establish a budget for salmon recovery is just that—a promise by the administration to bring costs under control. He also expressed concern that nothing has been committed to paper describing this agreement. That is why I insert language into the conference report on H.R. 1905—with his support—that directs the agencies involved to enter into a memorandum of agreement detailing the manner in which the annual salmon budget will be implemented.

Make no mistake: a huge amount of money will be devoted to salmon recovery, and the public deserves detailed accounting of how it is spent. We will have accountability, or we will pull the plug. I expect the National Marine Fisheries Service, the Bonneville Power Administration, and the four Northwest States—either through their Governors, or the Northwest Power Planning Council—to reach agreement on the best approach to recovery, and to provide a full written accounting of their efforts.

How will we recover these salmon runs, when we have had so little success to date? The answer is by following good science. The senior Senator and I also agree on this, though he made one comment that disturbs me. He said we should not spend all this money solely to recover one, two, or three weak runs of fish. Well, I agree, and I do not think anyone is suggesting we should just focus on three runs. There are over 80 salmon and steelhead runs in this basin, and we should focus on managing the whole population to maximum advantage. Like the national forests that are home to the spotted owl, the health of the river system is in trouble. Nearly every single salmon and steelhead run is trending downward in population.

If we examine the science as it is currently understood, we will find that what is good for 1 weak run is also good for 79 others. Furthermore, the Northwest Power Planning Council has developed its own plan, and it's almost identical to that of the Federal Government. The only difference is that it targets the whole basin. That is right; the regional, homespun salmon plan aims to rebuild all salmon runs in the basin, and yet it calls for recovery measures almost identical to those required by the ESA: better passage around dams, faster travel time to the ocean, habitat conservation, and decreased predation. So it is reasonable to conclude that scientific theories are headed in the same direction for all salmon in the basin, be they listed under the Endangered Species Act, or not.

My colleague also pointed out that the region's current problems are the fault of Federal laws and overzealous bureaucrats. While that is surely true in part, it is not the whole story. The Endangered Species Act gives NMFS the responsibility to act to save salmon. It has kicked in as a measure of last resort, because other actions have failed. There are other laws that also apply. The Northwest Power Act—written by our Senators Warren Magnuson, Scoop Jackson, and MARK HATFIELD specifically for the region—requires BPA to manage the river system to ensure the propagation of salmon. That law set up the Northwest Power Planning Council to oversee BPA.

It was a regional solution; but it maybe outdated, because it's no longer working.

But that's not all. The Federal Power Act requires non-Federal dams to take serious measures to protect salmon before they can get an operating license. There are treaties with native Americans—upheld by the Supreme Court of the United States as the highest law of the land—that require the Government to ensure healthy salmon runs exist. And finally, we have a treaty with Canada that requires each country to replaced the amount of fish it takes from the other's waters.

What solutions have been proposed by my senior colleague? He consistently has proposed shortcutting the law and tilting the balance of decision-making by limiting public involvement. His approach has been to find the quick fix: suspend the laws as they apply to our region, and impose an outcome from the Federal level. Well, more often than not, that approach shortchanges the science and leads to massive lawsuits. He has also proposed sweeping revision to the ESA, some of which might be needed. But the fact remains, we could repeal the ESA tomorrow, and it would not do a thing to help restore salmon to the Columbia Basin.

It is not as simple as turning the whole mess over to the States. That might get the Feds out of the picture, but it does not begin to solve the problem. In the end, we need to stop addressing all Columbia River issues in isolation. Salmon costs are not BPA's only problem; some might argue it is the least of its problems. BPA's biggest problem is how to continue delivering benefits to the people, given competitive changes to energy markets. It has inefficient management, a huge debt load, numerous public policy mandates, very little accountability, and virtually no regulatory oversight.

Politicians should commit to working for a series of shared values, and then start looking for ways to achieve them for the people. I think those values remain very clear: we should have clean, affordable hydropower; we should have bountiful fish and wildlife; and we should pay off the debts incurred to construct the system.

For fish, we need to find a way to make the requirements of all these laws and treaties consistent. And then we need one plan to meet these requirements. One set of standards, and one plan to meet them. We must utilize a scientifically sound, adaptive management approach. We must test, monitor, and adapt as we learn more about salmon science. The fact is, salmon science is inexact. There are many different theories on what is best for them; only by experimenting will we find the solutions that work best. Our challenge is to conduct these tests in the most sensible, cost effective way.

For the hydro system, we need to carefully reevaluate the role of BPA—and all its assets—as we enter the 21st century, and try to identify the role that makes the most sense for consumers in the new marketplace. The four Northwest Governors and the Department of Energy are currently planning a regional forum to review these issues. I hope this forum can be used to review proposals for change coming from the bottom up. I have been talking with many constituents over the past year, and I know much work has been done on the ground to scope out changes to the law that make sense for the region. I want to see that work carry over into the public arena. In my view, the Governors are best positioned to bring people together, review ideas, and forward useful guidance to the congressional delegation here in Washington, DC.

Mr. President, I have listened very closely to the people of the Northwest. They want salmon runs. They want clean hydropower in favor of nuclear power, or coal, or even gas. But above all else, they want to avoid the controversies of the past like the spotted owl: they want a solution. I am passionately committed to finding a solution that works for the Northwest. People do not want to see their politicians bicker. They do not want to see winners and losers in public debate. They want to see their politicians work together, and they want problems solved.

The agreement reached with the Clinton administration last week was a solid beginning. It was not landmark, and it certainly was not a long-term solution. But it buys time for the region to think this through very carefully, and it does not harm any aspect of the river system, or the fish. We now have an opportunity. We can move forward, and find solutions, or we can draw lines in the sand and let things devolve into politics. I know the people of the Pacific Northwest want the former.

NATIONAL SECURITY PROVISIONS OF THE GATT TREATY AS APPLIED TO ECONOMIC EMBARGOES

Mr. D'AMATO. Mr. President, I rise today to offer a brief explanation of article 21 of the GATT, otherwise known as the General Agreement on Tariffs and Trade, especially as it relates to the imposition of secondary economic sanctions against Iran. This is particularly pertinent because of my bill, S. 1228, the Iran Foreign Oil Sanctions Act.

Briefly, the provisions of article 21, are so broadly written, that legislation such as S. 1228 is possible, and in fact,

sustainable under the GATT. Furthermore, the concept has been tested before, in relative terms as it relates to economic sanctions imposed upon Cuba in the 1960's, Nicaragua, and even against Czechoslovakia in the 1940's.

