9 June 1989

UNITED STATES - RESTRICTIONS ON IMPORTS OF SUGAR

Report of the Panel adopted on 22 June 1989
(L/6514 - 36S/331)

1. INTRODUCTION

1.1 At its meeting in June 1988, the Council was informed that Australia had held consultations on 7 June 1988 with the United States under Article XXII:1 concerning United States import restrictions on sugar, in particular for the purpose of establishing the United States' justification under the General Agreement for its current sugar import régime. As these consultations did not lead to a satisfactory settlement, Australia, in a communication circulated as L/6373 of 19 July 1988, requested the establishment of a panel to examine the matter pursuant to Article XXIII:2.

1.2 At the meeting of the Council on 22 September 1988, the United States sought confirmation of its understanding that Australia's request for a panel referred only to United States import restrictions on raw and refined sugar implemented pursuant to the authority of the Headnote in the

2.2 This provision, enlarged to authorize the President of the United States to proclaim a rate of duty and quota limitation on imported sugars if the Sugar Act or substantially equivalent legislation should expire, was reflected in Schedule XX following the Torquay Round in 1951 and, with some modification, following the Kennedy Round in 1967 and the Tokyo Round in 1979. By Proclamation 3822 of 16 December 1967, the President of the United States added to the TSUS the Headnote reflecting this provision.

2.3 In 1988 the United States modified its GATT Schedule in accordance with the harmonized system. Since then, the provision has been contained in Chapter 17 of GATT Schedule XX (United States), and reflected in the corresponding portion of the Harmonized Tariff Schedule of the United States (HTSUS). The provision reads as follows:

> "2. The rates in subheadings 1701.11, 1701.12, 1701.91.20, 1701.99, 1702.90.30, 1702.90.40, 1806.10.40 and 2106.90.10, on 10 0 1 151.92 654.96 Tm604 Tm18 210 Tf(subheadings) Tj TjEwas

2.6 Since 1982, the global import quota has generally been set on an annual basis. For 1988 (calendar year), the global quota was 1,056,675 short tons (raw value). For 1989 (calendar year), the quota announced was 1,125,255 metric tonnes (raw value)[1], equal to 1,240,380 short tons (raw value). Australia's exports to the United States market was of 232,400 short tons (raw value) in 1982/83; 83,335 short tons (raw value) in 1988 and an allocated 96,343 short tons (raw value) in 1989. Although Australia's share of the base quota remained at 8.3 per cent, Australia's actual share of the total United States market for imported sugar declined to less than 7.9 per cent in 1987-1988 due to minimum shipment provisions provided in the quota arrangements for small quota countries.

2.7 Production of sugar in the United States (beet and cane, raw value) increased from 5.9 million short tons in 1982 to 7.3 million short tons in 1987. In 1988, production, as estimated by the United States Department of Agriculture, was 7.1 million short tons.

3. MAIN ARGUMENTS

Abstract

3.1 Australia asked the Panel to find that import restrictions on sugar implemented by the United States were contrary to the provisions of Article XI:1 and qualified neither for the exceptions provided for under that Article, nor for those provided under any other relevant provision of the General Agreement and also that these restrictions constituted, prima facie, a case of nullification or impairment of Australia'swere

of Article XI:1, the import-restricting measures must be "necessary to the enforcement of governmental measures which operate: to restrict the quantities of the like domestic product permitted to be marketed or produced …". It also required that the restrictions "… shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions".

3.5 Australia maintained that the United States import restrictions

contained, inter alia, an agreement that matters which might affect the practical effects of tariff concessions could be negotiated and incorporated into the appropriate schedule annexed to the General Agreement "provided that the results of such negotiations should not conflict with other provisions of the Agreement" (BISD 3S/225). Australia further recalled that in a precedent dispute settlement case brought by Canada against the EEC about a footnote to a concession on high-quality beef included in the EEC's Schedule of Concessions, the Panel had found, inter alia, that the words "terms, conditions or qualifications" in Article II:1(b) could not be interpreted to mean that a contracting party could explicitly or by the manner in which a concession was administered actually contravene another provision of the General Agreement (BISD 28S/99).

