MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG7/W/39
27 November 1987

Special Distribution

Original: Spanish

Group of Negotiations on Goods (GATT)
Negotiating Group on GATT Articles

COMMUNICATION FROM NICARAGUA

The following communication, dated 17 November 1987, has been received from the delegation of Nicaragua with the request that it be circulated to members of the Group.

In a communication dated 12 October 1987, contained in document MTN.GNG/NG7/W/34, Nicaragua requested that Article XXI of the General Agreement should be included in the list of GATT Articles to be reviewed during the negotiations, and raised some basic issues which, in its view, should be analysed by participants in the Negotiating Group on GATT Articles.

Nicaragua wishes to explain here the reasons for its request.

Article XXI of the General Agreement has rarely been invoked, and there are therefore few precedents on which to make an objective judgement as to the appropriateness of its provisions and of the manner in which they have been applied. Nevertheless, the case referred by Nicaragua to the CONTRACTING PARTIES concerning the trade embargo imposed upon it by the United States Government clearly shows that the provisions of Article XXI need to be revised or made more precise in order to ensure that they are not used arbitrarily.

In the opinion of Nicaragua, the position taken by the United States on the embargo reveals a dual inconsistency: inconsistency as to the sphere of competence of the GATT and of the United Nations, and inconsistency with respect to the unity and homogeneity of international law.

Firstly, when Nicaragua brought the issue of the embargo before the GATT Council, the United States argued that GATT was not the proper forum to discuss security matters. However, when the issue was raised in the United Nations, the United States opposed its consideration on the grounds that the action had been taken under Article XXI of the General Agreement.

Secondly, when the International Court of Justice ruled on the matter, the United States Government disdained its judgement while at the same time continuing to insist that the embargo was compatible with international law.

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UR-87-0409

The fact that so far it has not been possible to find a satisfactory solution within the framework of the GATT for so glaring a case as the one we have just described can only be attributed to one of the following factors: either the provisions of Article XXI allow the violation of the rules and norms of international law, and therefore are inappropriate and need to be revised; or else they are compatible with the latter, and are being wrongly interpreted. In that case, they need to be made more precise.

We shall analyse in particular three fundamental aspects arising out of the discussion of this issue in the Council.

The first refers to the competence of GATT in matters relating to national security and the relationship which exists or should exist between GATT and the United Nations in such matters.

The background to the drafting of Article XXI is of great value for the consideration of this point.

It may be deduced from the discussion that took place in 1947 concerning Articles 86 and 99 of the Havana Charter - the Articles which gave rise to Article XXI of the General Agreement - that for its authors the action referred to in those Articles concerns political measures or essential interests of members, and that therefore a direct relationship should exist between the planned International Trade Organization and the United Nations.

Thus, paragraph 3 of Article 86, "Relations with the United Nations", states:

> "The members recognize that the Organization (i.e. the ITO) should not attempt to take action which would involve passing judgment in any way on essentially political matters".

A note to the paragraph specifies:

> "If any member raises the question whether a measure is in fact taken directly in connection with a political matter brought before the United Nations ... the responsibility for making a determination on the question shall rest with the Organization".

Essentially, these provisions delimit the sphere of competence of each forum. While judgement on the substance of the question rests with the United Nations, the determination of the applicability of the provisions should fall within the scope of the GATT.

In the view of Nicaragua, the provisions of Article XXI should be interpreted in the sense that: <u>they should be applied only in the light of other international obligations such as the resolutions of the Security Council</u>.

The second aspect refers to the discretion of contracting parties with regard to recourse to sub-paragraph (b)(iii).

The existing text of paragraph (b) leaves some discretion to parties in taking action for security reasons; sub-paragraph (iii), however, requires the existence of specific conditions for the application of such measures. These conditions refer to time of war or other emergency in international relations.

To be viable, this discretionary power requires that parties taking such action must act in good faith.

Regrettably, there have been cases, such as that of the embargo, where such recourse has been abusive, excessive or arbitrary or for purposes other than those set forth in the provisions of Article XXI(b).

Consequently, it is necessary to revise these provisions and/or make them more precise so as to set this discretionary power within the context of the laws and norms constituting international law.

Nicaragua considers that for the invocation of sub-paragraph (b)(iii) to be justifiable, it must be consistent with international law and must be preceded by bilateral negotiations or by consideration by the organs of the United Nations or of intergovernmental organizations that deal with affairs relating to international peace and security.

Nicaragua likewise believes that the cases referred to in sub-paragraph (b)(iii) should be understood exclusively as being those referring to situations which threaten the international peace and security of the party invoking the measure and which have been considered by organs of the United Nations or of intergovernmental organizations that deal with peace and security matters.

The final aspect refers to the maintenance of the rights accruing under the General Agreement for parties affected by measures taken under Article XXI.

This question was discussed during the initial talks concerning what was to become Article XXI, and it was then made clear that its provisions would be subject to those of Article XXIII:2.

At the thirty-eighth session of the CONTRACTING PARTIES, however, it became necessary to reaffirm this principle, which was incorporated in the Decision Concerning Article XXI of the General Agreement as follows:

> "When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement".

Although these provisions are clearly linked and extremely precise, Nicaragua has encountered serious difficulties in enforcing its rights.

In the first place, its request for consultation under Article XXII was rejected.

Subsequently, its right to obtain the establishment of a panel was challenged, and finally, after having accepted that the embargo had affected advantages accruing to Nicaragua under the General Agreement, as was implicit in the mutually agreed terms of reference, the United States refuses to recognize the existence of any nullification or impairment of the said advantages.

The Council's consideration of the embargo case has highlighted at least two fundamental aspects which this Group will have to analyse with respect to the maintenance of rights under the General Agreement for parties affected by action taken under Article XXI.

The first refers to how a contracting party can enforce its rights to the investigation of a complaint in accordance with Article XXIII:2 without an investigation of the justification of the recourse to Article XXI.

The second concerns the solutions which will have to be provided to expand the powers granted under Article XXIII:2 in order to be able to give adequate redress to contracting parties which have been the object of a trade embargo in both directions.