I want to add that even when President Reagan imposed similar sanctions against the Soviet Union in the 1980's, in retaliation to the imposition of martial law in Poland, a Federal court upheld sanctions against Dresser France.

I feel that this point must be made clear for those who feel that there would be a challenge to this once it became law, or that it would cause legal disputes. In light of this, I ask unanimous consent that the following documents be printed in the RECORD, explaining the legality of secondary boycotts under the GATT: First, a memo dated June 28, 1983, from Sherman Unger, then legal counsel for the Department of Commerce, on the subject of the legality of import sanctions under GATT; an article from the New York Times from August 25, 1982, entitled ''Judge Backs U.S. Bid to Penalize Company on Soviet Pipeline Sale,'' that details an attempt by Dresser France to defy President Reagan's secondary boycott against foreign companies supplying oil pipeline equipment to the Soviet Union; and finally, an analytical index Guide to GATT Law and Practice, explaining article 21 in GATT, the national security exception.

In their totality, these documents will help to explain the legality and I hope that they will go some way toward settling any doubts about S. 1228.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

GENERAL COUNSEL OF THE
U.S. DEPARTMENT OF COMMERCE,
Washington, DC, June 28, 1983.

Memorandum to Lionel H. Olmer, Under Secretary for International Trade, from Sherman E. Unger, General Counsel.

EXPORT ADMINISTRATION ACT—INTERNATIONAL LEGALITY OF PROPOSED IMPORT SANCTION

SUMMARY

Proposed amendments to the Export Administration Act would authorize subjecting violators of national security export controls to sanctions in the form of import restrictions. The proper exercise of this authority would be consistent with United States obligations under the General Agreements on Tariffs and Trade (GATT) and under other potentially applicable trade agreements. GATT legality would not preclude the possibility of a claim of ''nullification or impairment'' under GATT Article XXIII, but the relationship of such sanctions to security interests and the likelihood of their relatively insignificant impact on a country's exports greatly reduce the risk of GATT-sanctioned counter-measures.

BACKGROUND

The Administration bill would amend section 11 of the Export Administration Act of 1979, as amended (the ''EAA'')[1]

''(3) Whoever violates any national security control imposed under section 5 of this Act, or any regulation, order or license related thereto, may be subject to such controls on the importing of its goods and technology into the United States or its territories and possessions as the President may prescribe.''[2]

The bill reported by the Senate Banking Committee contains a similar amendment, but the import controls on a violator are not limited to ''its'' goods and technology, and the sanction is also applicable to a violation of ''any regulation issued pursuant to a multilateral agreement to control exports for national security purposes, to which the United States is a part.''[3]

Under the present statute and regulations, violators of the export controls under the EAA are subject to criminal penalties and to administratively imposed civil fines and denial or limitation of access to exports from the United States.[4] When a violator is outside the United States, it may not be possible to acquire personal jurisdiction over that person for purposes of criminal proceedings or the collection of civil fines. The export control authority of the EAA can be used to deny a violator access to U.S. exports even if the violator elects not to contest the administrative enforcement proceedings and remains outside of United States territory.[5] Thus, denial of export privileges may be the only available sanction in certain cases. Whether this sanction will provide a meaningful penalty to deter further violations will depend upon the extent to which the violator needs continued access to U.S.-origin goods and technology. The ability to restrict imports, as well, would increase the economic impact on any violator and, for some, might be key to achieving an effective sanction.

GATT LEGALITY

GATT Article XI bars ''prohibitions or restrictions'' on imports, with certain exceptions not applicable to the EAA sanctions under consideration. Article XI applies to prohibitions or restrictions on the importation of ''any product of the territory of any other contracting party.'' Thus, the origin of the affected imports, rather than the nationality or place of business of the sanctioned violator, would be controlling. Absent an exception in the GATT, an affected contracting party could challenge the import sanction as an illegal restraint on the exports of its products to the United States.[6]

The United States would be able to defend a proper use of the import sanction against violators on the basis of exceptions provided in Articles XX and XXI of the GATT.

Among the general exceptions in Article XX is that in subparagraph (d) with respect to measures ''necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT] . . . ''. To qualify for an exception under the terms of Article XX, measures must not constitute ''a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'' or ''a disguised restriction on international trade.''

It should not be subject to serious question that denial of import privileges to violators would constitute a measure to secure compliance with the export control laws, with the likely economic consequences of such a sanction serving as a deterrent. The real issue, therefore, would be whether the export controls themselves are consistent with the GATT.

Article XI bars prohibitions or restrictions through export licenses with respect to the exportation or sale for export of any product destined for the territory of any other contracting party. The application of this prohibition is limited by exclusions stated in paragraph 2 of the Article, but none of these is applicable to national security export controls.

For purposes of this memorandum, I shall assume that the import sanction is imposed in connection with a violation of a control restricting the export of a product destined for the territory of a contracting party. It should be noted, however, that most of the controlled destinations under U.S. national security controls are Communist countries that are not GATT contracting parties. Where an export license must be applied for in connection with an export of a national security controlled product to a Free World destination, the basic purpose of licensing (with limited nuclear-related exceptions) is to assure that the indicated destination is bona fide and that diversion to a controlled destination is not in prospect. As the purpose of these licensing requirements is not to deny these Free World destinations access to the products, and as the trade impact in fact is nil because licenses are rarely denied to these destinations, it is arguable that such controls are not the kind of trade practice which Article XI should be deemed to prohibit. This argument would gain force if Article XI were invoked in a case involving the unauthorized export of a U.S.-origin product from the territory of the contracting party lodging the complaint. It is not unlikely that such reexport controls would be involved in a complaint, as it is this jurisdictional reach that distinguishes U.S. controls from those of its major trading partners.

Even if Article XI were applicable to the national security export control being enforced, the United States should be able to GATT—justify its actions under the security exception in Article XXI. This provides in pertinent part:

''Nothing in this Agreement shall be construed . . . (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 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. . . .''

The use in Article XXI of the term ''which it considers necessary'' is indicative of the deference to the judgment of contracting parties when they wish to justify measures on security grounds. The very limited testing of this Article in GATT proceedings has confirmed this deference.[7] Professor Jackson quotes statements from the GATT preparatory conference that ''some latitude must be granted for security as opposed to commercial purposes'' and that ''the spirit in which the Members of the Organization would interpret these provisions was the only guarantee against abuse.''[8] The United States invoked Article XXI in successfully defending its export controls against a Czechoslovak challenge in 1949. In May 1982, Argentina complained to the GATT Council that the trade sanctions (not limited to military or strategic items) imposed by the United kingdom, the European Community, Canada and Australia violated various GATT requirements and could not be justified under Article XXI. The complaint remains unresolved.

