Who Defines Members' Security Interest in the WTO?

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1. INTRODUCTION

The European Community (EC) has recently announced its decision to begin dispute-resolution procedures in the World Trade Organization (WTO) against the United States (US)[1] because of the latter's passage of the so-called 'Helms-Burton' law,[2] which tightens the sanctions against Cuba by means of extraterritorial application. This will, in all probability, offer the WTO an ideal opportunity to define the limits of the General Agreement on Tariffs and Trade's (GATT) security exception. The security exception, contained in GATT Article XXI, is also included in other agreements annexed to the Agreement establishing the World Trade Organization (WTO Agreement), such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[3] It provides an exception from all GATT (as well as GATS and TRIPs) obligations, including the all-important 'most-favoured-nation' non-discrimination rule. The security

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1. *See* Agence Europe, 'Europe' No. 6721, 4 May 1996, at 7. *See also* P. Fletcher, *German Investment Accord with Cuba*, Financial Times, 1 May 1996, at 7; and *Kinkel Warns on Sanctions*, Financial Times, 10 May 1996, at 4.
2. Cuban Liberty and Democratic Solidarity (LIBERATED) Act of 1996, US Public Law 104-114 of 12 March 1996, 110 Stat. 785 enacted HR 927, 104th Cong., 2nd Sess. (1996); reproduced *in* 35 ILM 357 (1996). For an excellent summary of the legislation's provisions, *see* S.E. Benson, *Dramatic Expansion of US Sanctions Against Cuba: Impact on US and Foreign Companies*, International Business Lawyer, June 1996, at 275.
3. GATT 1994 is part of Annex 1A, the Multilateral Agreement on Trade in Goods, of the WTO Agreement, 33 ILM 13 (1994). GATS and TRIPs are contained in Annex 1B and Annex 1C respectively. The security exception is contained in Art. XIV(bis) GATS and Art. 73 TRIPs.

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interests at issue must be those of a political, rather than an economic, nature. It should be noted that because there is no human rights and democracy exception to the GATT or other agreements annexed to the WTO Agreement, trade restrictions that are based either in whole or in part on these concerns, such as the measures against Cuba, are usually justified on the basis of the security exception.[4] In this regard, US President Bill Clinton defended the Helms-Burton law by stating:

> [w]e think [...] the persistent refusal of Cuba to move toward democracy or openness and the particular problems that causes for the countries in our hemisphere, and for the United States especially, justified the passage of the bill.[5]

While it is not yet certain at the time of this writing that a dispute resolution panel will be established to consider the dispute,[6] the increasingly vocal signs of discontent from US allies, and the predominance that this issue has gained in trans-Atlantic relations, diminishes the possibility of an amicable settlement to the dispute.[7] Thus, the establishment of a panel is likely, and within this context the raising of the security exception is probable. It is the intent of this article to examine the Helms-Burton law from the perspective of the GATT security exception. Thus, although the extraterritorial application of national law also gives rise to interesting issues of public international law in general, a discussion of these issues is beyond the scope of this article. Further, although the Helms-Burton law also implicates the security exception in GATS by its prohibition of the

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4. *See* M.J. Hahn, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Michigan Journal of International Law 558, at 595 (1990-1991).
5. *See* S. Fidler, *Europeans Press Clinton to Waive New Cuba Law*, Financial Times, 14 June 1996, at 4.
6. The WTO dispute resolution mechanism, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), discussed *infra*, requires a minimum consultation period of 60 days before a panel can be established. *See* Annex 2 of the WTO Agreement, *supra* note 3, Art. 4(7).
7. The EC has submitted two démarches to the US Department of State protesting the Act, reproduced *in* 35 ILM 397 (1996). *See also* Agence Europe, 'Europe' No. 6727, 13-14 May 1996, at 16; G. de Jonquières, *Britain in Fierce Attacks on US Trade Policy*, Financial Times, 22 May 1996, at 4; Agence Europe, 'Europe' No. 6736, 28-29 May 1996, at 12; B. Clark & N. Dunne, *Cuba Sanctions Threaten to Sour US-EU Relations*, Financial Times, 24 May 1996, at 6; P. Fletcher, *Russia Vows to Defy US in Links with Havana*, Financial Times, 24 May 1996, at 6; Fidler, *supra* note 5, at 4; Agence Europe, 'Europe' No. 6748, 14 June 1996, at 2 and 7; *Italy Condems US Law on Cuba*, Financial Times, 20 June 1996, at 8; and *S. Africa Assails New Cuba Law*, Financial Times, 21 June 1996, at 6.

provision of services, the forthcoming analysis will focus on the GATT because there is, as of yet, no experience with the GATS security exception, and the practice in the GATT context, developed over the last several decades, will, in all likelihood, be applied to the interpretation and application of GATS's security exception, particularly since the wording is identical.[8] Similarly, the practice involving the GATT security exception occurred in the context of GATT 1947, which is legally distinct from GATT 1994.[9] Nevertheless, the security exception was not amended in GATT 1994, and therefore the jurisprudence on its interpretation and application on the basis of GATT 1947 remains applicable.

