

39: Security Exceptions

Article 73 Security Exceptions

Nothing in this Agreement 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 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 a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

1. Introduction: terminology, definition and scope

Although there is a relatively widespread tendency among scholars to perceive international trade law as a concept differing from the classical idea of state sovereignty and to regard national security, borders and territory as state interests difficult to reconcile with liberalization of markets,²⁰³ the provision of Article 73, almost identical to Article XXI of the GATT and Article XIV *bis* of the GATS, proves that these traditional state interests continue to be a major concern of WTO Members.²⁰⁴

²⁰³ See, for instance, D.M. McRae, *The Contribution of International Trade Law to the Development of International Law*, Collected Courses of The Hague Academy of International Law, 1996, v. 260, pp. 99–238, at pp. 130–131.

²⁰⁴ For a more detailed analysis as to whether international trade law challenges the existing paradigm of public international law, see Mariano Garcia-Rubio, *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs – A General International Law Perspective* – Geneva, Studies and Working Papers, Graduate Institute of International Studies, 2000, p. 100, particularly Chapter 1 [in the following: Garcia-Rubio].

There was a clear reluctance among the former Contracting Parties of the GATT 1947 (which still exists as the “GATT 1994” among WTO Members) to activate the institutionalized dispute settlement mechanisms to deal with disputes involving the interpretation of the national security exceptions. The WTO is not perceived as an adequate forum for dealing with national security issues. Under the GATT 1947, only four such cases reached the level of formalized dispute settlement, while no panel established since the creation of the WTO for dealing with these kinds of disputes has succeeded in producing a report.²⁰⁵ Tacit agreement seems to exist among states to exclude the trade distortions originating from unilateral economic sanctions imposed for alleged security reasons from the scope of disputes to be solved through the compulsory dispute settlement system of the WTO.²⁰⁶

Article 73 allows states to take three kinds of measures contrary to their normal obligations under TRIPS: to preserve undisclosed security-sensitive information (para. a); to act in pursuance of obligations flowing from the Charter of the United Nations (para. c); or to take “any action” they “consider [...] necessary for the protection of [their] essential security interests (para. b) relating to nuclear materials (sub-para. i), trade in arms, ammunition and the like (sub-para. ii), or to redress war and other emergencies in international relations (sub-para. iii).

No dispute has been brought before the WTO dispute settlement organs regarding economic sanctions imposed by the Security Council of the United Nations under Chapter VII of the Charter. Although paragraph (c) of Article 73 is in line with Article 103 of the UN Charter, the compatibility of the adopted measures with the UN Security Council orders they are meant to serve could have potentially been the object of a WTO dispute. However, this situation has never arisen.²⁰⁷

2. History of the provision

2.1 Situation pre-TRIPS

At the outset of the negotiations on the establishment of the International Trade Organization, the suggested Charter, as proposed by the United States in 1946, as well as the first draft prepared by the Preparatory Committee in London in October and November of 1946 and the draft prepared by a technical drafting committee in New York in January and February of 1947, provided for national security exceptions only as a part of the general exceptions of the chapters on commercial policy and commodity agreements.²⁰⁸ Only at the meeting of the Preparatory Committee in Geneva from April to October 1947 was it decided to transfer the security

²⁰⁵ See below, Section 4.

²⁰⁶ To illustrate this point, see for instance the list of unilateral economic sanctions adopted by the Council of the European Union (which have never been the object of a dispute before the WTO dispute settlement organs) in Ramses Wessel, *The European Union's Foreign and Security Policy – A Legal Institutional Perspective*, The Hague, Kluwer Law International, 1999, p. 340 and ff.

²⁰⁷ Nevertheless, we share the doubts of Schloemann and Ohloff as to the competence of WTO panels to deal with such cases. See Hannes L. Schloemann, and Stefan Ohloff, ‘Constitutionalization’ and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, *American Journal of International Law*, v. 93, no. 2, 1999, pp. 424–451, at p. 431 [hereinafter Schloemann/Ohloff]. Also Garcia-Rubio, at p. 52.