The scarcity of official interpretations of Article XXI is due not only to the very few complaints in which it has been invoked, but also to the fact that the broad wording of the Article XXI exception relieves contracting parties of the obligation to provide notification of security-related measures.

Footnotes at end of article.

If the GATT were to be invoked with respect to controls on industrial goods being exported for industrial use, it might be contended that the controls are not within the Article XXI reference to traffic in ''other goods and materials . . . carried on directly or indirectly for the purpose of supplying a military establishment.'' Weighing strongly against the success of any such contention, however, is the fact that, from the earliest years of the GATT, the United States and the major industrialized countries of the West have operated a coordinated system of export controls with very broad product coverage and often with little or no concern as to whether supply of a military establishment was involved. In fact, in the early years of the GATT, Western embargoes of Communist countries were not confined to strategic goods, but included common industrial raw materials, so as to impair the growth of the economic base that could support a military effort. The targets of these controls included Czechoslovakia, a GATT contracting party.

If there is little likelihood of a successful GATT challenge to the security-related export control measure itself, might import sanctions imposed against a violator of that control nonetheless be found to be ''arbitrary or unjustifiable discrimination between countries'' or a ''disguised restriction on international trade'', preventing justification under the Article XX general exception? GATT negotiating history is not helpful in interpreting these provisions.[9] Import sanctions are unlikely to be overtly discriminatory between countries, for, as already noted, restrictions would apply to imports of a violator, irrespective of the country of origin. In practice, the impact of the import restraints would fall most heavily on the country where most of the violator's production occurs. It is conceivable, however, unlikely, that a pattern of selective use the import sanction could develop over time sufficient to sustain a claim of unjustifiable discrimination. The type of situation that could more reasonably be expected to lead to a GATT challenge and possible success would be a transparent use of the import sanction to achieve protectionist objectives. Circumstances suggesting such abuse would include the targeting of sanctions toward particular products accounting for troublesome import competition for domestic producers and the imposition of import restraints of such breadth or duration as to give them an economic impact disproportionate to other penalties for violation of export controls. (Note that denial of export privileges can serve both as a penalty and as a protective device—a blanket cut-off of a violator's access to U.S. goods and technology reduces that person's ability to engage in further diversions of strategic items).

Justification of import sanctions under Article XX would also require a showing that the measures were ''necessary'' to secure compliance—whereas Article XXI permits a contracting party to take measures ''which it considers necessary'' to protect its essential security interests. Where Article XX is applied to enforcement measures relating to security controls, however, it is reasonable to expect the same GATT deference to a party's assessment of its security needs and reluctance to render a decision on what would be viewed as a ''political'' matter.

NULLIFICATION OR IMPAIRMENT

The imposition of the import sanction against one of its companies could cause a contracting party to invoke Article XXIII claiming that the reduction of its exports to the U.S. has ''nullified or impaired'' benefits accruing to it under the GATT. It is not necessary to claim or establish that a GATT obligation has been breached. Art. XXIII: ((b) and (c). If the complaint is not satisfactorily adjusted between the parties concerned, it may be referred to the GATT disputes machinery and result in a panel proceeding and a GATT Council recommendation or ruling. The contracting parties could authorize the complaining country to suspend the application of concessions or obligations under the GATT to the country imposing the measures found to nullify or impair benefits.

Given the extreme rarity of Article XXIII complaints actually proceeding to authorized retaliation, it is hard to believe that an import sanction case would ever lead to this result. Specific factors weighing against a finding of nullification or impairment are 1) the likelihood that other producers in the country concerned would remain free to supply the exports to the U.S. barred to the violator 2) the likelihood that the economic impact of the sanction would be insignificant in relation to the concerned country's overall trade and 3) the likelihood that the contracting parties would avoid acting with respect to security-related measures even though they would not have to rule on their legality.

OTHER CONSIDERATIONS

United States treaties such as our Friendship, Commerce and Navigation treaties typically provide ''most favored nation'' treatment for imports from the other country. In general, import sanctions would seem even less vulnerable under such treaties then under the GATT. First, an enforcement system that treats similarly situated violators the same, without regard to country of origin, arguably does not violate an MFN obligation. Secondly, these treaties typically contain a ''security'' or ''vital interests'' exception more broadly worded than GATT Article XXI. However, a consideration that could induce a country to invoke such a treaty rather than GATT procedures would be concern over the difficulty of getting such cases decided in GATT and the belief that the World Court would be more willing to adjudicate.

The EAA import sanction amendment has been criticized as an example of the allegedly improper extraterritorial extension of U.S. export controls. Although the sanction is available whether the violation involves conduct within United States territory or abroad, it is undoubtedly recognized that the sanction would most likely be applied to persons beyond the reach of U.S. legal process. It is to be expected that the violations charged would often involve activity abroad, such as unauthorized reexports, which other governments claim is beyond the regulatory jurisdiction of the United States. The new sanction, of course, does not extend the jurisdictional reach of the regulations. Like the existing authority to deny export privileges, it simply supplies an enforcement tool that can be effective against persons outside the United States. In any possible challenge to the import sanction under the GATT, these questions of legal jurisdiction should be irrelevant. The Article XX exception is for measures to secure compliance with laws or regulations ''which are not inconsistent with the provisions of this Agreement.'' The Agreement contains no provision affecting rule-making jurisdiction, so claimed jurisdictional excesses ought not to bear on GATT justification based on Article XX. It should not be a surprise, nonetheless, if a government that finds cause to complain in the GATT of a U.S. export control action involving conduct abroad seeks to inject the jurisdictional issue. That government may well recognize that it has no real chance of having positive action taken on its complaint yet it may hope to get a GATT panel report to include some potentially useful criticism of the jurisdictional reach of the controls.

Finally, it should be noted that the factors that would be most important in sustaining the international legality of the proposed import sanction would be, for the most part, inapplicable to the other proposed EAA amendment that would permit controls to be imposed against imports from a country as to which export controls had been applied for foreign policy purposes. The Article XXI exception would be unavailable unless the controls could somehow be brought within that Article's characterization of ''security interests''. In contrast with sanctions against companies and individuals, sanctions against countries would entail literal conflict with the terms of pertinent GATT articles and MFN provisions in treaties.

In conclusion, the reasonable use of the import sanction against violators of security-related controls can be justified under pertinent GATT and treaty provisions. A government's good faith in imposing import controls is more likely to be questioned, due to the protectionist potential of such measures. Notwithstanding the traditional deference in official proceedings to a country's security-related justification of its measures, it will be important for our government to avoid measures which debase the national security standard and invite corresponding measures damaging to our trading interests and to the integrity of the international system of trade discipline.