3.10 Australia said that contrary to the United States argumentation (see also paragraph 3.6), it was not Australia but the United States which claimed that one part of the General Agreement could overrule another as it was arguing that a provision contained in its Schedule annexed to Part I overrode any obligations the United States might have under Part II of the General Agreement. In Australia's view, the question of one part of the General Agreement overriding another should not arise, as Schedules in Part I could not contain provisions which, in their operation, were inconsistent with those set out in other parts of the Agreement. Australia argued that this was supported, inter alia, by the argument presented by the United States to the panel examining Japan's restrictions on imports of certain agricultural products (L/6253, paragraphs 3.12-3.13 refer).

3.11 The United States contested that the cases cited by Australia were relevant to the issue examined by the Panel. The Working Party on Other Barriers to Trade was limited by its terms of reference to consideration of proposals submitted with respect to (a) subsidies, countervailing and anti-dumping measures, and (b) state trading, surplus disposal, disposal of non-commercial stocks and the general exceptions to the Agreement. It did not set out to make recommendations on Article II which was the subject of another working party, the Working Party on Schedules and Customs Administration also established as part of the 1955 review process. The United States noted that the statement cited by Australia would not support Australia's claim even if it were read to apply to matters other than subsidies. In that statement, the Working Party agreed that contracting parties "should" avoid agreeing to subsidies provisions in their Schedules which might not be consistent with other provisions of the General Agreement. In the United States view, this was clearly nothing more than a policy recommendation and not a legal requirement.

3.12 Regarding the case brought by Canada against the EEC on high-quality beef, the United States pointed out that this turned on the EEC's implementation of a provision in its Schedule. The panel did not examine the GATT consistency of the provision itself, which still stands in the EEC's Schedule as written at the time it was negotiated, but rather examined the manner in which the concession was implemented. And the panel "concluded that the manner in which the EEC's concession on high-quality beef was implemented accorded less favourable treatment to Canada than that provided for in the relevant EEC Schedule, thus being inconsistent with the provisions of paragraph 1 of Article II of the General Agreement" (BISD 28S/99, paragraph 4.6). Regarding the case brought by the United States against Japan on imports of certain agricultural products, the United States said that, in that case, it was merely arguing that the application of Article XI:1 was not limited to items that were subject to tariff bindings under Article II

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adopted by the CONTRACTING PARTIES were interpretations of the General Agreement and became the views of the contracting parties without qualification. Australia also argued that the issues in the case were analogous to the adopted findings of the

3.20 Australia considered that Article XIII was within the scope of the terms of reference of the Panel, which covered the relevant provisions of the General Agreement, in particular Article XI, and asked the Panel to make a finding on this matter also. It was Australia's understanding of GATT dispute settlement practices that issues directly relevant to a panel's work, even if they took place after the establishment of the panel, could legitimately be considered and ruled on by the panel.

4. SUBMISSIONS BY INTERESTED THIRD PARTIES

(a) Argentina

4.1 Argentina recalled the importance for some of its regions of sugar exports to the United States. Following the imposition of restrictive import quotas in 1982, Argentina's earnings from these exports dropped from US$21 million in 1981 to US$14 million in 1987. The tendency to apply quantitative restrictions as an instrument of protection was also evident from the decline in United States annual imports of sugars from more than 5 million short tons in the period 1977-81 to some 1 million short tons in 1988.

4.2 Argentina considered that the quantitative restrictions on imports of sugars imposed by the United States were contrary to Article XI. Argentina further considered that the United States could not justify such restrictions in the light of the Headnote authority. Items to which these restrictions applied were bound. If the possibility of having recourse to the Headnote provision was admitted, the United States would have the right to reduce its import quota to zero, which would render the concession meaningless. This would be inconsistent with the basic purpose of concessions, which was to create stable conditions of competition.

(b) Brazil

4.3 Brazil stated that, when the United States adopted a restrictive quota system for imports of sugar in 1982, the measure was announced as transitory, aimed at alleviating an emergency situation created by the instability of world market prices. But the quota system had been maintained and no signs of eliminating these restrictive policies had been given. Moreover, this policy had greatly contributed to the deterioration of the world sugar market.

