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**UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM  
PRODUCTS**

REPORT OF THE PANEL

*Appendices*

This supplement contains Appendices A and B to the Report of the Panel to be found in document WT/DS556/R.

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**APPENDIX A: MATERIALS SUBMITTED BY THE PARTIES ON URUGUAY ROUND  
NEGOTIATIONS OF THE AGREEMENT ON SAFEGUARDS**

**EXHIBITS REFERRED TO IN APPENDIX A**

<b>Panel Exhibit</b>	<b>Short Title</b>	<b>Title</b>
USA-190	Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991)	Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations (20 December 1991), MTN.TNC/W/FA
USA-215	June 1989 draft text	Negotiating Group on Safeguards, Draft Text by the Chairman (27 June 1989), MTN.GNG/NG9/W/25
USA-216	January 1990 draft text	Negotiating Group on Safeguards, Draft Text by the Chairman (15 January 1990), MTN.GNG/NG9/W/25/Rev.1
USA-217	July 1990 draft text	Negotiating Group on Safeguards, Chairman's Report on Status of Work in the Negotiating Group (13 July 1990), MTN.GNG/NG9/W/25/Rev.2
USA-220	October 1990 draft text	Negotiating Group on Safeguards, Draft Text of an Agreement (31 October 1990), MTN.GNG/NG9/W/25/Rev.3

## 1 INTRODUCTION

1.1. The parties in this dispute have referred to various materials from the Uruguay Round of negotiations to support their interpretations of Article 11.1(c) of the Agreement on Safeguards. The Panel recalls its conclusions in section 7.8.2 of the Panel Report based on the interpretation of Article 11.1(c) of the Agreement on Safeguards according to customary rules of interpretation of public international law, including Articles 31 and 33 of the Vienna Convention. The Panel does not consider that its interpretive conclusions regarding Article 11.1(c) of the Agreement on Safeguards leave the meaning of that provision ambiguous or obscure, nor does the Panel find that they lead to a result which is manifestly absurd or unreasonable. The Panel also notes the parties' agreement that recourse to supplementary means of interpretation under Article 32 of the Vienna Convention only serves to confirm the meaning of Article 11.1(c) of the Agreement on Safeguards as determined through the application of Article 31 of the Vienna Convention.<sup>1</sup>

1.2. The Panel will therefore examine the documents submitted as the negotiating history of Article 11.1(c) of the Agreement on Safeguards to confirm the meaning of the terms of that provision. The Panel will begin by providing an overview of the materials submitted by the parties as the negotiating history of Article 11.1(c) and their arguments in relation to these materials, followed by an assessment of the contents of these materials in relation to the interpretive issues raised in this dispute.

## 2 ARGUMENTS AND MATERIALS SUBMITTED BY PARTIES

### 2.1 June 1989 draft text

2.1. In the context of the multilateral trade negotiations of the Uruguay Round, the Chairperson of the Negotiating Group on Safeguards circulated several draft texts for an agreement on safeguards. A draft text issued on 27 June 1989 provided in relevant part:

4. A contracting party [or a customs union] may apply safeguard measures to a product being imported into its territory, only in a situation in which other GATT provisions do not provide specific remedies (e.g. Articles VI, XVI or XXVIII), and on the conditions that: ...<sup>2</sup>

### 2.2 January 1990 draft text

2.2. A revised draft, circulated on 15 January 1990, removed the references to "Articles VI, XVI or XXVIII" in paragraph 4 of the June 1989 draft text as follows:

4. A contracting party [or a customs union] may apply a safeguard measure to a product being imported into its territory only in a situation in which other provisions of the General Agreement do not provide specific remedies and on the conditions that: ...<sup>3</sup>

### 2.3 July 1990 draft text

2.3. Negotiations continued on the basis of draft texts by the Chairperson, who issued a new draft on 13 July 1990 "indicating the general trend of discussion of the Negotiating Group".<sup>4</sup> Unlike the draft texts of June 1989 and January 1990, this draft did not stipulate that safeguard measures could only be applied in the absence of "specific remedies" under other GATT provisions. Instead,

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<sup>1</sup> See e.g. United States' responses to Panel question No. 98; Switzerland's response to Panel question No. 98.

<sup>2</sup> June 1989 draft text, (Exhibit USA-215), p. 1. The "conditions" under this draft provision were: (a) "an unforeseen, sharp and substantial increase in the quantity of such product being imported"; (b) a determination by "competent national authorities" that "such increase is causing serious injury to domestic producers of like or directly competitive products"; and (c) "the measures are applied to products from all sources".

<sup>3</sup> January 1990 draft text, (Exhibit USA-216), p. 1. This draft included revised wording of the "conditions" regarding the increase of imports and the determination by competent authorities of serious injury caused to domestic producers, while moving the provision on application to products from all sources to another paragraph.

<sup>4</sup> July 1990 draft text, (Exhibit USA-217), p. 1.

Section I of this draft set out certain "General" provisions in two paragraphs, where paragraph 1 defined what "a safeguard measure shall be understood to mean"<sup>5</sup> and paragraph 2 stated:

2. The provisions of paragraph 1 above do not prejudice the rights and obligations of contracting parties regarding trade-restrictive measures taken in conformity with specific provisions of the General Agreement other than Article XIX, protocols, and agreements and arrangements negotiated under the auspices of GATT.<sup>6</sup>

#### **2.4 October 1990 draft text**

2.4. A revised draft text, accepted as "a working paper for the very final phase of the negotiations" of an agreement on safeguards, was circulated on 31 October 1990 to represent the level of agreement reached in the Negotiating Group on Safeguards at that stage.<sup>7</sup> The "General" section of this draft contained a single paragraph, stating that "[t]his agreement establishes rules for the application of safeguard measures".<sup>8</sup> In Section VII titled "Prohibition and Elimination of Certain Measures", the draft contained the following bracketed text:

24. No trade-restrictive measure shall be sought or taken by a contracting party unless it conforms with the provisions of Article XIX as interpreted by the provisions of this agreement, or is consistent with other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement. These include actions taken by a single contracting party as well as actions under agreements, arrangements and understandings entered into by two or more contracting parties. Any such measure in effect at the time of entry into force of this agreement shall either be brought into conformity with the provisions of Article XIX and this agreement or phased out in accordance with paragraph 25 below.<sup>9</sup>

#### **2.5 Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991)**

2.5. On 20 December 1991, the Chairperson of the Trade Negotiations Committee tabled the "Draft Final Act" embodying the results of the Uruguay Round of negotiations, including a draft agreement on safeguards, with the understanding that this "offer[ed] a concrete and comprehensive representation of the final global package of the results of the Uruguay Round".<sup>10</sup> Section VI of the draft agreement on safeguards addressed "Prohibition and Elimination of Certain Measures" and divided paragraph 24 of the October 1990 draft text into three parts as follows:

22. (a) A contracting party shall not take or seek any emergency action on imports of particular products as set forth in Article XIX unless such action conforms with the provisions of Article XIX of the General Agreement applied in accordance with this agreement.

(b) Furthermore, a contracting party shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.<sup>[1],[2]</sup> These include actions taken by a single contracting party as well as actions under agreements, arrangements and understandings entered into by two or more contracting parties. Any such measure in effect at the time of entry into force of this agreement shall be brought into conformity with this provision or phased out, in accordance with paragraph 23 below.

(c) Measures sought, taken or maintained by a contracting party pursuant to other provisions of the General Agreement, or protocols and agreements or arrangements

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<sup>5</sup> July 1990 draft text, (Exhibit USA-217), p. 3.

<sup>6</sup> July 1990 draft text, (Exhibit USA-217), p. 3.

<sup>7</sup> October 1990 draft text, (Exhibit USA-220), p. 1.

<sup>8</sup> October 1990 draft text, (Exhibit USA-220), p. 3.

<sup>9</sup> October 1990 draft text, (Exhibit USA-220), p. 9.

<sup>10</sup> Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190).

concluded within the framework of the General Agreement are not included in the scope of this agreement.<sup>11</sup>

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<sup>1</sup> An import quota applied as a safeguard measure in conformity with the relevant provisions of the General Agreement may, by mutual agreement, be administered by the exporting contracting party.

<sup>2</sup> Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

## 2.6 Arguments by the parties

2.6. According to the United States, while early draft texts of the Agreement on Safeguards would have limited the right to apply a safeguard measure to situations in which certain other provisions of the GATT 1994 were not available<sup>12</sup>, negotiators subsequently abandoned this approach to make clear that the proposed agreement would not prejudice a Member's ability to take action pursuant to GATT provisions other than Article XIX.<sup>13</sup>

2.7. In this regard, the United States refers to the October 1990 draft text and the use of the word "or" in paragraph 24 of that draft. For the United States, this confirms that Members could seek or take trade-restrictive measures that were "*either* in conformity with Article XIX *or* consistent with other provisions of the General Agreement (including Article XXI)" and that "the availability of Article XIX as a release from obligations does not constrain a Member's ability to take action pursuant to other provisions of the GATT 1994".<sup>14</sup>

2.8. The United States also advances several arguments in relation to the Draft Final Act embodying the results of the Uruguay Round. The United States notes that the text that would become Article 11.1(c) was revised in this draft to explicitly refer to the scope of "this agreement" and was moved so that it appeared after the text that would become Article 11.1(b).<sup>15</sup> The United States considers these two changes to indicate that the entire Agreement on Safeguards, including Article 11.1(b), is subject to Article 11.1(c).<sup>16</sup> The United States further considers relevant that the language in the Draft Final Act stating that measures sought, taken, or maintained pursuant to other GATT provisions "are not included in the scope of" the proposed agreement on safeguards was replaced in the final text of Article 11.1(c) with a "more definite statement" that the Agreement on Safeguards "does not apply" to such measures. The United States maintains that in this way, the final text makes even clearer that a Member's ability to seek, take, or maintain safeguard measures does not constrain a Member's ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI.<sup>17</sup>

2.9. Regarding the terms "pursuant to" in Article 11.1(c), the United States notes that the Draft Final Act changed the references in the October 1990 draft text to "measures ... consistent with other provisions of the General Agreement" and in the July 1990 draft to measures "taken in conformity with specific provisions of the General Agreement". For the United States, by referring instead to measures sought, taken, or maintained "pursuant to" other GATT provisions, the Draft Final Act underscores that the Agreement on Safeguards does not apply to measures that a Member "has tried to do, succeeded in doing or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX".<sup>18</sup>

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<sup>11</sup> Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), pp. M.6-M.7.

<sup>12</sup> United States' response to Panel question No. 94. See also United States' second written submission, paras. 221-222.

<sup>13</sup> United States' second written submission, paras. 223-224 (referring to July 1990 draft text, (Exhibit USA-217)).

<sup>14</sup> United States' second written submission, para. 226. (emphasis original)

<sup>15</sup> United States' response to Panel question No. 94 (further noting that in earlier drafts of the Agreement on Safeguards, the provision that would become Article 11.1(b) was placed after the text that would become Article 11.1(c) in the final Agreement).

<sup>16</sup> United States' response to Panel question No. 94 (also arguing that by placing the reference to "This Agreement" at the beginning of Article 11.1(c) in the Agreement on Safeguards, the final text of this Agreement makes even clearer that the text of Article 11.1(c) applies to the entire Agreement on Safeguards).

<sup>17</sup> United States' second written submission, paras. 229-230.

<sup>18</sup> United States' response to Panel question No. 98.

2.10. Switzerland refers to the evolution of the provision that would become Article 11.1(c) between July 1990 and December 1991. Switzerland considers the relevant draft texts to indicate that by agreeing to safeguard disciplines, WTO Members would not limit their rights to impose other restrictive measures permitted under specific provisions of the GATT or other covered agreements.<sup>19</sup> Switzerland further argues that at the same time, other provisions of what became Article 11 of the Agreement on Safeguards made clear that safeguard measures must be consistent with Article XIX of the GATT and the Agreement on Safeguards, and that grey area measures are prohibited.<sup>20</sup>

2.11. In addition, Switzerland notes that while earlier drafts of the Agreement on Safeguards included the terms "in conformity with" and "consistent with", these were later replaced by the terms "pursuant to". For Switzerland, this confirms that what is relevant for Article 11.1(c) is whether the measure taken "falls within the scope of" provisions "other than" Article XIX. With respect to the terms "other than", Switzerland contends that the negotiating history indicates that "measures to which the Agreement on Safeguards does not apply are measures taken pursuant to other provisions *except* Article XIX of the GATT."<sup>21</sup>

### 3 ASSESSMENT BY THE PANEL

3.1. Based on the parties' arguments and the relevant interpretive issues in this dispute, the Panel will begin by reviewing the evolution of the text that became Article 11.1(c) of the Agreement on Safeguards and its relation to the other draft provisions of the Agreement on Safeguards. The Panel will then review the language used in various draft texts of the Agreement on Safeguards corresponding to the terms "pursuant to" and "other than" in the final text of Article 11.1(c) of that agreement. Finally, the Panel will make some concluding observations on the parties' arguments concerning other paragraphs of the draft texts considered in this Appendix as well as additional materials submitted as the negotiating history of Article XIX of the GATT 1994 and the Agreement on Safeguards.

3.2. Early draft texts for an agreement on safeguards did not contain explicit references to the inapplicability of the proposed agreement to certain measures. Nevertheless, negotiators acknowledged the rights and obligations of contracting parties provided in other GATT provisions. In this regard, the June 1989 and the January 1990 draft texts recognized certain "specific remedies" provided in "other provisions of the General Agreement".<sup>22</sup> Notably, the July 1990 draft stipulated that the provision of that draft text on what "a safeguard measure shall be understood to mean" would "*not prejudice* the rights and obligations of contracting parties regarding trade-restrictive measures taken in conformity with specific provisions of the General Agreement other than Article XIX".<sup>23</sup> These documents indicate that the proposed agreement on safeguards was intended to preserve "specific remedies" or "trade-restrictive measures" available to Members under other GATT provisions.

3.3. Subsequent draft texts similarly reflect the intention that the rights of the contracting parties under other GATT provisions be preserved as part of the establishment of safeguard disciplines. In the draft text of October 1990, the corresponding provision to Article 11.1(c) of the Agreement on Safeguards was framed as a prohibition of "trade-restrictive measure[s]" with two exceptions: measures that "conform[] with the provisions of Article XIX as interpreted by the provisions of this agreement [on safeguards]" or measures that were "consistent with other provisions of the General Agreement".<sup>24</sup> In this manner, the draft text of October 1990 recognized that contracting parties were permitted to seek or take trade-restrictive measures consistent with GATT provisions other than Article XIX, notwithstanding the disciplines of an agreement on safeguards. The Draft Final Act embodying the result of the Uruguay Round of negotiations reaffirmed this by explicitly setting out the scope of the proposed agreement on safeguards. In addition to noting that the proposed

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<sup>19</sup> Switzerland's response to Panel question No. 94 (referring to Exhibit CHE-84, which states that the obligation "not to take safeguard action except through invocation of Article XIX" is "[w]ithout prejudice to the rights and obligations of GATT contracting parties regarding restrictive measures permitted for specified purposes under the terms of other GATT provisions"). See also Switzerland's response to Panel question No. 98.

<sup>20</sup> Switzerland's response to Panel question No. 98.

<sup>21</sup> Switzerland's response to Panel question No. 98. (emphasis original)

<sup>22</sup> January 1990 draft text, (Exhibit USA-216), p. 1. See also June 1989 draft text, (Exhibit USA-215), p. 1 (referring to "specific remedies" provided in "other GATT provisions").

<sup>23</sup> July 1990 draft text, (Exhibit USA-217), p. 3. (emphasis added)

<sup>24</sup> October 1990 draft text, (Exhibit USA-220), p. 9.

agreement "establishes rules for the application of safeguard measures", the Draft Final Act provided that measures sought, taken or maintained pursuant to "other provisions of the General Agreement" were "*not included in the scope of [that] agreement*".<sup>25</sup>

3.4. The Panel finds this negotiating history to confirm that the Agreement on Safeguards does not preclude measures "pursuant to provisions of GATT 1994 other than Article XIX" and Article 11.1(c) removes such measures from the scope of application of the Agreement.<sup>26</sup> The Panel further notes that none of the draft texts discussed above contained provisions limiting or otherwise subordinating the provision that became Article 11.1(c) to other parts of the draft texts that became Articles 11.1(a) and 11.1(b) of the Agreement on Safeguards. Accordingly, the negotiating history of the Agreement on Safeguards supports the Panel's interpretation that Article 11.1(c) governs the inapplicability of the Agreement on Safeguards as a whole, including the rules specified in Article 11.1(a) and the prohibition under Article 11.1(b).<sup>27</sup>

3.5. Regarding the terms "pursuant to" in Article 11.1(c) of the Agreement on Safeguards, the Panel observes that early drafts of the Agreement on Safeguards contained references to measures that were "taken in conformity with" provisions of the GATT 1994 other than Article XIX and measures that were "consistent with" such other provisions. However, these references were not retained in subsequent draft texts. In particular, in the Draft Final Act embodying the results of the Uruguay Round, negotiators agreed to exclude measures that were "*pursuant to* other provisions of the General Agreement" from the scope of the proposed agreement on safeguards.<sup>28</sup> The fact that negotiators deleted draft language requiring conformity or consistency from the provision in the Draft Final Act corresponding to Article 11.1(c) supports the Panel's conclusion that the terms "pursuant to" in Article 11.1(c) do not denote a standard of consistency with provisions of the GATT 1994 other than Article XIX.

3.6. The evolution of the provision that became Article 11.1(a) of the Agreement on Safeguards confirms this understanding. In the draft text of October 1990, the corresponding provision referred to trade-restrictive measures that "conform[] with the provisions of Article XIX as interpreted by the provisions of this agreement".<sup>29</sup> This explicit reference to conformity was retained in the Draft Final Act of the Uruguay Round negotiations, which precluded "emergency action on imports of particular products as set forth in Article XIX unless such action *conforms with* the provisions of Article XIX of the General Agreement applied *in accordance with this agreement*".<sup>30</sup> Thus, negotiators retained terms from the early draft texts of Article 11.1(a) expressing a requirement of consistency or conformity in the Draft Final Act of the Uruguay Round.<sup>31</sup> By contrast, similar terms from the early draft texts of Article 11.1(c) were deleted and replaced with the phrase "pursuant to" in the Draft Final Act of the Uruguay Round. This contrast provides further support for the Panel's conclusions regarding the meaning of "pursuant to" in Article 11.1(c).

<sup>25</sup> Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), p. M.7. (emphasis added)

<sup>26</sup> The parties to this dispute have also advanced arguments relating to communications from certain countries during the Uruguay Round of negotiations regarding the proposed agreement on safeguards. (See United States' response to Panel question No. 81; closing statement at the second meeting of the Panel, para. 35. See also Switzerland's response to Panel question Nos. 81 and 94). The Panel observes that these communications aim to set out the views of certain countries on the scope of issues that should be discussed in the Negotiating Group on Safeguards. The Panel also notes that these communications do not indicate a shared understanding by all negotiators on the scope of the proposed agreement on safeguards or the meaning of its terms. The Panel therefore does not consider it necessary to further examine the content of these communications to confirm its interpretation of the terms of Article 11.1(c).

<sup>27</sup> The Panel notes that the placement of the various draft texts of Article 11.1(c) changed in the course of negotiations. The Panel does not consider the placement of these draft provisions in itself to be determinative of the function of Article 11.1(c) or its relation to draft texts of Articles 11.1(a) and 11.1(b).

<sup>28</sup> Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), p. M.7 (emphasis added).

<sup>29</sup> October 1990 draft text, (Exhibit USA-220), p. 9.

<sup>30</sup> Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), p. M.6. (emphasis added)

<sup>31</sup> The Panel also notes the requirement in early draft texts to bring certain measures in effect at the time of entry into force of the proposed agreement on safeguards into "conformity" with the provisions of Article XIX of the GATT and that agreement. The wording of this requirement was retained in paragraph 22(b) of the Draft Final Act, which later became Article 11.1(b) of the Agreement on Safeguards. (See October 1990 draft text, (Exhibit USA-220), p. 9; Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), p. M.7).

3.7. Regarding the terms "other than" in Article 11.1(c), the Panel notes that the draft texts discussed above use the formulations "other GATT provisions"<sup>32</sup>, "other provisions of the General Agreement"<sup>33</sup>, and "specific provisions of the General Agreement other than Article XIX".<sup>34</sup> The Panel does not find these various formulations to provide additional clarity as to the ordinary meaning of the terms "other than" in the context of Article 11.1(c). Nor does the Panel find these draft texts to indicate an intention to impose a qualification with respect to being "other than Article XIX" in Article 11.1(c). The Panel notes that early draft texts of the Agreement on Safeguards contained references to "specific remedies" in "other GATT provisions"<sup>35</sup> and "specific provisions of the General Agreement other than Article XIX".<sup>36</sup> The Panel does not consider that the word "specific" in these draft texts in itself indicates an additional requirement or limitation of being exclusively pursuant to another GATT provision, and in any event, this word was removed from subsequent draft texts of Article 11.1(c) of the Agreement on Safeguards.<sup>37</sup> Accordingly, the analysis of these draft texts confirms, or at least does not undermine, the Panel's conclusion that the terms "other than" in Article 11.1(c) do not impose an additional requirement or limitation of being exclusively pursuant to another provision.

3.8. In their submissions on the negotiating history of Article XIX of the GATT 1994 and the Agreement on Safeguards, the parties also discuss other paragraphs of the draft texts considered in this Appendix and certain additional materials.<sup>38</sup> The Panel notes that the parties' arguments in this regard do not relate to Article 11.1(c) of the Agreement on Safeguards. Rather, the parties discuss these materials in relation to their arguments on the "condition precedent" for the right to take action under Article XIX of the GATT 1994, "invocation" of Article XIX of the GATT 1994, and measures within the scope of Article 11.1(b) of the Agreement on Safeguards. As discussed in section 7.8.2 of the Panel Report, the Panel focuses its assessment on the terms of Article 11.1(c) of the Agreement on Safeguards and, in particular, the meaning of the terms "pursuant to" and "other than" in that provision. Accordingly, the Panel does not find it necessary for the purposes of this dispute to address the parties' arguments in relation to other paragraphs of the draft texts considered in this Appendix and the additional materials submitted as the negotiating history of Article XIX of the GATT 1994 and the Agreement on Safeguards.

3.9. Based on the foregoing, the Panel finds that the negotiating history of Article 11.1(c) of the Agreement on Safeguards confirms the Panel's interpretation of that provision according to Articles 31 and 33 of the Vienna Convention.

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<sup>32</sup> June 1989 draft text, (Exhibit USA-215), p. 1.

<sup>33</sup> January 1990 draft text, (Exhibit USA-216), p. 1; October 1990 draft text, (Exhibit USA-220), p. 9; and Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), p. M.7.

<sup>34</sup> July 1990 draft text, (Exhibit USA-217), p. 3.

<sup>35</sup> June 1989 draft text, (Exhibit USA-215), p. 1. See also January 1990 draft text, (Exhibit USA-216), p. 1.

<sup>36</sup> July 1990 draft text, (Exhibit USA-217), p. 3.

<sup>37</sup> October 1990 draft text, (Exhibit USA-220), p. 9; Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), p. M.7.

<sup>38</sup> See United States' response to Panel question Nos. 18, 19 and 98; second written submission, sections IV.A.5 and IV.B.4.a; and opening statement at the second meeting of the Panel, para. 23. See also Switzerland's opening statement at the second meeting of the Panel, paras. 24-25; response to Panel question No. 94.

**APPENDIX B: MATERIALS SUBMITTED BY THE PARTIES ON THE INTERPRETATION OF  
ARTICLE XXI OF THE GATT 1994**

**EXHIBITS REFERRED TO IN APPENDIX B**

<b>Exhibit Number</b>	<b>Short title (if applicable)</b>	<b>Long title</b>
USA-24	--	GATT CONTRACTING PARTIES, Third Session, Agenda (Revised 8 April 1949), GATT/CP.3/2/Rev.2
USA-25	Statement by the Head of the Czechoslovak Delegation	GATT CONTRACTING PARTIES, Third Session, Statement by the Head of the Czechoslovak Delegation (30 May 1949), GATT/CP.3/33
USA-26	--	GATT CONTRACTING PARTIES, Third Session, Reply by the Vice Chairman of the US Delegation (2 June 1949), GATT/CP.3/38
USA-27	Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949)	GATT CONTRACTING PARTIES, Third Session, Summary of the twenty-second meeting (8 June 1949), GATT/CP.3/SR.22
USA-28	--	GATT, Basic Instruments and Selected Documents, Volume II (Decisions, Declarations, Resolutions, Rulings and Reports), May 1952
USA-31	Report of the First Session of the Preparatory Committee	United Nations Conference on Trade and Development, Report of the First Session of the Preparatory Committee (31 October 1946), E/PC/T/33
USA-32	--	United Nations Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, Committee II, Technical Subcommittee, Second meeting (21 October 1946), E/PC/T/C.II/W.5
USA-33	Report of the Drafting Committee of the Preparatory Committee	United Nations Economic and Social Council, Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (5 March 1947), E/PC/T/34
USA-34	May 1947 Proposal by the US Delegation	United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Proposal by the US Delegation (6 May 1947), E/PC/T/W/23
USA-35	--	United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Proposal by the US Delegation (4 July 1947), E/PC/T/W/236
USA-36	--	United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII (31 July 1947), E/PC/T/139
USA-37	Report of the Second Session of the Preparatory Committee	United Nations Economic and Social Council, Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (19 August 1947), E/PC/T/180
USA-38	Draft General Agreement on Tariffs and Trade	United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade (30 August 1947), E/PC/T/189
USA-39	An Informal Summary of the ITO Charter	United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter (21 November 1947), E/CONF.2/INF.8
USA-41	Report of the 24 July 1947 Meeting	United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Thirty-Third Meeting of Commission A (24 July 1947), E/PC/T/A/PV/33
USA-42	Report of the Working Party of Sub-Committee G of Committee VI (Organization) on Chapter VIII	United Nations Conference on Trade and Employment, Report of the Working Party of Sub-Committee G of Committee VI (Organization) on Chapter VIII (9 January 1948), E/CONF.2/C.6/W.30

Exhibit Number	Short title (if applicable)	Long title
USA-43	Third Meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of Committee VI (Organization)	United Nations Conference on Trade and Employment, Summary Record of the Third Meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of Committee VI (Organization) (13 January 1948), E/CONF.2/C.6/W.41
USA-44	Amendment to Article 94 proposed by the UK Delegation	United Nations Conference on Trade and Employment, Sub-Committee I of Committee VI (Organization), Amendment to Article 94 proposed by the UK Delegation (16 January 1948), E/CONF.2/C.6/W.48
USA-45	United Nations Conference on Trade and Employment, Final Act and Related Documents	United Nations Conference on Trade and Employment, Final Act and Related Documents (April 1948)
USA-46	United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Eight Meeting	United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Eight Meeting, E/CONF.2/C.6/W.123 (1 March 1948)
USA-47	United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting	United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, E/CONF.2/C.6/W.60 (17 January 1948)
USA-48	US Delegation, Minutes of the Delegation Meeting (2 July 1947)	US Delegation, Second Meeting of the United Nations Preparatory Committee for the International Conference on Trade and Employment, Minutes of the Delegation Meeting (2 July 1947)
USA-49	US Delegation, Memorandum of Mr Rubin	US Delegation, Second Meeting of the United Nations Conference on Trade and Development, Memorandum of Seymour J. Rubin (14 July 1947)
USA-52	US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter"	US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter" (17 June 1946)
USA-53	--	US Delegation, Economic Disarmament (Draft)
USA-54	US Delegation, Letter from Mr Coppock to Mr Wilcox	US Delegation, Letter dated 3 July 1946 from Mr Coppock to Mr Wilcox on "National Security Provisions in the Draft Charter"
USA-56	US Delegation, Minutes of the Delegation Meeting (4 July 1947)	US Delegation, Second Meeting of the United Nations Preparatory Committee for the International Conference on Trade and Employment, Minutes of the Delegation Meeting (4 July 1947)
USA-57	Summary of the meeting of the GATT CONTRACTING PARTIES (9 December 1961)	GATT CONTRACTING PARTIES, Nineteenth Session, Summary Record of the Twelfth Session (9 December 1961), SR.19/12
USA-58	Working Party Report on Accession of the United Arab Republic	GATT CONTRACTING PARTIES, Twenty-Sixth Session, Report by the Working Party on Accession of the United Arab Republic (25 February 1979), L/3362
USA-59	GATT Council, Minutes of the Meeting (7 May 1982)	GATT Council, Minutes of the Meeting (7 May 1982), C/M/157
USA-60	Communication of the European Communities, Australia, and Canada to GATT contracting parties (4 May 1982)	European Communities, Australia, and Canada, "Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons" (Revision), Communication to GATT contracting parties (4 May 1982), L/5319/Rev.1
USA-61	GATT Council, Minutes of the Meeting (29-30 June 1982)	GATT Council, Minutes of the Meeting (29-30 June 1982), C/M/159
USA-62	--	GATT CONTRACTING PARTIES, Decision Concerning Article XXI of the General Agreement (30 November 1982), L/5426
USA-63	GATT Council, Minutes of the Meeting (29 May 1985)	GATT Council, Minutes of the Meeting (29 May 1985), C/M/188
USA-64	GATT Council, Minutes of the Meeting (12 March 1986)	GATT Council, Minutes of the Meeting (12 March 1986), C/M/196
USA-65	--	GATT Panel Report, <i>United States – Trade Measures Affecting Nicaragua</i>
USA-66	GATT Council, Minutes of the Meeting (5-6 November 1986)	GATT Council, Minutes of the Meeting (5-6 November 1986), C/M/204

