.

### II. Panels

2. No contracting party may oppose the establishment of a panel when this has been requested under Article XXIII:2.

3. The terms of reference of panels must cover the entire matter raised.

4. If the parties to a dispute fail to reach agreement on the panel's terms of reference within thirty days following the decision of the CONTRACTING PARTIES, the latter must approve terms of reference of a "standard" type.

5. No contracting party may oppose examination of the applicability of GATT provisions and compliance with them.

6. Any panel must reach a clear conclusion regarding nullification and impairment of benefits.

### III. Recommendations of the CONTRACTING PARTIES

7. The CONTRACTING PARTIES must make a determination on any matter raised under Article XXIII and make recommendations or give a ruling in that respect.

8. The period between submission of the panel's report and the decision of the CONTRACTING PARTIES may not exceed sixty days.

9. Opposition by one of the parties concerned shall not constitute an obstacle to consensus.

10. The recommendations of the CONTRACTING PARTIES shall be mandatory.

### IV. Less-developed contracting parties

11. In the case of a matter raised by a less-developed contracting party, the recommendations of the CONTRACTING PARTIES may include measures of compensation for injury caused if the circumstances are serious enough to justify such measures.



12. In the case of a matter raised by a less-developed contracting party, the time-limit for implementation of the recommendations of the CONTRACTING PARTIES shall not exceed ninety days.

13. In the event that a recommendation of the CONTRACTING PARTIES is not implemented within the prescribed period (of ninety days), the CONTRACTING PARTIES shall consider what measures, further to suspension of concessions by the party affected, should be taken to resolve the matter. In the case of a matter raised by a less-developed contracting party, those measures may be of a collective nature.