FOOTNOTES

[1] 50 U.S.C. app. §2410(c) (Supp V, 1981).

[2] Section 8(6) H.R. 2500, 98th Cong., 1st Sess., 129th Cong. Rec. H. 1992 (April 12, 1983); Section 8(6) S. 979, 98th Cong., 1st Sess., 129th Cong. Rec. S. 4183, 4186 (April 6, 1983).

[3] Section 7 S. 979, 98th Cong., 1st Sess.

[4] 50 U.S.C. app. §2410 (a)–(c); 15 CFR §§387.1, 388.3 (1982).

[5] 15 CFR §388.8.

[6] The imposition of the import sanction arguably would not violate the ''most favored nation'' (MFN) requirements of Articles I and XIII of the GATT. Presumably, such sanctions would be applied in a source-neutral manner, that is, to bar all imports by or from the violator irrespective of the country of origin. The clear applicability of Article XI makes it unnecessary to pursue the question of MFN, but the issue of discrimination is addressed below with respect to the availability of an exception under the GATT.

[7] See Jackson, World Trade and the Law of GATT, 748–752 (1969).

[8] Id., at 748–49.

[9] Id., at 744.

[From the New York Times, Aug. 25, 1982]

JUDGE BACKS U.S. BID TO PENALIZE COMPANY ON SOVIET PIPELINE SALE

(By Clyde H. Farnsworth)

WASHINGTON, Aug. 24.—A Federal judge today cleared the way for the Commerce Department to penalize an American company for refusing to comply with President Reagan's sanctions against supplying equipment for the Siberian natural gas pipeline.

The company, Dresser Industries, has declined to order its French subsidiary to defy a French Government order to deliver equipment to be used for the Soviet pipeline.

In another move against the company, two Administration sources said, Cabinet members recommended during a meeting held in unusual secrecy that Dresser and Dresser France, the subsidiary, be placed on an American ''denial list.'' The action would prevent the subsidiary from having any commercial relations with the United States.

They said the blacklist was one of the options that President Reagan was asked to consider in an options paper that went to him tonight in California after the meeting, which was under the chairmanship of Secretary of State George P. Shultz.

Another meeting began at the Justice Department tonight to prepare for enforcement of the denial order once the pipeline equipment is actually loaded on a Russian freighter, the Borodin, at Le Havre. The loading, which was to take place today, has reportedly been delayed until Wednesday.

The sources stressed that it was still up to the President to decide on a course of action in the developing confrontation with France and other Western European countries over the pipeline and the extraterritorial reach of American laws.

United States District Judge Thomas O. Flannery, turning down a last minute appeal by Dresser, refused to bar the Administration from punishing the company.

JUDGE DENIES DRESSER REQUEST

The judge was asked by a lawyer representing Dresser, John Vanderstar of the Washington law firm of Covington & Burling, to issue a temporary restraining order that would prohibit the Government from issuing penalties against Dresser. However, the judge said that Mr. Vanderstar had failed to show that the Dallas-based company would suffer ''immediate and irreparable harm'' if the order was not issued.

Dresser France has agreed to supply three compressors, worth $2 million, that it has already built. The Russians have ordered a total of 21 compressors from Dresser, worth $18 million to $20 million, to pump natural gas through the 3,600 mile pipeline. The company argued that if its subsidiary did not ship the equipment, it would be liable to criminal and civil penalties in France.

On the other hand, if it did ship the compressors, it would violate the ban on supplying pipeline equipment to the Russians imposed by President Reagan under an executive decree last June 22. The American Export Administration Act of 1979, under which that decree was issued, also calls for civil and criminal penalties against violators.

That ruling extended American export controls not only to the foreign activities of United States companies, but also to foreign companies that use American technological licenses to manufacture products of their own. The controls were intended to deny American technology for the pipeline in retaliation for Soviet-inspired repression in Poland.

''The plaintiff is in a terrible jam,'' Mr. Vanderstar said. ''Congress simply cannot have intended to authorize the Secretary of Commerce, no matter how good his intentions, to impose sanctions against this company.''

Richard Willard, Acting Assistant Attorney General in the civil division of the Justice Department, told the judge that injunctive relief would ''severely damage the foreign relations of the United States.'' He emphasized that this was an issue on which the President felt strongly.

He also said that the United States was not prepared to concede that the French Government order to Dresser France to ship the compressors represented even a ''valid exercise of French law.''

On the other hand, the French and other Europeans, who have filed a strong protest against the American sanctions, argue that Europe cannot accept the right of the United States to extend its jurisdiction to companies established outside its territory.

Although it is the subsidiary of a Dallas-based company, Dresser France is a French company and operates under French laws.

Many other American subsidiaries in Europe and European companies that produce pipeline equipment under American license are affected by the June 22 order of the President. The reason that Dresser became the target is that, according to an Administration source, ''it just happened to have the earliest delivery schedule.''

Commerce Secretary Malcolm Baldrige, who was cited as a defendant in Dresser's petition for injunctive relief, said he was ''pleased with the judge's ruling.'' But neither he, nor Secretary of State Shultz, nor any other participant at the Cabinet-level meeting would comment on the results of the hearing.

The President has justified his action by citing both the Polish repression and the financial and political advantages the pipeline would bring to the Soviet Union. Europeans are both financing and providing equipment for the line to diversify energy sources and to provide employment for depressed industries.

The President said that the Russians stand to earn $10 billion to $12 billion a year from the gas and could use the proceeds to become an even greater military threat.

The penalties that may be levied against Dresser are discretionary, meaning that at one extreme the Government need do nothing at all. At the other extreme, officials explained, the United States could seek extradition of chief executives of offending companies and seek to jail them in the United States.

Although Secretary of State Shultz has supported the sanctions, he had gone on record before joining the Administration as opposing the use of trade as an instrument of United States foreign policy.

He was quoted once, for instance, as saying that trade cannot be ''turned on and off like a light switch,'' and called for a ''predictable set of rules'' to avoid domestic and foreign confusion.

COMPRESSORS FOR PIPELINE

Compressors are devices that increase the pressure of a gas, vapor, or mixture of gas and vapor by reducing the volume of such fluids as they pass through the device. In a pipeline, they are used to increase the amount of fuel that can be pumped through a line of a given diameter.

Dresser Industries manufactures a variety of compressors used in transporting fuels, including centrifugal, reciprocating, and axial compressors.

There are 21 50-ton centrifugal compressors involved in the current dispute, according to Edward Luter, Dresser's senior vice president. They cost about $700,000 each.