Exhibit Number	Short title (if applicable)	Long title
USA-90	--	GATT CONTRACTING PARTIES, Second Session, Rules of Procedure for Sessions of the CONTRACTING PARTIES (As adopted on 16 August 1948), GATT/CP.2/3 Rev.1
USA-91	--	GATT CONTRACTING PARTIES, Rules of Procedure for Sessions of the CONTRACTING PARTIES (6 September 1949), GATT/CP/30
USA-92	Corrigendum to Report of the 24 July 1947 Meeting	United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A (30 July 1947), E/PC/T/A/PV/33.Corr.3
USA-150	Article XXI Proposal by Nicaragua	Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua (28 June 1988), MTN.GNG/NG7/W/48
USA-151	Communication from Argentina	Negotiating Group on GATT Articles, Communication from Argentina (4 February 1988), MTN.GNG/NG7/W/44
USA-152	--	Negotiating Group on GATT Articles, Communication from Nicaragua (10 November 1987), MTN.GNG/NG7/W/34
USA-153	Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988	Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8
USA-181	--	The Treaty of Rome
USA-183	--	Group of Negotiations on Services, Communication from Switzerland – Draft General Agreement on Trade in Services (7 June 1990), MTN.GNS/W/102
USA-184	Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay – Structure of a Multilateral Framework for Trade in Services	Group of Negotiations on Services, Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay – Structure of a Multilateral Framework for Trade in Services (26 February 1990), MTN.GNS/W/95
USA-185	Communication from the United States – Agreement on Trade in Services	Group of Negotiations on Services, Communication from the United States – Agreement on Trade in Services (17 October 1989), MTN.GNS/W/75
USA-186	Communication from the European Communities – Draft General Agreement on Trade in Services	Group of Negotiations on Services, Communication from the European Communities – Draft General Agreement on Trade in Services (18 June 1990), MTN.GNS/W/105
USA-187	--	Group of Negotiations on Services, Communication from Japan - Draft General Agreement on Trade in Services (10 July 1990), MTN.GNS/W/107
USA-188	Group of Negotiations on Services, Draft Multilateral Framework for Trade in Services (23 July 1990)	Group of Negotiations on Services, Draft Multilateral Framework for Trade in Services (23 July 1990), MTN.GNS/35
USA-189	--	Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Revision) (3 December 1990), MTN.TNC/W/35/Rev.1
USA-190	Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991)	Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (20 December 1991), MTN.TNC/W/FA
USA-191	Draft Text of the TRIPS Agreement	Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, Status of Work in the Negotiating Group – Chairman's Report to the GNG (23 July 1990), MTN.GNG/NG11/W/76
USA-192	Communication from Nicaragua	Negotiating Group on Dispute Settlement, Communication from Nicaragua (3 November 1987), MTN.GNG/NG13/W/15
USA-193	--	Negotiating Group on Dispute Settlement, Meeting of 20 November 1987 – Note by the Secretariat, MTN.GNG/NG13/5
USA-194	Negotiating Group on Dispute Settlement, Meeting of 20 November 1987 – Note by the Secretariat (Addendum)	Negotiating Group on Dispute Settlement, Meeting of 20 November 1987 – Note by the Secretariat (Addendum), MTN.GNG/NG13/5/Add.1
USA-195	--	Negotiating Group on Dispute Settlement, Meeting of 25 June 1987 - Note by the Secretariat, MTN.GNG/NG13/2

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<b>Exhibit Number</b>	<b>Short title (if applicable)</b>	<b>Long title</b>
USA-196	--	Negotiating Group on Dispute Settlement, Meeting of 11 July 1988 - Note by the Secretariat, MTN.GNG/NG13/9
USA-197	Israel - United States Agreement on the Establishment of a Free Trade Area	Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America
USA-221	EEA Agreement	Agreement on the European Economic Area (EEA)

## 1 INTRODUCTION

1.1. The parties have referred to various materials to support or to confirm their interpretation of the terms of Article XXI of the GATT 1994. Much of this material relates to the negotiations of Article XXI of the GATT 1947, which remained unaltered in wording in the GATT 1994, as well as various views and decisions of the contracting parties under the GATT 1947. At the outset, the Panel notes that the relevant treaty provision for the purposes of its interpretive analysis is Article XXI of the GATT 1994, an agreement that "is legally distinct from" the GATT 1947.<sup>1</sup> The Panel also notes that the materials submitted by the parties may be of interpretive relevance to Article XXI of the GATT 1994 under the following legal bases: (i) Article XVI:1 of the WTO Agreement; (ii) paragraph 1(b)(iv) of the GATT 1994; (iii) Article 31(3) of the Vienna Convention; and (iv) Article 32 of the Vienna Convention.<sup>2</sup>

1.2. Pursuant to Article XVI:1 of the WTO Agreement, except as otherwise provided in that Agreement or in the Multilateral Trade Agreements, the WTO "shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to the GATT 1947 and the bodies established in the framework of GATT 1947". Paragraph 1(b)(iv) of the GATT 1994 stipulates that "other decisions of the CONTRACTING PARTIES to the GATT 1947" are incorporated into the GATT 1994. Article 31(3)(a) and (b) of the Vienna Convention establish that, when interpreting a treaty, there shall be "taken into account", together with the context: "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"; and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". In addition, Article 32 of the Vienna Convention allows recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31 of the Vienna Convention or to determine the meaning when the interpretation under Article 31 either leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

1.3. In this Appendix, the Panel addresses the parties' arguments on the various materials submitted in relation to the interpretation of Article XXI of the GATT 1994. The Panel will first review materials from the negotiations of the GATT 1947 and the International Trade Organization (ITO) Charter until the conclusion of the GATT 1947 (section 2). The Panel will then review materials from the ITO Charter negotiations that took place after the conclusion of the GATT 1947 (section 3). The Panel will next examine certain internal documents of the US delegation at the ITO/GATT 1947 negotiations (section 4). Thereafter, the Panel will examine two decisions (sections 5 and 6) and views expressed on various occasions by the GATT contracting parties (section 7). Finally, the Panel will review the parties' arguments on materials from the Uruguay Round of negotiations (section 8).

1.4. In each of the following sections, the Panel will first provide an overview of the arguments and the materials submitted by the parties. The Panel will then address the possible interpretive relevance of such materials to Article XXI of the GATT 1994 before assessing the content of the materials in relation to the interpretation of Article XXI of the GATT 1994.

## 2 NEGOTIATIONS OF THE ITO CHARTER AND THE GATT 1947

### 2.1 Arguments and materials submitted by the parties

2.1. The United States argues that the negotiating history of the GATT 1947 may constitute the historical background against which the GATT 1994 was negotiated, and can therefore be relevant for the purposes of interpreting provisions of the GATT 1994, including Article XXI.<sup>3</sup> The United States further emphasizes that the text of Article XXI remained unchanged when the

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<sup>1</sup> Article II:4 of the WTO Agreement. The text of the GATT 1947 was finalized in October 1947 and the agreement was applied from 1 January 1948 on a provisional basis. The Havana Charter creating the ITO never entered into force and the GATT 1947 continued to be provisionally applied until one year after the entry into force of the WTO Agreement and the GATT 1994.

<sup>2</sup> The Panel notes that the parties have not identified any other legal basis under which the submitted materials may be relevant for the purposes of the interpretation of Article XXI of the GATT 1994. (See the parties' responses to Panel question No. 24).

<sup>3</sup> United States' first written submission, para. 56.

provision was incorporated in the GATT 1994 during the Uruguay Round, even if negotiators were presented with the possibility of amending the language.<sup>4</sup>

2.2. Switzerland argues that the temporal relationship between the preparatory work of the GATT 1947 and the conclusion of the WTO Agreement is remote, thereby diminishing the relevance of the preparatory work of the GATT 1947.<sup>5</sup> Switzerland notes that the GATT 1994 is legally distinct from the GATT 1947 and specifically refers to the evolution of the rules on dispute settlement from the GATT 1947 to the WTO as a decisive factor for the reduced relevance of pre-1947 negotiating history.<sup>6</sup> Switzerland considers that although the negotiating materials refer to equivalent or similar provisions in the GATT 1947 and the GATT 1994, these should have marginal relevance under Article 32 of the Vienna Convention and cannot inform the "standard of review" applicable to Article XXI(b) of the GATT 1994, because the latter is now governed by the DSU.<sup>7</sup>

### 2.1.1 October 1946 proposal

2.3. In October 1946, the United States submitted a proposal for a draft text of the ITO Charter that included the following two exceptions provisions:

#### Article 32 (*General Exceptions to Chapter IV*)

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures ...

(c) relating to fissionable materials;

(d) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

(e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.

#### Article 49.2 (*Exceptions to Provisions Relating to Intergovernmental Commodity Agreements*)

None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on 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.<sup>8</sup>

2.4. The United States notes that the two proposed exceptions dealing with essential security interests were not explicitly self-judging in their initial formulation, emphasizing that this proposal did not include the phrase "it considers necessary", which features instead in the final text of Article XXI of the GATT 1947.<sup>9</sup>

<sup>4</sup> United States' second written submission, para. 46.

<sup>5</sup> Switzerland's response to Panel question No. 58.

<sup>6</sup> Switzerland's response to Panel question Nos. 57 and 58.

<sup>7</sup> Switzerland's response to Panel question No. 57.

<sup>8</sup> United Nations Conference on Trade and Development, Report of the First Session of the Preparatory Committee (31 October 1946), E/PC/T/33, (Exhibit USA-31), Annexure 11 (United States Draft Charter), pp. 60 and 63.

<sup>9</sup> United States' first written submission, para. 59. The United States also refers to a statement that a delegate of the United States made in October 1946 in the context of a meeting of the Preparatory Committee of the International Conference on Trade and Employment (Committee II – Technical Subcommittee). Responding to the concerns raised by another delegation on the scope of the draft provision on freedom of transit, the delegate of the United States "pointed out that Article 32(e) afforded complete opportunity for the

2.5. Switzerland does not specifically comment on this document.

### 2.1.2 March 1947 draft text

2.6. A report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, dated 5 March 1947, contained a draft general exceptions provision reproduced with the same text both in the GATT (Article XX) as well as in the draft text of the ITO Charter (Article 37). The text of the draft provision read, in relevant part:

Article 37 (*General exceptions to chapter V*) and Article XX (*General exceptions*)

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

(c) Relating to fissionable materials;

(d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.<sup>10</sup>

2.7. The United States notes that the security exceptions were placed alongside several subparagraphs identical to those that would later feature in the text of Article XX of the GATT 1947.<sup>11</sup> Furthermore, the United States points out that the security exceptions were subject to a proviso with language similar to that of the *chapeau* of Article XX of the GATT 1994 as it currently stands.<sup>12</sup> According to the United States, this structure and, specifically, the presence of the *chapeau* suggest that, at the time of the draft, not all delegations viewed the security exceptions as "self-judging".<sup>13</sup>

2.8. Switzerland does not specifically comment on this document.<sup>14</sup>

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adoption of all measures regarded as necessary for the protection of national interests in time of war or other national emergency". (United Nations Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, Committee II, Technical Subcommittee, Second meeting (21 October 1946), E/PC/T/C.II/W.5, (Exhibit USA-32), p. 11)

<sup>10</sup> United States' first written submission, para. 60; United Nations Economic and Social Council, Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (5 March 1947), E/PC/T/34, (Exhibit USA-33), pp. 31 and 77. Similarly, Article 59 of the draft text of the ITO Charter at that time (*Exceptions to provisions relating to intergovernmental commodity arrangements*) read:

The provisions of Chapter VII shall not apply: ...

(c) to arrangements relating to fissionable materials, to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment, or in the time of war or other emergency in international relations, to the protection of the essential security interests of a Member. (Report of the Drafting Committee of the Preparatory Committee, (Exhibit USA-33), pp. 43-44).

<sup>11</sup> United States' first written submission, para. 61.

<sup>12</sup> United States' first written submission, para. 61.

<sup>13</sup> United States' first written submission, para. 61.

<sup>14</sup> The European Union, in its third-party submission, disagrees with the United States on the significance of subjecting the security exceptions to a proviso akin to the language of the *chapeau* of Article XX of the GATT 1994. According to the European Union, a *chapeau* is not a necessary element for an exception to be justiciable, and several exceptions in the covered agreements, although not containing a *chapeau à la* Article XX of the GATT 1994, are nevertheless "justiciable" and are thus subject to panels' review when invoked in disputes. (See European Union's third-party submission, para. 86 (referring to Articles XIV.1 and XXIV of the GATT 1994)).

### 2.1.3 May 1947 proposal

2.9. In May 1947, the United States proposed several amendments to the draft text of the ITO Charter, including a proposal to move the security exceptions from being part of a broader provision on "general exceptions" to featuring as a standalone provision at the end of the Charter.<sup>15</sup> The proposed text submitted by the United States read, in relevant part:

Nothing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures: ...

(c) Relating to fissionable materials;

(d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.<sup>16</sup>

2.10. The United States notes that, under the proposed amendment, security exceptions would be formally separated from other exceptions and would apply to the entire ITO Charter as opposed to a specific chapter thereof.<sup>17</sup>

2.11. Switzerland disagrees with the United States' interpretation of the meaning of the proposed amendments. Switzerland notes that the separation of the security exceptions from the general exceptions does not indicate the drafters' intention to render the security exceptions self-judging as that amendment was merely aimed at ensuring the applicability of the security exceptions to the ITO Charter as a whole.<sup>18</sup>

### 2.1.4 4 July 1947 proposal

2.12. On 4 July 1947, the United States proposed the addition of a new chapter at the end of the draft text of the ITO Charter ("Miscellaneous"). The United States suggested the inclusion of the security exceptions provision in the new chapter, and proposed the following amendments to the previously circulated versions of the provision:

#### Article 94 (*General Exceptions*)

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:

a) Relating to fissionable materials or their source materials;

b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;

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<sup>15</sup> United States' first written submission, para. 62; United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Proposal by the US Delegation (6 May 1947), E/PC/T/W/23, (Exhibit USA-34), p. 5.

<sup>16</sup> May 1947 Proposal by the US Delegation, (Exhibit USA-34), p. 5.

<sup>17</sup> United States' first written submission, para. 62.

<sup>18</sup> Switzerland's second written submission, para. 211.

d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.<sup>19</sup>

2.13. The United States notes that this was the first time that the text of the provision on security exceptions contained a reference to actions that an ITO member might "consider" necessary relating to the protection of its essential security interests.<sup>20</sup> In the United States' view, the text as modified explicitly indicated that the provision could be invoked based on an ITO member's own judgment.<sup>21</sup> Furthermore, the United States submits that this reformulation marked a distinction between the "self-judging" nature of exceptions pertaining to security matters and exceptions related to the protection of other interests.<sup>22</sup>

2.14. Switzerland disagrees with the United States' interpretation of the meaning of the proposed amendments. Switzerland notes that the separation of the security exceptions from the general exceptions does not indicate the drafters' intention to render the security exceptions self-judging as that amendment was merely aimed at ensuring the applicability of the security exceptions to the ITO Charter as a whole.<sup>23</sup>

### 2.1.5 24 July 1947 meeting

2.15. The parties have referred to exchanges between delegates at a meeting of Commission A (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment) that took place on 24 July 1947.<sup>24</sup>

2.16. During this meeting, the delegate of the Netherlands requested clarification on the scope of the security exceptions in relation to the meaning of "emergency in international relations" and "essential security interests" in the draft provision.<sup>25</sup> The delegate of the Netherlands further raised the concern that an exception based on "essential security interests" could be "possibly a very big loophole in the whole Charter".<sup>26</sup>

2.17. The delegate of the United States took the floor to respond to these questions as the draft provision in question originated in a proposal by the United States. The delegate of the United States expressed recognition of "a great danger of having too wide an exception" that "would permit anything under the sun" if the provision simply referred to "measures relating to a Member's security interests".<sup>27</sup> The same delegate stated the desire 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".<sup>28</sup>

<sup>19</sup> United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Proposal by the US Delegation (4 July 1947), E/PC/T/W/236, (Exhibit USA-35), p. 13.

<sup>20</sup> United States' first written submission, para. 64.

<sup>21</sup> United States' first written submission, para. 64.

<sup>22</sup> United States' first written submission, para. 64.

<sup>23</sup> Switzerland's second written submission, para. 211. In its third-party submission, the European Union argues that the inclusion of language such as "it may consider necessary" does not demonstrate anything further on the proper interpretation of those words, nor does it show that the provision is self-judging and that WTO panels are precluded from objectively assessing the invocation of Article XXI by a party in a dispute. (See European Union's third-party submission, para. 88).

<sup>24</sup> The Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment was divided into two commissions, each consisting of representatives of all delegations. Commission A and its sub-committees worked on texts relating to the chapters on Employment and Economic Activity, Economic Development and General Commercial Policy. All the drafts were submitted for review at final plenary meetings of the Preparatory Committee. (See United Nations Economic and Social Council, Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (19 August 1947), E/PC/T/180, (Exhibit USA-37), p. vi, fn 1).

<sup>25</sup> United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Thirty-Third Meeting of Commission A (24 July 1947), E/PC/T/A/PV/33, (Exhibit USA-41), p. 19.

<sup>26</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 19.

<sup>27</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 20.

<sup>28</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 20; United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and

2.18. The delegate of the United States commented in relation to the expression "in time of war" that "the limitation ... is primarily in the time" of the actions taken by an ITO member. The delegate of the United States added that "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of war and to determine for itself ... what its security interests are."<sup>29</sup> Regarding the terms "other emergency in international relations", the delegate of the United States explained that "we had in mind particularly the situation which existed before" the participation of the United States in the Second World War.<sup>30</sup> Specifically, the delegate of the United States referred to measures that the United States took at that time "for [its] own protection" and that would have been prohibited by the Charter.<sup>31</sup> The delegate of the United States concluded the intervention by affirming the need for some "latitude" for security measures while maintaining a "balance":

It is really a question of a 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.<sup>32</sup>

2.19. The Chairperson intervened next and stated "in defence of the text" that "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention".<sup>33</sup>

2.20. Subsequently at the meeting, the Chairperson posed the question of whether "transferring these items from Article 37 to the end of the Charter" would mean that "these clauses should not provide for any possibility of redress", including under Article 35 of the draft text on consultations and nullification or impairment.<sup>34</sup> The delegate of the United States took the floor to express the view that the place of a provision in the Charter had "nothing to do" with the applicability of Article 35 of the draft text<sup>35</sup>, which at that time provided recourse if "any other Member is applying any measure, whether or not it conflicts with the terms of the Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter".<sup>36</sup>

2.21. In the view of the delegate of the United States, Article 35 was "very broad in its terms", and "probably cover[ed] any action taken by a Member under any provision of the Charter".<sup>37</sup> The delegate of the United States further stated that an action taken under the security exceptions "could not be challenged in the sense that it could not be claimed that the Member was violating the Charter", but there was still a possibility for that action, even if not in conflict with the terms of Article 94, to affect another ITO member.<sup>38</sup> The delegate of the United States thus noted that, in those circumstances, the affected ITO member "would have the right to seek redress under Article 35" of the draft text of the ITO Charter.<sup>39</sup> The delegate of the United States concluded the intervention noting that "there [was] no exception from the application of Article 35 to [Article 94] or any other Article".<sup>40</sup> The delegate of Australia intervened next to confirm that its delegation was reassured about the confirmation that, "at any rate", ITO members would still have the right to seek redress under Article 35(2) for actions justified under Article 94.<sup>41</sup> Following some additional

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Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A (30 July 1947), E/PC/T/A/PV/33.Corr.3, (Exhibit USA-92).

<sup>29</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 20; Corrigendum to Report of the 24 July 1947 Meeting, (Exhibit USA-92).

<sup>30</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 20.

<sup>31</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 20.

<sup>32</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 21.

<sup>33</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 21.

<sup>34</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 26.

<sup>35</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 26.

<sup>36</sup> Report of the Drafting Committee of the Preparatory Committee, (Exhibit USA-33), p. 30.

<sup>37</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 26.

<sup>38</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 26.

<sup>39</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 27.

<sup>40</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 27.

<sup>41</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 27. The delegate of Australia also proposed that a note be inserted in the Report of the Commission saying that it was the unanimous opinion of the drafters that the text of Article 94 was not in conflict with the ITO members' rights under Article 35(2). The delegate of the United States responded that, while not objecting to the proposal, the insertion of such a note would pose questions of interpretation elsewhere in the Charter. According to the delegate of the United States, Article 35 on consultations and nullification or impairment covered "everything in the Charter".

discussion of the applicability of Article 35 to the proposed security exceptions<sup>42</sup>, the Chairperson concluded the discussions noting that the Committee had considered and approved the draft of Article 94.<sup>43</sup>

2.22. In this dispute, the United States argues that this exchange demonstrates that the drafters understood that "essential security measures" could not be challenged as violating obligations in the underlying agreement.<sup>44</sup> According to the United States, the debate further shows that an ITO member affected by such measures could claim that its expected benefits under the Charter had been nullified or impaired as foreseen in Article 35(2).<sup>45</sup> Applied to the WTO context, the United States argues that the discussion indicates that essential security interests measures cannot be found to be in violation of any provision of the GATT 1994, but could at most be the subject of a non-violation complaint.<sup>46</sup>

2.23. Switzerland notes that the United States confirmed during the 24 July 1947 meeting that Article 35 of the draft text of the ITO Charter, covering both violation and non-violation complaints, would apply to the security exceptions.<sup>47</sup> According to Switzerland, the exchanges at the meeting of the negotiating committee prove that the drafters did not want to have a too broad exception that would permit "anything under the sun", and accordingly did not envisage a self-judging security exceptions provision.<sup>48</sup> Furthermore, Switzerland argues that the drafters did not intend to subject security measures exclusively to non-violation complaints, as the discussion reveals that the entirety of Article 35 would be applicable to measures taken pursuant to Article 94.<sup>49</sup> Switzerland further notes that it appears that the negotiators were discussing the availability of non-violation complaints where measures meet the requirements of the security exceptions.<sup>50</sup>

2.24. Certain third parties provided their views on the 24 July 1947 meeting. According to the European Union, the discussion demonstrates that the United States did not intend to draft the security exceptions as a self-judging provision. The European Union notes that the delegate of the United States emphasized the existence of objective and testable limits to the scope of the provision. The European Union also observes that the delegate of the United States was careful to exclude the applicability of the provision to measures "which really have a commercial purpose". Finally, the European Union disputes that non-violation complaints were the only available response to the invocation of the security exceptions.<sup>51</sup> Türkiye refers to the exchanges within the negotiating committee to argue that the United States itself recognized that the security exceptions had limited scope. Türkiye further maintains that nothing in the negotiations suggests that non-violation complaints were considered to be the only available remedy.<sup>52</sup> Hong Kong, China reads the summary of the discussion as showing how delegations, including the United States, did not consider Article XXI(b) to be entirely self-judging or that ITO members' rights of redress in respect of the exception would be limited.<sup>53</sup>

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The delegate of the United States further stated that, in order to prevent the application of Article 35 to Article 94, the negotiators would need to have "an explicit provision in Article 35 saying that no Member should bring any complaint in respect of measures taken pursuant to Article 94". However, in the view of the delegate of the United States, as it was "perfectly clear" from the existing text that Article 35 did apply to the security exceptions in Article 94, a note emphasizing what was already clear text was not necessary. The delegate of Australia acknowledged the intervention of the United States and withdrew Australia's reservation. (Ibid. pp. 28-29; see also Corrigendum to Report of the 24 July 1947 Meeting, (Exhibit USA-92), with a corrigendum to the verbatim report of the discussion).

<sup>42</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 29.

<sup>43</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 30.

<sup>44</sup> United States' first written submission, para. 71.

<sup>45</sup> United States' first written submission, para. 71.

<sup>46</sup> United States' first written submission, para. 71; second written submission, para. 49.

<sup>47</sup> Switzerland's first written submission, fn 558; second written submission, para. 218, response to Panel question No. 59.

<sup>48</sup> Switzerland's second written submission, para. 215.

<sup>49</sup> Switzerland's second written submission, para. 218.

<sup>50</sup> Switzerland's second written submission, paras. 219-220.

<sup>51</sup> European Union's third-party submission, paras. 91-100.

<sup>52</sup> Türkiye's third-party submission, paras. 3.73-3.77

<sup>53</sup> Hong Kong, China's third-party submission, para. 43.

### 2.1.6 31 July 1947 and 19 August 1947 Draft Texts

2.25. A report of the Preparatory Committee of the United Nations Conference on Trade and Employment, dated 31 July 1947, includes a text of the provision reflecting approval of the United States' proposed revision:

Article 91\* (*General Exceptions*)

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:

- (a) Relating to fissionable materials or their source materials;
- (b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- (c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
- (d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.<sup>54</sup>

\* As approved by Commission A

2.26. A report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment dated 19 August 1947 contains a new draft text of the ITO Charter, including the following text for the security exceptions:

Article 94 (*General Exceptions*)

Nothing in this Charter shall be construed

- (a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or
- (b) to prevent any Member 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 Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.<sup>55</sup>

2.27. The United States notes that, in this revised text, the language of the security exceptions changed, in relevant part, from "action which it may consider necessary" to "action which it considers

<sup>54</sup> United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII (31 July 1947), E/PC/T/139, (Exhibit USA-36), pp. 25-26.

<sup>55</sup> Report of the Second Session of the Preparatory Committee, (Exhibit USA-37), p. 178.

necessary".<sup>56</sup> The United States further notes that the final text of Article XXI of the GATT 1947 reflected this revision to the text of the security exceptions.<sup>57</sup>

2.28. Switzerland does not specifically comment on these documents.

### 2.1.7 "An Informal Summary of the ITO Charter" (21 November 1947)

2.29. The United States refers to a document entitled "An informal summary of the ITO Charter" prepared by the Negotiating Group in November 1947. Regarding the security exceptions, the summary reads:

Members may ... do whatever they think necessary to protect their security interests relating to atomic materials, arms traffic, and wartime or other international emergencies, and to maintain peace according to their obligations under the United Nations Charter.<sup>58</sup>

2.30. The United States argues that the summary comments on the self-judging nature of the provision.<sup>59</sup>

2.31. Switzerland does not specifically comment on this document.

## 2.2 Assessment by the Panel

2.32. The Panel notes that the parties disagree on the relevance of the negotiating history of the ITO Charter and the GATT 1947 as supplementary means for the interpretation of the GATT 1994 under Article 32 of the Vienna Convention.

