

UNITED STATES - TRADE MEASURES AFFECTING NICARAGUA

*Report by the Panel
(L/6053)*

1. Introduction

1.1 On 1 May 1985, the President of the United States of America issued an Executive Order prohibiting all trade with Nicaragua and transactions relating to air and sea transportation between Nicaragua and the United States with effect from 7 May 1985. The full text of the Executive Order is reproduced in paragraph 3.1 below. The United States informed the contracting parties of this action through a communication dated 7 May 1985 (L/5803). In a communication dated 6 May 1985 (L/5802 and Corr. 1), Nicaragua asked for a special meeting of the Council to examine the measures imposed by the United States. The Council discussed the matter at its meeting of 29 May 1985 (C/M/188, pages 1-16). The Chairman of the Council proposed and the Council agreed that the Chairman would consult with the delegations to determine how the matter could be dealt with at a later Council meeting. In a communication dated 11 July 1985 Nicaragua requested the United States to hold bilateral consultations under Article XXII:1 of the General Agreement (L/5847). The United States did not agree to those consultations (C/M/191, page 41).

1.2 The Chairman informed the Council at its meeting of 17-19 July 1985 that his consultations had not resulted in a consensus on how to deal with the issue. The representative of Nicaragua said that in view of the lack of progress in the consultations held by the Chairman, his Government now asked for the establishment of a panel to review the case and to report to the CONTRACTING PARTIES. The representative of the United States objected to the establishment of a panel. His Government's actions against Nicaragua were covered by Article XXI:(b)(iii). This provision left it to each contracting party to judge what actions it considered necessary for the protection of its essential security interests. A panel could therefore not address the validity of, nor the motivation for, the United

following his consultations with a number of interested parties, he could now report that the United States, while maintaining its position expressed at the July Council meeting, would not oppose the establishment of a panel provided it was understood that the Panel could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States in this matter. He proposed that a panel be established with terms of reference reflecting that understanding, to be determined by the Council Chairman in consultation with interested parties and, according to GATT practice, with the agreement of the parties to the dispute, and that the Council Chairman be authorized to designate, in consultation with the parties concerned, the Panel's members. The Council so agreed (C/M/192, page 6).

1.4 At

"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).

1.5 Following this announcement, the representative of the United States said the terms of reference had been drafted specifically for this case and would govern the Panel in this particular dispute. However, this should not imply that panels in other cases would not have to determine whether nullification or impairment existed. Only in this case did the United States not dispute the effects of a two-way trade embargo. Furthermore, the above terms of reference should not be interpreted to mean that any further action by the CONTRACTING PARTIES in this matter was necessary or appropriate. The representative of Nicaragua replied that, in his view, this Panel was not an exception; its functions would be those described in the 1979 Understanding (BISD 26S/211-218). Consequently, the CONTRACTING PARTIES would have to take appropriate action on the Panel's report (C/M/196, page 8).

1.6 On 4 April 1986 the Chairman of the Council circulated a document (C/137) indicating that agreement had been reached on the following composition of the Panel:

Chairman:	Mr. M. Huslid
Members:	Mr. D. Salim
	Mr. H. Villar.

1.7 The Panel met with the parties to the dispute on 9 May and 16 June 1986 and without the parties to the dispute on 9 July and 3 and 4 September 1986.

2. Documentation

2.1 The Panel had before it the following submissions by the two parties (in addition to the documents referred to in paragraphs 1.1-1.6 above):

- a memorandum dated 1 May 1986 with four annexes, presenting Nicaragua's position in respect of the dispute;
- a letter dated 29 April 1986 from the Geneva Office of th

- a letter dated 30 June 1986 from the Permanent Representative of Nicaragua, transmitting

TABLE 1

Nicaragua: Trend of Structure of Trade in Goods
(Exports and Imports)
(per cent)

	1980	1984	1985
Central America	28.1	9.2	7.2
Latin America	13.5	12.8	9.2
United States	30.4	14.9	5.4
Western Europe	17.6	25.2	28.8
Eastern Europe	1.0	15.4	27.1
Japan	3.0	9.9	9.9
Canada	2.6	2.9	2.9
Cuba	-	4.0	4.3
Others	3.8	5.7	5.3
Total	100.0	100.0	100.0

TABLE 2

Nicaragua: Trade in Goods with the United States
(in US\$'000)

Year	Total	Exports to the United States	Per cent of total	Total	Imports from the United States	Per cent of total
1977	636,805	144,887	23.8	781,927	219,501	28.8
1980	450,442	162,351	36.0	887,211	243,589	27.5
1981	508,265	116,774	23.0	999,440	262,886	26.3
1982	407,708	96,497	23.7	775,547	147,398	19.0
1983	431,295	77,741	18.0	806,915	- .5 338,880	