''Each compressor order is to certain specifications,'' Mr. Luter said yesterday in a telephone interview from Dresser's Dallas headquarters.

GUIDE TO GATT LAW AND PRACTICE

I. TEXT OF ARTICLE XXI

Article XXI—Security Exceptions

Nothing in this Agreement shall be construed

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

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

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

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

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

II. INTERPRETATION AND APPLICATION OF ARTICLE XXI

A. Scope and application of article XXI

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

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

During the discussion of the complaint of Czechoslovakia at the Third Session in 1949 (see page 556) it was stated, inter alia, that ''every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement.[2]

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

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

During the Council discussion in 1982 of trade restrictions applied for non-economic reasons by the EEC, its member States, Canada and Australia against imports from Argentina (see page 557), the representative of the EEC stated that ''the EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement. He said that in effect, this procedure showed that every contracting party

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Footnotes at end of article.

was—in the last resort—the judge of its exercise of these rights''. The representative of Canada stated that ''Canada's sovereign action was to be seen as a political response to a political issue . . . Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised. His delegation could not, therefore, accept the notion that there had been a violation of the General Agreement''.[4] The representative of Australia ''stated that the Australian measures were in conformity with the provisions of Article XXI:(c), which did not require notification or justification''.[5] The representative of the United States stated that ''The General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The CONTRACTING PARTIES had no power to question that judgement''.[6]

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

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

The question of whether and to what extent the Contracting Parties can review the national security reasons for measures taken under Article XXI was discussed again in the GATT Council in May and July 1985 in relation to the US trade embargo against Nicaragua which had taken effect on 7 May 1985.[9] While a panel was established to examine the US measures, its terms of reference stated that ''the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI(b)(iii) by the United States''.[10] In the Panel Report on ''United States—Trade Measures affecting Nicaragua'', which has not been adopted,

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

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

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

2. Paragraph (a): ''disclose . . . any information'':

During the discussion at the Third Session of a Czechoslovak complaint concerning United States national security export controls, in response to a request by Czechoslovakia for information under Article XIII:3 on the export licensing system concerned, the US representative stated that while it would comply with a substantial part of the request, ''Article XXI . . . provides that a contracting party shall not be required to give information which it considers contrary to its essential security interests. The United States does consider it contrary to its security interest—and to the security interest of other friendly countries—to reveal the names of the commodities that it considers to be most strategic''.[12]

The ''Decision Concerning Article XXI of the General Agreement'' of 30 November 1982 (see page 559 below) provides inter alia that ''Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI''.[13]

3. Paragraph (b): ''action'':

(1) ''relating to fissionable materials or the materials from which they are derived'':

The records of the Geneva discussions of the Preparatory Committee indicate that the representative of Australia withdrew its reservation on the inclusion of a reference to ''fissionable materials'' in the light of a statement that the provisions of Article 35 [XXIII] would apply to Article XXI; see below at page 560.[14]

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

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

At the Third Session in 1949, Czechoslovakia requested a decision under Article XXIII as to whether the US had failed to carry out its obligations under Articles I and XIII, by reason of the 1948 US administration of its export licensing controls (both short-supply controls and new export controls instituted in 1948 discriminating between destination countries for security reasons). The US stated that its controls for security reasons applied to a narrow group of exports of goods which could be used for military purposes[16] and also stated that ''the provisions of Article I would not require uniformity of formalities, as applied to different countries, in respect of restrictions imposed for security reasons''.[17] It was also stated by one contracting party that ''goods which were of a nature that could contribute to war potential'' came within the exception of Article XXI.[18] The complaint was rejected by a roll-call vote of 17 to 1 with 3 abstentions.[19]

(3) ''taken in time of war or other emergency in international relations'':

The 1970 Working Party Report on ''Accession of the United Arab Republic'' notes that in response to concerns raised regarding the Arab League boycott against Israel and the secondary boycott against firms having relations with Israel, the representative of the UAR stated that ''the history of the Arab boycott was beyond doubt related to the extraordinary circumstances to which the Middle East area had been exposed. The state of war which had long prevailed in that area necessitated the resorting to this system. . . . In view of the political character of this issue, the United Arab Republic did not wish to discuss it within GATT. . . . It would not be reasonable to ask that the United Arab Republic should do business with a firm that transferred all or part of its profits from sales to the United Arab Republic to an enemy country''.[20] Several members of the working party supported the views of the representative of the UAR that the background of the boycott measures was political and not commercial.[21]

In November 1975 Sweden introduced a global import quota system for certain footwear. The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated, inter alia, that the ''decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations''.[22] In the discussion of this measure in the GATT Council, ''Many representatives . . . expressed doubts as to the justification of these measures under the General Agreement . . . Many delegations reserved their rights under the GATT and took note of Sweden's offer to consult''.[23] Sweden notified the termination of the quotas as far as leather and plastic shoes were concerned as of 1 July 1977.[24]

In April 1982, the EEC and its member states, Canada, and Australia suspended indefinitely imports into their territories of products of Argentina. In notifying these measures they stated that ''they have taken certain measures in the light of the situation addressed in the Security Council Resolution 502 [the Falkland/Malvinas issue]; they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection''.[25] Argentina took the position that, in addition to infringing the principles and objectives underlying the GATT, these measures were in violation of Articles I;1, II, XI:1, XIII, and Part IV. The legal aspects of these trade restrictions affecting Argentina were discussed extensively in the Council.[26] The measures were removed in June 1982. Argentina sought an interpretation of Article XXI; these efforts led to the inclusion of paragraph 7(iii) in the Ministerial Declaration of November 1982, which provides that ''. . . the contracting parties undertake, individually and

jointly: . . . to abstain from taking restrictive trade measures, for reasons of a non-economic charter, not consistent with the General Agreement''[27] and also led to the adoption of the text below at page 559.