2.33. The supplementary means of interpretation that may be considered under Article 32 of the Vienna Convention are not exhaustively defined and may include, but are not limited to, the preparatory work and the circumstances of the conclusion of the treaty.<sup>60</sup> As noted above, the relevant treaty provision in this analysis is Article XXI of the GATT 1994, an agreement that "is legally distinct from" the GATT 1947.<sup>61</sup> This legal distinction does not preclude recourse to the preparatory work of the ITO Charter and the GATT 1947 as supplementary means for the interpretation of corresponding provisions in the GATT 1994<sup>62</sup>, particularly given that the terms of Article XXI of the GATT 1994 have not been amended compared to their original formulation in the GATT 1947. At the same time, the Panel is mindful that the ITO Draft Charter and the GATT 1947 were negotiated against the background of a different institutional setting compared to the WTO, particularly with respect to the resolution of disputes. The Panel will factor this consideration into its assessment as relevant to the contested issues in this dispute regarding the interpretation of Article XXI of the GATT 1994.

2.34. Under Article 32 of the Vienna Convention, recourse to supplementary means of interpretation may be had either to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. The Panel does not consider that the application of Article 31 of the Vienna Convention to the interpretation of Article XXI(b) of the GATT 1994 leaves the meaning of the provision ambiguous or obscure in relation to the contested interpretive issues in this dispute, nor does the Panel find that it leads to a result which is manifestly absurd or unreasonable. The Panel also notes the parties' agreement that any

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<sup>56</sup> United States' first written submission, para. 65.

<sup>57</sup> United States' first written submission, para. 65; United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade (30 August 1947), E/PC/T/189, (Exhibit USA-38), p. 47.

<sup>58</sup> United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter (21 November 1947), E/CONF.2/INF.8, (Exhibit USA-39), p. 35.

<sup>59</sup> United States' first written submission, para. 65.

<sup>60</sup> See Appellate Body Report, *EC – Chicken Cuts*, para. 283.

<sup>61</sup> See para. 1.1 and fn 1 above.

<sup>62</sup> See Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 24, fn 52 (regarding Article III:2 of the GATT 1947 and the *Ad note* thereto); *Canada – Periodicals*, p. 34 (regarding Article III:8(b) of the GATT 1947); *US – Line Pipe*, para. 175 (regarding Article XIX of the GATT 1947), and Panel Report, *Russia – Traffic in Transit*, para. 7.83 (regarding Article XXI of the GATT 1947).

recourse to supplementary means of interpretation may only serve to confirm the meaning of Article XXI(b) of the GATT 1994 as determined through the application of Article 31 of the Vienna Convention.<sup>63</sup> The Panel therefore reviews the negotiating history of the ITO Charter and the GATT 1947 in light of the interpretive conclusions resulting from the application of Article 31 of the Vienna Convention and the limited purposes under Article 32 of the Vienna Convention for having recourse to supplementary means of interpretation.

2.35. Based on the parties' arguments and the contested issues in this dispute, the Panel will begin by reviewing the evolution of the security exceptions provision in terms of its envisaged scope of application, the removal of language similar to the *chapeau* of Article XX of the GATT 1994, and the inclusion of reference to what a Member "considers" or "may consider" necessary as part of the provision. The Panel will then review the discussion that took place on 24 July 1947 with specific regard to the positions of the delegations on the limits for the invocation of the security exceptions and the possibility for ITO members affected by security measures to seek some form of redress. The Panel will next address the relevance of an informal summary prepared by the Negotiating Group towards the end of 1947. Finally, the Panel will make some concluding observations on early debates in the negotiations of the ITO Charter concerning the distinction between "justiciable" and "non-justiciable" issues.

2.36. Regarding the scope of application of the security exceptions, draft provisions were originally included in the general exceptions to the Chapter on general commercial policy in the draft text of the ITO Charter. Negotiators ultimately agreed that the security exceptions would be moved to the end of the Charter in a standalone provision applicable to the entire Charter and to the entire GATT 1947. Notably, the proponent of this amendment indicated its understanding at the time that the placement of the provision at the end of the Charter would not affect the applicability of the provisions on consultation and nullification or impairment.<sup>64</sup> The Panel similarly considers that the placement of the security exceptions does not in itself determine the applicability of provisions on consultations and nullification or impairment, which is instead a function of the terms of the exception and the relevant procedures in the event of nullification or impairment.

2.37. The United States draws the Panel's attention to the fact that, in earlier formulations, security exceptions would have been subject to a proviso akin to the *chapeau* of Article XX of the GATT 1994 and, by implication, that the removal of the *chapeau* language was a step towards making the security exceptions self-judging.<sup>65</sup> The Panel does not see the presence or absence of such language as indicating the intentions of the drafters regarding the review of an invocation of a provision dealing with "essential security interests". The text of the proviso included in the March 1947 draft does not refer to review of the invocation of the security exceptions, but rather includes requirements similar to those under the *chapeau* of Article XX of the GATT 1994 concerning application of measures in a manner that would qualify as arbitrary or unjustifiable discrimination, or as a disguised restriction to trade. The fact that negotiators decided not to include similar requirements in the introductory language to the security exceptions offers no indication, in and of itself, about the scope and nature of review that could be conducted in accordance with the specific terms and requirements that were ultimately included in Article XXI of the GATT 1947. Therefore, the Panel does not find a clear connection between early proposals to include certain requirements in an introductory proviso and any consideration that the security exceptions were "self-judging" in the sense argued by the United States.

2.38. The Panel takes note of the appearance in the security exceptions of terms such as "it may consider" and "it considers" beginning with a proposal by the United States dated 4 July 1947. The Panel does not find any explicit indication that these terms establish the entirely "self-judging nature" of the provision as argued by the United States. The terms "it may consider" (or "it considers" in later iterations of the text) denote the consideration or judgment of the Member taking action under the security exceptions. However, the introduction and retention of such terms does not in itself,

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<sup>63</sup> While the parties disagree on the meaning of Article XXI(b), they do not consider such disagreement to be symptomatic of an ambiguity that must be resolved through recourse to supplementary means of interpretation. (See United States' response to Panel question No. 56; Switzerland's response to Panel question No. 56).

<sup>64</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 26.

<sup>65</sup> See para. 2.7 above.

and without regard to other relevant features and terms of the provision, provide further clarity on the possible review of an invocation of the security exceptions in Article XXI of the GATT 1994.

2.39. The parties have submitted arguments concerning exchanges that took place at a meeting of the ITO Negotiating Committee of 24 July 1947. The Panel makes the following observations on these discussions, specifically concerning the scope of the security exceptions and the possible redress for ITO members affected by measures taken under that exception.

2.40. First, the negotiators agreed that there would be limits for the invocation of the security exceptions. The Panel refers to the explanation provided at the meeting by the delegate of the United States on "a great danger of having too wide an exception ... that would permit anything under the sun" and the motivation to "take care of real security interests and, and 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".<sup>66</sup> This suggests that the proponents of the text did not consider the security exceptions to be limitless. This statement should be read in the context of the explanation by the delegate of the United States on the need for "a balance" between providing ITO members with "latitude" to determine what their security interests are, while limiting the circumstances in which they could invoke the security exceptions.<sup>67</sup> Notably, the delegate of the United States specified that the security exceptions were not meant to be "so broad" to apply to measures that countries would adopt "under the guise of security, ... which really have a commercial purpose".<sup>68</sup> The Panel considers the exchanges at the above-mentioned meeting, and specifically the concerns raised about the possibility of abuse, as an element against interpreting the provision as entirely "self-judging" in the sense argued by the United States.

2.41. Second, regarding the possible redress for ITO members affected by measures under the security exceptions, the Panel notes the Chairperson's statement that, once the ITO was in operation, the atmosphere inside the Organization would have been "the only efficient guarantee against abuses" of the security exceptions. This statement by the Chairperson was offered "[i]n defence of the text" following the comment of the delegate of the United States on the draft text preserving a "proper balance" between an exception that is either "too tight" or "broad".<sup>69</sup> The Panel does not understand the Chairperson to have expressed a legal view on the full range of potential recourse in relation to measures taken under the security exceptions, but rather to have offered a general consideration on the institutional operation of the ITO based on the specific drafting questions raised by delegates at the meeting. In fact, further discussion in the meeting focused on the possibility for ITO members affected by the imposition of security measures to seek some form of redress, specifically in light of draft Article 35(2) dealing with consultations and nullification or impairment, which provided as follows:

*Article 35 (Consultation – Nullification or impairment)*

...

2. If any Member should consider that any other Member is applying any measure, whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter. If no such adjustment can be effected, the matter may be referred to the Organization, which shall, after investigation, and, if necessary after consultation with the Economic and Social Council of the United Nations and any appropriate intergovernmental organizations, make appropriate recommendations; to the Members concerned. The Organization, if it considers the case serious enough to

<sup>66</sup> See para. 2.17 above. This understanding is also confirmed when considering the observation made by the delegate of the United States at the meeting that the expression "in time of war" was meant to impose a limitation concerning primarily the time when an ITO member would be allowed to take action. The delegate of the United States added that "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself ... what its security interests are". (Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 20).

<sup>67</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 21; Exhibit Corrigendum to Report of the 24 July 1947 Meeting, (Exhibit USA-92).

<sup>68</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 21.

<sup>69</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), p. 21.

justify such action, may authorize a Member or Members to suspend the application to any other Member or members of such specified obligations or concessions under this Chapter as may be appropriate in the circumstances. If such obligations or concessions are in fact suspended, any affected Member shall then be free, not later than sixty days after such action is taken, to withdraw from the Organization upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Organization.<sup>70</sup>

2.42. At the time of the meeting in question, the draft text of the ITO Charter did not yet distinguish between violation, non-violation, and situation complaints as did the final agreed text of Article XXIII of the GATT 1947. While the discussion confirms the shared understanding among negotiators that ITO members affected by security measures could submit non-violation complaints, it does not reveal that non-violation complaints were the only available option to seek redress for the imposition of security measures. The discussion instead indicates that the security exceptions were not intended to be shielded from the application of Article 35, irrespective of its position in the draft text of the ITO Charter. Negotiators explicitly confirmed their understanding that Article 35 would apply to the entire draft text of the ITO Charter such that the security exceptions would not be excluded from the scope of application of the provisions on consultation and nullification or impairment as they existed at that time. This conclusion is further reinforced by the fact that the provisions on consultation and nullification or impairment in the ITO Draft Charter and GATT 1947 evolved to distinguish between violation, non-violation, and situation complaints<sup>71</sup>, with no explicit carve-out from any of these categories for matters arising under the security exceptions.

2.43. The applicability of provisions on consultations and nullification or impairment to matters arising under the security exceptions is not undermined by the following statement made by the delegate of the United States at that meeting:

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 the 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.<sup>72</sup>

2.44. The Panel understands this statement to clarify that actions taken in conformity with the provision on security exceptions could not be challenged as being in violation of the draft text of the ITO Charter, but it would still be possible for ITO members affected by those actions to claim that their benefits were nullified or impaired. This statement does not clearly address the possibility that an affected ITO member could claim that an action purportedly taken pursuant to Article 94 did not meet the requirements laid down in the provision and was thus inconsistent with the draft text of the ITO Charter. Therefore, while the exchanges at this meeting indicate that ITO members would retain some form of recourse for matters arising under the security exceptions, they do not reflect a limitation on the specific procedures or nature of possible review for claims of nullification or impairment by measures under the security exceptions.

2.45. The Panel further notes the United States' citation of the informal summary prepared in late 1947 by the Negotiating Group of the Preparatory Committee of the United Nations Conference on Trade and Employment.<sup>73</sup> That informal summary reported that, under the security exceptions, ITO members would be free to do "whatever they think necessary to protect their security interests relating to atomic materials, arms traffic, and wartime or other international emergencies, and to maintain peace according to their obligations under the United Nations Charter".<sup>74</sup> The Panel notes the informal nature of the document as a relevant factor in assessing the value that it should be

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<sup>70</sup> Report of the Drafting Committee of the Preparatory Committee, (Exhibit USA-33), p. 30; see also Article XIX:2 of the draft text of the GATT 1947 at the time (Ibid. pp. 76-77).

<sup>71</sup> The draft text of the GATT circulated in August 1947 already contained the distinction between violation, non-violation, and situation complaints. See Article XXI (*Nullification or impairment*), Draft General Agreement on Tariffs and Trade, (Exhibit USA-38), pp. 50-51.

<sup>72</sup> Report of the 24 July 1947 Meeting, (Exhibit USA-41), pp. 26-27.

<sup>73</sup> See para. 2.29 above.

<sup>74</sup> See para. 2.29 above.

given in the context of an interpretive analysis.<sup>75</sup> Furthermore, while the summary refers to the discretion that ITO members would retain to protect their essential security interests, it also refers to the specific subject matter and circumstances covered by the agreed provision in the ITO Draft Charter and reflected in the text of the Article XXI of the GATT 1947. The Panel does not consider this to provide clarity on the possible review of invocations of this provision<sup>76</sup> or that the provision should be treated as "self-judging" in the sense argued by the United States.

2.46. Finally, the Panel observes that early drafts of the ITO Charter contained references to "justiciable" issues, but such references were not retained as the negotiations continued. Specifically, the September 1946 draft text of the ITO Charter foresaw that questions or differences concerning the interpretation of the Charter could be referred to the ITO Conference (where all ITO members would be represented). ITO members could seek review by the International Court of Justice (ICJ) of "any justiciable issue" arising out of an interpretation by the Conference of certain provisions including those related to security matters.<sup>77</sup> The distinction between "justiciable" issues and other issues was removed in subsequent drafts after having been commented upon as "untenable" and "unworkable".<sup>78</sup> The debate on "justiciable" issues took place in the context of a draft text that foresaw a different institutional setting from the one that exists under the WTO covered agreements. In that context, the distinction between "justiciable" and "non-justiciable" issues was not to preclude external review but rather concerned which institution would be competent to review the invocation of certain provisions of the ITO Charter. Furthermore, both the security exceptions and the provisions on dispute settlement underwent substantial changes in the course of the negotiations leading to the final texts of the ITO Draft Charter and GATT 1947. The Panel considers these early debates on "justiciable" issues to underscore the different institutional backdrop of the ITO negotiations as part of the overall guidance that may be drawn from the negotiations of the ITO Charter and the GATT 1947 for the interpretive issues in this dispute.

2.47. The Panel does not find support in these materials for the "self-judging nature" of Article XXI(b) of the GATT 1994 as contended by the United States. Accordingly, the analysis of these materials confirms, or at least does not undermine, the Panel's interpretation of Article XXI(b) of the GATT 1994.

### **3 NEGOTIATIONS OF THE ITO CHARTER IN 1948**

#### **3.1 Arguments and materials submitted by the parties**

3.1. The United States has submitted materials pertaining to negotiations of the ITO Charter that took place in early 1948, thus after the text of the GATT 1947 was finalized and started being provisionally applied.<sup>79</sup> In submitting these materials, the United States argues that views expressed by the negotiators, including after the conclusion of an agreement, may provide "pertinent evidence of the intention of the parties", particularly as the GATT 1947 discussions were integral to the negotiations of the ITO Charter.<sup>80</sup>

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<sup>75</sup> As stated in the foreword of the document, "[t]he purpose of this information paper is to provide for the non-technical reader a summary of the Draft Charter for an [ITO]" that "attempts to restate in simple terms the salient features of each Article" with the addition of "[s]hort, informal and unofficial comments ... in order to indicate the relationship between one part of the Charter and another or to suggest some of the factors which were taken into consideration by the members of the Preparatory Committee during the formulation of the Draft." Given the limited purpose of the document, the foreword further refers readers to the "full text of the Draft Charter". (An Informal Summary of the ITO Charter, (Exhibit USA-39), p. ii).

<sup>76</sup> Regarding the provisions in Chapter VIII on "Settlement of Differences – Interpretation", the informal summary refers to "three general stages in the settlement of disputes": "[f]irst, consultation between members; secondly, reference of the dispute to the ITO; thirdly, reference to the International Court of Justice". The informal summary observes parenthetically that "the Preparatory Committee gave only a limited time to the study of this section and that a full re-examination by the World Trade Conference will be desirable." (An Informal Summary of the ITO Charter, (Exhibit USA-39), p. 34; see also Report of the Second Session of the Preparatory Committee, (Exhibit USA-37), p. 166).

<sup>77</sup> Report of the First Session of the Preparatory Committee, (Exhibit USA-31), Annexure 11 (United States Draft Charter), Article 76, p. 67.

<sup>78</sup> Report of the Drafting Committee of the Preparatory Committee, (Exhibit USA-33), "General Comments" to Article 86, p. 51.

<sup>79</sup> United States' first written submission, para. 72.

<sup>80</sup> United States' first written submission, para. 72 and fn 70.

3.2. According to Switzerland, the United States fails to explain how and to what extent the negotiating history pertaining to the ITO Charter remains relevant in the context of the WTO.<sup>81</sup>

### **3.1.1 9 January 1948 – Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII (Settlement of Differences – Interpretation)**

3.3. The United States refers to a report of a Working Party composed of four delegations (Australia, India, Mexico, and the United States) dated 9 January 1948.<sup>82</sup> The Working Party considered several suggested alternatives and agreed unanimously on new texts for Articles 89 (Consultation between Members) and 90(4) (Reference to the Organization).

3.4. The newly suggested text of Article 89 retained a distinction between three cases where an ITO member could seek redress if it considered that the benefits accruing to it under the Charter were being nullified or impaired: (a) the failure of another member to carry out its obligations; (b) the application by another member of any measure, whether or not it conflicted with the provisions of the Charter; (c) the existence of any other situation.<sup>83</sup>

3.5. The document submitted by the United States includes an explanation of the reasons leading to the agreement between the four participants to the Working Group:

After extensive discussion of sub-paragraph (b) of Article 89 it was decided to allow this sub-paragraph to remain as is in the Geneva text. The working party considered that this sub-paragraph would apply to the situation of action taken by a Member such as action pursuant to Article 94 of the Charter. Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.<sup>84</sup>

3.6. According to the United States, this excerpt reflects the intention of the parties that measures taken purportedly pursuant to the security exceptions could be subject to non-violation claims, to the exclusion of claims of inconsistency.<sup>85</sup> Specifically, the United States argues that this excerpt confirms that, even after a distinction was introduced between violation and non-violation claims, the drafters continued to believe that non-violation claims would be the only available recourse for ITO members affected by the imposition of security measures.<sup>86</sup>

<sup>81</sup> Switzerland's second written submission, para. 209.

<sup>82</sup> United States' first written submission, paras. 73-74 (referring to United Nations Conference on Trade and Employment, Report of the Working Party of Sub-Committee G of Committee VI (Organization) on Chapter VIII (9 January 1948), E/CONF.2/C.6/W.30, (Exhibit USA-42), p. 2). The Working Party was established within Sub-Committee G of Committee VI on Chapter VIII.

<sup>83</sup> The suggested text of Article 89 read:

If any Member should consider that any benefit accruing to it directly or indirectly, implicitly or explicitly under any of the provisions of this Charter other than Article 1 is being nullified or impaired, [or that the attainment of any of the objectives set forth in Article 1 is being impeded], as a result of

(a) the failure of another Member to carry out [its] an obligation[s] under this Charter, or  
(b) the application "by another Member of any measure, whether or not it conflicts with the provisions of the Charter, or

(c) the existence of any other situation[, ] the Member may ... discussions undertaken. (emphasis original)

(See Report of the Working Party of Sub-Committee G of Committee VI (Organization) on Chapter VIII, (Exhibit USA-42), p. 1)

<sup>84</sup> Report of the Working Party of Sub-Committee G of Committee VI (Organization) on Chapter VIII, (Exhibit USA-42), p. 2.

<sup>85</sup> United States' first written submission, para. 74.

<sup>86</sup> United States' response to Panel question No. 59.

3.7. Switzerland submits that the content of the Working Party report confirms that the negotiators aimed to allow for some type of redress with regard to measures consistent with the security exceptions, and therefore not in violation of the ITO Charter.<sup>87</sup>

### **3.1.2 13 January 1948 – Meeting of Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation)**

3.8. At a meeting of the sub-committee dealing with the chapter on settlement of differences and interpretation, "[f]ive representatives agreed with the Chairman that action of the type mentioned in Article 94 [i.e., the security exceptions provision] could not be challenged by recourse to the procedures of Chapter VIII".<sup>88</sup> According to this view, "[h]owever, any Member which considered that any benefit accruing to it being nullified or impaired as specified in Article 89 might invoke the procedures of Chapter VIII in order that compensatory measures might be permitted".<sup>89</sup> The representative of the United Kingdom stated that his delegation intended to propose an amendment to Article 94 that would clarify the relationship between the national security exceptions and the potential recourse for affected ITO members.<sup>90</sup> Two other representatives expressed doubts on the opinion given by the Chairperson.<sup>91</sup> The delegations eventually agreed to leave the question of the relationship between Article 94 and the rules on settlement of differences in Chapter VIII for further consideration later.<sup>92</sup>

3.9. The United States argues that the views expressed at this meeting, like those in the Working Party report discussed in the previous section, confirm the understanding that non-violation complaints were intended to be the only available form of redress for invocations of the national security exceptions.<sup>93</sup>

3.10. Switzerland does not specifically comment on this document.

### **3.1.3 16 January 1948 – Amendment to Article 94 proposed by the UK Delegation**

3.11. The United Kingdom proposed the following amendment to the text of the security exceptions:

Article 94 – General Exceptions

Nothing in this Charter shall be construed: ...

(b) to prevent any Member, either singly or with other Members, from taking any action which it considers necessary for the protection of its essential security interests; where such action

(i) relates to fissionable materials or the materials from which they are derived;

(ii) relates 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 of the Member or of any other country;

<sup>87</sup> Switzerland's second written submission, paras. 222-223.

<sup>88</sup> United States' first written submission, para. 75; United Nations Conference on Trade and Employment, Summary Record of the Third Meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of Committee VI (Organization) (13 January 1948), E/CONF.2/C.6/W.41, (Exhibit USA-43), p. 1.

<sup>89</sup> United States' first written submission, para. 7; Third Meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of Committee VI (Organization), (Exhibit USA-43), p. 1.

<sup>90</sup> Third Meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of Committee VI (Organization), (Exhibit USA-43), p. 1.

<sup>91</sup> Third Meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of Committee VI (Organization), (Exhibit USA-43), p. 1.

<sup>92</sup> Third Meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of Committee VI (Organization), (Exhibit USA-43), p. 1.

<sup>93</sup> United States' first written submission, para. 75.

(iii) is taken, in time of war or other emergency in international relations ... [.]<sup>94</sup>

3.12. This amendment was adopted and is reflected in the final text of the ITO Draft Charter.<sup>95</sup>

3.13. The United Kingdom also proposed the introduction of the following subparagraph 1(d) to the text of the security exceptions:

Nothing in this Charter shall be construed: ...

(d) to prevent a Member from taking any action in connection with any matter which has been brought before the United Nations in accordance with the provisions of Article 10, 11, or 14 of Chapter IV of the Charter of the United Nations, provided that the matter relates to the maintenance of peace and security or to the avoidance of political friction between States, or in accordance with the provisions of Chapter VI of the United Nations Charter.<sup>96</sup>

3.14. This proposed amendment was not adopted.

3.15. The United Kingdom finally proposed to add the following paragraph 2 to the text of the security exceptions:

If any action taken by a Member under paragraph 1 of this Article nullifies or impairs any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the Member taking action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate; provided that where the action is taken under paragraph 1(d) of this Article the procedure set forth in Chapter VIII of this Charter shall not apply until the United Nations has made recommendations on or otherwise disposed of the matter.<sup>97</sup>

3.16. This proposed amendment was not adopted.

3.17. According to the United States, the proposed paragraph 2, although "unnecessary" in light of the existing text, would have made "more explicit" the understanding that security actions could not be reviewed for their consistency with the Charter, but only for the nullification or impairment caused.<sup>98</sup>

3.18. Switzerland does not specifically comment on this document.

### **3.1.4 17 January 1948 – Meeting of Sub-Committee I (Article 94), Sixth Committee: Organization**

3.19. On 17 January 1948, a meeting of Sub-Committee I (Article 94) of the Sixth Committee (Organization) was held to discuss, *inter alia*, the proposal tabled by the United Kingdom. The sub-committee provisionally agreed to the revised text of paragraphs 1(a) and (b).<sup>99</sup>

<sup>94</sup> United States' first written submission, para. 76 and fn 77; United Nations Conference on Trade and Employment, Sub-Committee I of Committee VI (Organization), Amendment to Article 94 proposed by the UK Delegation (16 January 1948), E/CONF.2/C.6/W.48, (Exhibit USA-44), p. 1.

<sup>95</sup> United States' first written submission, fn 77; United Nations Conference on Trade and Employment, Final Act and Related Documents (April 1948), (Exhibit USA-45), pp. 92-93.

<sup>96</sup> Amendment to Article 94 proposed by the UK Delegation, (Exhibit USA-44), pp. 1-2.

<sup>97</sup> Amendment to Article 94 proposed by the UK Delegation, (Exhibit USA-44), p. 2.

<sup>98</sup> United States' first written submission, para. 77.

<sup>99</sup> The revised text read:

Nothing in this Charter shall be construed

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent a Member from taking, either singly or with other states, any action which it considers necessary for the protection of its essential security interests ...

(See United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, E/CONF.2/C.6/W.60 (17 January 1948), (Exhibit USA-47), p. 1).

3.20. With regard to the United Kingdom's proposal of a new subparagraph 1(d), the representative of Czechoslovakia argued that, if those matters were to be discussed further, the question of including that sort of language should be referred to the United Nations Security Council.<sup>100</sup> The delegate of India suggested that the language of the proposed subparagraph 1(d) be modified in order to qualify the word "action" as "relating to the subject matter covered by the present Charter", thus distinguishing "economic" actions from "political or military" ones.<sup>101</sup> The representative of India doubted that the taking of economic action could be regarded as necessarily infringing Article 2 of the United Nations Charter.<sup>102</sup>

3.21. Regarding the proposal for a paragraph 2, the representative of the United States commented in a preliminary manner that that it was "unnecessary" to have the first five lines of the proposed new text of the paragraph, as they would have been a repetition of paragraph (b) of Article 89 concerning non-violation claims.<sup>103</sup> The delegate of the United States also expressed some reservations regarding the expression "until the United Nations has ... otherwise disposed of the matter", as it might have been difficult to determine when the United Nations had "otherwise disposed of" a matter.<sup>104</sup>

3.22. The representative of the United Kingdom noted that he could agree to having the applicability of the provisions on dispute settlement in Articles 89 and 90 written into the record of the discussion rather than incorporated in the text of the security exceptions in Article 94.<sup>105</sup> He further observed that the proviso suggested in the proposed paragraph 2 was not intended to exclude the ITO from participation in the resolution of a matter after the United Nations had acted.<sup>106</sup> He indicated that the language of the proviso could be improved to make more clear at what stage the procedures on the settlement of differences under the ITO Charter would come into operation.<sup>107</sup>

3.23. The representative of India expressed doubts about whether, under the proposed paragraph 2, "the bona fides of an action allegedly coming within [the provision on security exceptions] could be questioned".<sup>108</sup> The representative of India understood that the intention was to limit the possibility of "counteraction" against security measures to "compensatory action and not to include 'punitive action'". The representative of India indicated that his delegation would be prepared to consider the proposed new paragraph.<sup>109</sup>

3.24. The United States observes that the representative of India, "when discussing nullification or impairment claims" as remedies for the invocation of security exceptions, expressed doubts about whether the good faith of an action purportedly coming within the provision on security exceptions could be put into question.<sup>110</sup> The United States further notes that reference to nullification or

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<sup>100</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 2.

<sup>101</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 2.

<sup>102</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 2.

<sup>103</sup> The delegate of the United States referred to the following portion of the proposed new paragraph 2: "If any action taken by a Member under paragraph 1 of this Article nullifies or impairs any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the Member taking action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate".

<sup>104</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 3.

<sup>105</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 3.

<sup>106</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 3.

<sup>107</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 3.

<sup>108</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 3.

<sup>109</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Fourth Meeting, (Exhibit USA-47), p. 3.

