

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Negotiating Group on GATT Articles

ARTICLE XXI

Note by the Secretariat

As requested by the Negotiating Group on GATT Articles, the secretariat has prepared the following background note on Article XXI (Security Exceptions) of the General Agreement. The note briefly describes the drafting history of the Article (Part I), cases of invocation of Article XXI (Part II), and the Procedural Guidelines for the Application of Article XXI, adopted on 30 November 1982 (Part III).

I. Drafting history of Article XXI

1. The present text of Article XXI reads:

"Nothing in this Agreement shall be construed

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

There is no interpretative note to Article XXI.

2. In the original versions of the draft Charter of the International Trade Organization, the provisions of what is now GATT Article XXI were combined with those of the present Article XX: General exceptions (see Article 32 US draft, Article 37 London and New York drafts).

These provisions were split in Geneva into two separate articles:

Article 43 General exceptions to Chapter IV (Commercial Policy)
 (presently Article XX), and

Article 94 General exceptions (presently Article XXI) (see
 E/PC/T/A/SR/33 of 24 July 1947, page 4).

The clear intention of the separation into two articles was, as appears from the title, to have the provisions of Article 43 (XX) relate to the commercial policy chapter, while those of Article 94 (XXI) were to be exceptions to the Charter as a whole.

3. In the discussions at Geneva, on 24 July 1947, it was stated that "some latitude must be granted for security as opposed to commercial purposes", and that "the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse" (E/P/C/T/A/SR.33, page 3). It was also stated that the terms of Article [XXI] were subject to the provisions of Paragraph 2 of Article [XXIII] (E/P/C/T/A/SR.33, page 5).

4. The text of Article 94 (XXI) was extensively discussed at Havana and resulted in the creation of two articles. The record states that "on examining several of the proposals submitted by delegations relating to action taken in connection with political matters or with the essential interests of Members, the Sub-Committee concluded that provision regarding such action should be made in connection with an article on 'Relations with the United Nations', since the question of the proper allocation of responsibility as between the Organization and the United Nations was involved" (E/CONF.2/6/93, para.13).

5. Article 94 (XXI) eventually became Article 99 of the Charter. Paragraphs 1(a) and (b) are identical to those of Article XXI, the only difference being an addition in the first line of paragraph (b) as follows: to prevent any Member from taking; either singly or with other States, any action ... Paragraph 1(c) of Article 94 (XXI) was moved to the new Article 86.

6. The final text of the new Article 86 - Relations with the United Nations - reads as follows:

"Article 86

1. The Organization shall be brought into relationship with the United Nations as soon as practicable as one of the specialized agencies referred to in Article 57 of the Charter of the United

Nations. This relationship shall be effected by agreement approved by the Conference.

2. Any such agreement shall, subject to the provisions of this Charter, provide for effective co-operation and the avoidance of unnecessary duplication in the activities of these organizations, and for co-operation in furthering the maintenance or restoration of international peace and security.

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

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

7. There are two Interpretative Notes to paragraph 3 of Article 86, which read as follows:

"ad Article 86

Paragraph 3

Note 1

If any Member raises the question whether a measure is in fact taken directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter, the responsibility for making a determination on the question shall rest with the Organization. If, however, political issues beyond the competence of the Organization are involved in making such a determination, the question shall be deemed to fall within the scope of the United Nations.

Note 2

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

8. The purpose of the above-mentioned provisions was explained by the Havana Sub-Committee as follows:

"Paragraph 3 of the proposed new Article, which like paragraph 4 is independent in its operation, is designed to deal with any measure which is directly in connection with a political matter brought before the United Nations in a manner which will avoid conflict of responsibility between the United Nations and the Organization with respect to political matters" (E/CONF.2/C.6/93, para.15).

9. The Sub-Committee further stated that "in the course of the discussion on this paragraph the Sub-Committee agreed that this provision would cover measures maintained by a Member even though another Member had brought the particular matter before the United Nations, so long as the measure was taken directly in connection with the matter" (E/CONF.2/C.6/93), para. 15).

