

ARTICLE XXI
SECURITY EXCEPTIONS

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I. TEXT OF ARTICLE XXI

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
 - (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
 - (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
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II. INTERPRETATION AND APPLICATION OF ARTICLE XXI

A. SCOPE AND APPLICATION OF ARTICLE XXI

1. Paragraphs (a) and (b): “it considers ... essential security interests”

During discussions in the Geneva session of the Preparatory Committee, in response to an inquiry as to the meaning of “essential security interests”, it was stated by one of the drafters of the original Draft Charter that “We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: ‘by any Member of measures relating to a Member's security interests,’ because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. ... there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose”. The Chairman of Commission A suggested in response that the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses of this kind.¹

During the discussion of the complaint of Czechoslovakia at the Third Session in 1949 (see page 602) it was stated, *inter alia*, that “every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement”.²

In 1961, on the occasion of the accession of Portugal, Ghana stated that its boycott of Portuguese goods was justified under the provisions of Article XXI:(b)(iii), noting that

“... under this Article each contracting party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests. It might be observed that a country's security interests might be threatened by a potential as well as an actual danger. The Ghanaian Government's view was that the situation in Angola was a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana”.³

During the Council discussion in 1982 of trade restrictions applied for non-economic reasons by the EEC, its member States, Canada and Australia against imports from Argentina (see page 603), the representative of the EEC stated that “the EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement. He said that in effect, this procedure showed that every contracting party was - in the last resort - the judge of its exercise of these rights”. The representative of Canada stated that “Canada's sovereign action was to be seen as a political response to a political issue ... Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised. His delegation could not, therefore, accept the notion that there had been a violation of the General Agreement”.⁴ The representative of Australia “stated that the Australian measures were in conformity with the provisions of Article XXI:(c), which did not require notification or justification”.⁵ The representative of the United States stated that “The General Agreement left to each contracting party the judgment as to what it

¹EPCT/A/PV/33, p. 20-21 and Corr.3; see also EPCT/A/SR/33, p. 3.

²GATT/CP.3/SR.22, Corr. 1.

³SR.19/12, p. 196.

⁴C/M/157, p. 10.

⁵C/M/157, p. 11.

considered to be necessary to protect its security interests. The CONTRACTING PARTIES had no power to question that judgement".⁶

The representative of Argentina noted that it had attempted to submit to GATT only the trade aspects of this case and stated "that in order to justify restrictive measures a contracting party invoking Article XXI would specifically be required to state reasons of national security ... there were no trade restrictions which could be applied without being notified, discussed and justified".⁷

Paragraph 7(iii) of the Ministerial Declaration adopted 29 November 1982 at the Thirty-eighth Session of the CONTRACTING PARTIES provides that "... the contracting parties undertake, individually and jointly: ... to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".⁸

The question of whether and to what extent the CONTRACTING PARTIES can review the national security reasons for measures taken under Article XXI was discussed again in the GATT Council in May and July 1985 in relation to the US trade embargo against Nicaragua which had taken effect on 7 May 1985.⁹ While a panel was established to examine the US measures, its terms of reference stated that "the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI(b)(iii) by the United States".¹⁰ In the Panel Report on "United States - Trade Measures affecting Nicaragua", which has not been adopted,

"... The Panel noted that, while both parties to the dispute agreed that the United States, by imposing the embargo, had acted contrary to certain trade-facilitating provisions of the General Agreement, they disagreed on the question of whether the non-observance of these provisions was justified by Article XXI(b)(iii) ...

"The Panel further noted that, in the view of Nicaragua, this provision should be interpreted in the light of the basic principles of international law and in harmony with the decisions of the United Nations and of the International Court of Justice and should therefore be regarded as merely providing contracting parties subjected to an aggression with the right of self-defence. The Panel also noted that, in the view of the United States, Article XXI applied to any action which the contracting party taking it considered necessary for the protection of its essential security interests and that the Panel, both by the terms of Article XXI and by its mandate, was precluded from examining the validity of the United States' invocation of Article XXI.