²⁰⁸ GATT, *Analytical Index: Guide to GATT Law and Practice* (6th. rev. ed., 1995), at 608 [hereinafter *Analytical Index*].

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exceptions from the general exceptions to a separate article at the end of the Charter, which was practically identical with the present text of GATT Article XXI.²⁰⁹

Concerns were raised at the Geneva meeting about the applicability of the dispute settlement mechanism to the security exceptions. By placing Article XXI between the general exceptions (Article XX) and the dispute settlement provision (Article XXIII), the Contracting Parties to the GATT 1947 made it clear that the dispute settlement mechanism would apply to the new article.

Countries imposing economic sanctions on Argentina after the Falkland/Malvinas events were of the view that they were exercising an inherent right existing under general international law, which was merely reflected by Article XXI of the GATT. This situation led Argentina to request an interpretation of such Article and the then Contracting Parties, although they did not interpret Article XXI, adopted a Decision Concerning Article XXI of the General Agreement.²¹⁰

Article 73 is essentially identical to Article XXI of the GATT 1947 (1994). By contrast, the major pre-TRIPS intellectual property instruments, the Berne and Paris Conventions, do not contain any provision on security exceptions.

2.2 Negotiating history

Neither the Anell Draft²¹¹ nor the Brussels Draft²¹² contained a provision on security exceptions. The Dunkel Draft,²¹³ by contrast, did provide for security exceptions. This provision was essentially the same as the current Article 73.

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The lack of a general interpretation of the meaning and scope of the provision of Article XXI of the GATT gains relevance when it comes to the analysis of the

²⁰⁹ *Ibid.*

²¹⁰ GATT Doc. L/5426 (1982), GATT B.I.S.D. (29th Supp.), at 23 (1983). The text of the decision reads as follow:

“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;

Recognising 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.”

²¹¹ See composite text of 23 July 1990, circulated by the Chairman (Lars E. R. Anell) of the TRIPS Negotiating Group, document MTN.GNG/NG11/W/76.

²¹² Document MTN.TNC/W/35/Rev. 1 of 3 December 1990.

²¹³ Part of document MTN.TNC/W/FA of 20 December 1991.

possible interpretations of Article 73. By stating that it is for the WTO Members to decide what information is essential for their essential security interests²¹⁴ and to define which are those essential security interests,²¹⁵ Article 73 places itself at the core of the tensions between a traditional decentralized legal order and the institutionalized dispute settlement mechanism embodied in the Dispute Settlement Understanding (DSU) of the WTO.²¹⁶ What is the role left for the dispute settlement organs, if any, when a Member invokes national security as a justification for the failure to comply with its obligations under the “covered agreements”?

One interpretation of Article 73 is to consider it not only as a justification, but also as a procedural jurisdictional defence, making a dispute inadmissible *ipso facto* by the mere invocation of the clause. However, there seem to be no grounds either in the negotiating history of the provision at issue or in their textual and contextual interpretation for upholding such a view.²¹⁷ Article 1 of the DSU states that it “shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement listed in Appendix 1”, “subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2”. No mention is made in such Appendix of any dispute settlement provision applying particularly to disputes concerning the national security exceptions. Therefore, the DSU itself is not subject to a national security exception and no particular rule applies to disputes on the application or interpretation of Article 73 or the analogous provisions in GATT and GATS. Furthermore, if Members were able to circumvent the application of the DSU merely by invoking the national security exception of GATT 1994, GATS or TRIPS, the purpose of strengthening the system that underlies Article 23 of the DSU could not be achieved.²¹⁸

What is, then, the scope of review that panels and the Appellate Body can exercise over measures taken under Article 73 or its analogous provisions in GATT and GATS? It appears that the political qualification of what constitutes a “national security” issue remains a right reserved for the Members themselves. However, the respect of the objective limits imposed on the exercise of that right by Article 73 is a matter of interpretation and, therefore, subject to judicial review.

