

UNITED STATES - THE CUBAN LIBERTY AND
DEMOCRATIC SOLIDARITY ACT

Request for the Establishment of a Panel by the European Communities

The following communication, dated 3 October 1996, from the Permanent Delegation of the European Commission to the Permanent Mission of the United States and the Dispute Settlement Body is circulated at the request of the European Communities.

On 3 May 1996 the European Communities, acting on its own behalf and on behalf of its Member States, (hereafter together referred to as the EC) requested consultations with the United States of America (US) pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article XXIII:1 of the General Agreement on Trade in Services (GATS) concerning the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Libertad Act), and related measures. This request was circulated to Members of the WTO on 13 May 1996 (WT/DS38/1).

Consultations were held with the US on 4 June and 2 July 1996 in Geneva and on 23 September 1996 in Washington. These consultations, which also involved written exchanges of questions and answers, have allowed a better understanding of the respective positions but have not led to a satisfactory resolution of the matter.

The principal US measures to which the EC objected are:

(a) the extraterritorial application of the US embargo of trade with Cuba in so far as it restricts trade between the EC and Cuba or between the EC and the US. This embargo is applied by virtue of the Cuban Assets Control Regulations (CACR) of 1962, which are now codified in part 515 of title 31, Code of Federal Regulations. It is confirmed, codified and reinforced by Sections 102 and 110 Libertad Act;

(b) denial of access to the US tariff rate quota for sugar by virtue of Section 902(c) of the Food Security Act of 1985, repeated in Section 110(c) of the Libertad Act which prohibits the allocation of any of the sugar quota to a country that is a net importer of sugar unless that country certifies that it does not import Cuban sugar that could indirectly find its way to the US. Several Member States of the EC are net importers of sugar and have been unable to export sugar to the US under the quota because of this provision;

(c) denial of transit by EC goods and vessels of Member States of the EC through ports in the US pursuant to Article 6005 (b) Cuban Democracy Act of 1992 (CDA). This provision prohibits (except in case of a special license from the US Treasury Department):

- vessels carrying goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has any interest from entering any United States port; and
- vessels which have entered a Cuban port for trade in goods or services from loading or unloading freight in US ports within 180 days after having departed from the Cuban port;

(d) the prohibition pursuant to Section 103 Libertad Act of the provision of "any loan, credit or other financing" (which includes such matters as provision of performance guarantees, insurance and some payments) by US persons to any person for the purpose of transactions involving any confiscated property the claim to which is owned by a United States national;

(e) under Title III of the Libertad Act, the creation of a right of action in favour of US citizens to sue EC persons and companies in US courts in order to obtain compensation for Cuban properties to which these US nationals have a claim, in cases where the EC persons or companies concerned have "trafficked" in such property that was confiscated by the Cuban Government from persons who were or are now US nationals;

(f) under Title IV of the Libertad Act, the denial of visas and exclusion from the US (or threat thereof) of persons involved in confiscating or "trafficking" in confiscated property a claim to which is owned by a US national and persons who are corporate officers, principals or shareholders with a controlling interest of an entity which has been involved in "trafficking" etc. in such property. Spouses, minor children and agents of such persons are also denied visas and excluded from the US under this provision.

Pursuant to Article XXIII of GATT 1994, Article XXIII of GATS, and Articles 4 and 6 of the DSU, the EC hereby requests that a panel be established at the next meeting of the Dispute Settlement Body scheduled for 16 October 1996.

The EC will in particular request that the panel consider and find that:

- (i) the measures described in point (a) above are inconsistent with Article XI of GATT 1994;
- (ii) the measures described in point (b) above are inconsistent with Article XIII of GATT 1994;
- (iii) the measures described in point (c) above are inconsistent with Article V of GATT 1994;
- (iv) the measures described in point (d) above are inconsistent with Article XI of GATS;
- (v) the measures described in points (e) and (f) above are inconsistent with Articles II, III, VI, XVI and XVII of GATS and the measures described in point (f) are also inconsistent with paragraphs 3 and 4 of the GATS Annex on the Movement of Natural Persons;
- (vi) even if wholly or partly not in conflict with GATT 1994, the measures described in points (a), (b), (c), (d), (e) and (f) above nullify and impair benefits which the EC could expect to have accrued to it directly or indirectly under GATT 1994. The benefits which the EC could have expected are the unrestricted export of Community goods to Cuba and to the US without such exports giving rise to or being subject to or providing an opportunity for unwarranted legal action and exclusion of persons from the US;

- (vii) even if wholly or partly not in conflict with GATT 1994, the measures described in points (a), (b), (c), (d), (e) and (f) above impede the attainment of an objective of GATT 1994. The objectives which are being impeded are notably the expansion of production and trade, the overall balance of rights and obligations between WTO Members, in particular the right of access to markets, and the principle, recognized in GATT jurisprudence, that WTO Members should not try to force other WTO Members to change their sovereign policies through trade sanctions;
- (viii) even if wholly or partly not in conflict with any of the provisions of GATS, the measures described in points (d), (e) and (f) above nullify and impair benefits which the EC could reasonably expect to have accrued to it under the specific commitments of the US and Cuba under GATS. These benefits are trade in services between the EC and the US and between the EC and Cuba unhindered by the interruption of financial services, the threat of seizure of assets for the purposes of satisfying compensation claims in respect of "trafficking" and by the harassment of its citizens through the denial of visas and exclusion from the US (or the threat thereof).

The above summary is designed to briefly describe the legal basis of the complaint sufficient to present the problem clearly but is not to be taken as restricting the arguments which the EC may develop before the panel.

The EC requests that the panel be established with the standard terms of reference or such other terms of reference as may be agreed pursuant to Article 7 DSU.