<sup>110</sup> United States' first written submission, para. 76.

impairment in the provision on security exceptions would have been "unnecessary", and refers to statements made by the representative of the United States at the above-mentioned meeting.<sup>111</sup>

3.25. Switzerland does not specifically comment on this document.

### **3.1.5 28 February 1948 – Meeting of Sub-Committee I (Article 94), Sixth Committee: Organization**

3.26. At a meeting of Sub-Committee I (Article 94) of the Sixth Committee (Organization) held on 28 February 1948, the delegations agreed to add the following paragraph to the notes from the previous meeting:

The representative of the United Kingdom Delegation, as the proposer of the new article, was asked whether in his opinion it would permit a Member, in the defined circumstances, to take unilateral economic sanctions. He replied that if this article were included in the Charter, the Charter would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions.<sup>112</sup>

3.27. According to the United States, this statement by the representative of the United Kingdom was made in relation to the revised security exceptions provision in the ITO Draft Charter, particularly with regard to the amended *chapeau* of the provision.<sup>113</sup>

3.28. Switzerland does not specifically comment on this document.

## **3.2 Assessment by the Panel**

3.29. As explained above, Article 32 of the Vienna Convention refers to preparatory work and the circumstances of the conclusion of a treaty but does not exhaustively define the supplementary means of treaty interpretation to which recourse may be had.<sup>114</sup> The discussions that took place in 1948 relate to a different treaty than the GATT 1947 and post-date the finalization of the text of the GATT 1947, including Article XXI thereof, which was transposed into the GATT 1994 with the same formulation. At the same time, both the negotiations of the GATT 1947 and the discussions of 1948 occurred in the broader context of the negotiations of the ITO Charter. Within that broader context, the terms of the security exceptions in Article XXI of the GATT 1947 had already been agreed following proposals and discussions addressed by the Panel in the previous section of this Appendix. In light of the chronology of the events under review as well as the institutional setting in which they took place, the Panel considers discussions during negotiations of the ITO Charter taking place in 1948 to be of relatively limited value for the purposes of interpreting Article XXI of the GATT 1994 in relation to the contested issues in this dispute. The Panel will weigh the results of its assessment of the materials and arguments submitted against the backdrop of this consideration and the limited purposes under Article 32 of the Vienna Convention for having recourse to supplementary means of interpretation.

3.30. The Panel will address the materials outlined above in their chronological sequence with specific regard to the United States' contention that the negotiators intended non-violation complaints to be the only available remedy in response to the invocation of the security exceptions under the ITO Draft Charter and the GATT 1947.

3.31. Concerning the Report of the Working Party of Sub-Committee G of Committee VI on Chapter VIII (Settlement of Differences – Interpretation) dated 9 January 1948<sup>115</sup>, the Panel notes that the Working Party considered that the provision on non-violation complaints would apply to actions taken pursuant to the security exceptions. In those situations, the Working Party indicated that such

<sup>111</sup> United States' first written submission, para. 77.

<sup>112</sup> United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Eight Meeting, E/CONF.2/C.6/W.123 (1 March 1948), (Exhibit USA-46), p. 1.

<sup>113</sup> United States' first written submission, para. 76, fns 77 and 78 (referring to Amendment to Article 94 proposed by the UK Delegation, (Exhibit USA-44); United Nations Conference on Trade and Employment, Final Act and Related Documents, (Exhibit USA-45); and United Nations Conference on Trade and Employment, Sub-Committee I (Article 94) of Committee VI (Organization), Notes of the Eight Meeting, (Exhibit USA-46)).

<sup>114</sup> See para. 2.33 above.

<sup>115</sup> See section 3.1.1 above.

actions would be consistent with the ITO Draft Charter but could still nullify or impair the benefits accruing to other ITO members. The Working Party expressed the understanding that, in those circumstances, affected ITO members could not claim the ITO-inconsistency of the contested actions but could nevertheless resort to non-violation complaints. In the Panel's view, this statement does not necessarily reveal that non-violation complaints would be the only available remedy for the invocation of the security exceptions. The reference to actions "consistent" with the ITO Draft Charter could also suggest that actions meeting the requirements of the security exceptions would be consistent with the Charter but could still be subject to non-violation complaints. Furthermore, the statement reflects the views of four delegations only. In any event, the understanding arrived at by those four delegations refers to a revision of the dispute settlement provisions different from the text of Article XXIII of the GATT 1947 that was concluded in October 1947. Absent an explicit connection being made in the text of the Working Party Report in that regard, it is doubtful that any understanding arrived at by four delegations in relation to the ITO Draft Charter would also affect the GATT 1947, which was already applied on a provisional basis at the time of the discussion.

3.32. Regarding the meeting of the Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation) of the Sixth Committee (Organization), dated 13 January 1948<sup>116</sup>, the minutes show an agreement of five delegations with the Chairperson that actions of the type mentioned in the security exceptions of the ITO Draft Charter could not be challenged by recourse to the procedures of the Chapter on the "Settlement of Differences". Those delegations also agreed that affected members could still resort to the procedures on compensatory measures. However, no consensus could be reached on this point, and the minutes clearly mention that two delegates expressed doubts on the position put forward by the Chairperson. Eventually, the sub-committee agreed to leave the question of the relationship between the security exceptions and the rules on dispute settlement for further consideration at a later point in time. Thus, although some delegations expressed the view that action taken pursuant to the security exceptions could not be subject to dispute settlement procedures, the minutes of the meeting clearly show that there was no agreement on this point, and that two representatives expressed doubts on this specific aspect.

3.33. In its proposed amendments to the security exceptions submitted on 16 January 1948, the United Kingdom sought to introduce language allowing application to the ITO for authorization to suspend obligations or concessions for an equivalent amount of any benefit under the ITO Draft Charter that was nullified or impaired by actions under the security exceptions.<sup>117</sup> The proposal further sought to temporarily exclude certain measures adopted in pursuance of Chapter IV of the Charter of the United Nations from the applicability of the provisions on dispute settlement, until the United Nations had made recommendations or had otherwise disposed of the matter.<sup>118</sup> The Panel notes that the proposal did not provide that the only option of ITO members affected by the application of security measures would be to suspend or withdraw concessions or obligations for an equivalent amount. Furthermore, the proposal sought to exclude the applicability of the provisions of dispute settlement only to a subset of measures, and only temporarily. The proposal, moreover, was not ultimately adopted.

3.34. In relation to the meeting of Sub-Committee I of the Sixth Committee held on 17 January 1948, the Panel notes that the delegate of India expressed doubts about whether "the bona fides of an action allegedly coming within [the security exceptions] could be questioned". The Panel does not consider this statement made by one representative to shed light on the issue of the reviewability of the security exceptions. The Panel further notes that the delegate of the United States considered it "unnecessary" to include reference to the notions of nullification or impairment in the text of the provision of security exceptions, on the grounds that it would amount to a repetition of the content of the provision on dispute settlement. In the Panel's view, this statement is not dispositive of the question of whether non-violation complaints were considered by ITO negotiators to be the only available remedy to the invocation of the security exceptions under the ITO Draft Charter. The Panel also notes that other passages from the minutes of the above-mentioned meeting do not provide relevant clarification as to the interpretive questions raised in this dispute.

3.35. The Panel further refers to the statement of the representative of the United Kingdom, made at a meeting of Sub-Committee I of the Sixth Committee on 28 February 1948, that "if this article

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<sup>116</sup> See section 3.1.2 above.

<sup>117</sup> See para. 3.15 above.

<sup>118</sup> See para. 3.15 above.

were included in the Charter, the Charter would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions".<sup>119</sup> It is questionable whether this statement was made in relation to the entire revised security exceptions provision in the ITO Draft Charter or, as the United States contends, with specific regard to the *chapeau* of the provision, which was slightly amended compared to the formulation in Article XXI of the GATT 1947.<sup>120</sup> In this regard, the statement does not explicitly refer to the revised *chapeau* of the security exceptions in the ITO Draft Charter but rather the entire "article". The Panel notes from the minutes of the previous meeting that the discussion revolved around three specific issues, none of which concerned the revised *chapeau* of the security exceptions or the reviewability of the invocation of the provision.<sup>121</sup> Moreover, the Panel notes that this statement was made by one delegation only and was limited to "unilateral economic sanctions" without further clarification. Accordingly, the Panel does not find clear interpretive guidance in this statement absent a clear link to the contested issues in this dispute and without any indication of the views of other delegations.

3.36. To summarize, the materials indicate that, after the text of the GATT 1947 was finalized and the agreement was already applied on a provisional basis, some delegations at the ITO Charter negotiations expressed the understanding that actions purportedly taken under the security exceptions could be subject to non-violation complaints. However, the discussions in 1948 do not show that there was a shared understanding by all negotiators that non-violation complaints would be the only form of redress for invocations of the security exceptions to the exclusion of claims of inconsistency. In any event, neither the ITO Draft Charter nor the GATT 1947 contain any explicit derogation precluding claims of inconsistency for measures taken pursuant to the security exceptions. Furthermore, nowhere do the materials reviewed refer explicitly to Article XXI of the GATT 1947, but only to the corresponding provision in the ITO Draft Charter.

3.37. Based on the foregoing, the Panel does not find support in these materials for the contention by the United States that measures taken under the security exceptions could only be subject to non-violation claims to the exclusion of claims of inconsistency. This conclusion is consistent with the Panel's understanding that Article XXI(b) of the GATT 1994 is not "self-judging" in the sense argued by the United States. Accordingly, the analysis of these materials confirms, or at least does not undermine, the Panel's interpretation of Article XXI(b) of the GATT 1994.

## **4 INTERNAL DOCUMENTS OF THE US DELEGATION AT THE ITO/GATT 1947 NEGOTIATIONS**

### **4.1 Arguments and materials submitted by the parties**

4.1. The United States submits various internal documents of the US delegation at the negotiations of the ITO Charter and the GATT 1947 and notes that the panel in *Russia – Traffic in Transit* referred to a study discussing these documents.<sup>122</sup> While submitting these documents as part of its arguments on the interpretation of Article XXI(b) of the GATT 1994, the United States argues that the materials referred to by the panel in *Russia – Traffic in Transit* are not "negotiating history" within the meaning of the Vienna Convention.<sup>123</sup> The United States maintains that those materials were confidential at the time of the negotiations, and that availability to all relevant parties before and during a negotiation is a relevant factor to determine whether certain materials are part of the "negotiating history", or other supplementary means of interpretation under Article 32 of the

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<sup>119</sup> See para. 3.26 above. This statement was added to the minutes from a previous meeting, which were not submitted by either party in this dispute. The previous meeting of the Sixth Committee was held on 27 February 1948. (See United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Seventh Meeting (Article 94), E/CONF.2/C.6/W.121 (27 February 1948)).

<sup>120</sup> See United States' first written submission, para. 76, fn 77.

<sup>121</sup> Specifically, the minutes of the 27 February 1948 meeting report a discussion on three issues relating to Article 94: (i) the provisional agreement already reached by the negotiators on the addition of a paragraph dealing with peace treaties and special regimes; (ii) the possibility to amend the wording of subparagraph 1(c) of Article 94 dealing with intergovernmental agreements made by or for a military establishment; and (iii) the possibility to include a provision in the text of the security exceptions on temporary arrangements between India and Pakistan pending the establishment of permanent trade relations. (See United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Seventh Meeting (Article 94), E/CONF.2/C.6/W.121 (27 February 1948)).

<sup>122</sup> United States' first written submission, para. 80.

<sup>123</sup> United States' first written submission, para. 81.

Vienna Convention.<sup>124</sup> The United States thus holds that it would be legal error to consider internal documents of the US delegation at the ITO Charter and GATT 1947 negotiations as preparatory work constituting supplementary means of interpretation.<sup>125</sup> Nevertheless, the United States submits that, when reviewed, the above-mentioned materials demonstrate that the US negotiators and other ITO negotiating parties sought to exclude essential security matters from scrutiny in international fora focused on trade.<sup>126</sup> The United States is thus of the view that, even if these materials were to be taken into account, they would further confirm that Article XXI(b) of the GATT 1994 is "self-judging".<sup>127</sup>

4.2. Switzerland argues that internal documents of the US delegation at the ITO Charter and GATT 1947 negotiations fall within the scope of Article 32 of the Vienna Convention.<sup>128</sup> Switzerland considers that these documents confirm the position of the United States as the original drafter of the security exceptions, and the fact that they were not accessible to other parties is not decisive.<sup>129</sup> According to Switzerland, the internal documents of the US delegation can qualify as circumstances of the treaty conclusion, as they are part of the historical background for the negotiations of Article XXI of the GATT 1947.<sup>130</sup> Switzerland further argues that the Panel may still take the above-mentioned documents into account under Article 32 of the Vienna Convention even if it were to find that they do not form part of the circumstances of the conclusion of the GATT 1947.<sup>131</sup> In this regard, Switzerland notes that the list of supplementary means of interpretation in Article 32 of the Vienna Convention is not exhaustive.<sup>132</sup>

#### **4.1.1 US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter" (17 June 1946)**

4.3. A memorandum dated 17 June 1946 summarizes a discussion on the security exceptions among representatives of different branches and agencies within the government of the United States prior to the submission of the United States' proposal for a draft text of the ITO Charter.<sup>133</sup> The following participants took part in the discussion: General Royall (Under Secretary of War); Mr Kenney (Deputy to the Assistant Secretary of the Navy); Mr Deupree (Army-Navy Munitions Board); Mr Neff (Department of War); Mr Clayton (Assistant Secretary of State); and Mr Wilcox (Head of the Office of International Trade Policy at the Department of State).<sup>134</sup>

4.4. General Royall raised the concern that the proposed ITO Charter would make it impossible to impose restrictions on the exportation of strategic raw materials or scrap materials essential for security purposes, or to prevent enemies from obtaining United States' supplies of such materials. General Royall made it clear that the army desired to have a "free hand" to stop shipments of materials or technology "at any time without regard to whether or not there was an imminent threat of war".<sup>135</sup> Mr Deupree was concerned by the phrase "imminent threat of war" and suggested a change in wording in order to avoid serious diplomatic repercussions.<sup>136</sup>

4.5. Mr Clayton addressed the concerns of the military services, noting the importance of the objectives sought by the "trade program", including the preservation of peace and the protection of national security.<sup>137</sup> The representatives of the services acknowledged these points but continued to

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<sup>124</sup> United States' first written submission, paras. 84-86; response to Panel question No. 63.

<sup>125</sup> United States' first written submission, para. 87.

<sup>126</sup> United States' first written submission, para. 89.

<sup>127</sup> United States' first written submission, para. 82.

<sup>128</sup> Switzerland's second written submission, fn 251; response to Panel question No. 63.

<sup>129</sup> Switzerland's response to Panel question No. 63; second written submission, para. 212.

<sup>130</sup> Switzerland's response to Panel question No. 63.

<sup>131</sup> Switzerland's response to Panel question No. 63.

<sup>132</sup> Switzerland's response to Panel question No. 63.

<sup>133</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter" (17 June 1946), (Exhibit USA-52).

<sup>134</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52), p. 1.

<sup>135</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52), p. 1.

<sup>136</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52), p. 2.

<sup>137</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52), p. 2.

argue for a "free hand in controlling international transactions for military purposes".<sup>138</sup> Mr Wilcox assured the participants that the Department of State intended to make all necessary provisions to safeguard national security, in a way that would not give "carte blanche to other countries to violate their commitments with respect to commercial policy under the cloak of a sweeping security exception".<sup>139</sup>

4.6. At the end of the meeting, the participants agreed that Mr Neff and Mr Wilcox would work on the possibility to develop some wording that would meet the concerns of the military services without invalidating the Charter or necessitating the abandonment of the "trade program".<sup>140</sup>

4.7. The United States notes from the summary of this discussion that military stakeholders sought a provision on security exceptions that would allow the United States to take measures "without regard to whether or not there was an imminent threat of war".<sup>141</sup>

4.8. Switzerland does not specifically comment on this document.

#### **4.1.2 US Delegation, Economic Disarmament (Draft) (1946)**

4.9. This document contains a reaction, unattributed to a specific source, to the argument raised by military services that commitments in the ITO Charter would constitute economic disarmament, and that responsibility for economic disarmament was properly placed under the jurisdiction of the Security Council of the United Nations, where certain nations held veto rights.<sup>142</sup> The document reports the view that the argument whereby any aspect of military security, no matter how remote, would override all considerations of "economic and social well-being" was "wholly at variance" with the United States' established foreign policy and the Charter of the United Nations.<sup>143</sup> The document continues with the affirmation that international economic cooperation, including the reduction of trade barriers, was a "major goal" of the United States' foreign policy.<sup>144</sup>

4.10. According to the United States, this document shows how, in early internal discussions, the view was held that a broad exception whereby military security interests would override all considerations of social and economic wellbeing was inconsistent with the established foreign policy of the United States and with the Charter of the United Nations.<sup>145</sup>

4.11. Switzerland does not specifically comment on this document.

#### **4.1.3 US Delegation, Letter from Mr Coppock to Mr Wilcox (3 July 1946)**

4.12. This document is an internal US government memorandum from Mr Coppock (Department of State) to Mr Wilcox on "National Security Provisions in the Draft Charter".<sup>146</sup> The memorandum recalls the diverging positions within the US delegation between the military branch and the Department of State, the former advocating for an exemption for any measure that a country deemed essential to its national defence, and the latter being concerned with the risk that the wide use of a broad exception would nullify much of the ITO Charter.<sup>147</sup>

4.13. The memorandum suggests a compromise along "procedural" instead of "substantive lines", by "assigning to some body, presumably international, probably the Executive Board of the ITO or the Security Council (or some sub-group of it), the task of granting exceptions to the Charter

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<sup>138</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52), p. 2.

<sup>139</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52), p. 2.

<sup>140</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52), p. 2.

<sup>141</sup> United States' first written submission, para. 90.

<sup>142</sup> US Delegation, Economic Disarmament (Draft), (Exhibit USA-53), p. 1.

<sup>143</sup> US Delegation, Economic Disarmament (Draft), (Exhibit USA-53), p. 1.

<sup>144</sup> US Delegation, Economic Disarmament (Draft), (Exhibit USA-53), p. 1.

<sup>145</sup> United States' first written submission, para. 91.

<sup>146</sup> US Delegation, Letter dated 3 July 1946 from Mr Coppock to Mr Wilcox on "National Security Provisions in the Draft Charter", (Exhibit USA-54).

<sup>147</sup> US Delegation, Letter from Mr Coppock to Mr Wilcox, (Exhibit USA-54), p. 1.

provisions on the grounds of national defense".<sup>148</sup> In support of the proposed solution, the memorandum outlines two additional considerations: (i) any rule written in the Charter would call for interpretation "unless the unilateral assertions of a particular country that their restrictive measures are essential to their national defense are accepted at face value"; (ii) the difficulty "to write a rule that is general enough to cover the rather wide variety of intended circumstances and yet narrow enough to restrain abuses".<sup>149</sup>

4.14. The memorandum assumes that interpretations of the invocation of the security exceptions would need to be made, and therefore proposes to "face squarely" the question of whether the Executive Board of the ITO would be the proper body to do so.<sup>150</sup> The memorandum suggests the option of the Executive Board acting in the first instance, with the possibility that any decision be appealed to the Security Council of the United Nations or a committee thereof.<sup>151</sup>

4.15. The United States notes that this "procedural solution" was included in the draft text of the ITO Charter that the United States presented to other delegations in September 1946.<sup>152</sup>

4.16. Switzerland does not specifically comment on this document.

#### 4.1.4 US Delegation, Minutes of the Delegation Meeting (2 July 1947)

4.17. This document reproduces the minutes of a meeting of the US delegation held in Geneva on 2 July 1947 in the context of the second meeting of the Preparatory Committee of the United Nations Conference on Trade and Employment.<sup>153</sup> The discussion notably revolved around the security exceptions<sup>154</sup> concerning a proposal by Mr Neff for another draft provision with the following text:

#### Article 94

##### General Exceptions to the Whole Charter

1. Without limiting the generality of any other exception or qualification, none of the obligations of this Charter shall apply to any measure or agreement:

a. Relating to fissionable materials or their source materials;

<sup>148</sup> US Delegation, Letter from Mr Coppock to Mr Wilcox, (Exhibit USA-54), p. 1.

<sup>149</sup> US Delegation, Letter from Mr Coppock to Mr Wilcox, (Exhibit USA-54), pp. 1-2.

<sup>150</sup> US Delegation, Letter from Mr Coppock to Mr Wilcox, (Exhibit USA-54), p. 2.

<sup>151</sup> US Delegation, Letter from Mr Coppock to Mr Wilcox, (Exhibit USA-54), p. 2.

<sup>152</sup> United States' first written submission, para. 93 (referring to Report of the First Session of the Preparatory Committee, (Exhibit USA-31), Annexure 11 (United States Draft Charter)).

<sup>153</sup> US Delegation, Second Meeting of the United Nations Preparatory Committee for the International Conference on Trade and Employment, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48).

<sup>154</sup> The security exceptions were discussed also earlier in the meeting based on a proposal by Mr Neff, which was rejected with a unanimous vote of the US delegation, to add the words "directly or indirectly" to Article 94(1)(b) as follows: "... 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." US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), p. 5 (emphasis added). In support of the proposal, Mr Neff argued that this language would have been in line with a legislative proposal for the control of traffic in arms and implements of war that had been submitted to the Congress of the United States around the same time. Moreover, Mr Neff added that the proposed wording was "dictated by considerations to give the US Government the widest possible latitude in dealing with national security objectives". The minutes report that the proposal "provoked sharp discussion". Mr Evans (Department of Commerce) replied that the proposal was "unnecessary", as the United States already enjoyed ample latitude to meet any contingency under the wording as it was at that time. Mr Leddy (Department of State), Mr Rubin (legal advisor for the delegation), and Mr Bronz (Department of Treasury) argued "with equal fervor" against the inclusion of the proposed wording. Mr Wilcox held that the addition of the proposed words would have been "equally destructive" of the purpose of the Charter as the amendments proposed by other countries were designed to eliminate control over the use of quantitative restrictions. (US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), p. 5). Eventually the phrase "directly or indirectly" was included in the final formulation of Article XXI(b)(ii) of the GATT 1947 and Article 99(1)(b)(ii) of the ITO Draft Charter.

b. 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;

c. In time of war or other emergency in international relations, relating to the protection of its [essential] security interests;

d. Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.

2. Notwithstanding any provision of the Charter, no Member shall have to furnish any information in any report required by, or pursuant to, the Charter the furnishing of which will be contrary to its national security.

3. The provisions of Article 86 relating to the interpretation and settlement of disputes shall not apply to paragraphs 1 and 2 of this Article but each Member shall have independent power of interpretation.<sup>155</sup>

4.18. According to the minutes of the meeting, the draft provoked "considerable discussion".<sup>156</sup> Concerning the expression "[w]ithout limiting the generality of any other exception or qualification" in paragraph 1, several members of the delegation raised doubts about whether it was necessary to achieve the objective sought. Mr Catudal (Department of State) pointed out that, as a matter of law, the clause in question was "unnecessary" and added nothing to the draft text of the security exceptions proposed by Mr Kellogg (Department of State), which read in its introductory clause: "Nothing in this Charter shall be construed to prevent the adoption or enforcement by any Member of any measure which it may deem necessary ...".<sup>157</sup> According to Mr Catudal, Mr Kellogg's draft covered "[e]very possible contingency involving the national security of the United States".<sup>158</sup> Mr Rubin, Mr Brown (Department of State), Mr Leddy, and Mr Evans agreed with Mr Catudal.<sup>159</sup>

4.19. The United States notes that in internal discussions, some government stakeholders sought to make the "self-judging" nature of the national security exception even more explicit.<sup>160</sup> The United States further highlights that this proposal tabled by a military representative included language that the provisions on dispute settlement would not apply to the security exceptions, leaving to the ITO members concerned the "independent power of interpretation".<sup>161</sup> According to the United States, the panel in *Russia – Traffic in Transit* erroneously concluded that the US delegation rejected Mr Neff's proposals based on a view that "the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter".<sup>162</sup> Instead, the United States maintains that the suggestions were rejected on the grounds that they were deemed "unnecessary", as the majority of the delegation was of the view that the existing text adequately preserved the United States' freedom of action.<sup>163</sup>

4.20. Switzerland does not specifically comment on this document.

<sup>155</sup> US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), p. 10. (emphasis original)

<sup>156</sup> US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), p. 6.

<sup>157</sup> US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), pp. 6 and 9.

<sup>158</sup> US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), p. 6.

<sup>159</sup> US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), p. 6.

<sup>160</sup> United States' first written submission, para. 97.

<sup>161</sup> United States' first written submission, para. 97; US Delegation, Minutes of the Delegation Meeting (2 July 1947), (Exhibit USA-48), p. 10.

<sup>162</sup> United States' first written submission, para. 98 (citing Panel Report, *Russia – Traffic in Transit*, paras. 7.90-7.91).

<sup>163</sup> United States' first written submission, para. 98.

#### 4.1.5 US Delegation, Minutes of the Delegation Meeting (4 July 1947)

4.21. Further to a request made by Mr Wilcox at a previous meeting, Mr Rubin submitted a new draft article on "general exceptions"<sup>164</sup> with the following text:

#### Chapter IX

#### Article

#### General Exceptions

[Without limitation of any other exceptions or qualification] Nothing in this Charter shall be construed to compel any Member to furnish any information the furnishing of which it considers contrary to its essential security interests, or to prevent the adoption or enforcement by any Member of any measure or agreement which it may [deem] consider to be necessary and to relate to:

- a) [Relating to] Fissionable materials or their source materials;
- b) [Relating to] The traffic in arms, munition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c) In time of war or other emergency in international relations [relating to] the protection of its essential security interests;
- d) [Undertaken] Undertakings in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.

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 N. B. The brackets indicate changes from the original draft submitted by Mr Neff. For copy of Mr Neff's original draft see minutes of July 2, 8 p.m. meeting.<sup>165</sup>

4.22. Among the issues discussed at the meeting<sup>166</sup>, there was a request by Mr Wilcox to change the phrase "and to relate to" at the end of the introductory clause of the provision with the words "relating to".<sup>167</sup> Mr Rubin replied that he had discussed this issue with Mr Neff, who "objected vigorously" to the change.<sup>168</sup> According to Mr Neff, the use of the terms "and to relate to" meant that, "[b]y retaining it as an independent clause the meaning is clear; the US may take unilateral action".<sup>169</sup> Mr Evans, Mr Leddy, and Mr Terrill "objected strongly" to the retention of the words "and to relate to", arguing that such a provision would destroy "the entire efficacy of the Charter".<sup>170</sup> The three specifically noted that "[p]roviding the means for unilateral action will surely be abused by some countries", as "any country could, under the pretext of national security, take any measure whatsoever it might wish in complete disregard of all provisions of the Charter".<sup>171</sup> Mr Leddy added that it would have been "better to abandon all work on Charter" instead of including the proposed wording.<sup>172</sup>

<sup>164</sup> US Delegation, Second Meeting of the United Nations Preparatory Committee for the International Conference on Trade and Employment, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 2.

<sup>165</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 4. (emphasis original)

<sup>166</sup> Earlier in the meeting there was a discussion on the necessity to include the words "or agreement" in the introductory clause of the provision. Further to the discussion, the participants reached a compromise, replacing the words "measure or agreement" with "action". (US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 2).

<sup>167</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 2.

<sup>168</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 2.

<sup>169</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 2.

<sup>170</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 2.

<sup>171</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), pp. 2-3.