One of those objective limits is that neither Article 73 nor its analogous provisions in GATT and GATS serves to protect economic security interests.²¹⁹ In

²¹⁴ Paragraph (a) of Article 73 of the TRIPS Agreement.

²¹⁵ Paragraph (b) of Article 73 of the TRIPS Agreement.

²¹⁶ One of the main features of international law is that “each state establishes for itself its legal situation *vis-à-vis* other states”. See *Air Services Agreement* case, 18 R.I.L.A., Vol. XVIII, p. 443, para. 81. See also Abi-Saab, Georges; *‘Interprétation’ et ‘Auto-Interprétation’: Quelques réflexions sur leur rôle dans la formation et la résolution du différend international*, in *Recht zwischen Umbruch und Bewahrung*, Festschrift für Rudolf Bernhardt, Springer Verlag, Berlin, 1995, pp. 9–19.

²¹⁷ We refer to the negotiating history of the provision in first place because it was already dealt with in this chapter. However, it must be noted that a correct application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties would call for an analysis of the text in its context before making reference to the preparatory work.

²¹⁸ Schloemann/Ohlhoff, p. 439.

²¹⁹ Article XXI GATT requires a rather delicate balance. As expressed by one of the drafters of the provision: “We have got to have some exceptions. We cannot make it too tight, because we cannot

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some cases, however, it may be particularly difficult to establish a clearly cut borderline between commercial purposes and security reasons. As illustrated by the debate on IPRs and access to essential medicines, pandemics such as HIV may pose fundamental threats to the very existence of vulnerable societies. In such cases, it might be possible to invoke the Article 73 security exception for the protection of a nation's essential security interests. Arguably, pandemics such as HIV could be qualified as "emergencies in international relations" as provided under Article 73(b)(iii) (the international relations component being the failure to obtain adequate supplies of medicines within the framework of the multilateral institutional structure). This being said, the issue requires further thought.

Another example in this context refers to Sweden's introduction of a quota for a certain type of shoes in 1975, arguing that a decrease in its domestic capacity to produce footwear, qualifying as a "vital industry", threatened the country's economic defence strategy and thus its security interests. Many Contracting Parties took the view that this was precisely the kind of justification not available under Article XXI. Sweden terminated the quotas imposed on leather and plastic shoes as of 1 July 1977.²²⁰

The compatibility with Article 73 of a measure allegedly adopted for national security reasons may also involve a test of reasonableness and an interpretation of whether the measure is "necessary" to protect the invoked security interests. This was the view taken by the International Court of Justice in the *Nicaragua* case by stating that

"[T]he concept of essential security interests certainly extends beyond the concept of armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'".²²¹

Whether a security threat reasonably exists is also a matter of interpretation, and the margin of discretion given to Members under Article 73 to define their national interests can by no means be considered as an absolute discretion.²²² Some delegates noted, in discussing the embargo measures brought by the United States against Nicaragua, that it "was not plausible that a small country with small resources could constitute an extraordinary threat to the national security of the United States".²²³

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." Cited in GATT, Analytical Index, p. 600.

²²⁰ GATT, Analytical Index, p. 603.

²²¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, p. 117, para. 224.

²²² On the concept of "reasonableness" in international law, see Olivier Corten, *L'utilisation du "raisonnable" par le juge international: discours juridique, raison et contradictions*, Brussels, Bruylant: Ed. de l'Université de Bruxelles, 1997.

²²³ GATT Council, *Minutes of the Meeting Held May 29, 1985*, GATT Doc. C/7/188 (restricted), at p. 7, as cited by M. Hahn, *Vital Interests in the Law of GATT: An Analysis of GATT's Security Exception*, Michigan Journal of International Law, v. 12, 1991, p. 558.