"The Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by its mandate. It recalled that its terms of reference put strict limits on its activities because they stipulated that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States ... The Panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement".¹¹

2. Paragraph (a): "furnish ... any information"

During the discussion at the Third Session of a Czechoslovak complaint concerning United States national security export controls, in response to a request by Czechoslovakia for information under Article XIII:3 on the export licensing system concerned, the US representative stated that while it would comply with a substantial part of the request, "Article XXI ... provides that a contracting party shall not be required to give information which it considers contrary to its essential security interests. The United States does consider it contrary to its security

⁶C/M/159, p. 19; see also C/M/157, p. 8.

⁷C/M/157, p. 12; C/M/159, pp. 14-15.

⁸L/5424, adopted on 29 November 1982, 29S/9, 11.

⁹C/M/188, pp. 2-16; C/M/191, pp. 41-46.

¹⁰C/M/196 at p. 7.

¹¹L/6053, dated 13 October 1986 (unadopted), paras. 5.1-5.3.

interest - and to the security interest of other friendly countries - to reveal the names of the commodities that it considers to be most strategic".¹²

The "Decision Concerning Article XXI of the General Agreement" of 30 November 1982 (see page 605 below) provides *inter alia* that "Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI".¹³

3. Paragraph (b): "action"

(1) *"relating to fissionable materials or the materials from which they are derived"*

The records of the Geneva discussions of the Preparatory Committee indicate that the representative of Australia withdrew its reservation on the inclusion of a reference to "fissionable materials" in the light of a statement that the provisions of Article 35 [XXIII] would apply to Article XXI; see below at page 606.¹⁴

(2) *"relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment"*

During discussions in the Geneva session of the Preparatory Committee, in connection with a proposal to modify Article 37(g) [XX(g)] to permit export restrictions on raw materials for long-term defense purposes, the question was put whether the phrase "for the purpose of supplying a military establishment" would permit restrictions on the export of iron ore when it was believed that the ore would be used by ordinary smelting works and ultimately for military purposes by another country. It was stated in response that "if a Member exporting commodities is satisfied that the purpose of the transaction was to supply a military establishment, immediately or ultimately, this language would cover it".¹⁵

At the Third Session in 1949, Czechoslovakia requested a decision under Article XXIII as to whether the US had failed to carry out its obligations under Articles I and XIII, by reason of the 1948 US administration of its export licensing controls (both short-supply controls and new export controls instituted in 1948 discriminating between destination countries for security reasons). The US stated that its controls for security reasons applied to a narrow group of exports of goods which could be used for military purposes¹⁶ and also stated that "the provisions of Article I would not require uniformity of formalities, as applied to different countries, in respect of restrictions imposed for security reasons".¹⁷ It was also stated by one contracting party that "goods which were of a nature that could contribute to war potential" came within the exception of Article XXI.¹⁸ The complaint was rejected by a roll-call vote of 17 to 1 with 3 abstentions.¹⁹

(3) *"taken in time of war or other emergency in international relations"*

The 1970 Working Party Report on "Accession of the United Arab Republic" notes that in response to concerns raised regarding the Arab League boycott against Israel and the secondary boycott against firms having relations with Israel, the representative of the UAR stated that "the history of the Arab boycott was beyond doubt related to the extraordinary circumstances to which the Middle East area had been exposed. The state of war which had long prevailed in that area necessitated the resorting to this system. ... In view of the political character of this issue, the United Arab Republic did not wish to discuss it within GATT. ... It would not be reasonable to ask that the United Arab Republic should do business with a firm that transferred all or part of its profits from sales to the United Arab Republic to an enemy country".²⁰ Several members of the

¹²GATT/CP.3/38, p. 9.

¹³L/5426, 29S/23-24, para. 1.

¹⁴EPCT/A/PV/33, p. 29; see also EPCT/A/PV/33/Corr. 3.

¹⁵EPCT/A/PV/36, p. 19; see also proposal referred to at EPCT/W/264.

¹⁶GATT/CP.3/38; GATT/CP.3/SR.22, p. 8.