4.4 The restrictions maintained by the United States had caused irreparable losses to Brazil which had seen its annual sugar exports decline from 1 million short tons in the early '80s to 15,300 short tons in 1988. Furthermore, sugar substitute programmes which favoured greater consumption of alternative sweeteners in the United States tended to restrict the Brazilian share of the United States sugar market even more. For these reasons, Brazil considered that the maintenance by the United States of restrictive import quotas on sugar had nullified or impaired benefits accruing to Brazil under the General Agreement.

(c) Canada

4.5 Canada said that since the imposition of restrictive quotas in 1982, it had suffered a decline in exports of sugars to the United States while, at the same time, United States exports of sugars to Canada had grown. Quotas on refined sugars had restricted Canadian exports which had declined from 29,419 short tons in 1983 to 9,749 short tons in 1987. It was Canada's understanding that the United States did not consider that the quotas maintained under the Headnote authority fell within the waiver granted to the United States under Section 22 of the Agricultural Adjustment Act (of 1933), as amended.

4.6 Canada argued that these restrictions were contrary to Article XI and could not be justified under paragraph 2 of that Article. Furthermore, it was Canada's view that the existence of a headnote in a schedule of concessions allowing the combination of duties and quotas did

(f) Nicaragua

4.12 Nicaragua argued that the decision of the President of the United States of 5 May 1982 to introduce a quota system for regulating imports of sugar into the United States constituted a restriction within the terms of Article XI:1. The system did not meet the conditions for exceptions mentioned in Article XI:2 and was not justifiable under the 1955 Waiver granted to the United States.

4.13 Nicaragua further argued that no justification for such a system could be found in Article II:1(b). In Nicaragua's view, the "terms, conditions or qualifications" provided for in that Article could not allow measures contrary to other provisions of the General Agreement. Consequently, the Headnote did not have any validity as a waiver either to Article XI or to Article XIII. If a different interpretation was to be accepted, it might be asked what would be the value and scope of the United States concessions, which in an extreme case could lead to an outright prohibition of sugar imports.

4.14 Nicaragua stated that the propositions formulated above had been presented to the Panel responsible for examining the measures taken by the United States against Nicaragua in May 1983.

(g) Thailand

4.15 Thailand said that since the introduction of an increasingly restrictive country quota system for sugar imports in 1982, the quota allocated to Thailand had been reduced greatly, affecting the country's sugar industry and export earnings.

4.16 In Thailand's view, the system operated by the United States contravened the provisions of Article

Article II:7, an integral part of the General Agreement, the restrictions were consistent with the United States obligations under that Agreement. Australia argues that qualifications to concessions made in accordance with Article II:1(b) cannot justify measures contrary to other provisions of the General Agreement, in particular not quantitative restrictions inconsistent with Article XI:1 (for a complete description of the parties' arguments, see Section 3 above).

5.2 The Panel first examined the issue in the light of the ETBTfhingBT1 0 0 1 348.48 66892 Tm/F8 11 Tf(of)

Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the view of the Panel, the conclusion that the CONTRACTING PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.

5.6 The Panel finally examined the issue in the light of the drafting history. It noted that the reference to "terms and qualifications" was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to "conditions". This amendment was proposed and adopted "in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than conditions governing the tariff bindings to which they relate" (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under

that the matter referred to the CONTRACTING PARTIES by Australia were restrictions maintained under the authority of the Headnote in the Tariff Schedules of the United States, and not restrictions taken under Section 22 of the Agricultural Adjustment Act (of 1933) as amended (see paragraph 1.2 above). Therefore the issue raised by the EEC could not be examined by the Panel. The Panel also recalled in this context that the practice has been for panels to make findings only on those issues raised by the parties to the dispute, not on those raised solely by third parties (L/6264, page 43 and L/6309, page 37).

6. CONCLUSIONS

6.1 In the light of the considerations set out in Section 5 above, the Panel has concluded that the restrictions on the importation of certain sugars maintained by the United States under the authority of the Headnote in the Tariff Schedule of the United States are inconsistent with Article XI:1 and cannot be justified under the provisions of Article II:1(b).

6.2 The Panel therefore recommends that the CONTRACTING PARTIES request the United States either to terminate these restrictions or to bring them into conformity with the General Agreement.