

**NICARAGUA – MEASURES AFFECTING IMPORTS FROM
HONDURAS AND COLOMBIA**

Statements by Nicaragua

Revision

The following statements made by the delegation of Nicaragua at the DSB meetings on 18 May and 7 April 2000 are circulated to Members at the request of that delegation.

Statement on 18 May 2000

I should like to begin my statement by recognizing the right of Colombia to request the establishment of a panel.

Having made this principle clear, my delegation would like to refer to two aspects that are fundamental for this Organization's dispute settlement system. The first is connected with the procedures for the establishment of panels, while the second relates to the very essence of the WTO, its institutionality.

Nicaragua considers that the request for the establishment of a panel submitted by Colombia suffers from defects of form and of substance and does not meet the requirements of Article 6, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

In the first place, the request submitted by Colombia today differs from the request submitted as an item of the agenda of the previous Dispute Settlement Body (DSB) meeting and, consequently, Nicaragua considers that this is the first time that Colombia has submitted to the DSB its request for the establishment of a panel. My country therefore asks that the establishment of the panel be deferred until the next meeting.

In the second place, in its request for the establishment of a panel, Colombia bases its claim on provisions which the consultations did not deal with and, consequently, Nicaragua considers that any panel established to assess Law No. 325 and its regulations must do so solely in the light of the provisions of Article I and II of the GATT 1994, mentioned by Colombia in document WT/DS188/1.

In document WT/DS188/2/Corr.1, Colombia requests that the panel established to examine the measures applied by Nicaragua affecting imports from Honduras and Colombia should have the standard terms of reference set out in Article 7 of the Understanding.

On this particular point, I wish to place on record that it is the position of the Government of Nicaragua that, by the very nature of the provisions of Article XXI of the GATT 1994, invoked by my country in this dispute, which confirm the inherent right of a State to protect its security and constitute

an exception to the multilateral trade rules, these provisions cannot be subjected to an examination by a panel.

This position of principle has been endorsed by GATT practice and is enshrined in the Decision of 30 November 1982 by the CONTRACTING PARTIES concerning Article XXI of the General Agreement.

The understanding reached by the Council on 10 October 1985 that the Panel could not examine or judge the validity of or the reasons for the invocation by the United States of Article XXI (b)(iii) should be considered as having normative force, since it is a decision endorsed by the CONTRACTING PARTIES to GATT.

Article XVI, paragraph 1, of the WTO Agreement and Article 1(b)(iv) of Annex 1A, incorporating GATT 1994 into the WTO Agreement bring the history and legal experience acquired in GATT 1947 into the new sphere of the WTO, in such a way as to guarantee continuity and coherence in a smooth transition from the GATT 1947 system. In this way, the importance for the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to GATT 1947 is confirmed and the importance of that experience for the new trading system served by the WTO is recognized.

The Decision of 30 November 1982 concerning Article XXI of the GATT recognizes the exclusive authority of the CONTRACTING PARTIES to interpret Article XXI of the GATT, as is reaffirmed in Article IX, paragraph 2, of the WTO Agreement which provides that "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Article IX, paragraph 2, also provides that such decisions "shall be taken by a three-fourths majority of the Members". The fact that the WTO Agreement has so specifically established this "exclusive authority" to interpret the Agreement is sufficient reason to conclude that this authority is not given implicitly or inadvertently anywhere else to any other body.

Consequently, unless and until there is a formal interpretation of Article XXI of the GATT which invalidates the understanding reached by the Council in October 1985, the standard terms of reference provided for in Article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes will have to exclude the possibility of examining and/or judging the validity of or the reasons for Nicaragua's resort to Article XXI(b)(iii) of the GATT.

In conclusion, my Government requests that the Panel should not be established in this meeting and that the terms of reference for the Panel should prevent it from examining and/or judging the validity of or the reasons for the resort by Nicaragua to Article XXI(b)(iii) of the GATT 1994.

Nicaragua has requested that its statement in the DSB meeting on 7 April 2000 be regarded as an official document and circulated to Members together with the text of this statement.

Statement on 7 April 2000

On 2 August 1986, against a background of the cold war, Honduras and Colombia signed a Maritime Delimitation in the Caribbean Treaty (henceforth referred to as the Ramírez – López Treaty), motivated by the circumstances that then prevailed in the Central American region as a result of the East-West conflict. The said Treaty was signed immediately after Nicaragua had submitted a complaint against Honduras to the International Court of Justice at the Hague (Case concerning Border and Transborder Armed Actions). From the outset, Nicaragua protested most energetically

against the signing of the Colombian – Honduran Delimitation in the Caribbean Treaty which, it considered, violated its sovereign rights.