On 7 May 1985 the US notified the contracting parties of an Executive Order prohibiting all imports of goods and services of Nicaraguan origin, all exports from the US of goods to or destined for Nicaragua (except those destined for the organized democratic resistance) and transactions relating thereto.[28] In Council discussions of this matter, Nicaragua stated that these measures contravened Article I, II, V, XI, XIII and Part IV of the GATT, and that ''this was not a matter of national security but one of coercion''.[29] Nicaragua further stated that Article XXI could not be applied in an arbitrary fashion; there had to be some correspondence between the measures adopted and the situation giving rise to such adoption.[30] Nicaragua stated that the text of Article XXI made it clear that the Contracting Parties were competent to judge whether a situation of ''war or other emergency in international relations'' existed and requested that a Panel be set up under Article XXIII:2 to examine the issue.[31] The United States stated that its actions had been taken for national security reasons and were covered by Article XXI:(b)(iii) of the GATT; and that this provision left it to each contracting party to judge what action it considered necessary for the protection of its essential security interest.[32] The terms of reference of the Panel precluded it from examining or judging the validity of the invocation of Article XXI(b)(ii) by the U.S. Concerning the Panel decision on this issue, see page 555 and the discussion of Article XXIII below. When the Council discussed the Panel Report, Nicaragua requested that the Council recommend removal of the embargo; authorized special support measures for Nicaragua so that countries wanting to do so could grant trade preferences aimed at re-establishing a balance in Nicaragua's pre-embargo global trade relations and at compensating Nicaragua for the damage caused by the embargo; and prepare an interpretative note on Article XXI. Consensus was not reached on any of these alternatives. The Panel Report has not been adopted. At the meeting of the Council on 3 April 1990 Nicaragua announced the lifting of the trade embargo. The representative of the US announced that the conditions which had necessitated action under Article XXI had ceased to exist, his country's national security emergency with respect to Nicaragua had been terminated, and all economic sanctions, including the trade embargo, had been lifted.[33]

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

At the Forty-seventh Session in December 1991, Yugoslavia referred to the Decision of 1982 on notification of measures taken under Article XXI (see page 559 below) and reserved its GATT rights. In February 1992 Yugoslavia requested establishment of a panel under Article XXIII:2, stating that the measures taken by the EC were inconsistent with Articles I, XXI and the Enabling Clause; departed from the letter and intention of paragraph 7(iii) of the Ministerial Decision of November 1982; and impeded the attainment of the objectives of the General Agreement. Yugoslavia further stated:

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

In March 1992, the Council agreed to establish a panel with the standard terms of reference unless, as provided in the Decision of 12 April 1989, the parties agreed otherwise within twenty days.[36] At the April 1992 Council meeting, in discussion of the notification of the transformation of the Socialist Federal Republic of Yugoslavia (SFRY) into the Federal Republic of Yugoslavia (FRY) consisting of the Republics of Serbia and Montenegro, the EC representative said that until the question of succession to Yugoslavia's contracting party status had been resolved, the Panel process which had been initiated between the former SFRY and the EC no longer had any foundation and could not proceed.[37] At the May 1992 Council meeting, in a discussion concerning the status of the FRY as a successor to the former SFRY as a contracting party, the Chairman stated that ''In these circumstances, without prejudice to the question of who should succeed the former SFRY in the GATT, and until the Council returned to this issue, he proposed that the representative of the FRY should refrain from participating in the business of the Council''. The Council so agreed.[38] At the June 1993 Council meeting this decision was modified taking into account United Nations General Assembly Resolution 47/1 to provide that the FRY could not continue automatically the contracting party status of the former SFRY and that it shall not participate in the work of the Council and its subsidiary bodies.[39]

4. Other invocations of Article XXI:

The United States embargo on trade with Cuba, which was imposed by means of Proclamation 3447 by the President of the United States, dated 3 February 1962, was not formally raised in the Contracting Parties but notified by Cuba in the inventory of non-tariff measures. The United States invoked Article XXI as justification for its action.[40]

5. Procedures concerning notification of measures under Article XXI:

During the Council discussion in 1982 of trade measures for non-economic reasons taken against Argentina (see page 557), it was stated by the countries taking these measures that ''Article XXI did not mention notification'' and that many contracting parties had, in the past, invoked Article XXI without there having been any notification or challenge to the situation in GATT.[41] Argentina sought an interpretation of Article XXI. Informal consultations took place during the Thirty-eighth Session in November 1982 in connection with the adoption of the Council report to the Contracting Parties, in so far as it related to these trade restrictions.[42] As a result, on 30 November 1982 the Contracting Parties adopted the following ''Decision Concerning Article XXI of the General Agreement'':

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

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

''Recognizing that in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected;

''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''.[43]

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

B. Relationship between article XXI and other articles of the General Agreement

1. Articles I and XIII:

During the discussion at the Third Session of the complaint of Czechoslovakia that U.S. export controls were administered inconsistently with Articles I and XIII (see page 556), the US representative stated that these restrictions were justified under Article XXI(b)(ii). In calling for a decision, the Chairman indicated that Article XXI ''embodied exceptions to the general rule contained in Article I''. In a Decision of 8 June 1949 under Article XXIII:2, the Contracting Parties rejected the contention of the Czechoslovak delegation.[44]

2. Article XXIII:

During discussions in Geneva in 1947 in connection with the removal of the provisions now contained in Article XXI and their relocation in a separate exception (Article 94) at the end of the Charter, the question was raised whether the dispute settlement provisions of Article 35 of the New York Draft [XXII/XXIII] would nevertheless apply. It was stated that ''It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that a Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 37 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article''.[45] The

addition of a note to clarify that the provisions of paragraph 2 of Article 35 [XXIII] applied to Article 94 was rejected as unnecessary.[46]

See the discussion above of the Czechoslovak complaint concerning export controls, in which the Contracting Parties make a decision under Article XXIII:2 as to ''whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences''.[47]

During the discussion of the trade restrictions affecting Argentina applied for non-economic reasons, the view was expressed ''that the provisions of Article XXI were subject to those of Article XXIII:2''. Argentina reserved its rights under Article XXIII in respect of any injury resulting from trade restrictions applied in the context of Article XXI.[48]

Paragraph 2 of the ''Decision Concerning Article XXI of the General Agreement'' of 30 November 1982 stipulates that ''. . . when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement''.[49]

The 1984 Panel Report on ''United States—Imports of Sugar from Nicaragua'' examined the action taken by the US government to reduce the share of the US sugar import quota allocated to Nicaragua and distribute the reduction in Nicaragua's allocation to El Salvador, Honduras and Costa Rica. The Panel Report notes that ''The United States stated that it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms . . . the action of the United States did of course affect trade, but was not taken for trade policy reasons.''[50]

''The Panel noted that the measures taken by the United States concerning sugar imports from Nicaragua were but one aspect of a more general problem. The Panel, in accordance with its terms of reference . . . examined those measures solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute.''[51]

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

''The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XXIII. The Panel did not examine whether the reduction in Nicaragua's quota could be justified under any such provision.''[52]

The follow-up on the Panel report was discussed in the Council meetings of May and July 1984. The United States said that it ''had not obstructed Nicaragua's resort to GATT's dispute settlement process; it had stated explicitly the conditions under which the issue might be resolved; and it recognized that Nicaragua had certain rights under Article XXIII which it had reserved and could continue to exercise''.[53] Nicaragua stated that it was aware of its rights under Article XXIII.