¹⁷GATT/CP.3/SR.22, p. 4-5.

¹⁸GATT/CP.3/SR.20, p. 3-4.

¹⁹GATT/CP.3/SR.22, p. 9; Decision of 8 June 1949 at II/28.

²⁰L/3362, adopted on 27 February 1970, 17S/33, 39, para. 22.

working party supported the views of the representative of the UAR that the background of the boycott measures was political and not commercial.²¹

In November 1975 Sweden introduced a global import quota system for certain footwear. The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated, *inter alia*, that the “decrease in domestic production has become a critical threat to the emergency planning of Sweden’s economic defence as an integral part of the country’s security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations”.²² In the discussion of this measure in the GATT Council, “Many representatives ... expressed doubts as to the justification of these measures under the General Agreement ... Many delegations reserved their rights under the GATT and took note of Sweden’s offer to consult”.²³ Sweden notified the termination of the quotas as far as leather and plastic shoes were concerned as of 1 July 1977.²⁴

In April 1982, the EEC and its member states, Canada, and Australia suspended indefinitely imports into their territories of products of Argentina. In notifying these measures they stated that “they have taken certain measures in the light of the situation addressed in the Security Council Resolution 502 [the Falkland/Malvinas issue]; they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection”.²⁵ Argentina took the position that, in addition to infringing the principles and objectives underlying the GATT, these measures were in violation of Articles I:1, II, XI:1, XIII, and Part IV. The legal aspects of these trade restrictions affecting Argentina were discussed extensively in the Council.²⁶ The measures were removed in June 1982. Argentina sought an interpretation of Article XXI; these efforts led to the inclusion of paragraph 7(iii) in the Ministerial Declaration of November 1982, which provides that “... the contracting parties undertake, individually and jointly: ... to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement”²⁷ and also led to the adoption of the text below at page 605.

On 7 May 1985 the US notified the contracting parties of an Executive Order prohibiting all imports of goods and services of Nicaraguan origin, all exports from the US of goods to or destined for Nicaragua (except those destined for the organized democratic resistance) and transactions relating thereto.²⁸ In Council discussions of this matter, Nicaragua stated that these measures contravened Articles I, II, V, XI, XIII and Part IV of the GATT, and that “this was not a matter of national security but one of coercion”.²⁹ Nicaragua further stated that Article XXI could not be applied in an arbitrary fashion; there had to be some correspondence between the measures adopted and the situation giving rise to such adoption.³⁰ Nicaragua stated that the text of Article XXI made it clear that the CONTRACTING PARTIES were competent to judge whether a situation of “war or other emergency in international relations” existed and requested that a Panel be set up under Article XXIII:2 to examine the issue.³¹ The United States stated that its actions had been taken for national security reasons and were covered by Article XXI:(b)(iii) of the GATT; and that this provision left it to each contracting party to judge what action it considered necessary for the protection of its essential security interest.³² The terms of reference of the Panel precluded it from examining or judging the validity of the invocation of Article XXI:(b)(iii) by the US. Concerning the Panel decision on this issue, see page 601 and the discussion of Article XXIII below. When the Council discussed the Panel Report, Nicaragua requested that the Council recommend removal of the embargo; authorize special support measures for Nicaragua so that countries wanting to do so could grant trade preferences aimed at re-establishing a balance in Nicaragua’s pre-embargo global trade relations and at compensating Nicaragua for the damage caused by the embargo; and

²¹*Ibid.*, 17S/40, para. 23.

²²L/4250, p. 3.

²³C/M/109, p. 8-9.

²⁴L/4250/Add.1; L/4254, p. 17-18.

²⁵L/5319/Rev.1.

²⁶L/5317, L/5336; C/M/157, C/M/159.

²⁷L/5424, adopted on 29 November 1982, 29S/9, 11.

²⁸L/5803.

²⁹C/M/188, p. 4.

³⁰C/M/188, p. 16.

³¹L/5802; C/M/191, pp. 41-46.