2. THE CODIFIED SECURITY EXCEPTION

2.1. Article XXI GATT

Article XXI GATT provides that

> [n]othing in this Agreement shall be construed
> (a) to require any contracting party [member] to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party [member] from taking any action which it considers necessary for the protection of its essential security interests
> (i) relating to fissionable materials or 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; or
> (c) to prevent any contracting party [member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[10]

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8. Art. 3(1) of the DSU stipulates that WTO members "affirm their adherence to the principles of the management of disputes heretofore applied under Articles XXII and XXIII of the GATT 1947, as elaborated and modified herein." *See* Annex 2 of the WTO Agreement, *supra* note 3.
9. *See* Art. II(4) WTO Agreement, *supra* note 3.
10. *Id.*, Art. XXI(b) GATT.

2.2. The three security exceptions

The security exception in GATT in fact comprises three separate exceptions. The first exception, contained in Article XXI(a), grants members an exception from furnishing information if they consider disclosure contrary to their essential security interests. As this exception relates only to the disclosure of information, it is relatively uncontroversial. The third exception, contained in Article XXI(c), allows members to take any action in compliance with their obligations under the UN Charter "for the maintenance of international peace and security" and is also uncontroversial. The quoted language is a direct reference to Chapter VII of the UN Charter, which empowers the Security Council to decide on measures to maintain or restore international peace and security. Of particular relevance is Article 41 of the UN Charter, which grants the Security Council the power to take measures not involving the use of force, including the restriction of trade, in order to achieve this purpose. According to Article 25 of the UN Charter, member states of the UN are required to abide by Security Council decisions and, according to Article 103, obligations under the UN Charter take precedence over obligations arising under other international agreements.[11] Thus, this exception merely recognizes the overriding obligation on member states of the UN.

In contrast, the second exception, contained in Article XXI(b), which allows a member to take "any action which it considers necessary for the protection of its essential security interests",[12] has been the subject, at least in part, of much uncertainty. This uncertainty is the focus of this article and is discussed in detail below.

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11. *Id.*, Arts. 25 and 103. *See also* Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United Kingdom) (Interim Measures), Order of 14 April 1992, 1992 ICJ Rep. 3, at 16, para. 39.
12. Art. XXI(b) GATT, *supra* note 3.

3. ARTICLE XXI(B) GATT

3.1. Requirements for utilization

As noted above, Article XXI(b) allows a WTO member to take "any action which it considers necessary for the protection of its essential security interests."[13] The requirement that the invoking member consider the action necessary for the protection of its essential security interests is the same as that required for the restriction of information. However, unlike Article XXI(a), the drafters of the original GATT attempted to limit what they feared might be a excessively open-ended exception by exclusively listing the three circumstances in which reliance on Article XXI(b) was permissible. The first two are fairly specific in that they limit the subject that can be restricted, i.e., 'fissionable material' and its derivatives and 'traffic in arms', and the subjects themselves have a close nexus with security.

The last circumstance, however, has not been well defined. It requires only that the action be taken in "time of war or other emergency in international relations." Thus, an exception from all GATT obligations toward another WTO member is allowed if two prerequisites are met: the member taking the action must consider it necessary for the protection of its essential security interests, and the action must be taken in time of war or other emergency in international relations.

3.2. Justiciability

While the requirements for the invocation of Article XXI(b) are, at least in principle, unambiguous, the role of the organizational component of the GATT (which in the pre-WTO regime was known as the 'Contracting Parties' and is now called the WTO) in the interpretation and application of this article was initially unclear. Thus, parties to the GATT periodically asserted that once Article XXI was invoked, the entire matter rested within the sovereignty of the invoking party. The 'unlimited sovereignty' argument came to a head in 1982 as a result of the embargo by the (then) EEC, its member states, Australia and Canada against Argentina during the

13. *Id.*

Falkland Islands crises. The EEC and its member states stated that they had taken the sanctions "on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection [...]".[14] Thus, although Article XXI was mentioned, no attempt was made to justify the actions by means of the exception because the real basis was deemed to lie in the inherent rights of states. As such, these parties asserted that their actions did not require notification, justification or approval.[15]

The Contracting Parties eventually rejected the principle that the use of Article XXI was within the unlimited sovereignty of the invoking party, asserting instead that the organization also had a role. This meant that the invocation of Article XXI was a justiciable issue. Unfortunately, given the deficiencies of the dispute resolution mechanism which allowed, *inter alia*, the 'losing' party to a dispute to block the adoption of a panel's report, the parameters of this role were never defined. The Contracting Parties limited themselves to asserting that the dispute-resolution procedures of the GATT applied to actions justified under this exception and that certain procedural requirements must be met.[16] Further elucidation was not forthcoming. Thus, while it was clear that the invocation of Article XXI was a justiciable issue, it was not clear to what issues this review extended.