With the advent of the peace process in the Central American region, a new phase began in which Nicaragua, showing its clear desire for peace and as a sign of good faith, began a process of dialogue with Honduras and agreed to withdraw the complaint that it had lodged against Honduras in the International Court of Justice at the Hague, at the same time as Honduras undertook not to ratify the Ramírez – López Treaty, signed between that country and Colombia.

Unexpectedly, on 30 November 1999, the authorities of Honduras and, subsequently, those of Colombia announced the ratification of the Ramírez – López Treaty.

The Ramírez – López Treaty injures the sovereign rights of Nicaragua in the Caribbean Sea, by seeking to impose boundaries on our country in a unilateral, unlawful and arbitrary way, through a mutual recognition by Honduras and Colombia of their expansionist intentions in the Caribbean Sea, to the detriment of Nicaragua's territorial rights, thus endeavouring to dispossess our country of more than 130,000 kilometres of continental shelf in the Caribbean Sea, which are particularly rich in fish, hawksbill turtles, prawns and lobsters and have a great oil potential.

This Maritime Delimitation in the Caribbean Treaty, signed between Colombia and Honduras, completely ignores the rights of a third country, in this case Nicaragua, thus constituting for us what in legal terms is defined as "*res inter alios acta*", which means that it creates no right for Colombia nor for Honduras with respect to Nicaragua. It is also a rule of customary international law and of the law of treaties that a legal instrument does not create obligations or rights for a third State without its consent.

Nicaragua considers and asserts that the ratification of the Ramírez – López Treaty violates its sovereignty and political independence and creates a situation of grave international tension, which has become apparent in the immediate movement of Honduran troops and military equipment to the northern frontier of our country, in the complaints of the Miskita communities living on the Honduran border, in the increase of the national defence budget by the Honourable Congress of the Republic of Honduras, and in the military manoeuvres carried out in the region by combat aircraft and a Colombian corvette on the Nicaraguan continental shelf. The implementation of this Treaty creates a more complex maritime situation, since Nicaragua regularly maintains sea patrols to repress drug trafficking and to conserve its fisheries. This means that, if Colombia and Honduras try to introduce a naval presence into the region, some deplorable incidents of unpredictable significance could occur, and might well jeopardize the region's peace and stability.

For this reason, and making use of the machinery offered by international law, Nicaragua has brought up and reported on the situation thus created in the suitable forums. The serious international tension has been recognized at the hemisphere level, culminating in the approval by consensus, at an emergency meeting of the Permanent Council of the Organization of American States (OAS) – of which Colombia and Honduras are members – of the appointment of a Special Representative, with the specific mandate to "evaluate the situation, facilitate dialogue and formulate recommendations aimed at easing tension and preventing acts that could affect peace in the Hemisphere", a resolution by which the OAS recognized the state of serious international tension.

It is in this context that, due to the serious international tension provoked by the events I have just described, my country was obliged to adopt measures that it considered necessary to protect its security, including Law 325 of 6 December 1999, published in *La Gaceta*, Official Journal No. 237 of 13 December 1999, whereby it established a tax, calculated on the basis of the sum of the c.i.f value plus pre-existing tariffs, of 35 per cent on any good or service, imported, manufactured or assembled, coming from or originating in the Republic of Colombia or in that of Honduras. In addition,

Ministerial Order No. 041-99 of the Ministry of Development, Industry and Trade (MIFIC) of 15 December 1999 cancelled the fishing licences of all fishing vessels under Honduran and Colombian flags operating with a Commercial Fisheries Exploitation Licence issued by the Ministry.

Nicaragua considers that this measure is in accordance with international, regional and trade law and is based on the provisions of Article XXI of the General Agreement on Tariffs and Trade (GATT of 1994) and on Article XVI *bis* of the General Agreement on Trade in Services (GATS), which reflect the inherent rights of a State to protect its security and constitute a general exception to the multilateral trade rules.

Nicaragua has taken the view that the Ramírez – López Treaty, by attempting to reduce its maritime space, continental shelf and exclusive economic zone, as well as the islands, keys, bars, reefs and other geographical accidents located therein or emerging therefrom, and claiming that part of them belong to a third State, is in violation of the rules of international law and constitutes an attack on the sovereignty of our country, which is why Nicaragua has resorted to forums such as the Permanent Council of the OAS.