³²C/M/191, pp. 41,46.

prepare an interpretative note on Article XXI. Consensus was not reached on any of these alternatives. The Panel Report has not been adopted. At the meeting of the Council on 3 April 1990 Nicaragua announced the lifting of the trade embargo. The representative of the US announced that the conditions which had necessitated action under Article XXI had ceased to exist, his country's national security emergency with respect to Nicaragua had been terminated, and all economic sanctions, including the trade embargo, had been lifted.³³

In November 1991, the European Community notified the contracting parties that the EC and its member States had decided to adopt trade measures against Yugoslavia "on the grounds that the situation prevailing in Yugoslavia no longer permits the preferential treatment of this country to be upheld. Therefore, as from 11 November, imports from Yugoslavia into the Community are applied m.f.n. treatment ... These measures are taken by the European Community upon consideration of its essential security interests and based on GATT Article XXI."³⁴ The measures comprised suspension of trade concessions granted to the Socialist Federal Republic of Yugoslavia under its bilateral trade agreement with the EC; application of certain limitations (previously suspended) to textile imports from Yugoslavia; withdrawal of GSP benefits; suspension of similar concessions and GSP benefits for ECSC products; and action to denounce or suspend the application of the bilateral trade agreements between the EC and its member states and Yugoslavia. On 2 December the Community and its member states decided to apply selective measures in favour of "those parties which contribute to progress toward peace". Economic sanctions or withdrawal of preferential benefits from the Yugoslavia were also taken by Australia, Austria, Canada, Finland, Japan, New Zealand, Norway, Sweden, Switzerland, and the United States.

At the Forty-seventh Session in December 1991, Yugoslavia referred to the Decision of 1982 on notification of measures taken under Article XXI (see page 605 below) and reserved its GATT rights. In February 1992 Yugoslavia requested establishment of a panel under Article XXIII:2, stating that the measures taken by the EC were inconsistent with Articles I, XXI and the Enabling Clause; departed from the letter and intention of paragraph 7(iii) of the Ministerial Decision of November 1982; and impeded the attainment of the objectives of the General Agreement. Yugoslavia further stated:

"The situation in Yugoslavia is a specific one and does not correspond to the notion and meaning of Article XXI(b) and (c). There is no decision or resolution of the relevant UN body to impose economic sanctions against Yugoslavia based on the reasoning embodied in the UN Charter....the 'positive compensatory measures' applied by the European Community to certain parts of Yugoslavia [are] contrary to the MFN treatment of 'products originating in or destined for the territories' - taken as a whole - 'of all contracting parties'".³⁵

In March 1992, the Council agreed to establish a panel with the standard terms of reference unless, as provided in the Decision of 12 April 1989, the parties agreed otherwise within twenty days.³⁶ At the April 1992 Council meeting, in discussion of the notification of the transformation of the Socialist Federal Republic of Yugoslavia (SFRY) into the Federal Republic of Yugoslavia (FRY) consisting of the Republics of Serbia and Montenegro, the EC representative said that until the question of succession to Yugoslavia's contracting party status had been resolved, the Panel process which had been initiated between the former SFRY and the EC no longer had any foundation and could not proceed.³⁷ At the May 1992 Council meeting, in a discussion concerning the status of the FRY as a successor to the former SFRY as a contracting party, the Chairman stated that "In these circumstances, without prejudice to the question of who should succeed the former SFRY in the GATT, and until the Council returned to this issue, he proposed that the representative of the FRY should refrain from participating in the business of the Council". The Council so agreed.³⁸ At the June 1993 Council meeting this decision was modified taking into account United Nations General Assembly Resolution

³³C/M/240, p. 31; L/6661.

³⁴L/6948.

³⁵DS27/2, dated 10 February 1992.

³⁶C/M/255, p. 18.

³⁷C/M/256, p. 32.

³⁸C/M/257 p. 3 and Corr.1.