10. The report of the Sub-Committee which had prepared the text of Article 99 (XXI) and the new Article 86 on Relations with the United Nations, was discussed by the Sixth Committee on 10 March 1948 (E/CONF.2/6/SR.37). The following excerpts from the Summary Record are illustrative of the general approach towards trade measures applied in connection with political matters:

11. One representative said that "the Charter ought to make provision for economic measures which are closely linked with political questions, ... in the sense of excluding them, because he believed that an economic measure taken for political reasons was not properly speaking an economic measure but a political measure and as such was not within the competence of the Organization" (C.6/SR.37, page 3).

12. Another representative said that "the Organization should be an economic organization and should therefore not judge any measure employed in connection with a political dispute when that political dispute was within the jurisdiction of the United Nations" (C.6/SR.37, page 3).

13. There is little drafting history in respect of the other provisions of Article XXI, i.e. paragraphs (a) and (b)(i) and (ii). Concerning paragraph (c) on relations with the United Nations, see paragraphs 4, 6 and 7 above; it was not considered necessary to include the elaborate text to be contained in Article 86 of the Charter in the text of the General Agreement. During the discussion at the sixth session of the CONTRACTING PARTIES of the suspension of obligations between the US and Czechoslovakia (see para. 16 below), one representative stated, however, with reference to Article 86:3 that "although Chapter VII of the Charter was not specifically included by reference in Article XXIX of the Agreement, it had surely been the general intention that the principles of the Charter should be guiding ones for the CONTRACTING PARTIES" (GATT/CP.6/SR.12, page 4).

II. Invocation of Article XXI

14. There has been one case where the CONTRACTING PARTIES have considered measures justified under Article XXI:(b)(ii) and eight cases where measures taken under Article XXI:(b)(iii) - although this sub-paragraph has not always been explicitly invoked - have been discussed by the CONTRACTING PARTIES. Issues arising under the remaining paragraphs of Article XXI have never been examined by the CONTRACTING PARTIES. In one case a contracting party invoked "the spirit" of Article XXI.

A. Article XXI:(b)(ii)

United States embargo on strategic goods (1949)

15. In 1949 Czechoslovakia launched a complaint under Article XXIII:2 against the United States withholding the issue of export licences of certain goods in a manner discriminating against Czechoslovakia. The United States' main reply was that the practice was covered by the provisions of Article XXI:(b)(ii). In the discussion the Chairman indicated that Article XXI "embodied exception to the general rule contained in Article I". It was stated, inter alia, that "every country must be the judge in the last resort on questions relating to its own security" (CP.3/SR.22, page 7). The claim that the US had failed to carry out its obligations under the General Agreement through its administration of the issuance of export licences, was rejected by roll-call vote (17 to 1, with 3 abstentions) (CP.3/SR.22, page 9).

B. Article XXI:(b)(iii) or other measures taken for non-economic reasons

United States - Suspension of obligations between the US and Czechoslovakia (1951)

16. In 1951 the US requested the CONTRACTING PARTIES to formally dissolve the obligations between the two countries embodied in the General Agreement, which had already been rendered a nullity by political events (GATT/CP.6/5). The declaration "that the Governments of the United States and Czechoslovakia shall be free to suspend, each with respect to the other, the obligations of the General Agreement on Tariffs and Trade", was adopted on 27 September 1951 by a roll-call vote (24 to 1, with 4 abstentions) (BISD II/36).

Prohibition of Czechoslovakian imports by Peru (1954)

17. After consultations, the import embargo introduced by Peru in 1954 (L/235) and the Peruvian decree which restricted trade with countries having centrally planned economies were abrogated in 1967 (L/2844).

Ghana - Ban on imports of Portuguese goods (1961)

18. In 1961, at the occasion of the accession of Portugal, the representative of Ghana justified its boycott of Portuguese goods under the

provisions of Article XXI:(b)(iii), noting that "under this Article each contracting party was the sole judge of what was necessary in its essential security interests" (SR.19/12, page 196). The statement by Ghana on the invocation of Article XXI was noted by the CONTRACTING PARTIES. Ghana subsequently invoked the provisions of Article XXXV against Portugal (L/1764).