The measures adopted by Nicaragua do not pursue commercial ends nor are they intended to protect domestic industry but are directed towards safeguarding the country's essential security interests.

On the other hand, in applying this Article, Nicaragua has taken account of the provisions of the Decision of 30 November 1982 concerning Article XXI of the General Agreement which states, in its preambular paragraphs, "that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the right of contracting parties when they consider that reasons of security are involved" and that "in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected;".

Indeed, it should be emphasized that, in spite of the extent of the exception, Nicaragua has exercised its right with prudence and responsibility. The measures adopted do not affect the trade of third countries nor do they obstruct the transit of goods through its national territory.

As for the products coming from or originating in Honduras and Colombia, the measures are also of limited scope in that the tax levied does not exceed Nicaragua's ceiling level in the World Trade Organization, in view of the expectations that the affected countries may reasonably have under the General Agreement. What is more, imports worth less than US\$500 are exempted from the tax, as are those goods exonerated from taxes by our Constitution, such as medicines, inputs and raw materials for educational and cultural activities and so forth.

Although it is premature to draw conclusions concerning the impact of the measures adopted by Nicaragua on Colombia's trade flows, the figures available for the months of December 1999 and January and February 2000 seem to indicate that trade has continued at the previous levels: imports into Nicaragua originating from Colombia during those months totalled \$1,800,000, a figure which is, comparable with the total imports in the two previous years, which amounted to approximately \$8 million.

Colombia has requested the establishment of a panel to examine the measures adopted by Nicaragua. Our country recognizes Colombia's right to do so. Nevertheless, it is not clear what such a panel could do.

This is not the first time that a State has invoked Article XXI of the General Agreement. It should be remembered that this general exception was already to be found among the provisions of

the Havana Charter and, since its inclusion as Article XXI in the General Agreement on Tariffs and Trade (GATT 1947), it has been standard practice in this Organization for the contracting party which applies the measure to be the sole judge with regard to its essential security interests and the fact that they may be threatened by any danger, actual or potential.

Furthermore, there are virtually no precedents regarding measures adopted for security reasons. The sole Panel established within the framework of GATT that concluded its work and submitted a Report, which was not adopted, refers to the case of the trade embargo imposed upon Nicaragua in 1985 and had terms of reference which stipulated that it could not "examine or judge the validity of or the motivation for the invocation of Article XXI." **This Panel stated in paragraph 5.2 of its report that "both by the terms of Article XXI and by its mandate [it] was precluded from examining the validity of the United States' invocation of Article XXI."**

In paragraph 5.18 of its Report on United States – Trade Measures Affecting Nicaragua, the Panel noted that " ... in 1982, the CONTRACTING PARTIES took a 'Decision Concerning Article XXI of the General Agreement' which refers to the possibility of a formal interpretation of Article XXI and to a further consideration by the Council of this matter" (BISD 29S/23-24). Nicaragua would be in favour of the WTO General Council proceeding to such an interpretation.

A panel with standard terms of reference as Colombia requests, established under the present conditions, could not but conclude the obvious, namely, that Colombia's rights under Article I of the GATT and Article II of the GATS have been reduced as a result of the measures applied by Nicaragua. Indeed, if the panel were to arrogate to itself powers which belong only to political forums, this could result in the establishment of a dangerous and unacceptable precedent.

To conclude, my country considers that:

- (1) The measures were adopted by Nicaragua for national security reasons and are fully supported by Article XXI, paragraph (b)(iii), of the GATT and Article XIV *bis*, paragraph 1(b)(iii), of the GATS;
 - (2) Article XXI constitutes a general exception to the provisions of the General Agreement, and therefore measures adopted under it can never constitute a violation of the General Agreement;
 - (3) there is no nullification or impairment of Colombia's rights under Article II of the General Agreement, since the measures applied by Nicaragua do not exceed the bound tariff ceilings in its schedule of concessions, nor under Article XVI of the GATS, since fisheries do not form part of the specific commitments undertaken by Nicaragua; and
 - (4) before setting up a panel to examine this matter, the WTO General Council should express an opinion on the competence of any panel set up within this Organization on eminently political issues and should establish an authoritative interpretation of Article XXI of the General Agreement.
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