<sup>172</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

4.23. In response to the criticisms, Mr Neff argued that, with regard to matters of national security, the United States had to be "given a free hand to make whatever decisions may be necessary without challenge by the ITO".<sup>173</sup> Mr Evans replied that the United States would be a sufficiently important member of the ITO and that, in the event of a "bona fide" national security problem, the ITO would not be able to do otherwise than find in favour of the United States.<sup>174</sup> This opinion was shared by Mr Brown.<sup>175</sup>

4.24. Mr Ryder (Tariff Commission) stated that, in practical terms, no injury could come to the United States by an intervention of the ITO to determine whether certain measures were in fact taken in the interest of national security.<sup>176</sup> Mr Wilcox argued that he did not think that the ITO would ever become a forum to discuss national security interests.<sup>177</sup> In light of the diverging views of the members of the delegation, Mr Wilcox called for a vote on the question whether the language "and to relate to" should be retained. Only three members of the delegation voted to retain this wording (Captain Thorp (Navy), Mr Neff, and Mr Brossard (Tariff Commission)), whereas the majority voted to change the language to "relating to" (Mr Ryder, Mr Leddy, Mr Evans, Mr Brown, Mr Arnold (Department of State), Mr Rubin, Mr Terrill, Mr Hawkins, and Mr Schwenger (Department of Agriculture)).<sup>178</sup>

4.25. After the vote, Mr Neff asked that a provision be included in the Charter to the effect that any challenge against a measure taken purportedly for national security reasons be referred to the "World Court" for decision, rather than to the ITO.<sup>179</sup> Mr Neff further requested that his dissent to the decision taken by vote be reflected in the minutes of the meeting.<sup>180</sup>

4.26. The United States highlights that a proposal was tabled to add the words "and to relate to" to the text of the provision, and that such proposal was ultimately rejected.<sup>181</sup>

4.27. Switzerland does not specifically comment on this document.

#### **4.1.6 US Delegation, Memorandum of Mr Rubin (14 July 1947)**

4.28. In response to two memoranda filed, respectively, by Mr Neff and Captain Thorp, Mr Rubin submitted another memorandum with his comments on the internal deliberations of the US delegation concerning the drafting of the security exceptions.<sup>182</sup>

4.29. Mr Rubin provided his views with regard to the question of "the power to interpret the security exceptions".<sup>183</sup> Mr Rubin recognized that there were differences between the wording of the draft security exceptions provision at that time and the proposal submitted by Mr Neff, pursuant to which the introductory clause of the provision would have ended with the words "from taking any action which it may consider to relate to ...".<sup>184</sup>

4.30. Mr Rubin noted that the changes proposed by Mr Neff "would make it perfectly clear that any [ITO m]ember had the unilateral power to decide that any action which it proposed to take related to the matters illustrated in the lettered [sub]paragraphs".<sup>185</sup> Mr Rubin further noted that those changes would have made "unchallengeable ... a justification, however far-fetched, of any action on this basis".<sup>186</sup> In this respect, Mr Rubin wrote that, "[t]o the extent that the wording approved by

<sup>173</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>174</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>175</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>176</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>177</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>178</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>179</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>180</sup> US Delegation, Minutes of the Delegation Meeting (4 July 1947), (Exhibit USA-56), p. 3.

<sup>181</sup> United States' first written submission, paras. 97-98.

<sup>182</sup> US Delegation, Second Meeting of the United Nations Conference on Trade and Development, Memorandum of Seymour J. Rubin (14 July 1947), (Exhibit USA-49). The memoranda of Mr Neff and Captain Thorp were not submitted to the Panel and are not part of the record of this dispute.

<sup>183</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 1.

<sup>184</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 1.

<sup>185</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 1.

<sup>186</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 1.

the Delegation does not permit this completely open escape from the Charter, it may be said, as Mr Neff argues, to limit the scope of the unilateral interpretation portion of the security exceptions."<sup>187</sup>

4.31. Mr Rubin further argued that "the security exceptions are as drafted sufficiently broad to take care of any reasonable case".<sup>188</sup> According to Mr Rubin, the security exceptions were redrafted "to provide for unilateral determination by each [ITO m]ember, unchallenged by any other [ITO m]ember, as to what action it deems necessary in a field 'relating to' the listed subjects" in the lettered subparagraphs.<sup>189</sup> Mr Rubin therefore expressed his understanding that no challenge could be made to any action taken by the United States: (i) falling in the field of "fissionable materials", as no challenge could be made to measures regulating the use of "source materials" for fissionable materials, or the traffic in arms, ammunitions, and implements of war, "no matter how remote may be considered the relevance of the measure undertaken to the problem to be solved, if the measure falls in any of these fields"; or (ii) "if the measure relates to any of the any of the identified fields of interest – another phrase which grants broad power of unilateral determination".<sup>190</sup>

4.32. Mr Rubin further referred to testimony before the US Senate Finance Committee that "does not indicate a commitment to go farther than these broad and unilateral exceptions, nor a desire that ... the Charter should in effect be negated by such a broad and unilateral security exception that any action, no matter how little related to security, would be immune even from question".<sup>191</sup>

4.33. Mr Rubin expressed the view that, as the exceptions were drafted at that time, "no action in or relating to certain fields where national security is concerned can be questioned, whether before the Organization or the Court".<sup>192</sup> Mr Rubin expressed the understanding that the changes introduced in the wording of the provision were in accordance with the commitment of the Department of State expressed in the following terms: "These new exceptions would be worded so as to give each Member freedom to apply them as it determines in the interest of its own security".<sup>193</sup>

4.34. Mr Rubin then addressed the comment raised by Mr Neff that there was a contrast between the proposals submitted in the context of the ITO negotiations and the United Nations Charter in which, according to Mr Neff, "the United States reserved the complete power of unilateral action in regard to any matter affecting its national security".<sup>194</sup> In this regard, Mr Rubin "supposed that this refers to the veto power" and noted that it was not the policy of the United States to support the veto principle in international affairs or to reserve the veto "for all nations which come into any international organizations, ITO or any other".<sup>195</sup>

4.35. In conclusion, Mr Rubin stated that the security exceptions as drafted at that time gave "a great deal of leeway for unilateral determination on matters affecting national security", and that the wording proposed by Mr Neff would have made the ITO Charter an "illusory document".<sup>196</sup> Mr Rubin further explained that a "broader exception" would have been invoked by other countries rather than by the United States, and that the formulation of the security exceptions at that time granted the United States freedom to apply the provision as it determined in the interests of its own security, "provided that it [was] the exception and not something else".<sup>197</sup>

4.36. According to the United States, this memorandum confirms that earlier formulations of the security exceptions already provided for broad power of unilateral interpretation, and that the suggestions from the military representatives would have expanded that power only to the extent that it was not already preserved in the text.<sup>198</sup> The United States further emphasizes that the memorandum reiterates that "no challenge" could be made with regard to actions falling "in the field of fissionable materials ... or the traffic in arms ... no matter how remote may be considered the

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<sup>187</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 1.

<sup>188</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 2.

<sup>189</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 2.

<sup>190</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 2.

<sup>191</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 2.

<sup>192</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 3.

<sup>193</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 3.

<sup>194</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 3.

<sup>195</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 3.

<sup>196</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 3.

<sup>197</sup> US Delegation, Memorandum of Mr Rubin, (Exhibit USA-49), p. 3.

<sup>198</sup> United States' first written submission, para. 100.

relevance of the measures undertaken to the problem to be solved".<sup>199</sup> The United States argues that it was the view of the US delegation that the then-current text of the security exceptions already permitted each ITO member to determine, "for itself", what actions were necessary to protect its essential security interests in the fields listed in the provision.<sup>200</sup> The United States considers that the US delegation did not take the position "that the scope of the unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision", as concluded by the panel in *Russia – Traffic in Transit*.<sup>201</sup> Instead, the United States maintains that the memorandum specifically states that, under the text of the security exceptions, the United States could justify security measures "as it may contemplate as 'relating to'" the subjects listed in the provision.<sup>202</sup>

4.37. Switzerland notes Mr Rubin's affirmation that the US delegation rejected the changes proposed by Mr Neff on the grounds that they would have transformed the ITO Charter in an "illusory document".<sup>203</sup> According to Switzerland, the memorandum explained that the proposed amendment "would make it perfectly clear that any Member had the unilateral power to decide that any action which it proposed to take did relate to the matters contained in the lettered paragraphs", thereby making "unchallengeable by the Organization or any other Member a justification, however far-fetched, of any action on this basis".<sup>204</sup> In Switzerland's view, it follows that the security exceptions as proposed by the United States in ITO negotiations after a majority deliberation of the delegation were not meant to grant "unlimited discretion" to a member of the ITO invoking that justification.<sup>205</sup>

## 4.2 Assessment by the Panel

4.38. The Panel notes the parties' views on the potential relevance under Article 32 of the Vienna Convention of the internal documents of the US delegation at the negotiations for the ITO Charter and the GATT 1947. The Panel further recalls its understanding that Article 32 of the Vienna Convention refers to preparatory work and the circumstances of the conclusion of a treaty as examples, without limiting the scope of the supplementary means of treaty interpretation to which there may be recourse.<sup>206</sup>

4.39. In considering the possible relevance of these documents under Article 32, the Panel notes that these documents were not in the public domain, nor were they accessible to other delegations at the time the negotiations of the ITO and the GATT 1947 took place. These documents pertain to the internal deliberations of only one delegation among those negotiating the ITO Charter and GATT 1947, albeit the proponent of the draft text for the security exceptions. The Panel is mindful that the documents do not shed light on the views or intentions of other delegations, nor are these documents submitted as a comprehensive record of the internal views of the one delegation to which they pertain.

4.40. Subject to these limitations, the Panel does not consider that these documents are, in principle, entirely irrelevant as supplementary means for the interpretation of Article XXI(b) of the GATT 1994. These documents provide a record of discussions on various alternative versions of the security exceptions taking place around the time the provision was being drafted. Furthermore, certain discussions reported in the submitted documents specifically revolved around the extent to which the text of the security exceptions would permit some form of review of their invocation. Against this background, the Panel reviews the content of these documents bearing in mind their inherent limitations as a partial record of the internal views of one single delegation, and the different institutional setting compared to the WTO in which these discussions took place, particularly with respect to the resolution of disputes.

4.41. The first two documents reflect diverging views among various branches of the US government prior to the submission of the United States' proposal for a draft text of the ITO

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<sup>199</sup> United States' first written submission, para. 101.

<sup>200</sup> United States' first written submission, para. 101.

<sup>201</sup> United States' first written submission, para. 102 (citing Panel Report, *Russia – Traffic in Transit*, para. 7.91).

<sup>202</sup> United States' first written submission, para. 102.

<sup>203</sup> Switzerland's second written submission, para. 212.

<sup>204</sup> Switzerland's second written submission, para. 212.

<sup>205</sup> Switzerland's second written submission, para. 212.

<sup>206</sup> See para. 2.33 above.

Charter<sup>207</sup>, particularly between the military services and the Department of State in relation to the drafting of the security exceptions. While the military services argued in favour of a "free hand" to impose export restrictions of materials or technology, without there needing to be an "imminent threat of war", representatives of the Department of State emphasized the benefits of the "trade program" and committed to make sure that national security interests be fully preserved, without giving "carte blanche" to other ITO members to avoid their trade commitments "under the cloak of a sweeping security exception".<sup>208</sup> The divergence of views extended to the perceived rationale for the ITO Charter, with military services considering it a form of economic disarmament to be properly placed under the aegis of the Security Council of the United Nations, and other branches of the US government noting that the reduction of trade barriers was a major goal of the United States' foreign policy, not to be necessarily overridden by any aspect of military security.<sup>209</sup> The Panel considers that these documents reveal an initial difference in the positions of various branches of the US government that would be the subject of efforts to reach a compromise.

4.42. With regard to the letter from Mr Coppock to Mr Wilcox, the Panel notes that it contained a "procedural" proposal with the aim of bridging the diverging views between the military services and the Department of State. According to this proposal, in light of the impossibility to draft a text of the provision that would satisfy the opposing views, a solution could be found by entrusting the Executive Board of the ITO or the Security Council of the United Nations with the authority to review the invocation of the security exceptions, either in the first instance or on appeal.<sup>210</sup> Consistent with the review of the negotiating history of Article XXI of the GATT 1947 conducted earlier, this document shows that various alternative institutional architectures for the ITO were being considered around the time early drafts of the security exceptions provisions began to be discussed.

4.43. Turning to the minutes of the meeting that took place on 2 July 1947, the Panel notes that the debate concerned a proposal for an alternative wording of the security exceptions tabled by a representative of the military services. Specifically, the proposal included language that was understood to explicitly shield the invocation of the security exceptions from the applicability of the rules on dispute settlement.<sup>211</sup> While the debate does not reveal the specific reasons for rejecting the proposed paragraph, the Panel notes that similar wording did not feature in any of the various iterations of the security exceptions that were discussed during the negotiations of the ITO Charter or the GATT 1947.

4.44. Regarding the meeting that took place on 4 July 1947, the Panel notes that the US delegation discussed two versions of the introductory clause of the security exceptions provision. Under one version, similarly to the current formulation of Article XXI of the GATT 1994, the *chapeau* of the provision would end with the words "relating to". Under another version, the introductory sentence referred to measures that an ITO member "consider[s] to be necessary and to relate to" one of the situations detailed in the subsequent subparagraphs.<sup>212</sup> The majority of the delegation voted in favour of the first version.<sup>213</sup> Among the considerations that led to rejecting the second version, the Panel notes that several participants to the meeting argued that it would have unduly expanded the scope for unilateral action for ITO members, thereby opening the door to the possibility of abuses. In this regard, the Panel notes that the US delegation rejected a potential formulation that would have explicitly left it to the ITO member invoking the security exceptions to determine whether a certain measure was within the scope of the subparagraphs.

4.45. With respect to the memorandum drafted by Mr Rubin to the Chairperson of the US delegation, the Panel notes that the author examines different positions that emerged within the US delegation concerning the power to interpret the security exceptions. Specifically, Mr Rubin commented on a proposal by Mr Neff that the introductory clause of the security exceptions end with the phrase "from taking any action which it may consider to relate to", followed by the relevant subparagraphs. According to the memorandum, this language would have made it clear that ITO members retained the "unilateral power" to determine that their actions "did relate to the matters contained in the lettered [sub]paragraphs", which would make "unchallengeable ... a justification, however far-

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<sup>207</sup> US Department of State, Memorandum of Conversation on "Security Exceptions to proposed ITO Charter", (Exhibit USA-52); and US Delegation, Economic Disarmament (Draft), (Exhibit USA-53).

<sup>208</sup> See para. 4.5 above.

<sup>209</sup> See para. 4.9 above.

<sup>210</sup> See para. 4.14 above.

<sup>211</sup> See para. 4.17 above.

<sup>212</sup> See para. 4.21 above.

<sup>213</sup> See para. 4.24 above.

fetched, of any action" purportedly taken under the security exceptions. The memorandum contrasts "this completely open escape from the Charter" with the provision as it was drafted at that time, which was already "sufficiently broad to apply to any reasonable case" by providing for "unilateral determination by each [ITO m]ember, unchallenged by any other [ITO m]ember, as to what action it deems necessary *in a field*" identified in the subparagraphs. Accordingly, the memorandum refers to "action *in or relating to certain fields* where national security is concerned" that could not be "questioned" before the competent organs envisaged in the draft text of the ITO Charter at that time.<sup>214</sup> While recognizing the need for "leeway" for ITO members in the pursuit of their security interests, the memorandum raised the concern that the proposals submitted by Mr Neff would have transformed the ITO Charter into an "illusory document", opening the door for abuses by other ITO members to the detriment of the interests of the United States.<sup>215</sup> The identification of such concerns along with explanations as to the specific "fields" in the subparagraphs indicates the aim of drafting the text of the security exceptions so as to balance the need for ITO members to protect their security interests while establishing limits to the potential abuse of the provision.

4.46. The materials examined in this section indicate that, during the negotiations of the GATT 1947 and the ITO Charter, different sensitivities emerged within the US delegation with regard to the drafting of the security exceptions. Bearing in mind the limits of this analysis as already foreshadowed at the beginning of the Panel's assessment, the Panel notes that the US delegation considered various alternative proposals. According to some of these proposals, the invocation of the security exceptions would have been explicitly shielded from the provisions on dispute settlement. Under other alternative proposed wordings, whether the conditions listed in the subparagraphs were met would have been a matter to be left exclusively to the consideration of the ITO member invoking the security exceptions. The majority of the US delegation rejected these proposals with a view to avoiding that excessively broad security exceptions could be abused, thereby undermining the entire architecture of the ITO.

4.47. The Panel does not consider that these materials indicate that the provision as it was drafted at the time already provided ITO members with the unilateral power to interpret it. Specifically, the Panel is not persuaded that the materials reveal an understanding that an ITO member could unilaterally determine whether certain measures met the conditions listed under the subparagraphs of the security exceptions provision, as contended by the United States. While not conclusive in and of itself, the Panel considers noteworthy in this respect the fact that a drafting proposal suggesting this very possibility was rejected by the majority of the US delegation.

4.48. Based on the foregoing, the Panel does not find support in these materials for the "self-judging nature" of Article XXI(b) of the GATT 1994 as contended by the United States. Accordingly, and taking into account the inherent limitations of these materials for the interpretive issues in this dispute, the analysis of these materials confirms, or at least does not undermine, the Panel's interpretation of Article XXI(b) of the GATT 1994.

## **5 DECISION OF THE CONTRACTING PARTIES IN US EXPORT RESTRICTIONS (CZECHOSLOVAKIA) (1949)**

### **5.1 Arguments and materials submitted by the parties**

5.1. The United States refers to the Decision of the CONTRACTING PARTIES in the 1949 *US Export Restrictions (Czechoslovakia)* dispute between the United States and Czechoslovakia (the 1949 Decision) as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".<sup>216</sup> The United States argues that the 1949 Decision "reflects the interpretation of Article XXI(b) as self-judging and constitutes a subsequent agreement ... within the meaning of Article 31(3)(a) of the Vienna Convention".<sup>217</sup>

5.2. The United States also argues that while a few contracting parties abstained and one party dissented, the 1949 Decision nevertheless constitutes a subsequent agreement within the meaning

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<sup>214</sup> See para. 4.33 above (emphasis added). The memorandum found further support in the absence of indications that the US Senate Finance Committee desired "such a broad and unilateral security exception that any action, no matter how little related to security, would be immune even from question".

<sup>215</sup> See section 4.1.6 above.

<sup>216</sup> United States' first written submission, para. 47.

<sup>217</sup> United States' first written submission, para. 47.

of Article 31(3)(a) of the Vienna Convention.<sup>218</sup> The United States maintains that a subsequent agreement need not be unanimous and refers to the text of Article 31 of the Vienna Convention in support of this point, namely that Article 31(2)(a) refers to "all the parties" whereas Article 31(3)(a) refers to "the parties".<sup>219</sup> In the United States' view, this is indicative of the drafters' intention to deliberately omit the word "all", thereby not subjecting subsequent agreements to the requirement of unanimity.<sup>220</sup> What is relevant for the United States is "whether the parties have reached agreement pursuant to the decision-making rules that they have agreed for purposes of that agreement".<sup>221</sup> The United States maintains that the rules of procedure existing at that time provided that "decisions shall be taken by a majority of the representatives present and voting".<sup>222</sup> The United States notes that while the WTO Agreement sets out detailed procedures for the adoption of authoritative interpretations by the Ministerial Conference, such procedures were not in place at the time of the above-mentioned dispute.<sup>223</sup>

5.3. According to the United States, since the GATT 1947 was incorporated verbatim into the GATT 1994 without modifications, and since the text of Article XXI of the GATT 1947 is identical to the text of Article XXI of the GATT 1994, "the interpretation reflected in the *United States Export Restrictions* decision is also a subsequent agreement for the purposes of the interpretation of Article XXI of the GATT 1994".<sup>224</sup>

5.4. The United States further characterizes the 1949 Decision as being one of the "decisions" within the meaning of Paragraph 1(b)(iv) of the language incorporating the GATT 1947 and other instruments into the GATT 1994 (Paragraph 1(b)(iv) of the GATT 1994) and Article XVI:1 of the WTO Agreement.<sup>225</sup> The United States argues that the 1949 Decision was taken in accordance with the rules in force at that time, and should therefore be distinguished from a recommendation by a panel or a Working Party that was later adopted by the parties.<sup>226</sup> The United States thus argues that, in interpreting the terms of the security exceptions, the Panel may consider the 1949 Decision to be relevant "context", supporting the conclusion that Article XXI(b) of the GATT 1994 is self-judging.<sup>227</sup>

5.5. Switzerland objects to the characterization of the 1949 Decision as a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention. Switzerland argues that the 1949 Decision was taken pursuant to Article XXIII:2 of the GATT 1947, the predecessor to the current rules on dispute settlement.<sup>228</sup> In that regard, Switzerland argues that interpretations in dispute settlement proceedings are only binding to the parties in a given dispute and not to the membership at large, and to argue otherwise would run counter to fundamental principles of the WTO.<sup>229</sup> Furthermore, Switzerland maintains that a decision taken under the GATT 1947 cannot constitute a "subsequent agreement" to the GATT 1994.<sup>230</sup> In any event, Switzerland notes that the 1949 Decision was not adopted by all the parties, and therefore it cannot be considered as proving the existence of an agreement among all the parties to the GATT 1947.<sup>231</sup> Switzerland notes that, in the

<sup>218</sup> United States' first written submission, fn 44.

<sup>219</sup> United States' first written submission, fn 44; response to Panel question No. 65.

<sup>220</sup> United States' first written submission, fn 44.

<sup>221</sup> United States' response to Panel question No. 65.

<sup>222</sup> United States' opening statement at the first meeting of the Panel, para. 29 and fn 12 (citing GATT CONTRACTING PARTIES, Second Session, Rules of Procedure for Sessions of the CONTRACTING PARTIES (As adopted on 16 August 1948), GATT/CP.2/3 Rev.1 (Exhibit USA-90), and GATT CONTRACTING PARTIES, Rules of Procedure for Sessions of the CONTRACTING PARTIES (6 September 1949), GATT/CP/30 (Exhibit USA-91), Rules 27 and 28). See also United States' response to Panel question No. 64.

<sup>223</sup> United States' first written submission, para. 48; response to Panel question No. 64. The United States also notes that the GATT contracting parties subsequently established the practice of adopting interpretations of the GATT 1947 through joint actions under Article XXV of the GATT 1947, but that practice was not yet in place at the time of the 1949 Decision. See United States' response to Panel question No. 66.

<sup>224</sup> United States' response to Panel question No. 66.

<sup>225</sup> United States' response to Panel question No. 25.

<sup>226</sup> United States' response to Panel question No. 25.

<sup>227</sup> United States' response to Panel question No. 25.

<sup>228</sup> Switzerland's opening statement at the first meeting of the Panel, para. 65; response to Panel question No. 68.

<sup>229</sup> Switzerland's opening statement at the first meeting of the Panel, para. 65.

<sup>230</sup> Switzerland's opening statement at the first meeting of the Panel, para. 66; second written submission, paras. 254-255.

<sup>231</sup> Switzerland's opening statement at the first meeting of the Panel, para. 68; response to Panel question No. 64.

WTO framework, to date the instruments that have been recognized to demonstrate "a common understanding", thus amounting to an "agreement" under Article 31(3)(a) of the Vienna Convention, were all adopted by consensus.<sup>232</sup>

5.6. Switzerland argues that the 1949 Decision does not qualify as one of the "other decisions of the CONTRACTING PARTIES" mentioned in Paragraph 1(b)(iv) of the GATT 1994.<sup>233</sup> According to Switzerland, in order for an instrument to be considered as a "decision" under that provision, it must be "formal legal text which represented a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947".<sup>234</sup> Switzerland argues that this is not the case for the 1949 Decision, which pertains to the resolution of a dispute between the United States and Czechoslovakia.<sup>235</sup>

5.7. According to Switzerland, the 1949 Decision could constitute at most one of the "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947" under Article XVI of the WTO Agreement by which the WTO shall be "guided" unless otherwise specified in the WTO Agreement or in the Multilateral Trade Agreements, but it does not contain guidance for the Panel on the standard of review for Article XXI(b) of the GATT 1994.<sup>236</sup> Switzerland also argues that the 1949 Decision would be irrelevant even as a supplementary means of interpretation, as it reflects the views of a limited number of parties in the context of a particular dispute.<sup>237</sup>

### 5.1.1 Request of Czechoslovakia for a decision under Article XXIII of the GATT 1947

5.8. The agenda for the Third Session of the GATT CONTRACTING PARTIES, revised on 8 April 1949, included the "Request of the Government of Czechoslovakia for a decision under Article XXIII as to whether or not the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licenses".<sup>238</sup>

5.9. The parties do not make specific comments with regard to this document.

### 5.1.2 Statements by Czechoslovakia and the United States

5.10. In a statement made in support of the request pursuant to Article XXIII of the GATT 1947, the representative of Czechoslovakia argued that the United States administered its export licences for products in short supply or of military significance differently, depending on whether goods were destined to Canada and European countries participating in the European Recovery Programme or to other European countries.<sup>239</sup> The representative of Czechoslovakia claimed that the measures at issue were inconsistent with Articles I and XIII of the GATT 1947.<sup>240</sup> Czechoslovakia also claimed that the measures could not be justified under Articles XIV, XX, or XXI of the GATT 1947.<sup>241</sup>

5.11. The representative of the United States replied that Czechoslovakia's description of the measures was inaccurate, because a number of products were not subject to export licences, not all applications for export licences to Czechoslovakia were denied, and in any event the measures were justified under Articles XX and XXI of the GATT 1947.<sup>242</sup>

5.12. The parties do not make specific comments with regard to these documents.

<sup>232</sup> Switzerland's response to Panel question No. 65.

<sup>233</sup> Switzerland's second written submission, para. 256.

<sup>234</sup> Switzerland's second written submission, para. 256 (emphasis omitted) (citing Panel Report, *US – FSC*, para. 7.63).

<sup>235</sup> Switzerland's second written submission, paras. 256-258.

<sup>236</sup> Switzerland's second written submission, paras. 260-261.

<sup>237</sup> Switzerland's opening statement at the first meeting of the Panel, para. 69.

<sup>238</sup> GATT CONTRACTING PARTIES, Third Session, Agenda (Revised 8 April 1949), GATT/CP.3/2/Rev.2, (Exhibit USA-24), item 14.

<sup>239</sup> GATT CONTRACTING PARTIES, Third Session, Statement by the Head of the Czechoslovak Delegation (30 May 1949), GATT/CP.3/33, (Exhibit USA-25), pp. 1-3.

<sup>240</sup> Statement by the Head of the Czechoslovak Delegation, (Exhibit USA-25), p. 2.

<sup>241</sup> Statement by the Head of the Czechoslovak Delegation, (Exhibit USA-25), pp. 2-3.

<sup>242</sup> GATT CONTRACTING PARTIES, Third Session, Reply by the Vice Chairman of the US Delegation (2 June 1949), GATT/CP.3/38, (Exhibit USA-26), pp. 2, 5, 8, and 11.

### 5.1.3 Debate and Decision of the CONTRACTING PARTIES

5.13. The CONTRACTING PARTIES discussed Czechoslovakia's request at a meeting held on 8 June 1949.

5.14. The representative of Czechoslovakia was the first to intervene and cautioned against the consequences for international trade of a rejection of Czechoslovakia's request.<sup>243</sup>

5.15. The representative of the United States stated that Czechoslovakia did not submit new facts and accordingly requested the CONTRACTING PARTIES to dismiss the request.<sup>244</sup>

5.16. The representative of Cuba spoke in support of the United States' proposal to dismiss the request of Czechoslovakia, arguing that "[t]he question asked by the Czechoslovakian representative in relation to the provisions of Article I did not require an answer since the United States representative had justified his case under Article XXI whose provisions overrode those of Article I".<sup>245</sup>

5.17. The representative of Czechoslovakia maintained that "Article XXI referred to the traffic in arms, ammunition and implements of war and other goods and materials for the purpose of supplying a military establishment, but the United States Government had used and interpreted the expression 'war material' so extensively that no one knew what it really covered".<sup>246</sup>

5.18. The representative of Pakistan stated that "Article XXI, embodying exceptions to all other provisions of the Agreement, should stand by itself notwithstanding the provisions of other Articles including Article I, and therefore the case called for examination only under the provisions of that Article".<sup>247</sup> He further argued that he was convinced that the measures at issue were taken "in the interest of security and peace".<sup>248</sup> The representative of Pakistan opposed the establishment of a Working Group to deal with the matter, arguing that "he did not believe that tangible results could be produced by deliberations in a sub-group and that no economy of time would be justified in dealing with a matter of such great importance".<sup>249</sup> The representative of Pakistan expressed the opinion that "the CONTRACTING PARTIES should suggest that the two governments approach each other through diplomatic channels and seek a solution".<sup>250</sup> Finally, the representative of Pakistan concluded stating that, "[i]n view of the importance of the question, the CONTRACTING PARTIES should not decide upon the request, but should try to bring about an understanding between the two parties, which was not an objective achievable by deliberations in sub-committees".<sup>251</sup>

5.19. The representative of the United Kingdom argued that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must be the judge in the last resort on questions relating to its own security".<sup>252</sup> The representative of the United Kingdom further argued that "the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement", noting that the nature of the question suggested that "it should be examined in detail by the two governments concerned" and that "no purpose would be served by a general inquest by the CONTRACTING PARTIES".<sup>253</sup> The

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<sup>243</sup> GATT CONTRACTING PARTIES, Third Session, Summary of the twenty-second meeting (8 June 1949), GATT/CP.3/SR.22, (Exhibit USA-27), p. 4.