In July 1985, following a request by Nicaragua for the establishment of a panel to review certain US trade measures affecting Nicaragua, the right of a contracting party to invoke Article XXIII in cases involving Article XXI was discussed again in the GATT Council.[54] At its meetings in October 1985 and March 1986 respectively the Council established a panel with the following terms of reference to deal with the complaint by Nicaragua:

''To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI(b)(iii) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211–218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD 29S/13–16), the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the Contracting Parties in further action in this matter''.[55]

In the Panel Report on ''United States—Trade Measures affecting Nicaragua'', which has not been adopted, the Panel noted the different views of the parties regarding whether the United States' invocation of Article XXI(b)(iii) was proper, and concluded that this issue was not within its terms of reference; see above at page 555. With regard to Nicaragua's claim of non-violation nullification or impairment, the Panel ''decided not to propose a ruling in this case on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party''.[56]

When the Panel's report was discussed by the Council in November 1986, the US representative stated that ''Nullification or impairment when no GATT violation had been found was a delicate issue, linked to the concept of 'reasonable expectations'. It was not simply a question of trade damage, since no one doubted the existence of trade damage. Applying the concept of 'reasonable expectations' to a case of trade sanctions motivated by national security considerations would be particularly perilous, since at a broader level those security considerations would nevertheless enter into expectations . . . the Panel had acted wisely in refraining from a decision that could create a precedent of much wider ramifications for the scope of GATT rights and obligations . . .''.[57] The representative of Nicaragua stated that her delegation could not support adoption of the report, inter alia because it could only be adopted once the Council was in a position to make recommendations.[58]

C. Relationship between article XXI and general international law

The 1986 Panel Report on ''United States—Trade Measures Affecting Nicaragua'', which has not been adopted, noted the different views of the parties to the dispute concerning the relationship between Article XXI and general international law including decisions of the United Nations and the International Court of Justice.[59]

In discussion at the Forty-seventh Session in December 1991 concerning trade measures for non-economic purposes against Yugoslavia, the representative of India stated that ''India did not favour the use of trade measures for non-economic reasons. Such measures should only be taken within the framework of a decision by the United Nations Security Council. In the absence of such a decision or resolution, there was serious risk that such measures might be unilateral or arbitrary and would undermine the multilateral trading system''.[60]

III. PREPARATORY WORK

In the US Draft Charter, and London and New York Draft Charter texts, the Article on exceptions to the commercial policy chapter included the provisions of what is now GATT Article XXI (see Article 32, US draft; Article 37, London and New York drafts). Also in these drafts, the exceptions clause for the chapter on commodity agreements included provisions excepting arrangements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and traffic in goods and materials for the purpose of supply a military establishment; or in time of war or other emergency in international relations, to the protection of the essential security interests of a member (Article 49:2, US Draft; Article 59(2), London Draft; article 59(c), New York Draft). At Geneva it was decided to take paragraphs (c), (d), (e) and (k) of Article 37 and place them in a separate Article.[61] It was agreed that this Article would be a general exception applicable to the entire Charter.[62] The corresponding security exception was also removed from the commodity chapter. The security exception provisions became Article 94 in Chapter VII of the Geneva draft Charter, which was virtually identical to the present text of Article XXI.

The text of Article 94 was extensively discussed at Havana in the Sixth Committee on Organization. Article 94 became Article 99 of the Charter on General Exceptions, of which paragraphs 1(a) and (b) were almost identical to those of Article XXI, the only differences being (i) an addition in the first line of paragraph (b) as follows: ''to prevent any Member from taking, either singly or with other States, any action . . .'', and (ii) an addition to paragraph (b)(ii) as follows: ''a military establishment of any other country''. Article 99 also included a paragraph 1(c) exempting intergovernmental military supply agreements[63]; a paragraph 1(d) on trade relations between India and Pakistan (dealt with in the General Agreement by the provisions of Article XXIV:11); and a paragraph 2 providing that nothing in the Charter would override the provisions of peace treaties resulting from the Second World War or UN instruments creating trust territories or other special regimes.

However, ''on examining several of the proposals submitted by delegations relating to action taken in connection with political matters or with the essential interests of Members, the Committee concluded that the provisions regarding such action should be made in connection with an article on 'Relations with the United Nations', since the question of the proper allocation of responsibility as between the Organization and the United Nations was involved'',[64] Accordingly a new Article 86 of the Charter on ''Relations with the United Nations'' was drafted, including the former paragraph 1(c) of Article 94 [XXI:(c)].

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

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

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

The interpretative notes to paragraph 3 provided that:

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

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

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

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

''It was the view of the Committee that the word 'measure' in paragraph 3 of Article [86] refers only to a measure which is taken directly in connection with a political matter brought before the United Nations in accordance with Chapters IV and VI of the Charter of the United Nations and does not refer to any other measure''.[65]

The Charter provisions in Articles 86 and 99 were not not taken into the General Agreement. While Article XXIX:1 provides that ''The contracting parties undertake to observe . . . the general principles of Chapters I to VI and of Chapter IX of the Havana Charter'', the Note Ad Article XXIX:1 provides that ''Chapters VII and VIII . . . have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization''. In this connection, during the discussion at the Sixth Session of the Contracting Parties of the US suspension of trade relations with Czechoslovakia it was stated with reference to Article 86, paragraph 3 of the Havana Charter that ''although Chapter VII of the Charter was not specifically included by reference in Article XXIX of the Agreement, it had surely been the general intention that the principles of the Charter should be guiding ones for the Contracting Parties''.[66]

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

IV. RELEVANT DOCUMENTS

Geneva:

Discussion: EPCT/WP.1/SR/11, EPCT/A/SR/25, 30, 33, 40(2), EPCT/A/PV/25, 30, 33, 40(2).

Reports: EPCT/103.

Other: EPCT/W/23.

Havana:

Discussion: E/CONF.2/C.5/SR.14, E/CONF.2/C.6/SR.18, 19, 37, and Add. 1.

Reports: E/CONF.2/C.5/14, E/CONF.2/C.6/45, 93, 104.

Other: E/CONF.2/C.6/12/Add.9, E/CONF.2/C.6/W/48.