47/1 to provide that the FRY could not continue automatically the contracting party status of the former SFRY and that it shall not participate in the work of the Council and its subsidiary bodies.³⁹

4. Paragraph (c): “any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security”

India’s 1994 background document for simplified balance-of-payments consultations notes that while almost all of India’s trading partners received most-favoured-nation treatment in the issue of import licences, import licences were not issued for imports from countries facing UN mandated sanctions, at present Iraq, Fiji, Serbia and Montenegro”.⁴⁰ Brazil’s 1994 notification on import licensing notes that the import licensing system of Brazil applies for goods entering from or exported to any country except for those covered by UN embargoes.⁴¹ The import licensing notification of Cyprus similarly notes that imports from certain countries are prohibited in accordance with United Nations resolutions.⁴² The 1993 licencing notification of Norway notes that all imports from Iraq and Serbia/Montenegro are prohibited.⁴³

5. Other invocations of Article XXI

The United States embargo on trade with Cuba, which was imposed by means of Proclamation 3447 by the President of the United States, dated 3 February 1962, was not formally raised in the CONTRACTING PARTIES but notified by Cuba in the inventory of non-tariff measures. The United States invoked Article XXI as justification for its action.⁴⁴

6. Procedures concerning notification of measures under Article XXI

During the Council discussion in 1982 of trade measures for non-economic reasons taken against Argentina (see page 603), it was stated by the countries taking these measures that “Article XXI did not mention notification” and that many contracting parties had, in the past, invoked Article XXI without there having been any notification or challenge to the situation in GATT.⁴⁵ Argentina sought an interpretation of Article XXI. Informal consultations took place during the Thirty-eighth Session in November 1982 in connection with the adoption of the Council report to the CONTRACTING PARTIES, in so far as it related to these trade restrictions.⁴⁶ As a result, on 30 November 1982 the CONTRACTING PARTIES adopted the following “Decision Concerning Article XXI of the General Agreement”:

“*Considering* that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;

“*Noting* that recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement;

“*Recognizing* 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;

³⁹C/M/264, p. 3.

⁴⁰L/5640/Add.7/Rev.6, 18 August 1994; see also BOP/321 of 24 October 1994.

⁴¹L/5640/Add.54.

⁴²L/5640, 24 January 1994.

⁴³L/5640/Add.2/Rev.4, 13 October 1993.

⁴⁴COM.IND/6/Add.4, p. 53 (notification); MTN/3B/4, p. 559 (response citing binding resolution under Inter-American Treaty of Reciprocal Assistance). See also Council discussion May 1986 concerning US measures authorizing denial of sugar import quota to any failing to certify that it does not import sugar produced in Cuba for re-export to the US, stated by US to be a “procedural safeguard” against trans-shipment of sugar in violation of the embargo; C/M/198 p. 33, L/5980. See also statement by Cuba in L/7525.

⁴⁵C/M/159, p. 18.

⁴⁶See L/5414 (Council report); see also C/W/402, W.38/5, L/5426.

“That until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application;

The CONTRACTING PARTIES *decide* that:

“1. Subject to the exception in Article XXI:*a*, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.

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

“3. The Council may be requested to give further consideration to this matter in due course”.⁴⁷

See the references to this Decision above in the case of EC measures on trade with Yugoslavia.

B. RELATIONSHIP BETWEEN ARTICLE XXI AND OTHER ARTICLES OF THE GENERAL AGREEMENT

1. Articles I and XIII

During the discussion at the Third Session of the complaint of Czechoslovakia that US export controls were administered inconsistently with Articles I and XIII (see page 602), the US representative stated that these restrictions were justified under Article XXI(b)(ii). In calling for a decision, the Chairman indicated that Article XXI “embodied exceptions to the general rule contained in Article I”. In a Decision of 8 June 1949 under Article XXIII:2, the CONTRACTING PARTIES rejected the contention of the Czechoslovak delegation.⁴⁸

2. Article XXIII

During discussions in Geneva in 1947 in connection with the removal of the provisions now contained in Article XXI and their relocation in a separate exception (Article 94) at the end of the Charter, the question was raised whether the dispute settlement provisions of Article 35 of the New York Draft [XXII/XXIII] would nevertheless apply. It was stated that “It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that a Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article”.⁴⁹ The addition of a note to clarify that the provisions of paragraph 2 of Article 35 [XXIII] applied to Article 94 was rejected as unnecessary.⁵⁰

See the discussion above of the Czechoslovak complaint concerning export controls, in which the CONTRACTING PARTIES made a decision under Article XXIII:2 as to “whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences”.⁵¹

During the discussion of the trade restrictions affecting Argentina applied for non-economic reasons, the view was expressed “that the provisions of Article XXI were subject to those of Article XXIII:2”. Argentina reserved its rights under Article XXIII in respect of any injury resulting from trade restrictions applied in the context of Article XXI.⁵²

⁴⁷L/5426, 29S/23.