<sup>244</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), pp. 4-5.

<sup>245</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 5.

<sup>246</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 6.

<sup>247</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 6.

<sup>248</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 6.

<sup>249</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), pp. 6-7.

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<sup>250</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 7.

<sup>251</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 7.

<sup>252</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 7.

<sup>253</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), pp. 7-8 and Corrigendum.

representative of the United Kingdom concluded that the request of Czechoslovakia should be dismissed.<sup>254</sup>

5.20. The representative of Czechoslovakia stated that Article XXI was being "misapplied because the narrow reference in the text to war materials had been construed by the United States [g]overnment to cover a wide range of goods which could never be so regarded".<sup>255</sup>

5.21. The representative of the United States replied that "this was a distortion of facts", explaining that the United States government had never denied export licences on goods that were placed on a "positive list", and that only 200 group items out of 3,000 were subject to export controls.<sup>256</sup> The representative of the United States thus concluded that "there were no grounds for the accusation that the provisions of Article XXI were extended to cover everything; for the commodities thus controlled constituted an extremely small proportion of the exports of the country".<sup>257</sup>

5.22. Summing up the debate, the Chairperson concluded that, for the purposes of Article XXIII of the GATT 1947, it should be understood that consultations under paragraph 1 of the provision "had already taken place".<sup>258</sup> The Chairperson further noted that, pursuant to Article XXIII:2 of the GATT 1947, "the CONTRACTING PARTIES should promptly investigate, and should either make an appropriate recommendation to the contracting parties concerned or give a ruling on the matter as appropriate".<sup>259</sup> The Chairperson stated that "[t]he complaint made by Czechoslovakia was based on Articles I and XXI and the United States justified any discrimination which might have occurred on the basis of Articles XX and XXI and particularly on the ground of security covered by the latter".<sup>260</sup> The Chairperson took note of the lack of support for a proposal to set up a Working Party to examine the issue.<sup>261</sup>

5.23. The Chairperson thus stated that the "CONTRACTING PARTIES ... should give a decision in accordance with paragraph 2 of Article XXIII".<sup>262</sup> The Chairperson noted that the representative of Czechoslovakia had posed the question on the consistency of the contested regulations with Article I of the GATT 1947.<sup>263</sup> The Chairperson was however of the opinion that the question was not appropriately put in light of the United States' defence under Articles XX and XXI of the GATT 1947.<sup>264</sup> According to the Chairperson, the question should be put as "whether the [g]overnment of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licenses".<sup>265</sup>

5.24. A vote took place with Czechoslovakia being the only contracting party voting in the affirmative.<sup>266</sup> Seventeen delegations voted in the negative, three abstained, and two were absent.<sup>267</sup>

5.25. The representative of Pakistan explained his vote holding that "the charge ... was not proved by factual evidence".<sup>268</sup>

5.26. The representative of Czechoslovakia stated that his government "could not consider that the CONTRACTING PARTIES had made a legally valid decision or correct interpretation of the General Agreement".<sup>269</sup> He further "enquired whether the decision could not be communicated to all

<sup>254</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 8 and Corrigendum.

<sup>255</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 8.

<sup>256</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 8.

<sup>257</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 8.

<sup>258</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 8.

<sup>259</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 8.

<sup>260</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 8.

<sup>261</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), pp.

8-9.

<sup>262</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 9.

<sup>263</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 9.

<sup>264</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 9.

<sup>265</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 9.

<sup>266</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 9.

<sup>267</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 9.

<sup>268</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p. 9.

<sup>269</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p.

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members of the Interim Commission for the International Trade Organization, so that they would be informed of the interpretation given by the CONTRACTING PARTIES of the provisions of the Havana Charter".<sup>270</sup>

5.27. The representative of the United States "expressed his understanding of the position of those representatives who abstained".<sup>271</sup>

5.28. In response to the request of the representative of Czechoslovakia, the Chairperson stated that "the summary record of [the] meeting would be sent, according to the usual practice, to all signatories of the Havana Final Act and to other members of the United Nations".<sup>272</sup>

5.29. Volume II of the "Basic Instruments and Selected Documents of the Contracting Parties to the GATT" published in 1952, Part II (Decisions, Declarations, Resolutions and Rulings), includes a reference to the 1949 Decision, as follows<sup>273</sup>:

#### ARTICLE XXI

##### United States Export Restrictions<sup>[2]</sup>

Decision of 8 June 1949

The CONTRACTING PARTIES decided to reject the contention of the Czechoslovak delegation that 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.

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<sup>2</sup> A complaint was brought by the Czechoslovak Government under Articles I and XXI that export restrictions imposed by the United States did not conform to the provisions of Article I.

5.30. In this dispute, the United States argues that, with the 1949 Decision, the CONTRACTING PARTIES rejected Czechoslovakia's challenge, finding that the invocation by the United States of the security exceptions was "not justiciable".<sup>274</sup> According to the United States, various participants at the meeting "expressed the view that Article XXI is self-judging".<sup>275</sup> The United States notes that the Chairperson opined that the question as raised by Czechoslovakia – whether the United States' measures were in conformity with Article I of the GATT 1947 – "was not appropriately put", in light of the United States' invocation of the security exceptions.<sup>276</sup> The Chairperson stated that the question should rather be whether the United States "had failed to carry out its obligations" under the GATT 1947.<sup>277</sup> According to the United States, the reformulation of the question is an indication that the relevant question was a broader one: whether the United States had any obligations under the GATT 1947 given its invocation of Article XXI.<sup>278</sup>

5.31. The United States also refers to the fact that, after the vote, the representative of Czechoslovakia requested "whether the decision could not be communicated to all members of the Interim Commission of the [ITO], so that they would be informed of the *interpretation given* by the CONTRACTING PARTIES of the provisions of the Havana Charter".<sup>279</sup> The United States notes that no contracting party disagreed with that statement.<sup>280</sup> According to the United States, this supports its view that, based on the rules applicable at that time, the CONTRACTING PARTIES had reached

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<sup>270</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p.

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<sup>271</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p.

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<sup>272</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (8 June 1949), (Exhibit USA-27), p.

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<sup>273</sup> GATT, Basic Instruments and Selected Documents, Volume II (Decisions, Declarations, Resolutions, Rulings and Reports), May 1952, (Exhibit USA-28), pp. 1-3.

<sup>274</sup> United States' first written submission, para. 47.

<sup>275</sup> United States' first written submission, para. 50.

<sup>276</sup> United States' response to Panel question No. 64.

<sup>277</sup> United States' response to Panel question No. 64.

<sup>278</sup> United States' response to Panel question No. 64.

<sup>279</sup> United States' opening statement at the first meeting of the Panel, para. 30. (emphasis original)

<sup>280</sup> United States' opening statement at the first meeting of the Panel, para. 30.

agreement on the interpretation of Article XXI of the GATT 1947 that "actions pursuant to that provision are not subject to review for consistency in GATT or WTO dispute settlement".<sup>281</sup>

5.32. Switzerland submits that the 1949 Decision does not address the general interpretive question of the standard of review to be applied to the invocation of the security exceptions and has no bearing specifically upon the interpretation of the relevant provision.<sup>282</sup> According to Switzerland, the 1949 Decision simply rejected the claim of Czechoslovakia that the administration of export licences by the United States was GATT-inconsistent.<sup>283</sup>

## 5.2 Assessment by the Panel

5.33. The Panel notes that the parties disagree on the relevance of the 1949 Decision as a "subsequent agreement" pursuant to Article 31(3)(a) of the Vienna Convention, to be taken into account, together with the context, when interpreting Article XXI of the GATT 1994. The parties further express diverging views regarding the possible qualification of the 1949 Decision as being one of the "other decisions of the CONTRACTING PARTIES" under Paragraph 1(b)(iv) of the GATT 1994.

5.34. Article 31(3)(a) of the Vienna Convention reads:

### Article 31

#### *General rule of interpretation*

... 3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions

5.35. To qualify as a subsequent agreement, a decision must meet two conditions: (i) it is adopted subsequent to the relevant covered agreement; and (ii) its terms and contents express an agreement between Members on the interpretation of a treaty or the application of its provisions.<sup>284</sup> The Panel is not persuaded that the 1949 Decision meets either of these two conditions for the following reasons.

5.36. Concerning the temporal dimension, the provision at issue is Article XXI of the GATT 1994, which is an agreement that is "legally distinct" from the GATT 1947 pursuant to Article II:4 of the WTO Agreement.<sup>285</sup> The document under review was a decision adopted in 1949 by the GATT CONTRACTING PARTIES as opposed to the WTO Members, and dealt with the application of a provision of the GATT 1947, and not the GATT 1994.<sup>286</sup> As such, the Panel does not consider the 1949 Decision to be "subsequent" to the GATT 1994.

5.37. In addition to occurring prior to the GATT 1994, there are indications that the 1949 Decision does not express an "agreement" on the interpretation or the application of Article XXI of the GATT 1994. The 1949 Decision under review is the outcome of a process in which the views of the parties concerned were discussed and examined in a plenary meeting of the CONTRACTING PARTIES, and eventually a decision was taken by means of a vote. The minutes of the meeting do not report a shared understanding by the participants on broader interpretive questions concerning the invocation of the security exceptions, nor do those minutes reflect the notion put forward by the United States in this dispute that the invocation of the security exceptions would be entirely "self-judging". The Panel further notes that the vote was not unanimous, with Czechoslovakia voting to uphold its challenge, three delegations abstaining and two being absent. The explicit disagreement of at least one of the participants to the meeting with the majority indicates the absence of an "agreement" for the purposes of Article 31(3)(a) of the Vienna Convention.

<sup>281</sup> United States' opening statement at the first meeting of the Panel, para. 30.

<sup>282</sup> Switzerland's response to Panel question No. 67.

<sup>283</sup> Switzerland's response to Panel question No. 67.

<sup>284</sup> See Appellate Body Report, *US – Clove Cigarettes*, para. 262.

<sup>285</sup> See para. 1.1 above.

<sup>286</sup> See Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.3008.

5.38. The Panel is therefore of the view that the 1949 Decision does not meet the conditions to be considered as a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention for the interpretive issues raised in this dispute.

5.39. The Panel now turns to whether the 1949 Decision could be considered as one of the "decisions" referred to in Paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement.

5.40. Paragraph 1(b)(iv) of the GATT 1994 provides:

1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of: ...

(b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement: ...

(iv) other decisions of the CONTRACTING PARTIES to GATT 1947.

5.41. Article XVI:1 of the WTO Agreement reads:

Article XVI

*Miscellaneous Provisions*

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

5.42. The Panel observes that decisions of the CONTRACTING PARTIES to GATT 1947 under Article XVI:1 of the WTO Agreement "provide guidance" to the WTO, whereas the "other decisions" mentioned in Paragraph 1(b)(iv) of the GATT 1994 are an integral part of the GATT 1994.<sup>287</sup>

5.43. The Panel recalls that the 1949 Decision was made in response to a request filed by Czechoslovakia under Article XXIII:2 of the GATT 1947, the provision in that agreement regulating the resolution of controversies between contracting parties. The provision establishes that, once a matter was raised, "the CONTRACTING PARTIES ... shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate". The provision thus clarifies that recommendations or rulings issued by the CONTRACTING PARTIES were limited to the issue raised in a specific controversy and directed at the contracting parties concerned. The Panel does not consider that the 1949 Decision, which was taken under Article XXIII:2 of the GATT 1947, served the purpose of clarifying the interpretation of the provisions of the GATT 1947 beyond the framework of that specific dispute.<sup>288</sup> The Panel is therefore not persuaded that the 1949 Decision could be characterized as a relevant "decision" under Paragraph 1(b)(iv) of the GATT 1994.

5.44. Furthermore, the 1949 Decision concerned a specific factual situation and does not address the broader interpretive question as to whether the invocation of Article XXI of the GATT 1994 is "self-judging" in the sense argued by the United States. In particular, there is no explicit recognition by the participants that the invocation of the security exceptions could not be reviewed in dispute settlement. Whereas one participant expressed the view that "every country must be the judge in the last resort on questions relating to its own security"<sup>289</sup>, the debate focused mostly on the factual circumstances of the controversy between the two disputing parties, and on whether Czechoslovakia

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<sup>287</sup> Previous panels have considered that, in order to qualify as a decision falling under Paragraph 1(b)(iv) of the GATT 1994, a document must be a "formal legal text which represented a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947". (See Panel Reports, *US – FSC*, para. 7.63; *Australia – Tobacco Plain Packaging*, fn 5900).

<sup>288</sup> Even after the contracting parties to the GATT 1947 developed the practice of referring disputes to panels, adopted panel reports were not considered to be binding "except with respect to resolving the particular dispute between the parties to that dispute". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14).

<sup>289</sup> See para. 5.19 above.

had submitted sufficient evidence to prevail in the dispute. Ultimately, the dispute was resolved by means of a vote, with Czechoslovakia explicitly indicating its disagreement about the outcome.<sup>290</sup>

5.45. To the extent that the 1949 Decision could be classified as falling under Article XVI:1 of the WTO Agreement, the Panel considers that any "guidance" under that provision is limited due to the specific subject matter considered in that dispute and the lack of indication in the minutes of the meeting on the general interpretive question concerning the reviewability of the security exceptions.

5.46. Based on the foregoing, the Panel concludes that the 1949 Decision does not provide relevant interpretive guidance for the purposes of the issues raised in this dispute under Article XXI of the GATT 1994.

## **6 DECISION OF THE GATT CONTRACTING PARTIES CONCERNING ARTICLE XXI OF THE GATT 1947 (1982)**

### **6.1 Arguments and materials submitted by the parties**

6.1. The United States refers to the Decision of the GATT CONTRACTING PARTIES concerning Article XXI of the GATT 1947 of 30 November 1982 (the 1982 Decision) as a decision falling under both Paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement.<sup>291</sup>

6.2. Switzerland submits that the 1982 Decision may constitute a "decision" pursuant to Paragraph 1(b)(iv) of the GATT 1994 and, in any event, would fall within the scope of Article XVI:1 of the WTO Agreement.<sup>292</sup>

#### **6.1.1 GATT CONTRACTING PARTIES, Decision Concerning Article XXI of the General Agreement (30 November 1982)**

6.3. The text of the 1982 Decision is reproduced below:

#### DECISION CONCERNING ARTICLE XXI OF THE GENERAL AGREEMENT

##### Decision of 30 November 1982

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;

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.

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<sup>290</sup> See para. 5.24 above.

<sup>291</sup> United States' response to Panel question No. 25.

<sup>292</sup> Switzerland's response to Panel question No. 25.

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.<sup>293</sup>

6.4. The United States argues that the preamble to the 1982 Decision "twice acknowledges the self-judging nature of Article XXI".<sup>294</sup> First, the United States notes that the preamble emphasizes the importance of Article XXI of the GATT 1947 in safeguarding the rights of the GATT contracting parties "when they consider' that reasons of security are involved".<sup>295</sup> Specifically, the United States maintains that this expression mirrors "the pivotal self-judging phrase" of Article XXI of the GATT 1947.<sup>296</sup> Second, the United States notes that the decision recognizes 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".<sup>297</sup> According to the United States, this phrase demonstrates the acknowledgement by the contracting parties that the decision of whether to take essential security measures is "within the authority of each contracting party".<sup>298</sup>

6.5. According to Switzerland, the 1982 Decision sets forth procedural guidelines for the application of Article XXI that apply until "the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI".<sup>299</sup> Switzerland argues that while the 1982 Decision does not specifically discuss the standard of review under Article XXI(b), it provides that in the event that provision is invoked, the contracting parties retain "their full rights under the General Agreement".<sup>300</sup> According to Switzerland, "the 1982 Decision thus confirms that the [c]ontracting [p]arties, and subsequently WTO Members, retain their full rights, including a right to challenge an action for which a defence under Article XXI(b) is invoked and a right to have their claims reviewed by a panel".<sup>301</sup> Switzerland maintains that, contrary to what the United States argues, there is nothing in the preamble to the 1982 Decision that would confirm that Article XXI of the GATT 1994 is "self-judging".<sup>302</sup>

## 6.2 Assessment by the Panel

6.6. The Panel notes that the parties agree that the 1982 Decision is a "decision" within the meaning of Article XVI:1 of the WTO Agreement.

6.7. In the Panel's view, the phrase "[t]he CONTRACTING PARTIES decide" that immediately precedes the three paragraphs of the 1982 Decision indicates the intention to set forth procedural guidelines to be followed by all GATT contracting parties in the application of Article XXI of the GATT 1947.<sup>303</sup> In this respect, the Panel considers that the 1982 Decision could be regarded as a decision falling under Paragraph 1(b)(iv) of the GATT 1994.<sup>304</sup> The Panel is also of the view that, in any event, the 1982 Decision could be regarded as a decision within the meaning of Article XVI:1 of the WTO Agreement.

6.8. Regarding the content of the 1982 Decision, the Panel recalls the United States' view that the 1982 Decision acknowledges "the self-judging nature" of Article XXI of the GATT 1994.<sup>305</sup> The United States finds support for this affirmation in two paragraphs of the preamble.<sup>306</sup> The first paragraph of the preamble recognizes the importance of Article XXI for the safeguard of the

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<sup>293</sup> GATT CONTRACTING PARTIES, Decision Concerning Article XXI of the General Agreement (30 November 1982), L/5426, (Exhibit USA-62). (emphasis original)

<sup>294</sup> United States' response to Panel question No. 25.

<sup>295</sup> United States' response to Panel question No. 25.

<sup>296</sup> United States' response to Panel question No. 25.

<sup>297</sup> United States' response to Panel question No. 25.

<sup>298</sup> United States' response to Panel question No. 25.

<sup>299</sup> Switzerland's response to Panel question No. 25.

<sup>300</sup> Switzerland's response to Panel question No. 25; second written submission, para. 247.

<sup>301</sup> Switzerland's response to Panel question No. 25.

<sup>302</sup> Switzerland's second written submission, para. 248.

<sup>303</sup> Pursuant to Article XXV:1 of the GATT 1994, "[w]herever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES".

<sup>304</sup> See fn 287 above.

<sup>305</sup> United States' response to Panel question No. 25.

<sup>306</sup> United States' response to Panel question No. 25.

Members' rights "when they consider that reasons of security are involved". The third paragraph states that, when taking action under Article XXI, a Member should take into consideration the interests of third parties which may be affected.

6.9. The Panel is not persuaded that the two paragraphs referred to by the United States provide guidance as to the issue of the reviewability of the invocation of Article XXI of the GATT 1994. There is no explicit indication in either of the two paragraphs referred to by the United States or elsewhere in the 1982 Decision that the invocation by a Member of Article XXI cannot be reviewed by a panel in the context of a dispute. In this regard, the Panel finds it relevant that the 1982 Decision is concerned with "procedural guidelines" for the application of Article XXI "until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI". The language used indicates that the 1982 Decision does not constitute a substantive interpretation of the terms of Article XXI that would preclude review of its invocation in the context of a dispute.

6.10. The procedural nature of the 1982 Decision is underscored by the stipulation in paragraph 2 of the 1982 Decision that, "[w]hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement". The Panel considers that the reference to "full rights under the General Agreement" serves to preserve those rights as reflected in the terms of the GATT 1947 without further elaboration as to the interpretation or scope of those rights. In the absence of any explicit indication to the contrary, the Panel finds that the reference to "full rights under the General Agreement" could admit, and at least does not preclude, the possibility of having recourse to the dispute settlement provisions under the GATT 1947 and, eventually, the GATT 1994 and the DSU.

6.11. Accordingly, the Panel does not find any indication in the 1982 Decision that Article XXI of the GATT 1994 should be understood as an entirely "self-judging" provision in the sense argued by the United States in this dispute.

## **7 VIEWS OF THE GATT CONTRACTING PARTIES IN CONNECTION WITH PRIOR INVOCATIONS OF ARTICLE XXI OF THE GATT 1947**

### **7.1 Arguments and materials submitted by the parties**

7.1. The United States argues that the GATT contracting parties repeatedly expressed the view that Article XXI(b) is "self-judging" and that the GATT was not the appropriate forum in which to resolve disputes concerning matters of national security.<sup>307</sup> According to the United States, the views expressed by the GATT contracting parties do not have a particular status under Articles 31 and 32 of the Vienna Convention, but can inform or support the meaning of Article XXI of the GATT 1994 as interpreted according to the customary rules of public international law.<sup>308</sup>

7.2. Switzerland argues that the views of the GATT contracting parties cited by the United States are not relevant under Article 31 of the Vienna Convention, Paragraph 1(b)(iv) of the GATT 1994, or Article XVI:1 of the WTO Agreement, and may at most be considered as supplementary means of interpretation under Article 32 of the Vienna Convention.<sup>309</sup> In any event, Switzerland argues that the above-mentioned views are not relevant for the purposes of interpreting Article XXI of the GATT 1994, because they pre-date the GATT 1994 and demonstrate that the GATT contracting views did not share a common interpretation of the terms of Article XXI of the GATT 1947.<sup>310</sup> Finally, Switzerland notes that most of the views expressed by GATT contracting parties did not specifically address the question of whether the invocation of Article XXI is subject to review by a panel and were expressed in different circumstances.<sup>311</sup>

#### **7.1.1 Ghana's reference to measures taken pursuant to Article XXI in the context of the accession of Portugal to the GATT**

7.3. At a meeting held on 9 December 1961 to consider the draft protocol of accession to the GATT of Portugal, the representative of Ghana stated that his government maintained a ban on goods

<sup>307</sup> United States' first written submission, para. 106.

<sup>308</sup> United States' response to Panel question Nos. 69-70.

<sup>309</sup> Switzerland's response to Panel question No. 69.

<sup>310</sup> Switzerland's opening statement at the first meeting of the Panel, paras. 71-73.

<sup>311</sup> Switzerland's second written submission, para. 239.

coming into Ghana from Portugal.<sup>312</sup> The representative of Ghana stated that this measure was justified under Article XXI of the GATT 1947 under which "each contracting party was the sole judge of what was necessary in its essential security interests" and therefore there could be no objection to Ghana's measure.<sup>313</sup> The representative of Ghana maintained 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".<sup>314</sup> No contracting party commented on the statement made by the representative of Ghana. The Chairperson affirmed that the statement made by the representative of Ghana on the invocation of Article XXI would be noted.<sup>315</sup>

7.4. The United States argues that the exchange between Ghana and the Chairperson, combined with the "acceptance" by other contracting parties of Ghana's invocation of Article XXI of the GATT 1947, shows that the contracting parties viewed Article XXI as "self-judging".<sup>316</sup>

7.5. Switzerland argues that the fact that Ghana considered that it had discretion with respect to the necessity of its measures *vis-à-vis* Portugal does not imply that it considered Article XXI(b) of the GATT 1947 as a whole to be self-judging.<sup>317</sup>

### 7.1.2 The United Arab Republic's reference to Article XXI in the context of its accession to the GATT

7.6. The 1970 report of the Working Party on the accession of the United Arab Republic to the GATT sets out a discussion regarding measures adopted by the acceding government imposing a direct boycott against Israel and indirect forms of boycott targeting third-country firms and persons having business ties with Israel.<sup>318</sup> The representative of the United Arab Republic stated that direct boycott measures would not entail any inconsistency with the GATT 1947, as the Government of the United Arab Republic intended, upon accession, to resort to Article XXXV of the GATT 1947 (i.e. the non-application clause) *vis-à-vis* Israel.<sup>319</sup> Concerning the secondary boycott, some members of the Working Party "reserved all rights, under GATT or otherwise".<sup>320</sup> The representative of the United Arab Republic noted that the measures adopted were related to the "extraordinary circumstances" existing in the Middle East at that time.<sup>321</sup> In light of the political character of the issue, the representative of the United Arab Republic indicated that his government did not wish to discuss it within the GATT.<sup>322</sup> Other members of the Working Party supported the views expressed by the representative of the United Arab Republic that the background of the measures was political and not commercial.<sup>323</sup> The representative of Israel stated that she would not reply to the political issues raised, as they were being discussed in the competent organs of the United Nations.<sup>324</sup>

7.7. The United States argues that the fact that several members of the Working Party supported the United Arab Republic's position that the background of the measures was "political and not commercial" indicates that the GATT contracting parties viewed Article XXI of the GATT 1947 as "self-judging".<sup>325</sup>

<sup>312</sup> GATT CONTRACTING PARTIES, Nineteenth Session, Summary Record of the Twelfth Session (9 December 1961), SR.19/12, (Exhibit USA-57), p. 196.

<sup>313</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (9 December 1961), (Exhibit USA-57), p. 196.

<sup>314</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (9 December 1961), (Exhibit USA-57), p. 196.

<sup>315</sup> Summary of the meeting of the GATT CONTRACTING PARTIES (9 December 1961), (Exhibit USA-57), p. 196.

<sup>316</sup> United States' first written submission, para. 108.

<sup>317</sup> Switzerland's second written submission, para. 241.

<sup>318</sup> GATT CONTRACTING PARTIES, Twenty-Sixth Session, Report by the Working Party on Accession of the United Arab Republic (25 February 1979), L/3362, (Exhibit USA-58), para. 18.

<sup>319</sup> Working Party Report on Accession of the United Arab Republic, (Exhibit USA-58), para. 19.

<sup>320</sup> Working Party Report on Accession of the United Arab Republic, (Exhibit USA-58), para. 20.

<sup>321</sup> Working Party Report on Accession of the United Arab Republic, (Exhibit USA-58), para. 22.

<sup>322</sup> Working Party Report on Accession of the United Arab Republic, (Exhibit USA-58), para. 22.

<sup>323</sup> Working Party Report on Accession of the United Arab Republic, (Exhibit USA-58), para. 23.

<sup>324</sup> Working Party Report on Accession of the United Arab Republic, (Exhibit USA-58), para. 24.

<sup>325</sup> United States' first written submission, para. 110.

7.8. Switzerland notes that there is no explicit reference in the report of the Working Party to Article XXI of the GATT 1947.<sup>326</sup> Moreover, Switzerland notes that some members of the Working Party reserved all their rights under the GATT 1947, including the right to challenge the measures pursuant to Article XXIII of the GATT 1947.<sup>327</sup> According to Switzerland, the information on record does not suggest that the GATT contracting parties viewed Article XXI as "self-judging".<sup>328</sup>

### **7.1.3 Invocation of Article XXI of the GATT 1947 by the European Communities, Canada, and Australia in relation to certain measures affecting Argentina**

7.9. In 1982, in relation to the situation between the United Kingdom and Argentina relating to the Falkland Islands (Islas Malvinas), the European Communities (and its member states), Canada, and Australia adopted certain measures affecting Argentina.