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

FOOTNOTES

[1] EPCT/A/PV/33, p. 20–21 and Corr. 1; see also EPCT/A/SR/33, p. 3.
[2] GATT/CP.3/SR.22, Corr. 1.
[3] SR.19/12, p. 196.
[4] C/M/157, p. 10.
[5] C/M/157, p. 11.
[6] C/M/159, p. 19; see also C/M/157, p. 8.
[7] C/M/157, p. 12; C/M/159, pp. 14–15.
[8] L/5424, adopted on 29 November 1982, 29S/9, 11.
[9] C/M/188, pp. 2–16; C/M/191, pp. 41–46.
[10] C/M/196 at p. 7.
[11] L/6053, dated 13 October 1953 (unadopted), paras. 5.1–5.3.
[12] GATT/CP.3/38, p. 9.
[13] L/5426, 29S/23–24, para. 1.
[14] EPCT/A/PV/33, p. 29; see also EPCT/A/PV/33/Corr. 3.
[15] EPCT/A/PV/36, p. 19; see also proposal referred to at EPCT/W/264.
[16] GATT/CP.3/38; GATT/CP.3/SR.22, p. 8.
[17] GATT/CP.3/SR.22, p. 4–5.
[18] GATT/CP.3/SR.20, p. 3–4.
[19] GATT/CP.3/SR.22, p. 9; Decision of 8 June 1949 at II/28.
[20] L/3362, adopted on 27 February 1970, 17S/33, 39, para. 22.
[21] Ibid., 17S/40, para. 23.
[22] L/4250, p. 3.
[23] C/M/109, p. 8–9.
[24] L/4250/Add.1; L/4254, p. 17–18.
[25] L/5319/Rev. 1.
[26] L/5317, L/5336; C/M/157, C/M/159.
[27] L/5424. adopted on 29 November 1982, 29S/9, 11.
[28] L/5803.
[29] C/M/188l p. 4.
[30] C/M/188, p. 16.
[31] L/5802; C/M/191, pp. 41–46.
[32] C/M/191, pp. 41,46.
[33] C/M/240, p. 31; L/6661.
[34] L/6948.
[35] DS27/2, dated 10 February 1992.
[36] C/M/255, p. 18.
[37] C/M/256, p. 32.
[38] C/M/257 p. 3 and Corr. 1.
[39] C/M/264, p. 3.
[40] COM.IND/6/Add.4, p. 53 (notification); MTN/3B/4, p. 559 (response citing binding reolution under Inter-American Treaty of Reciprocal Assistance). See also Council discussion May 1986 concerning US measures authorizing denial of sugar import quota to any failing to certify that it does not import sugar produced in Cuba for re-export to the US, stated by US to be a ''procedural safeguard'' against tran-shipment of sugar in violation of the embargo; C/M/198 p. 33, L/5980.
[41] C/M/159, p. 18.
[42] See L/5414 (Council report); see also C/W/402, W.38/5, L/5426.
[43] L/5426, 29S/23.
[44] GATT/CP.3/SR.22, p. 9; II/28.
[45] EPCT/A/PV/33, p. 26–27.
[46] EPCT/A/PV/33 p. 27–29 and EPCT/A/PV/33/Corr. 3.
[47] GATT/CP.3/SR.22, p. 9.
[48] C/M/157, p. 9; C/M/159, p. 14; C/M/165, p. 18.
[49] 29S/24.
[50] L/5607, adopted on 13 March 1984, 31S/67, 72, para. 3.10.
[51] Ibid., 31S/73, para. 4.1.
[52] Ibid., 31S/74, paras. 4.4–4.5.
[53] C/M/178, p. 27.
[54] C/M/191, pp. 41–46.
[55] C/M/196, p. 7.
[56] L/6053 (unadopted), dated 13 October 1986, paras. 5.4–5.11.
[57] C/M/204.
[58] C/M/204. See also communication from Nicaragua at C/W/506.
[59] L/6053, unadopted, dated 13 October 1986, prs. 5.2.
[60] SR.47/3, p. 5.
[61] See proposal at EPCT/W/23, reports on discussions in Commission A (commercial policy) at EPCT/WP.1/SR/11, EPCT/103 p. 3, EPCT/A/PV/25 p. 38–42.
[62] EPCT/A/PV/25 p. 39–42.
[63] See Havana Reports, p. 118, para. 32 and p. 145–147.
[64] Havana Reports, p. 153, para. (a).
[65] Havana Reports, p. 153–154, paras. (b)-(c).
[66] GATT/CP.6/SR.12, p. 4.

NOTE

In the RECORD of October 27, at page S16007, during consideration of the balanced budget reconciliation bill, Mr. LIEBERMAN moved to commit the bill to the Finance Committee with instructions to report the bill back to the Senate with an amendment. The text of the amendment was not printed in the RECORD. The permanent RECORD will be corrected to reflect the following omitted language.

MOTION TO COMMIT WITH INSTRUCTIONS

Mr. President, I move to commit the bill S. 1357 to the Committee on Finance with instructions to report the bill back to the Senate within 3 days (not to include any day the Senate is not in session) with the following amendment, and to make sufficient reductions in the tax cuts to maintain deficit neutrality.

(Purpose: To restore the solvency of the Medicare part A Hospital Insurance Trust Fund for the next 10 years. To reform the Medicare Program and provide real choices to Medicare beneficiaries by increasing the range of health plans available, providing better information so that beneficiaries can act as informed consumers and to require strategic planning for the demographic changes that will come with the retirement of the ''babyboom'' generation)

On page 442, beginning on line 1, strike all through page 748, line 18, and insert:

Subtitle A—Medicare

SEC. 7001. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This subtitle may be cited as the ''Medicare Improvement and Solvency Protection Act of 1995''.

(b) TABLE OF CONTENTS.—The table of contents of this subtitle is as follows:

CHAPTER 1—PROVISIONS TO IMPROVE AND EXPAND MEDICARE CHOICES

Sec. 7002. Increasing choice under medicare.
Sec. 7003. Provisions relating to medicare coordinated care contracting options.
Sec. 7004. Provisions relating to medicare supplemental policies.
Sec. 7005. Special rule for calculation of payment rates for 1996.
Sec. 7006. Graduate medical education and disproportionate share payment adjustments to hospitals providing services to enrollees in eligible organizations.
Sec. 7007. Effective date.

CHAPTER 2—PROVISIONS RELATING TO QUALITY IMPROVEMENT AND DISTRIBUTION OF INFORMATION

Sec. 7011. Quality report cards.

CHAPTER 3—PROVISIONS TO STRENGTHEN RURAL AND UNDER-SERVED AREAS

Sec. 7021. Rural referral centers.
Sec. 7022. Medicare-dependent, small, rural hospital payment extension.
Sec. 7023. PROPAC recommendations on urban medicare dependent hospitals.