⁴⁸GATT/CP.3/SR.22, p. 9; II/28.

⁴⁹EPCT/A/PV/33, p. 26-27.

⁵⁰EPCT/A/PV/33 p. 27-29 and EPCT/A/PV/33/Corr.3.

⁵¹GATT/CP.3/SR.22, p. 9.

⁵²C/M/157, p. 9; C/M/159, p. 14; C/M/165, p. 18.

Paragraph 2 of the “Decision Concerning Article XXI of the General Agreement” of 30 November 1982 stipulates that “... when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement”.⁵³

The 1984 Panel Report on “United States - Imports of Sugar from Nicaragua” examined the action taken by the US government to reduce the share of the US sugar import quota allocated to Nicaragua and distribute the reduction in Nicaragua’s allocation to El Salvador, Honduras and Costa Rica. The Panel Report notes that “The United States stated that it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms ... the action of the United States did of course affect trade, but was not taken for trade policy reasons”.⁵⁴

“The Panel noted that the measures taken by the United States concerning sugar imports from Nicaragua were but one aspect of a more general problem. The Panel, in accordance with its terms of reference ... examined those measures solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute.”⁵⁵

“... The Panel ... concluded that the sugar quota allocated to Nicaragua for the fiscal year 1983/84 was inconsistent with the United States’ obligations under Article XIII:2.

“The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua’s quota could be justified under any such provision.”⁵⁶

The follow-up on the Panel report was discussed in the Council meetings of May and July 1984. The United States said that it “had not obstructed Nicaragua’s resort to GATT’s dispute settlement process; it had stated explicitly the conditions under which the issue might be resolved; and it recognized that Nicaragua had certain rights under Article XXIII which it had reserved and could continue to exercise”.⁵⁷ Nicaragua stated that it was aware of its rights under Article XXIII.

In July 1985, following a request by Nicaragua for the establishment of a panel to review certain US trade measures affecting Nicaragua, the right of a contracting party to invoke Article XXIII in cases involving Article XXI was discussed again in the GATT Council.⁵⁸ At its meetings in October 1985 and March 1986 respectively the Council established a panel with the following terms of reference to deal with the complaint by Nicaragua:

“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”.⁵⁹

In the Panel Report on “United States - Trade Measures affecting Nicaragua”, which has not been adopted, the Panel noted the different views of the parties regarding whether the United States’ invocation of Article XXI(b)(iii) was proper, and concluded that this issue was not within its terms of reference; see above at page 601. With regard to Nicaragua’s claim of non-violation nullification or impairment, the Panel “decided not

⁵³29S/24.

⁵⁴L/5607, adopted on 13 March 1984, 31S/67, 72, para. 3.10.

⁵⁵*Ibid.*, 31S/73, para. 4.1.

⁵⁶*Ibid.*, 31S/74, paras. 4.3-4.4.

⁵⁷C/M/178, p. 27.

⁵⁸C/M/191, pp.41-46.

⁵⁹C/M/196, p. 7.