7.10. On 4 May 1982, the European Communities, Australia, and Canada issued a communication to the GATT contracting parties announcing that they had taken certain measures "on the basis of their inherent rights of which Article XXI of the [GATT 1947] is a general reflection".<sup>329</sup> The three contacting parties further expressed the hope that "the situation ... will soon be satisfactorily resolved by appropriate negotiations elsewhere".<sup>330</sup>

7.11. Argentina brought the matter for discussion in the GATT and a GATT Council meeting was held to discuss the matter on 7 May 1982. In raising the matter, the representative of Argentina argued that the measures "were based on reasons of a political nature and were meant to exert political pressure on the sovereign decisions of Argentina in order to intervene in a conflict in which only one of the countries concerned was involved".<sup>331</sup> The representative of Argentina further argued that the measures were not justified under the GATT 1947, and specifically not under Article XXI.<sup>332</sup>

7.12. The representative of the European Communities stated that the European Communities and its member states had taken the contested measures based on their "inherent rights, of which Article XXI of the [GATT 1947] was a reflection".<sup>333</sup> According to the representative of the European Communities, the exercise of these rights "required neither notification, justification nor approval" and the practice of the GATT contracting parties over the preceding 35 years showed that every contracting party was "the judge of its exercise of these rights".<sup>334</sup> Finally, the representative of the European Communities expressed the hope that "appropriate negotiations elsewhere" would promptly allow for the settlement of the situation.<sup>335</sup>

7.13. The representative of Canada maintained that his government took action in light of a resolution of the UN Security Council, that the measures were to be seen as a "political response to a political issue", and that the GATT "had neither the competence nor the responsibility to deal with the political issue which had been raised".<sup>336</sup> Accordingly, the representative of Canada stated that his delegation could not accept the notion that there had been a violation of the GATT 1947.<sup>337</sup> The representative of Canada added that Article XXI of the GATT 1947 did not define "essential security interests", nor did it mention notification.<sup>338</sup>

7.14. The representative of Australia maintained that it was inappropriate to enter a debate regarding the "political aspect" of the matter.<sup>339</sup> The representative of Australia stated that the

<sup>326</sup> Switzerland's second written submission, para. 242.

<sup>327</sup> Switzerland's second written submission, para. 242.

<sup>328</sup> Switzerland's second written submission, para. 242.

<sup>329</sup> European Communities, Australia, and Canada, "Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons" (Revision), Communication to GATT contracting parties (4 May 1982), L/5319/Rev.1, (Exhibit USA-60), para. 1.

<sup>330</sup> Communication of the European Communities, Australia, and Canada to GATT contracting parties (4 May 1982), (Exhibit USA-60), para. 2.

<sup>331</sup> GATT Council, Minutes of the Meeting (7 May 1982), C/M/157, (Exhibit USA-59), p. 2.

<sup>332</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 4.

<sup>333</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 10.

<sup>334</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 10.

<sup>335</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 10.

<sup>336</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 10.

<sup>337</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 10.

<sup>338</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), pp. 10-11.

<sup>339</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 11.

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measures were in conformity with Article XXI(c) of the GATT 1947, "which did not require notification or justification".<sup>340</sup>

7.15. Other GATT contracting parties took the floor at the meeting, expressing various views in support of the positions of either Argentina or the contracting parties that had adopted the measures discussed at the meeting.<sup>341</sup>

7.16. Certain GATT contracting parties made interventions referring explicitly to Article XXI of the GATT 1947. The representative of Brazil stated that the case could set a dangerous precedent if the measures at issue were considered necessary for the protection of essential security interests in time of war or other international emergency, because "such interests had not been demonstrated".<sup>342</sup> The representative of Brazil added that while the matter could be considered to constitute an emergency in international relations, "this was the case only in respect of the region in question", as defined by the UN Security Council.<sup>343</sup> The representative of Brazil further stated that the actions of the UN Security Council "had a bearing on the GATT in the light of paragraph (c) of Article XXI".<sup>344</sup> The representative of Brazil maintained that it was difficult for his delegation to accept that the countries adopting the measures, "except one", were taking action to protect their essential security interests.<sup>345</sup> Later in the debate, the representative of Brazil took the floor again to invite the Council to "reflect more deeply about the interpretation of Article XXI", and raised the question of whether actions taken under Article XXI fell outside the scope of Article XXIII.<sup>346</sup>

7.17. The representative of Spain argued that, in his view, the United Kingdom could find justification for its action under Article XXI(b)(iii) of the GATT 1947, but he had doubt concerning the action taken by other contracting parties which were not "in the same position vis-à-vis Argentina".<sup>347</sup>

7.18. The representative of Cuba argued that Article XXI of the GATT 1947 "did not provide legal grounds" for the measures adopted by the European Communities, Canada, and Australia.<sup>348</sup>

7.19. The representative of the Philippines noted that he was under the impression that the European Communities and its member states, Canada, and Australia had taken measures "as their inherent rights, of which Article XXI of the GATT was a reflection".<sup>349</sup> Since the European Communities was not a contracting party to the GATT, the representative of the Philippines "wondered about its inherent rights".<sup>350</sup>

7.20. The representative of Pakistan intervened in support of Argentina, noting that the GATT only permitted the suspension of obligations in situations of "extreme urgency", and that the situation in question was not an "extreme emergency in international relations".<sup>351</sup>

7.21. The representative of Singapore considered that "the wording of Article XXI allowed a contracting party the right to determine the need for protection of its essential security interests".<sup>352</sup> At the same time, the representative of Singapore "saw a danger in the broad interpretation which Article XXI permitted".<sup>353</sup>

7.22. The representative of the United States argued that "the GATT had never been the forum for resolution of any disputes whose essence was security and not trade, and that for good reasons, such disputes had seldom been discussed in the GATT, which had no power to resolve political or

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<sup>340</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 11.

<sup>341</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), pp. 2-13.

<sup>342</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 5.

<sup>343</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 5.

<sup>344</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 5.

<sup>345</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 5.

<sup>346</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 12.

<sup>347</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 6.

<sup>348</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 6.

<sup>349</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 7.

<sup>350</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 7.

<sup>351</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 7.

<sup>352</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 7.

<sup>353</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 7.

security disputes".<sup>354</sup> According to the representative of the United States, the "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis".<sup>355</sup> The representative of the United States concluded that the matter fell outside the sphere of competence of the GATT.<sup>356</sup>

7.23. The representative of Hungary stated that "the security considerations under Article XXI of the General Agreement were within the realm of the individual contracting parties", and that this type of provision should therefore be "handled with great care".<sup>357</sup>

7.24. The representative of Poland argued that his delegation did not consider that the measures could be justified under Article XXI, "whose purpose was to give a contracting party the right to defend its legitimate interests in case of serious danger and not to punish another contracting party for actions which were hardly of an economic nature".<sup>358</sup> The representative of Poland also took the view that Article XXI was subject to the provision of Article XXIII:2 of the GATT 1947.<sup>359</sup>

7.25. The representatives of India, New Zealand, Singapore, the United States, and Zaire held the view that the GATT was not the appropriate forum to deal with the matter.<sup>360</sup>

7.26. The Chairperson noted that the parties expressed "differing views as to whether the trade measures in question violated GATT obligations, as to whether the measures were based on inherent or natural rights and whether justification, notification and/or approval were necessary".<sup>361</sup> The Chairperson then suggested, "in light of the utmost importance of the subject", that the matter remain open and be kept on the agenda of the Council.<sup>362</sup>

7.27. The GATT Council continued its discussion on the matter at a meeting held on 29-30 June 1982. At the meeting, the contracting parties specifically discussed a proposal by the representative of Argentina that the Council, acting by consensus, "pronounce itself in the form of a note interpreting Article XXI so that all contracting parties would know their rights and obligations" under the GATT 1947.<sup>363</sup> The following is an excerpt from the minutes of the meeting reporting the view of the representative of Argentina:

That note would enable the contracting parties firstly, to know whether Article XXI exempted contracting parties from any obligation regarding notification and surveillance procedures when measures taken under its provisions affected the trade of another contracting party; secondly, to determine the natural rights which could be inherent for contracting parties and had been invoked in relation to Article XXI in general; thirdly, to establish whether any contracting party, including one not involved in a problem between two other contracting parties, could interpret per se that there existed an emergency in international relations as referred to in Article XXI:(b)(iii) and consequently take unilateral trade measures; fourthly, whether one or more contracting parties could take action under Article XXI(c) without the prior existence of a specific provision adopted by the United Nations authorizing the application of restrictive trade measures.<sup>364</sup>

7.28. The representatives of the European Communities recalled his statement at the previous meeting.<sup>365</sup> The representative of Canada expressed surprise that there had been no reference to an earlier invocation of Article XXI by Ghana.<sup>366</sup> According to the representative of Canada, on that occasion the notion of national security was interpreted in a broad sense by the government of

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<sup>354</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 8.

<sup>355</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 8.

<sup>356</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 8.

<sup>357</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 8.

<sup>358</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 9.

<sup>359</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 9.

<sup>360</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), pp. 5, 7, 8, and 9.

<sup>361</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 13.

<sup>362</sup> GATT Council, Minutes of the Meeting (7 May 1982), (Exhibit USA-59), p. 13.

<sup>363</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), C/M/159, (Exhibit USA-61), p. 15.

<sup>364</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 16.

<sup>365</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 16.

<sup>366</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 18.

Ghana and there had been no challenge to it.<sup>367</sup> The representative of Canada further stated that many contracting parties had previously taken similar action and no notification had been provided or requested.<sup>368</sup> The representative of Australia reiterated the position already expressed at the previous meeting.<sup>369</sup> He argued that only the CONTRACTING PARTIES acting jointly could interpret the GATT 1947 and that, given the infrequent use of Article XXI until that moment, he had doubts that there was a need for an interpretation of that provision.<sup>370</sup>

7.29. The representatives of Brazil, Colombia, Cuba, Dominican Republic, Ecuador (observer), India, Nigeria, Peru, the Philippines, Romania, Spain, Venezuela (observer), Uruguay, and Yugoslavia supported the proposal made by the representative of Argentina for a note interpreting Article XXI of the GATT 1947.<sup>371</sup>

7.30. The representative of the United States argued that the GATT had no role in a crisis of military force and left to each contracting party the judgment as to what it considered to be necessary for its security interests.<sup>372</sup>

7.31. The representative of the United Kingdom, speaking for Hong Kong, China, stated that the Council should avoid political discussions.<sup>373</sup> The representatives of Japan, New Zealand, and Norway expressed similar views.<sup>374</sup>

7.32. The Chairperson noted that the contracting parties held differing views with regard to the need for a note interpreting Article XXI of the GATT 1947.<sup>375</sup> He suggested that the representatives continue to consider the matter and engage in consultations, and that the Council revert to the item at its next meeting.<sup>376</sup>

7.33. Eventually, the CONTRACTING PARTIES adopted the 1982 Decision in relation to these discussions.<sup>377</sup>

7.34. In this dispute, the United States argues that views expressed in connection with the invocation of Article XXI of the GATT 1947 by the European Communities, Canada, and Australia further confirm that Article XXI is "self-judging" by the acting Member.<sup>378</sup>

7.35. Switzerland notes that "[s]everal GATT [c]ontracting [p]arties expressed views that do not support the position that Article XXI(b) is self-judging".<sup>379</sup>

#### **7.1.4 Invocation of Article XXI of the GATT 1947 by the United States in relation to certain measures affecting Nicaragua**

7.36. At a meeting held on 29 May 1985, the representative of Nicaragua asked the GATT Council to "condemn the trade embargo and other restrictive measures" adopted by the United States.<sup>380</sup> According to Nicaragua, the measures taken by the United States were inconsistent with certain provisions of the GATT 1947.<sup>381</sup> The representative of the United States argued that his government took measures for national security reasons that fell within Article XXI(b)(iii) of the GATT 1947.<sup>382</sup> According to the representative of the United States, his delegation did not intend to debate the matter in the GATT Council or any other GATT body "since GATT was not the appropriate body for

<sup>367</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 18.

<sup>368</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 18.

<sup>369</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 19.

<sup>370</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 19.

<sup>371</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), pp. 17, 18.

<sup>372</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 19.

<sup>373</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 20.

<sup>374</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 20.

<sup>375</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 21.

<sup>376</sup> GATT Council, Minutes of the Meeting (29-30 June 1982), (Exhibit USA-61), p. 22.

<sup>377</sup> See para. 6.3 above.

<sup>378</sup> United States' first written submission, para. 119.

<sup>379</sup> Switzerland's second written submission, para. 245.

<sup>380</sup> GATT Council, Minutes of the Meeting (29 May 1985), C/M/188, (Exhibit USA-63), p. 2.

<sup>381</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 4.

<sup>382</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 4.

debating political and security issues".<sup>383</sup> The representative of the United States further argued that Article XXI left to each contracting party the judgment of any action "which it considers necessary for the protection of its essential security interests".<sup>384</sup> In this respect, the representative of the United States noted that his delegation took a similar position in prior instances.<sup>385</sup> According to the representative of the United States, "[i]t was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no competence to judge such matters".<sup>386</sup>

7.37. The representative of Cuba maintained that "recourse to Article XXI had to be backed by certain facts, otherwise there would be no effective guarantees for any contracting party against abuse of the General Agreement".<sup>387</sup>

7.38. The representative of Brazil expressed his government's understanding that "the right to invoke security reasons under Article XXI should only be exercised in the light of other international obligations such as those assumed under the UN Charter".<sup>388</sup>

7.39. The representative of Chile argued that "resort to Article XXI should be qualified by the contracting party invoking it" and that "the Article did not imply that the trade consequences of measures taken under it could not be discussed in GATT".<sup>389</sup>

7.40. The representative of Spain argued that the United States' measures could not be justified under the provisions of Article XXI of the GATT 1947.<sup>390</sup>

7.41. The representative of Sweden maintained that "[w]hereas it had to be up to each country to define its essential security interests under Article XXI, contracting parties should be expected to exercise their rights under that Article with utmost prudence".<sup>391</sup> The representative of Sweden argued that in the case under discussion, "Sweden considered that the United States had not shown the necessary prudence but had chosen to give a too far-reaching interpretation to Article XXI".<sup>392</sup> The representative of Sweden finally expressed the hope that efforts be undertaken elsewhere with the aim of bringing about a mutually acceptable solution to the dispute.<sup>393</sup>

7.42. The representative of Czechoslovakia contested the interpretation of Article XXI advanced by the United States. According to the representative of Czechoslovakia, "[i]f the US interpretation of Article XXI were to be accepted, any contracting party wanting to justify introduction of certain trade measures against any other contracting party could simply refer to Article XXI and declare that its security was threatened".<sup>394</sup> The representative of Czechoslovakia expressed the view that none of the provisions in Articles XXI(b)(i)-(iii) of the GATT 1947 were relevant in the case under discussion, and therefore there was no legal basis to justify the action taken by the United States.<sup>395</sup>

7.43. The representative of India argued that a contracting party having recourse to Article XXI(b)(iii) of the GATT 1947 "should be able to demonstrate a genuine nexus between its security interests and the trade action taken", and that "the security exception should not be used to impose economic sanctions for non-economic purposes".<sup>396</sup> According to the representative of India, the United States had not established such a nexus, and therefore the measures under discussion were not in conformity with the GATT 1947.<sup>397</sup>

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<sup>383</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 4.

<sup>384</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 4.

<sup>385</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 4.

<sup>386</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 5.

<sup>387</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 5.

<sup>388</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), pp. 7-8.

<sup>389</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 8.

<sup>390</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 9.

<sup>391</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 10.

<sup>392</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 10.

<sup>393</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 10.

<sup>394</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 10.

<sup>395</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 10.

<sup>396</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 11.

<sup>397</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 11.

7.44. The representative of Finland expressed the belief that "contracting parties should exercise utmost prudence when invoking Article XXI".<sup>398</sup> With regard to the specific case at issue, the representative of Finland "doubted whether a balance had been observed between prudence, the measures taken, and their effects on the multilateral trading system".<sup>399</sup> The representative of Finland expressed the hope that efforts to bring about a mutually acceptable solution would be undertaken elsewhere.<sup>400</sup>

7.45. The representative of Switzerland recognized that Article XXI "gave overriding weight to the judgement of the contracting parties invoking the Article".<sup>401</sup> The representative of Switzerland added that his delegation also considered that "in light of the particular character of Article XXI, any contracting party intending to have recourse to it should take particular care to avoid any harmful erosion of the [GATT 1947] and any deterioration of the climate of international economic cooperation".<sup>402</sup>

7.46. The representative of Egypt expressed the view that Article XXI should be invoked "in a limited manner and with great prudence".<sup>403</sup>

7.47. The representative of Canada argued that the United States had the right to invoke the provisions of the GATT 1947 that it considered to be relevant, and at the same time Nicaragua retained its rights under the GATT 1947.<sup>404</sup> The representative of Canada further noted that "this was fundamentally not a trade issue, but one which could only be resolved in a context broader than GATT".<sup>405</sup>

7.48. The representative of Australia argued that "the United States was permitted under Article XXI of the [GATT 1947] to take action of this kind with no requirement to justify such action".<sup>406</sup>

7.49. The representative of the European Communities held the view that "GATT had never had the role of settling disputes essentially linked to security", and that "the [GATT 1947] left to each contracting party the task of judging what was necessary to protect its essential security interests".<sup>407</sup>

7.50. The representative of Norway "endorsed the view of the representative of the European Communities that contracting parties should show responsibility, discernment and moderation when resorting to Article XXI, and that discretion did not mean arbitrary application".<sup>408</sup>

7.51. The representative of Iceland "did not question the sovereign right of every contracting party to decide whether or when the provisions of Article XXI should be invoked".<sup>409</sup> He further expressed the hope that "efforts undertaken elsewhere" would contribute to resolve the matter.<sup>410</sup>

7.52. The representative of Portugal argued that "Article XXI did provide for exceptions based on national security, and it was up to the contracting party invoking Article XXI to determine what was necessary in this regard".<sup>411</sup>

7.53. The representative of Nicaragua maintained that "[i]t seemed that no delegation had separated the provisions of Article XXI from the provisions of the UN Charter, and none had denied that Nicaragua retained its full rights under Article XXIII".<sup>412</sup>

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<sup>398</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 11.

<sup>399</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 11.

<sup>400</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 11.

<sup>401</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 11.

<sup>402</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 11.

<sup>403</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 12.

<sup>404</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 12.

<sup>405</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 12.

<sup>406</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 13.

<sup>407</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 13.

<sup>408</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 14.

<sup>409</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 14.

<sup>410</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 14.

<sup>411</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 15.

<sup>412</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 16.

7.54. The delegation of Nicaragua circulated a draft decision condemning the measures adopted by the United States and urging the parties to resort to dispute settlement.<sup>413</sup> The representatives of the United States and the European Communities criticized the draft decision and saw no utility in the recourse to dispute settlement to settle the matter.<sup>414</sup>

7.55. The Council took note of the statements made and noted that the Chairperson would consult with delegations to determine how the matter could be dealt with at a subsequent Council meeting.<sup>415</sup>

7.56. At a GATT Council meeting held on 12 March 1986, a panel was established under Article XXII:2 of the GATT 1947.<sup>416</sup> Pursuant to the agreed terms of reference, "the Panel [could not] examine or judge the validity of or motivation for the invocation of Article XXI(b)(iii) [of the GATT 1947] by the United States".<sup>417</sup> 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 [GATT 1947], it could find the United States neither to be complying with its obligations under the [GATT 1947] nor to be failing to carry out its obligations under that Agreement".<sup>418</sup>

7.57. A meeting of the GATT Council was held on 5-6 November 1986. A discussion took place, with the contracting parties holding differing views with regard to the interpretation of Article XXI of the GATT 1947. Whereas the representatives of the United States and the European Communities made statements recognizing that contracting parties had the right to determine their own national security interests<sup>419</sup>, other contracting parties expressed opposite views. For instance: (i) the representative of Nigeria argued that "Article XXI could be invoked only in cases of a state of war or emergency; neither was the case regarding the US embargo";<sup>420</sup> (ii) the representative of Argentina argued that "Article XXI had been improperly invoked by the United States"<sup>421</sup>; (iii) the representative of Sweden argued that panels should be able to examine all relevant GATT articles, including Article XXI, and that "to restrict a panel's examination of measures taken in the context of Article XXI was to risk an erosion of faith in GATT's rules"<sup>422</sup>; (iv) the representative of Cuba maintained that "the use of Article XXI by one contracting party to punish another should not be acceptable"<sup>423</sup>; (v) the representative of Czechoslovakia argued that the Panel's conclusion confirmed that "if interpretation of Article XXI were reserved entirely to the contracting party invoking it, that Article would often be used for purposes other than those for which it was intended" and that, in his view, the measures adopted by the United States did not conform with Article XXI of the GATT 1947<sup>424</sup>; (vi) the representative of India argued that a contracting party invoking Article XXI of the GATT 1947 should be able to demonstrate a "genuine nexus" between its security interests and the action taken.<sup>425</sup>

7.58. Ultimately, consensus could not be reached on the adoption of the Panel report.<sup>426</sup> Under the circumstances, the Chairperson suggested that the Council take note of the statements and request the Chairperson to consult informally with the delegations on how to deal with the Panel's report.<sup>427</sup> The Council so agreed.<sup>428</sup>

7.59. In this dispute, the United States argues that although the GATT Council could not adopt the report, statements of the contracting parties in connection with the United States' reference to

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<sup>413</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), pp. 16-17.

<sup>414</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), pp. 16-17.

<sup>415</sup> GATT Council, Minutes of the Meeting (29 May 1985), (Exhibit USA-63), p. 17.

<sup>416</sup> GATT Council, Minutes of the Meeting (12 March 1986), C/M/196, (Exhibit USA-64), p. 7.

<sup>417</sup> GATT Council, Minutes of the Meeting (12 March 1986), (Exhibit USA-64), p. 7.

<sup>418</sup> GATT Panel Report, *United States - Trade Measures Affecting Nicaragua*, (Exhibit USA-65), para. 5.3.

<sup>419</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), C/M/204, (Exhibit USA-66), pp. 8-9 and 15-16. The representative of the European Communities noted, however, that "the discretionary right inherent in Article XXI should not be arbitrarily invoked". (Ibid., p. 16).

<sup>420</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 10.

<sup>421</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 11.

<sup>422</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 12.

<sup>423</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), pp. 12-13.

<sup>424</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 14.

<sup>425</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 14.

<sup>426</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 17.

<sup>427</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 17.

<sup>428</sup> GATT Council, Minutes of the Meeting (5-6 November 1986), (Exhibit USA-66), p. 17.

Article XXI of the GATT 1947 "demonstrate that invocations of Article XXI(b) were seen as self-judging and that the GATT was not intended as a forum to discuss political disputes".<sup>429</sup>

7.60. Switzerland argues that a number of contracting parties expressed views contrary to those of the United States, and that therefore the exchange of views among GATT contracting parties confirms that Article XXI was not considered to be "self-judging".<sup>430</sup> Switzerland also notes that the explicit exclusion of Article XXI(b)(iii) from the Panel's terms of reference confirms that, absent the exclusion, the Panel would have been required to review the invocation of Article XXI by the United States.<sup>431</sup>

## 7.2 Assessment by the Panel

7.61. The Panel notes that the parties agree that the views of the GATT contracting parties summarized above do not have a particular status under either Articles 31 or 32 of the Vienna Convention. The documents submitted refer to discussions taking place among GATT contracting parties in four separate instances.

7.62. With regard to the 1961 meeting of the GATT CONTRACTING PARTIES where a discussion took place on Portugal's accession to the GATT, the Panel notes that Ghana invoked Article XXI of the GATT 1947 as the justification for imposing a ban on the importation of Portuguese products. In that context, Ghana expressed the view that "each contracting party was the sole judge of what was necessary in its essential security interests".<sup>432</sup> The minutes of the meeting do not report any reaction by any GATT contracting party to the statement of the representative of Ghana, and the Panel does not find any basis to interpret this lack of reaction as showing either support or opposition to the views expressed by the representative of Ghana.

7.63. With regard to the 1970 Working Party Report on the accession of the United Arab Republic to the GATT, the Panel notes that the document does not explicitly refer to Article XXI of the GATT 1947. Furthermore, the document reveals that some GATT contracting parties "reserved their rights" under the GATT 1947, without further specification. In the Panel's view, the document does not reveal a common understanding by the parties on the interpretation of Article XXI of the GATT 1947. The circumstance that some contracting parties reserved their rights under the GATT 1947 further indicates that the discussion recorded in the document did not preclude or predetermine such rights, including the possibility to resort to dispute settlement.

7.64. With regard to the discussions that took place in 1982 in relation to the invocation by the European Communities, Canada, and Australia of Article XXI of the GATT 1947 to justify the adoption of certain measures affecting trade with Argentina in connection with the situation in the Falkland Islands (Islas Malvinas), the Panel notes that the documents on record show a variety of views among the GATT contracting parties. Differing views were expressed concerning a number of issues, including: (a) whether those GATT contracting parties that invoked Article XXI of the GATT 1947 were entitled to do so; (b) whether GATT contracting parties invoking Article XXI of the GATT 1947 were required to notify their measures; and (c) what remedies were available for GATT contracting parties affected by measures taken pursuant to Article XXI of the GATT 1947. Accordingly, the materials submitted demonstrate that the GATT contracting parties did not express a common understanding on the interpretation of Article XXI of the GATT 1947. The Panel further notes that these discussions eventually led to the adoption of the 1982 Decision.<sup>433</sup> In this respect, the Panel recalls its earlier findings that there is no indication in the 1982 Decision that Article XXI of the GATT 1994 should be understood as an entirely "self-judging" provision in the sense argued by the United States in this dispute.<sup>434</sup>

7.65. Finally, the Panel turns to the discussions that took place in 1985 and 1986 in relation to the United States' invocation of Article XXI of the GATT 1947 to justify certain measures affecting trade with Nicaragua. The Panel notes that while the United States and the European Communities made statements arguing that the GATT contracting parties had the right to determine their own national

<sup>429</sup> United States' first written submission, para. 127.

<sup>430</sup> Switzerland's second written submission, para. 251.

<sup>431</sup> Switzerland's second written submission, para. 250.

<sup>432</sup> See para. 7.3 above.

<sup>433</sup> See para. 6.3 above.

<sup>434</sup> See para. 6.11 above.

security interests, a number of contracting parties expressed opposite views, including by challenging the notion that the invocation of Article XXI of the GATT 1947 by a GATT contracting party would be self-judging. Further, a panel was established in the dispute between Nicaragua and the United States for which the parties agreed on special terms of reference explicitly preventing that panel from examining or judging "the validity of or motivation for the invocation of Article XXI(b)(iii) [of the GATT 1947] by the United States".<sup>435</sup> Eventually, there was no consensus in the GATT Council to adopt the report of the panel. Based on the foregoing, the Panel is of the view that these discussions do not reveal a common understanding on the interpretation of Article XXI of the GATT 1947 among the GATT contracting parties.

7.66. The Panel therefore concludes that the materials reviewed in this section reveal various and, at times, opposing views expressed by several GATT contracting parties with reference to Article XXI of the GATT 1947. In light of the heterogeneity of the views expressed in the materials reviewed above, the Panel does not consider that these provide any relevant guidance for the contested issues in this dispute regarding the interpretation of Article XXI of the GATT 1994.

## **8 URUGUAY ROUND NEGOTIATIONS**

### **8.1 Arguments and materials submitted by the parties**

8.1. The United States refers to certain materials from the negotiating record of the Uruguay Round as "negotiating history" that confirms that the invocation of Article XXI(b) of the GATT 1994 is self-judging.<sup>436</sup>

8.2. Switzerland argues that the materials submitted by the United States do not suggest that Article XXI(b) of the GATT 1994 is self-judging, but instead confirm that measures taken under Article XXI of the GATT 1994 "were always meant to be subject to a panel's review under Article XXIII of the GATT 1994 and the DSU".<sup>437</sup>

#### **8.1.1 Proposals regarding Article XXI at the Negotiating Group on GATT Articles**

8.3. The United States submits documents concerning two proposals tabled by Nicaragua and Argentina at the Uruguay Round Negotiating Group on GATT Articles.

8.4. On 10 November 1987, Nicaragua sent a communication to the Negotiating Group on GATT Articles, requesting the inclusion of Article XXI among the provisions of the GATT 1947 to be reviewed during the Uruguay Round of negotiations.<sup>438</sup> On 28 June 1988, Nicaragua submitted a proposal to the Negotiating Group on GATT Articles regarding the interpretation of Article XXI and the consequences of the invocation of that provision.<sup>439</sup>

8.5. First, Nicaragua proposed the adoption of an interpretative note regarding the "which it considers" language in Article XXI(b). The proposed interpretative note read:

Any invocation of this provision must be in good faith, that is, it must be consistent with international law and must come after the invoking party has first tried to protect its interest through bilateral negotiations, and, if such negotiations prove unsuccessful, has tried to protect its interests by appealing to the appropriate body of the United Nations or other appropriate inter-governmental organisation that deals with war or other emergencies in international relations. Any invocation of this provision must also be consistent with any resolution or determination reached by a body of the United Nations or other such inter-governmental organisation.<sup>440</sup>

<sup>435</sup> See para. 7.56 above.