Therefore, “security interests” that are “essential” must be defined by WTO Members in good faith and preventing any abuse of the right.²²⁴ This requires a minimum degree of proportionality between the threatened individual security interest and the measure taken in response to that threat that is clearly subject to judicial review, according to general international law standards, by the competent WTO organs for the settlement of disputes.²²⁵

4. GATT and WTO jurisprudence

Four cases involving the security exception can be said to have reached the level of formalized dispute settlement under Article XXIII of the GATT 1947:

Shortly after the creation of the GATT, in 1949, the United States, through a system of export licenses, imposed a ban on the export of certain products to Czechoslovakia. Czechoslovakia, in turn, resorted to dispute settlement under Article XXIII and the United States invoked, *inter alia*, Article XXI, not as a procedural defence but as a substantive one. Although 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”,²²⁶ they did not altogether deny their formal Article XXIII jurisdiction over matters involving Article XXI of the GATT 1947.

The Reagan administration’s Central American policy gave rise to two cases relating to Article XXI. In 1983, the United States decided to drastically reduce the share of sugar imports allocated to Nicaragua. The United States did not block either the establishment of the panel or the adoption of its report. Neither did it invoke Article XXI or attempted to defend its actions in GATT terms. According to the 1984 panel report, “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 t]he action of the United States did of course affect trade, but was not taken for trade policy reasons”.²²⁷ Consequently, the panel did not examine whether the action could be justified under the security exception because it had not been invoked. However, this fact did not prevent the panel from finding that the United States was in violation of Article XIII (2).²²⁸

In 1985, the United States decided to impose a complete import and export embargo on Nicaragua, which requested the establishment of a panel again. The position of the United States in this case was considerably different to that adopted in the first dispute with Nicaragua. It managed to exclude from the terms of reference of the panel the possibility “to examine or judge the validity of or motivation

²²⁴ See, in general, Robert Kolb, *La bonne foi en droit international public – Contribution à l’étude des principes généraux de droit*, Paris, PUF, 2000, particularly pp. 429 et seq.

²²⁵ See J. Delbrück, *Proportionality*, in R. Bernhardt (ed), *Encyclopedia of Public International Law*, v. 7, 1984, p. 396.

²²⁶ Decision of June 8, 1949, 2 GATT B.I.S.D. 28 (1952).

²²⁷ *United States – Imports of Sugar from Nicaragua*, March 13, 1984, GATT B.I.S.D. (31st. Supp.), at para. 3.10.

²²⁸ *Ibid.* paras. 4.3, 4.5 and 4.7.

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for the invocation of Article XXI:(b)(iii) by the United States . . .”²²⁹ Some other GATT Contracting Parties, such as Canada and the European Communities agreed with the United States that Article XXI issues were political questions not subject to panel scrutiny.²³⁰ The panel nevertheless referred to the question in the following terms:

“If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for the purposes other than those set out in this provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that provision, do they limit the adversely affected contracting party’s right to have its complaint investigated in accordance with Article XXIII:2?”²³¹

In 1991, as a consequence of the civil war in the former Socialist Federal Republic of Yugoslavia, the European Communities decided to restrict trade explicitly on the grounds of Article XXI.²³² Yugoslavia requested the establishment of a panel and argued that the requirements of neither Article XXI(b) nor (c) were met. This could have been the first case in which a panel could have properly analyzed the scope of Article XXI. However, given the uncertainties about the status of Serbia and Montenegro (FRY) as Party to the GATT, the proceedings were suspended by a Council decision in 1993.

Two other situations relating to Article XXI during the GATT era deserve to be mentioned, although they did not reach the level of a formalized dispute under GATT Article XXIII. One is the situation arising out of the sanctions imposed on Argentina in 1982 referred to above (Section 2.1). The other relates to the boycott of Portuguese goods imposed by Ghana in 1961. The particularity of this case resides in the fact that Ghana invoked Article XXI, arguing that each contracting party was the sole judge of what was necessary in its essential security interests and, therefore, there could not be an objection to the boycott.²³³

After the establishment of the WTO, there has been no dispute related to Article 73. However, disputes related to the national security exception under other WTO agreements arose in connection with the extra-territorial effects of some U.S. legislation, notably the *Cuban Liberty and Democratic Solidarity Act* of 1996,²³⁴ and the *Iran and Libya Sanctions Act*.²³⁵

²²⁹ GATT Doc. C/M/196, at 7 (1986).