United States embargo on trade with Cuba (1962)

19. United States Law No. 87 - 195 of 1961 authorizes the President to impose and maintain a total embargo on all trade between the United States and Cuba. Proclamation 3447 by the President of the United States, dated 3 February 1962, imposed a total embargo on trade between the United States and Cuba. Cuba did not formally raise this matter in the CONTRACTING PARTIES but notified the embargo in the inventory of non-tariff measures (COM.IND/6/Add.4, p.53). The United States invoked the security exceptions (Article XXI) as justification for its action (MTN/3B/4 at 559).

Egypt - Boycott against Israel and secondary boycott (1970)

20. Upon the accession of Egypt to the GATT in 1970 the representative of Egypt refused to discuss in the GATT the boycott against Israel and the secondary boycott against firms having relations with Israel, in view of the political character of this issue (BISD 17S/39, para.22). Several members of the Working Party supported the Egyptian views that the background of the boycott measures was political and not commercial (BISD 17S/40, para. 23).

EC, Australia and Canada - Trade measures against Argentina (1982)

21. In May 1982, the European Community and its Member States, Australia and Canada communicated that "they have taken certain measures in the light of the situation addressed in the Security Council Resolution 502" (the Falkland/Malvinas issue) and that "they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection" (L/5319/Rev.1). Argentina took the view that, in addition to infringing the principles and objectives underlying the GATT, the import suspension imposed by the EEC, Australia and Canada was in violation of the General Agreement, namely Articles I:1, II, XI:1, XIII, XXXVI-XXXVIII (L/5319 and L/5336). The legal aspects of these trade restrictions affecting Argentina were discussed extensively in the Council (C/M/157 and C/M/159).

United States - Imports of sugar from Nicaragua (1982)

22. In 1982 the United States reduced the sugar import quota allocated to Nicaragua. In the Panel established at the request of Nicaragua to examine the matter, the United States stated "that it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms" and that "the action of the United States did of course affect trade, but was not taken for trade policy reasons" (BISD 31S/72).

United States - Embargo on trade with Nicaragua (1985)

23. On 7 May 1985 the United States introduced an embargo on all trade with Nicaragua (L/5803). In the following discussion in the Council, the United States stated that its actions were covered by Article XXI:(b)(iii) of the GATT and that this provision left it to each contracting party to judge what action it considered necessary for the protection of its essential security interest (C/M/191). On the other hand, Nicaragua expressed the view that the text of Article XXI made it clear that the CONTRACTING PARTIES were competent to judge whether a situation of "war or other emergency in international relations" existed and requested that a Panel be set up under Article XXIII:2 to examine the issue. At a later meeting of the Council, the United States accepted the establishment of a Panel provided that it was understood that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States (C/M/192). The Report of the Panel was circulated in document L/6053 on 13 October 1986. It is still under consideration by the Council.

C. The spirit of Article XXI

Sweden - Import quota system for footwear (1975)

24. In November 1975 Sweden introduced a global import quota system for certain footwear. The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated, inter alia, that the "decrease in domestic production has become a threat to the planning of Sweden's economic defence in situations of emergency as an integral part of its security policy. This policy required the maintenance of a minimum domestic production capacity in vital industries" (L/4250). In the Council "many representatives expressed doubts as to the justification of these measures under the General Agreement" (C/M/109). Sweden notified the termination of the quotas as far as leather and plastic shoes were concerned as of 1 July 1977 (L/4250/Add.1).

III. Procedural guidelines for the application of Article XXI

25. Consultations took place during the Thirty-Eighth Session of the CONTRACTING PARTIES in November 1982 in connection with the adoption of the Report by the Council (L/5414) insofar as it related to the trade restrictions affecting Argentina (cf. paragraph 21 above). As a result of these consultations, the CONTRACTING PARTIES adopted on 30 November 1982 the following "Decision Concerning Article XXI of the General Agreement" (BISD 29S/23).

"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.
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."

The Council has not pursued this matter further.