<sup>436</sup> United States' second written submission, para. 46.

<sup>437</sup> Switzerland's second written submission, para. 227.

<sup>438</sup> Negotiating Group on GATT Articles, Communication from Nicaragua (10 November 1987), MTN.GNG/NG7/W/34, (Exhibit USA-152).

<sup>439</sup> Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua (28 June 1988), MTN.GNG/NG7/W/48, (Exhibit USA-150).

<sup>440</sup> Article XXI Proposal by Nicaragua, (Exhibit USA-150).

8.6. Second, Nicaragua also proposed the adoption of an interpretative note to define the terms "emergency in international relations" in Article XXI(b)(iii), with the following language:

For purposes of this Article, "emergency in international relations" shall be understood to refer only to situations which in the opinion of the CONTRACTING PARTIES threaten international peace and security and which the party invoking the Article has first sought to resolve by appealing to the appropriate body of the United Nations or other appropriate inter-governmental organisation that deals with peace and security issues.<sup>441</sup>

8.7. Finally, Nicaragua submitted a proposal for the adoption of the following provision:

The CONTRACTING PARTIES shall make recommendations, which shall be obligatory, with a view to compensating in full any developing country whose rights or benefits under the General Agreement have been nullified or impaired by the actions taken by another contracting party under Article XXI, provided that in the opinion of the CONTRACTING PARTIES the acts cited by the contracting party invoking Article XXI as the basis for such invocation do not constitute acts taken in time of war or other emergency in international relations or a violation of international law.<sup>442</sup>

8.8. On 4 February 1988, Argentina submitted a communication to the Negotiating Group on GATT Articles concerning Article XXI.<sup>443</sup> In the communication, Argentina stated that experience to that date had shown that "there is no restriction on the unilateral interpretation of the contracting party invoking [Article XXI], which creates a legal gap that will have to be studied and resolved during the current Round of Negotiations".<sup>444</sup>

8.9. Argentina noted that the ITO Draft Charter envisaged the possibility to refer disputes of a "political" nature to the United Nations, thereby limiting the jurisdiction of the ITO and providing for a solution to matters "in one forum or the other".<sup>445</sup> To avoid "future uses of Article XXI that could continue to undermine the functioning of the General Agreement", Argentina proposed that the Negotiating Group consider the following options:

(a) To draft an Interpretative Note restoring the original link between Articles 86 and 99.

(b) To interpret certain terms of the provisions of Article XXI(b)(iii) in such a way as to limit possible arbitrariness.

Such terms would include: (1) protection of essential security interests; and (2) time of war or other emergency in international relations.<sup>446</sup>

8.10. In its communication, Argentina further noted that trade measures adopted under Article XXI did not allow developing countries affected by those to effectively retaliate, which "facilitates the use of these provisions against economically weaker countries".<sup>447</sup> To address this concern, Argentina proposed that future provisions "be strengthened ... by ensuring suitable legal protection for developing or commercially weaker contracting parties".<sup>448</sup>

<sup>441</sup> Article XXI Proposal by Nicaragua, (Exhibit USA-150).

<sup>442</sup> Article XXI Proposal by Nicaragua, (Exhibit USA-150).

<sup>443</sup> Negotiating Group on GATT Articles, Communication from Argentina (4 February 1988), MTN.GNG/NG7/W/44, (Exhibit USA-151).

<sup>444</sup> Communication from Argentina, (Exhibit USA-151), p. 1.

<sup>445</sup> Communication from Argentina, (Exhibit USA-151), p. 2.

<sup>446</sup> Communication from Argentina, (Exhibit USA-151), p. 3. See Articles 86 and 99 of the ITO Draft Charter.

<sup>447</sup> Communication from Argentina, (Exhibit USA-151), p. 3.

<sup>448</sup> Communication from Argentina, (Exhibit USA-151), p. 3.

8.11. The two proposals were discussed at a meeting of the Negotiating Group on GATT Articles held on 27-30 June 1988. Representatives of Argentina and Nicaragua introduced their proposals.<sup>449</sup> Several delegations intervened, but a note on the meeting does not indicate their identity.

8.12. One delegation expressed the view that when measures were taken for security reasons, it was important to establish a clear relationship between "the measures taken and the security considerations on which they were based".<sup>450</sup> The same delegation further stated that "[w]ithout calling into question the sovereign right to invoke Article XXI[, ] the Group should examine how such a direct relationship could be established".<sup>451</sup>

8.13. Other delegations argued that "since Article XXI involved very sensitive matters a great deal of discretion was necessary in dealing with it". As considerations of sovereignty were "paramount" in the application of Article XXI, "it was unrealistic to think of a GATT body placing conditions on its use since only the individual contracting party concerned was ultimately in a position to judge what its security interests were".<sup>452</sup> It was also noted that "[h]itherto contracting parties had been very judicious in using Article XXI, which had been invoked very infrequently".<sup>453</sup>

8.14. With respect to the proposal submitted by Argentina, "one delegation expressed the opinion that since the GATT had no competence in the determination of questions of security or of a political nature, it seemed doubtfully useful to set up any institutional test to determine whether a matter was security-related or political".<sup>454</sup>

8.15. Other delegations argued that there was a "danger" of Article XXI being abused if governments were not cautious in its invocation.<sup>455</sup> The minutes of the meeting further report that "[o]ther delegations, which did not favour any change in the text of Article XXI or the development of rigid disciplines in what was essentially a matter for unilateral decision, suggested that the notification provisions under the Article might be improved".<sup>456</sup> The minutes mention that "[t]he point was also made that the right of recourse to Article XXIII was the appropriate safeguard against abuse".<sup>457</sup>

8.16. Finally, with regard to the issue of the lack of retaliatory power for less-developed contracting parties, delegations expressed a variety of views, ranging from not seeing the issue as a "North-South problem" to arguing in favour of making provision for compensation for less-developed countries when action affecting them was not consistent with Article XXI.<sup>458</sup>

8.17. According to the United States, the discussion reported above shows that negotiators during the Uruguay Round expressed views consistent with those of the negotiators of Article XXI of the GATT 1947, "namely that matters of essential security under Article XXI are left to the judgement of the invoking member".<sup>459</sup> According to the United States, even those delegations that agreed with Argentina and Nicaragua acknowledged this meaning.<sup>460</sup> The United States maintains that the documents submitted show how "Uruguay Round negotiators did not intend to alter the self-judging nature of Article XXI, and they rejected proposals that would have done so".<sup>461</sup>

8.18. Switzerland argues that the materials submitted confirm that Article XXI was not considered to be "self-judging" in the sense argued by the United States and was meant to be subject to the disciplines of Article XXIII, "which were further developed and strengthened in the DSU".<sup>462</sup>

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<sup>449</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8, (Exhibit USA-153), pp. 1-2.

<sup>450</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 2.

<sup>451</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 2.

<sup>452</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 2.

<sup>453</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 2.

<sup>454</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), pp. 2-

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<sup>455</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 3.

<sup>456</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 3.

<sup>457</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 3.

<sup>458</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, (Exhibit USA-153), p. 3.

<sup>459</sup> United States' second written submission, para. 55.

<sup>460</sup> United States' second written submission, para. 55.

<sup>461</sup> United States' second written submission, para. 55.

<sup>462</sup> Switzerland's second written submission, para. 233.

According to Switzerland, the GATT 1994 negotiators recognized that Article XXIII was the appropriate safeguard against abuse of Article XXI.<sup>463</sup> Switzerland also argues that some negotiators recognized the risk of Article XXI being abused, "including because one party could block the establishment of a panel, insist on excluding certain matters from the scope of the terms of reference, which at that time required approval by the GATT Council, and thereby oppose the examination of the applicability of GATT provisions and compliance with them".<sup>464</sup> According to Switzerland, the DSU addressed this issue by introducing standard terms of reference in Article 7.1.<sup>465</sup> Finally, Switzerland notes that some Members expressed the view that action under Article XXI could be GATT-inconsistent.<sup>466</sup>

### 8.1.2 The drafting of security exceptions in the GATS and in the TRIPS Agreement

8.19. The United States submits materials concerning the drafting of security exceptions in the GATS and in the TRIPS Agreement.

8.20. Concerning the negotiating history of the GATS, the United States submitted the draft texts of the security exceptions that were proposed by a number of delegations at the Uruguay Round between 1989 and 1990.

8.21. Switzerland submitted a proposal for a provision granting exceptions for "public order and national security" that omitted the language "it considers" and required that measures "necessary to protect ... essential security interests" be not applied "in a manner that would constitute a means of arbitrary or unjustifiable discrimination between PARTIES, a disguised restriction on trade in services, or a means of circumventing the objectives of the Agreement".<sup>467</sup>

8.22. A joint proposal by Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay included an exception for measures "consistent with international law, that are ... [n]ecessary to protect national security".<sup>468</sup> Such exception would feature alongside exceptions for measures addressing other concerns (e. g., "public morals", "public order", "safety or health").<sup>469</sup> Like the proposal submitted by Switzerland, this proposal did not include the "it considers" language. The proposal also subjected measures necessary to protect national security to the requirement that they not be used "as a means to circumvent the objectives, principles and disciplines of this Framework nor as disguised restrictions on international trade in services".<sup>470</sup> Finally, the proposal introduced a notification requirement.<sup>471</sup>

8.23. The United States submitted a proposal for a "General Exceptions" provision, which included a separate paragraph dealing with national security.<sup>472</sup> Similarly to Article XXI of the GATT 1947, this proposal retained the "it considers" language and the reference to action "taken in time of war

<sup>463</sup> Switzerland's second written submission, para. 233.

<sup>464</sup> Switzerland's second written submission, para. 233.

<sup>465</sup> Switzerland's second written submission, para. 233.

<sup>466</sup> Switzerland's second written submission, para. 233.

<sup>467</sup> Group of Negotiations on Services, Communication from Switzerland – Draft General Agreement on Trade in Services (7 June 1990), MTN.GNS/W/102 (Exhibit USA-183), p. 10.

<sup>468</sup> Group of Negotiations on Services, Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay – Structure of a Multilateral Framework for Trade in Services (26 February 1990), MTN.GNS/W/95, (Exhibit USA-184), p. 9.

<sup>469</sup> Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay – Structure of a Multilateral Framework for Trade in Services, (Exhibit USA-184), p. 9.

<sup>470</sup> Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay – Structure of a Multilateral Framework for Trade in Services, (Exhibit USA-184), p. 9.

<sup>471</sup> Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay – Structure of a Multilateral Framework for Trade in Services, (Exhibit USA-184), p. 9.

<sup>472</sup> Group of Negotiations on Services, Communication from the United States – Agreement on Trade in Services (17 October 1989), MTN.GNS/W/75, (Exhibit USA-185), p. 12.

or other emergency in international relations".<sup>473</sup> Similar elements characterized a proposal submitted by Japan.<sup>474</sup>

8.24. A draft text proposed by the European Communities also included a separate paragraph dealing with national security issues in the context of a broader "Exceptions" provision.<sup>475</sup> Like the proposals of the United States and Japan, the draft text retained the "it considers" language and the reference to action "taken in time of war or other emergency in international relations".<sup>476</sup> In addition, the proposal of the European Communities: (i) required parties to "take into consideration the interests of third parties which may be affected"; (ii) provided that "PARTIES shall be informed to the fullest extent possible of measures taken under this Article"; and (iii) established that "[a]ll parties affected by action under this Article retain their full rights under this Agreement".<sup>477</sup>

8.25. In July 1990, the Chairperson of the Group of Negotiations on Services circulated a draft of a "Multilateral Framework for Trade in Services".<sup>478</sup> The draft included an "Exceptions" provision with a paragraph specifically dealing with national security exceptions. The provision, in relevant part, read as follows:

Article XIV

Exceptions

2. Nothing in this Agreement shall be construed:

(a) to require any party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any party from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the provision of services as carried on directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

3. PARTIES shall be informed to the fullest extent possible of measures taken under this Article.<sup>479</sup>

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<sup>473</sup> Communication from the United States – Agreement on Trade in Services, (Exhibit USA-185), p. 12.

<sup>474</sup> Group of Negotiations on Services, Communication from Japan - Draft General Agreement on Trade in Services (10 July 1990), MTN.GNS/W/107, (Exhibit USA-187), p. 12.

<sup>475</sup> Group of Negotiations on Services, Communication from the European Communities – Draft General Agreement on Trade in Services (18 June 1990), MTN.GNS/W/105, (Exhibit USA-186), p. 13.

<sup>476</sup> Communication from the European Communities – Draft General Agreement on Trade in Services, (Exhibit USA-186), p. 13.

<sup>477</sup> Communication from the European Communities – Draft General Agreement on Trade in Services, (Exhibit USA-186), p. 13.

<sup>478</sup> Group of Negotiations on Services, Draft Multilateral Framework for Trade in Services (23 July 1990), MTN.GNS/35, (Exhibit USA-188).

<sup>479</sup> Group of Negotiations on Services, Draft Multilateral Framework for Trade in Services (23 July 1990), (Exhibit USA-188), pp. 11-12.

8.26. With minimal modifications, this provision was also included in the draft text of the GATS circulated in December 1990.<sup>480</sup>

8.27. In December 1991, the Chairperson of the Trade Negotiations Committee circulated a draft text of the GATS that further separated "General Exceptions" in Article XIV from "Security Exceptions", now placed in Article XIV *bis* and worded as follows:

Article XIV bis

Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any party from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the provision of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The PARTIES shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.<sup>481</sup>

8.28. Concerning the negotiations of the security exceptions in the TRIPS Agreements, the United States submits two documents.

8.29. The first document is an excerpt from the draft text of the TRIPS Agreement circulated on 23 July 1990 at the request of the Chairperson of the Negotiating Group on Trade-Related Aspects on Intellectual Property Rights, including Trade in Counterfeit Goods.<sup>482</sup> The draft text did not include a provision on security exceptions, but incorporated GATT provisions "to the extent that this PART does not provide for more specific rights, obligations and exceptions thereof".<sup>483</sup>

8.30. The second document is an excerpt from the December 1991 draft text of the TRIPS circulated by the Chairperson of the Trade Negotiations Committee. The draft text included a "Security Exceptions" provision with the following text:

Article 73: Security Exceptions

Nothing in this Agreement shall be construed:

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<sup>480</sup> Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Revision) (3 December 1990), MTN.TNC/W/35/Rev.1, (Exhibit USA-189), p. 348.

<sup>481</sup> Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), pp. 18-19.

<sup>482</sup> Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, Status of Work in the Negotiating Group – Chairman's Report to the GNG (23 July 1990), MTN.GNG/NG11/W/76, (Exhibit USA-191).

<sup>483</sup> Draft Text of the TRIPS Agreement, (Exhibit USA-191), p. 78.

(a) to require any PARTY to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any 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 PARTY from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.<sup>484</sup>

8.31. In this dispute, the United States argues that Uruguay Round negotiators decided to include in GATS and TRIPS security exceptions mirroring Article XXI of the GATT 1947 in relevant part.<sup>485</sup> According to the United States, the Uruguay Round drafters deliberately chose to replicate in the GATS and TRIPS elements of the security exceptions that make them self-judging, namely the reference to action that a Member "considers necessary" and the separation from the discipline on "general exceptions".<sup>486</sup> The United States notes that a proposal by Switzerland and a joint proposal of 11 delegations sought to remove the "it considers" language in the GATS security exceptions and to add requirements against discrimination, circumvention of the disciplines of the GATS, and disguised restrictions to trade.<sup>487</sup> The United States further notes that proposals tabled by, respectively, the European Communities, Japan, and the United States retained the "it considers" language as well as the reference to action "taken in time of war or other emergency in international relations", separated the security exceptions from "general exceptions", and did not include "non-discrimination requirements" in the text of the security exceptions.<sup>488</sup>

8.32. The United States notes that the proposal submitted by the European Communities included the following language at the end of the national security exceptions: "In taking action under this paragraph, parties shall take into consideration the interests of third parties which may be affected".<sup>489</sup> According to the United States, this suggests that the European Communities acknowledged that "it was the parties – now Members – that would be choosing whether to take action under this provision".<sup>490</sup> The United States further argues that, by providing in its proposal that "All parties affected by action under this Article retain their full rights under this Agreement", the European Communities acknowledged the 1982 Decision<sup>491</sup> and "yet retained the self-judging reference to actions a Member 'considers necessary for the protection of its essential security interests'".<sup>492</sup>

8.33. The United States maintains that the draft texts of the GATS circulated by the Chairperson reflected in relevant part the proposals submitted by the European Communities, Japan, and the United States. Specifically, the United States argues that the drafters "deliberately" chose to separate security exceptions from general exceptions, subjecting only the latter to review for non-discrimination, leaving the former "self-judging".<sup>493</sup>

<sup>484</sup> Draft Final Act Embodying the Results of the Uruguay Round (20 December 1991), (Exhibit USA-190), p. 90.

<sup>485</sup> United States' second written submission, para. 56.

<sup>486</sup> United States' second written submission, paras. 56-57.

<sup>487</sup> United States' second written submission, paras. 58-59.

<sup>488</sup> United States' second written submission, para. 60.

<sup>489</sup> United States' second written submission, para. 61; Communication from the European Communities – Draft General Agreement on Trade in Services, (Exhibit USA-186), p. 13.

<sup>490</sup> United States' second written submission, para. 61.

<sup>491</sup> See para. 6.3 above.

<sup>492</sup> United States' second written submission, para. 61.

<sup>493</sup> United States' second written submission, paras. 62-63.

8.34. The United States finally refers to the negotiating history of the security exceptions in the TRIPS Agreement.<sup>494</sup> According to the United States, drafters were presented again with the choice of whether to diverge from the language of Article XXI of the GATT 1947, and eventually decided again "to use the language of Article XXI in the security exceptions at TRIPS Article 73".<sup>495</sup> The United States concludes that negotiators were aware of how Article XXI of the GATT 1947 had been interpreted, and "were comfortable continuing with that interpretation".<sup>496</sup>

8.35. Switzerland argues that nothing in the negotiating history of the GATS and the TRIPS Agreement suggests that the security exceptions contained in those agreements are "self-judging".<sup>497</sup>

### 8.1.3 Negotiations of the DSU

8.36. The United States submits materials related to the negotiations of the DSU and a proposal by Nicaragua.

8.37. On 3 November 1987, Nicaragua submitted a communication to the Negotiating Group on Dispute Settlement.<sup>498</sup> Nicaragua shared its experience in GATT dispute settlement and submitted several proposals for consideration during the negotiations, including the following:

No contracting party may oppose examination of the applicability of GATT provisions and compliance with them.

...

Any panel must reach a clear conclusion on nullification or impairment of benefits.<sup>499</sup>

8.38. At a meeting held on 20 November 1987, the negotiators discussed, among other topics, "GATT Article XXI and its review by a GATT panel".<sup>500</sup> The delegation of Chile submitted an addendum to the note, summarizing its statements at the meeting.<sup>501</sup> Referring to the communication of Nicaragua discussed above, Chile considered "pertinent" the contents of large parts of the document.<sup>502</sup> However, Chile "found unacceptable the introduction and the extremely politicized framework of the document, as well the lack of any reference to Article XXI of the General Agreement, which is fully valid".<sup>503</sup>

8.39. The United States argues that Nicaragua's proposal was not incorporated into the DSU.<sup>504</sup> The United States further submits that other statements by the drafters of the DSU confirm that "the DSU does not alter the ordinary meaning of the terms of the covered agreements".<sup>505</sup> According to the United States, the decision of the drafters "not to include language in the DSU that would alter

<sup>494</sup> United States' second written submission, para. 62.

<sup>495</sup> United States' second written submission, para. 65.

<sup>496</sup> United States' second written submission, para. 65.

<sup>497</sup> Switzerland's opening statement at the second meeting of the Panel, para. 38.

<sup>498</sup> Negotiating Group on Dispute Settlement, Communication from Nicaragua (3 November 1987), MTN.GNG/NG13/W/15, (Exhibit USA-192).

<sup>499</sup> Communication from Nicaragua, (Exhibit USA-192), p. 8.

<sup>500</sup> A note by the Secretariat summarizing the meeting does not provide details about the discussion. (Negotiating Group on Dispute Settlement, Meeting of 20 November 1987 – Note by the Secretariat, MTN.GNG/NG13/5, (Exhibit USA-193), p. 3).

<sup>501</sup> Negotiating Group on Dispute Settlement, Meeting of 20 November 1987 – Note by the Secretariat (Addendum), MTN.GNG/NG13/5/Add.1, (Exhibit USA-194).

<sup>502</sup> Negotiating Group on Dispute Settlement, Meeting of 20 November 1987 – Note by the Secretariat (Addendum), (Exhibit USA-194), p. 2.

<sup>503</sup> Negotiating Group on Dispute Settlement, Meeting of 20 November 1987 – Note by the Secretariat (Addendum), (Exhibit USA-194), p. 2.

<sup>504</sup> United States' second written submission, para. 68.

<sup>505</sup> United States' second written submission, para. 69; Negotiating Group on Dispute Settlement, Meeting of 25 June 1987 - Note by the Secretariat, MTN.GNG/NG13/2 (Exhibit USA-195), and Negotiating Group on Dispute Settlement, Meeting of 11 July 1988 - Note by the Secretariat, MTN.GNG/NG13/9, (Exhibit USA-196).

the interpretation of Article XXI" confirms that Uruguay Round negotiators were aware of the existing interpretation of Article XXI of the GATT 1947 and agreed with it.<sup>506</sup>

8.40. Switzerland argues that some negotiators recognized the risk of Article XXI being abused, including because one party could block the establishment of the panel, insist on excluding certain matters from the scope of the terms of reference and thereby oppose the examination of the applicability of GATT provisions and compliance with them.<sup>507</sup> According to Switzerland, these shortcomings were ultimately addressed in the DSU, including through standard terms of reference in Article 7.1, which can now be changed only by agreement of both parties to the dispute.<sup>508</sup>

#### **8.1.4 The formulation of security exceptions in international agreements concluded after 1947**

8.41. The United States argues that the choice of Uruguay Round negotiators to keep the language of Article XXI of the GATT 1947 and to substantially replicate it in other covered agreements is notable in light of the approaches to security exceptions taken in other trade agreements negotiated after 1947.<sup>509</sup> According to the United States, while some agreements (such as the 1985 Agreement between Israel and the United States) incorporated by reference Article XXI of the GATT 1947, other agreements (such as the Treaty of Rome and the Agreement on the European Economic Area) "reflect significant deviations from the text of Article XXI, including by expressly providing for the review of measures taken by a government for essential security purposes".<sup>510</sup>

8.42. Switzerland does not comment on these materials.

#### **8.2 Assessment by the Panel**

8.43. In this section of the Appendix, the Panel reviews four sets of documents submitted by the United States concerning: (i) proposals to modify the wording of Article XXI and the ensuing discussion; (ii) the negotiations of the security exceptions in the GATS and in the TRIPS Agreement; (iii) the negotiations of the DSU; and (iv) the formulation of security exceptions in other international agreements.

8.44. The Panel recalls its understanding that Article 32 of the Vienna Convention does not exhaustively define the types of supplementary means of interpretation that an interpreter may have recourse to in order to confirm the meaning of treaty terms.<sup>511</sup> The first three sets of documents listed above naturally fall within the meaning of "preparatory work" for the purposes of Article 32 of the Vienna Convention. One of these sets of documents pertains directly to the negotiations of Article XXI of the GATT 1994, which is the relevant treaty provision in this analysis. Documents concerning the negotiations of the security exceptions in the GATS and in the TRIPS Agreement, as well as those relating to the negotiations of the DSU, could also be considered "preparatory work" of the relevant covered agreements.

8.45. Concerning the negotiations that led to the transposition of Article XXI of the GATT 1947, unaltered in wording, into the GATT 1994, the Panel is not persuaded that the documents reveal, as the United States argues, that the negotiators understood Article XXI to be "self-judging" and that they therefore rejected proposals that would make it subject to review. Specifically, the Panel does not find anything in these documents that would point to a shared understanding by the negotiators that Article XXI had consistently been interpreted as a "self-judging" provision. The Panel notes that in the discussions that followed the proposals submitted by Nicaragua and Argentina, various participants disagreed with the idea that Article XXI was entirely "self-judging". While some participants argued that it was for the individual contracting party concerned only "to judge what its security interests were", others maintained that action taken under Article XXI could be found to be

<sup>506</sup> United States' second written submission, para. 70.

<sup>507</sup> Switzerland's second written submission, para. 233 and fn 287.

<sup>508</sup> Switzerland's second written submission, para. 233 and fn 287.

<sup>509</sup> United States' second written submission, paras. 71 and 82.

<sup>510</sup> United States' second written submission, para. 71; Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, (Exhibit USA-197), The Treaty of Rome, (Exhibit USA-181), and Agreement on the European Economic Area (EEA), (Exhibit USA-221).

<sup>511</sup> See para. 2.33 above.

inconsistent with the GATT, thereby implying the reviewability of the provision.<sup>512</sup> Finally, the Panel considers it significant that participants referred to Article XXIII as "the appropriate safeguard" against abuses of the invocation of the security exceptions.<sup>513</sup>

8.46. With regard to the negotiations of the security exceptions in the GATS and in the TRIPS Agreement, the Panel notes that the materials do not show any explicit discussion on the reviewability of the provisions in the event of a dispute. Accordingly, and bearing in mind that the documents refer to similar provisions, but not directly to the relevant provision in this dispute, the Panel does not consider these documents to provide relevant guidance for the contested issues in this dispute regarding Article XXI of the GATT 1994.

8.47. The Panel has also reviewed documents pertaining to the negotiations of the DSU. The Panel notes that the three documents submitted concern inconclusive discussions that took place at the early stages of the negotiations of the DSU. Furthermore, the Panel is of the view that these documents should be considered against the background of the final text of the DSU, which makes no explicit reference to Article XXI of the GATT 1994 or the potential review of its invocation in dispute settlement proceedings. Therefore, the Panel does not consider these documents to provide relevant guidance for the contested issues in this dispute regarding Article XXI of the GATT 1994.

8.48. With regard to the security exceptions in other international agreements concluded between 1947 and the Uruguay Round, the Panel considers that they could in theory fall within the broader residual category of supplementary means of interpretation under Article 32 of the Vienna Convention other than preparatory work and the circumstances of the conclusion of a treaty. However, the Panel is not persuaded that the specific documents submitted are relevant to the contested issues in this dispute. One of these documents is the 1985 "Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America".<sup>514</sup> Article 7 of the Agreement incorporates by reference Articles XX and XXI of the GATT 1947.<sup>515</sup> In the Panel's view, nothing in this document addresses the issue of the nature of Article XXI as "self-judging" or otherwise. The other two documents refer to the security exceptions and dispute settlement rules in the Treaty of Rome and in the EEA Agreement. Neither makes any reference to Article XXI of the GATT 1947.<sup>516</sup> Furthermore, those provisions relate to agreements with their own detailed rules for the settlement of disputes, separate and distinct from those of the GATT or the WTO. In any event, there is no indication of the relation of these documents to the negotiations of Article XXI of the GATT 1994 or of the security exceptions in other covered agreements. The sole fact that such "alternative approaches"<sup>517</sup> to security exceptions existed at the time of the Uruguay Round negotiations is not sufficient in itself for the provisions in other agreements to be considered as relevant elements for the purposes of interpreting Article XXI of the GATT 1994.

8.49. Based on the foregoing, the Panel does not find support in these materials for the "self-judging nature" of Article XXI(b) of the GATT 1994 as argued by the United States. Accordingly, the analysis of these materials confirms, or at least does not undermine, the Panel's interpretation of Article XXI(b) of the GATT 1994.

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<sup>512</sup> See para. 8.13 above.

<sup>513</sup> See para. 8.15 above.

<sup>514</sup> Israel – United States Agreement on the Establishment of a Free Trade Area, (Exhibit USA-197).

<sup>515</sup> Israel – United States Agreement on the Establishment of a Free Trade Area, (Exhibit USA-197),

p. 2.

<sup>516</sup> The Treaty of Rome, (Exhibit USA-181); EEA Agreement, (Exhibit USA-221).

<sup>517</sup> United States' second written submission, para. 82.