TABLE 3

Nicaragua: Main Products Exported to the United States
and Percentages of Total (1984)

(In US\$'000)

	United States (1)	Total (2)	Per cent (1/2)
Sesame	433	5,904	7.3
Coffee	6,985	121,812	5.7
Sugar	4,107	20,904	19.6
Molasses	2,587	2,587	100.0
Bananas	11,878	11,888	99.9
Meat	6,609 *	17,601	47.0 **
Marine products	10,739	12,607	85.2
Tobacco and cigars	2,643	3,480	76.0
Others	1,303	188,020	0.7
Total	47,284	384,803	12.3

* If Puerto Rico is included the

3.3 According to calculations made by the GATT Secretariat almost all

*4.5 Nicaragua stated that the United States could not properly rely on Article XXI:(b)(iii) in this case. This provision could be invoked only if two conditions were met: first, the measure adopted had to be necessary for the protection of essential security interest and, second, the measure had to be taken in time of war or other emergency in international relations. Neither of these conditions were fulfilled in this present case. Obviously, a small developing country such as Nicaragua could not constitute a threat to the security of the United States. The embargo was therefore not necessary to protect any essential security interest of that country. Nor was there any "emergency" in the sense of Article XXI. Nicaragua and the United States were not at war and maintained full diplomatic relations. If there was tension between the two countries, it was

Article XXIII

and to achieve the

it could not recommend an authorization of suspension of obligations of Nicaragua in respect of the United States as this was meaningless in the circumstances, it could not recommend any action involving third countries and it could not consider any effects of the embargo other than direct trade effects on Nicaragua. The Panel could in other words only find something that was obvious: that trade had been embargoed. Nicaragua disagreed with the argument put forward by the United States that the only measure which the CONTRACTING PARTIES could take would be to authorize Nicaragua to withdraw its concessions. The objective of Article XXIII was not reprisal

recommendations" (EPCT/A/PV/5, p.16). The report of the Sixth Committee during the Havana Conference notes with respect to the power of the Executive Board to make recommendations to member States in any matter

Article XXI, the CONTRACTING PARTIES could, in the circumstances of the present case, 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 the light of the foregoing considerations 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.

5.12 The Panel proceeded to consider the request by Nicaragua that the Panel recommend that the CONTRACTING PARTIES grant, in accordance with Article XXV:5 and footnote 2 to paragraph 2 of the Enabling Clause (BISD 26S/203), a general waiver which would permit the contracting parties which so desire to compensate the effects of the embargo by giving, notwithstanding their obligations under Article I, differential and more favourable treatment to products of Nicaraguan origin.

5.13 The Panel examined whether it was appropriate for a panel established under Article XXIII to make recommendations on requests for waivers under Article XXV. It noted the following GATT practices and procedures on this question: Only once in the history of the GATT, in 1971, has a panel established under Article XXIII recommended a waiver pursuant to Article XXV. This waiver released the party complained against from an obligation which it had failed to observe (BISD 18S/33, 183-188). All other panels have proposed recommendations and rulings of the CONTRACTING PARTIES under Article XXIII:2 and not decisions under Article XXV. This practice

5.16 The Panel, noting that it had been given not only the mandate to prepare a decision of the CONTRACTING PARTIES under Article XXIII:2 but the wider task of assisting the CONTRACTING PARTIES in further action in this matter, examined the effects of the embargo on Nicaragua's economy and on the international trading system. The Panel noted that the embargo had brought the trade between two contracting parties to a standstill and that it had a severe impact on the economy of a less-developed contracting party. The Panel further noted that embargoes imposed for security reasons create uncertainty in trade relations and, as a consequence, reduce the willingness of governments to engage in open trade policies and of enterprises to make trade-related investments. The Panel therefore concluded that embargoes such as the one imposed by the United States, independent of whether or not they were justified under Article XXI, ran counter to basic aims of the GATT, namely to foster non-discriminatory and open trade policies, to further the development of the less-developed contracting parties and to reduce uncertainty in trade relations. The Panel recognized that the General Agreement protected each contracting party's essential security interests through Article XXI and that the General Agreement's purpose was therefore not to make contracting parties forego their essential security interests for the sake of these aims. However, the Panel considered that the GATT could not achieve its basic aims unless each contracting party, whenever it made use of its rights under Article XXI, carefully weighed its security needs against the need to maintain stable trade relations.

5.17 The above considerations and the conclusions to