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".⁶⁰

When the Panel's report was discussed by the Council in November 1986, the US representative stated that "Nullification or impairment when no GATT violation had been found was a delicate issue, linked to the concept of 'reasonable expectations'. It was not simply a question of trade damage, since no one doubted the existence of trade damage. Applying the concept of 'reasonable expectations' to a case of trade sanctions motivated by national security considerations would be particularly perilous, since at a broader level those security considerations would nevertheless enter into expectations ... the Panel had acted wisely in refraining from a decision that could create a precedent of much wider ramifications for the scope of GATT rights and obligations ...".⁶¹ The representative of Nicaragua stated that her delegation could not support adoption of the report, *inter alia* because it could only be adopted once the Council was in a position to make recommendations.⁶²

C. RELATIONSHIP BETWEEN ARTICLE XXI AND GENERAL INTERNATIONAL LAW

The 1986 Panel Report on "United States - Trade Measures Affecting Nicaragua", which has not been adopted, notes the different views of the parties to the dispute concerning the relationship between Article XXI and general international law including decisions of the United Nations and the International Court of Justice.⁶³

In discussion at the Forty-seventh Session in December 1991 concerning trade measures for non-economic purposes against Yugoslavia, the representative of India stated that "India did not favour the use of trade measures for non-economic reasons. Such measures should only be taken within the framework of a decision by the United Nations Security Council. In the absence of such a decision or resolution, there was a serious risk that such measures might be unilateral or arbitrary and would undermine the multilateral trading system".⁶⁴

III. PREPARATORY WORK

In the US Draft Charter, and London and New York Draft Charter texts, the Article on exceptions to the commercial policy chapter included the provisions of what is now GATT Article XXI (see Article 32, US draft; Article 37, London and New York drafts). Also in these drafts, the exceptions clause for the chapter on commodity agreements included provisions excepting arrangements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and traffic in goods and materials for the purpose of supplying a military establishment; or in time of war or other emergency in international relations, to the protection of the essential security interests of a member (Article 49:2, US Draft; Article 59(2), London Draft; Article 59(c), New York Draft). At Geneva it was decided to take paragraphs (c), (d), (e) and (k) of Article 37 and place them in a separate Article.⁶⁵ It was agreed that this Article would be a general exception applicable to the entire Charter.⁶⁶ The corresponding security exception was also removed from the commodity chapter. The security exception provisions became Article 94 in Chapter VII of the Geneva draft Charter, which was virtually identical to the present text of Article XXI.

The text of Article 94 was extensively discussed at Havana in the Sixth Committee on Organization. Article 94 became Article 99 of the Charter on General Exceptions, of which paragraphs 1(a) and (b) were almost identical to those of Article XXI, the only differences being (i) an addition in the first line of paragraph (b) as follows: "to prevent any Member from taking, *either singly or with other States*, any action ...", and (ii) an addition to paragraph (b)(ii) as follows: "a military establishment *of any other country*". Article 99 also included a paragraph 1(c) exempting intergovernmental military supply agreements⁶⁷; a paragraph 1(d) on

⁶⁰L/6053 (unadopted), dated 13 October 1986, paras. 5.4-5.11.

⁶¹C/M/204, p. 9.

⁶²C/M/204, p. 17. See also communication from Nicaragua at C/W/506.

⁶³L/6053, unadopted, dated 13 October 1986, para. 5.2.

⁶⁴SR.47/3, p. 5.

⁶⁵See proposal at EPCT/W/23, reports on discussions in Commission A (commercial policy) at EPCT/WP.1/SR/11, EPCT/103 p. 43, EPCT/A/PV/25 p. 38-42.

⁶⁶EPCT/A/PV/25 p.39-42.

⁶⁷See Havana Reports, p. 118, para. 32 and p. 145-147.

trade relations between India and Pakistan (dealt with in the General Agreement by the provisions of Article XXIV:11); and a paragraph 2 providing that nothing in the Charter would override the provisions of peace treaties resulting from the Second World War or UN instruments creating trust territories or other special regimes.

However, “on examining several of the proposals submitted by delegations relating to action taken in connection with political matters or with the essential interests of Members, the Committee concluded that the provisions regarding such action should be made in connection with an article on ‘Relations with the United Nations’, since the question of the proper allocation of responsibility as between the Organization and the United Nations was involved”.⁶⁸ Accordingly a new Article 86 of the Charter on “Relations with the United Nations” was drafted, including the former paragraph 1(c) of Article 94 [XXI:(c)].