²³⁰ Such interpretation is based on the view that the mere invocation of a clause relating to security exceptions makes a dispute inadmissible, see above, Section 3.

²³¹ *United States – Trade Measures Affecting Nicaragua*, 13 October 1986 (unadopted), GATT Doc. L/6053, par. 5.17.

²³² GATT, Analytical Index, p. 604.

²³³ *Ibid.*, p. 600.

²³⁴ Generally referred to as the “Helms-Burton Act”, International Legal Materials 1996, pp. 357 et seq.

²³⁵ Generally referred to as the “D’Amato-Kennedy Act”, International Legal Materials 1996, pp. 1274 et seq. For a study on this issue, see, among others, Andrea Giardina, *The Economic Sanctions of the United States against Iran and Libya and the GATT Security Exception*,

With regard to the *Cuban Liberty and Democratic Solidarity Act*, the European Communities requested consultations with the United States in connection with trade sanctions imposed on Cuba. The EC claimed that U.S. trade restrictions on goods of Cuban origin, as well as the possible refusal of visas and the exclusion of non-U.S. nationals from U.S. territory, were inconsistent with the U.S. obligations under the GATT 1994 and the GATS. The Dispute Settlement Body (DSB) established a panel at its meeting on 20 November 1996²³⁶ but, at the request of the EC, dated 21 April 1997, the panel suspended its work. The panel's authority lapsed on 22 April 1998, pursuant to Article 12.12 of the Dispute Settlement Understanding (DSU).

More recently, Honduras and Colombia instituted proceedings against the trade sanctions imposed by Nicaragua as a result of a maritime delimitation dispute.²³⁷ The dispute has been at the consultations stage since 26 June 2000, in respect of Law 325 of 1999 whereby a tax is established on goods and services coming from or originating in Honduras and Colombia as well as implementing Decree 129-99 and Ministerial Order 041-99. Honduras considered that Law 325 of 1999 and implementing Decree 129-99 are incompatible with Nicaragua's obligations under the GATT 1994, and in particular Articles I and II thereof, and that the aforementioned measures as well as Ministerial Order 041-99 are incompatible with Nicaragua's obligations under Articles II and XVI of the GATS.²³⁸

5. Relationship with other international instruments

5.1 WTO Agreements

There is no particular relationship between Article 73 and the provisions on security exceptions under other WTO agreements. As mentioned above (Section 1), the text of Article 73 was modelled upon Article XI of the GATT 1947 and is almost identical to Article XIV *bis* of the GATS.

5.2 Other international instruments

There is no particular relationship between Article 73 and the provisions on security exceptions under other international instruments.

in G. Hafner and others (eds), *Liber Amicorum Professor Seidl-Hohenveldern – in Honour of his 80th Birthday*, the Netherlands, Kluwer Law International, 1998; R. Dattu, and J. Boscariol, *GATT Article XXI, Helms-Burton and the Continuing Abuse of the National Security Exception*, Canadian Business Law Journal, v. 28, No. 2, 1997, pp. 198–221; K.J. Kuilwijk, *Castro's Cuba and the U.S. Helms-Burton Act – An Interpretation of the GATT Security Exemption*, Journal of World Trade, v. 31, No. 3, 1997, pp. 49–62; A. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, Yale Journal of International Law, v. 23, No. 2, 1998, pp. 302–381; K. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States under the GATT Security Exception*, Florida Journal of International Law, v. 11, No. 3, 1997, pp. 487–516.

²³⁶ WT/DS38.

²³⁷ WT/DS201/1. The EC requested to join the consultations, see WT/DS201/2.

²³⁸ See <<http://www.wto.org>>.

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6. New developments

6.1 National laws

6.2 International instruments

6.3 Regional and bilateral contexts

6.4 Proposal for review

There are no proposals so far to review Article 73.

7. Comments, including economic and social implications

The rare recourse to security exceptions in the context of international economic relations illustrates the limited importance of such exception for developing countries. The problems these countries will face in the intellectual property area are usually of an economic and a social nature, rather than security-related.