Article 86 of the Charter dealt with various institutional questions such as the conclusion of a specialized agency agreement between the ITO and the UN. It also stated, in paragraphs 3 and 4, that:

“3. The Members recognize that the Organization should not attempt to take action which would involve passing judgement in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.

“4. No action, taken by a Member in pursuance of its obligations under the United Nations Charter for the maintenance or restoration of international peace and security, shall be deemed to conflict with the provisions of this Charter”.

The interpretative notes to paragraph 3 provided that:

“1. 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 in accordance with the provisions of Chapters IV or VI of the United Nations Charter, the responsibility for making a determination on the question shall rest with the Organization. If, however, political issues beyond the competence of the Organization are involved in making such a determination, the question shall be deemed to fall within the scope of the United Nations.

“2. If a Member which has no direct political concern in a matter brought before the United Nations considers that a measure taken directly in connection therewith and falling within the scope of paragraph 3 of Article 86 constitutes a nullification or impairment within the terms of paragraph 1 of Article 93, it shall seek redress only by recourse to the procedures set forth in Chapter VIII of this Charter”.

The purpose of these provisions was explained by the Sixth Committee as follows:

“Paragraph 3 of Article [86], which like paragraph 4 is independent in its operation, is designed to deal with any measure which is directly in connection with a political matter brought before the United Nations in a manner which will avoid conflict of responsibility between the United Nations and the Organization with respect to political matters. The Committee agreed that this provision would cover measures maintained by a Member even though another Member had brought the particular matter before the United Nations, so long as the measure was taken directly in connection with the matter. It was also agreed that such a measure, as well as the political matter with which it was directly connected, should remain within the jurisdiction of the United Nations and not within that of the Organization. The Committee was of the opinion that the important thing was to maintain the jurisdiction of the United Nations over political matters and over economic measures of this sort taken directly in connection with such a political matter, and nothing in Article [86] could be held to prejudice the freedom of action of the United Nations to settle such matters and to take steps to deal with such economic measures in accordance with the provisions of the Charter of the United Nations if they see fit to do so.

⁶⁸Havana Reports, p. 153, para. (a).

“It was the view of the Committee that the word ‘measure’ in paragraph 3 of Article [86] refers only to a measure which is taken directly in connection with a political matter brought before the United Nations in accordance with Chapters IV and VI of the Charter of the United Nations and does not refer to any other measure”.⁶⁹

The Charter provisions in Articles 86 and 99 were not taken into the General Agreement. While Article XXIX:1 provides that “The contracting parties undertake to observe ... the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter”, the Note *Ad* Article XXIX:1 provides that “Chapters VII and VIII ... have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization”. In this connection, during the discussion at the Sixth Session of the CONTRACTING PARTIES of the US suspension of trade relations with Czechoslovakia it was stated with reference to Article 86, paragraph 3 of the Havana Charter that “although Chapter VII of the Charter was not specifically included by reference in Article XXIX of the Agreement, it had surely been the general intention that the principles of the Charter should be guiding ones for the CONTRACTING PARTIES”.⁷⁰

The present text of Article XXI dates from the 30 October 1948 Geneva Final Act. It has never been amended. Amendment of Article XXI was neither proposed nor discussed in the 1954-55 Review Session.

IV. RELEVANT DOCUMENTS

Geneva

Discussion: EPCT/WP.1/SR/11
 EPCT/A/SR/25, 30, 33, 40(2)
 EPCT/A/PV/25, 30, 33, 40(2)
 Reports: EPCT/103
 Other: EPCT/W/23

See also London, New York and Geneva document references concerning Article XX.

Havana

Discussion: E/CONF.2/C.5/SR.14
 E/CONF.2/C.6/SR.18, 19, 37 and
 Add.1
 Reports: E/CONF.2/C.5/14
 E/CONF.2/C.6/45, 93, 104
 Other: E/CONF.2/C.6/12/Add.9
 E/CONF.2/C.6/W/48

⁶⁹Havana Reports, p. 153-154, paras. (b)-(c).

⁷⁰GATT/CP.6/SR.12, p. 4.