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14. GATT Doc. L/5319/Rev. 1 (1982). Similar assertions of unlimited sovereignty over the use of Art. XXI were made during the Geneva session of the Preparatory Commission. *See* GATT Doc. EPCT/A/SR.33, at 3 (1946). The position of some parties that the use of Art. XXI is within their unlimited discretion is also evident from the refusal of some states even to invoke it when taking measures for political purposes. *See, e.g.*, the US 1983 sanctions against Nicaragua, discussed *infra*, and the measures taken by Germany against Iceland in 1974: GATT Council, Minutes of Meeting held 18 February 1975, GATT Doc. C/M/103, at 4 (1975).
15. GATT Doc. L/5319/Rev. 1 (1982).
16. Decision Concerning Article XXI of the General Agreement, GATT Doc. L/5426, adopted 30 November 1982, BISD 29S/23. *See also* para. 7(iii) of the Ministerial Declaration adopted 19 November 1982, BISD 29S/11, which states that "the Contracting Parties undertaking, individually and jointly: [...] to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".

3.3. Scope of review

From the discussion above, it is clear that the WTO, and the Contracting Parties before it, considers the use of Article XXI(b) to be reviewable. The extent to which the reviewing body can address the substance of the decision to apply the measures justified under Article XXI(b) has, however, never been clarified. It is evident from the wording of the exception, as well as subsequent commentaries, that it is the party taking the action that judges whether the first requirement is met, i.e., whether such action is necessary for its essential security interests.[17] However, it is not at all clear whether the fulfilment of the second prerequisite, i.e., that the action be taken in time of war or other emergency in international relations, is to be judged solely by the invoking member, or whether a dispute resolution panel can objectively assess whether a time of war or other emergency in international relations exists.

The US has, on two occasions, been brought before a GATT panel because of embargoes it has taken for political reasons, both against the government of Nicaragua. As a result of its substantial reduction of Nicaragua's sugar import quota in 1983 the US was brought before a dispute-resolution panel. However, as it did not justify its measures on the basis of the security exception, the exception was not addressed.[18] In 1985, after the imposition of a comprehensive trade embargo, including the provision of related services,[19] Nicaragua again requested the establishment of a dispute-resolution panel. This time, the US justified its actions by claiming that they were necessary to protect its essential security interests. In response, Nicaragua, as well as several other parties to the GATT, asserted that a country such as Nicaragua could never truly constitute a threat to US security interests and, further, there was no war

17. Various statements of the Contracting Parties to GATT 1947 support this interpretation. *See, e.g.*, GATT/CP.3/SR.22, Corr. 1 (statement of Contracting Parties during discussion about Czechoslovakia at the Third Session in 1949); GATT/CP.3/SR.19/12, Corr. 1, at 196 (regarding Ghana's boycott of Portugese goods on the occassion of Portugal's accession to GATT 1947 in 1961); GATT Docs. C/M/159, at 19, and C/M/157, at 6 (in response to the embargo against Argentina in 1982). This interpretation was also supported by the International Court of Justice in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States) (Merits), 1986 ICJ Rep. 14, at 116, para. 222.
18. *See* GATT Doc. L/5607, BISD 31S/67, at 74.
19. The embargo was imposed by Executive Order No. 12513, 50 Fed. Reg. 18629 (1985). The controls are contained in 31 Code of Fed. Reg., Pt. 540 (1985) (restricted).

or other emergency in international relations as required by the terms of the exception.[20] As a result of the ability under the pre-WTO dispute-resolution mechanism for individual parties to block, or at least stall, the establishment of a panel, the US was able to limit the panel's mandate by excluding any consideration of whether its reliance on the security exception was justified.[21]

4. APPLICATION TO THE CURRENT DISPUTE

The Helms-Burton law constitutes what is referred to as a secondary boycott. It extends the US embargo to companies doing business ('trafficking') in Cuba by subjecting them to litigation in US courts from interested parties claiming compensation for goods appropriated 38 years ago.[22] It also bars employees of companies benefiting from such investments or property from entering the US.[23] If the US's decision to take these measures is brought before a dispute-resolution panel, the US government will likely invoke the security exception as justification for the measures. If so, it will offer the WTO an opportunity to address the issue of whether the satisfaction of the requirements for invoking the security exception are judged solely by the invoking member, or whether the panel can substitute its view for that of the invoking member regarding whether there exists a time of war or other emergency in international relations. This is particularly important as Article XXI(b) GATT provides that as soon as these criteria are met, *any* action can be taken. Thus, it appears that a dispute-resolution panel could not find that the US was justified in taking measures but that the measures selected were inappropriate.

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20. United States - Trade Measures Affecting Nicaragua - Communications From the United States, GATT Doc. L/5803, at 7 (1985) (restricted).
21. *See* GATT Doc. C/M/196, at 7. The most recent case involving Art. XXI took place in November 1991, when the EC notified the GATT that it, as well as its member states, had decided to take economic measures against Yugoslavia. A panel was established, but it was subsequently terminated because of the uncertainty regarding the succession of the Federal Republic of Yugoslavia to the seat formerly held by the Socialist Federal Republic of Yugoslavia. *See* Statements of the Yugoslav Representative at the Forty-Seventh Session in December 1991, GATT Doc. DS27/2 (1992), reproduced *in* GATT, Analytical Index: Guide to GATT Law and Practice 556, 6th ed. (1994).
22. Helms-Burton law, *supra* note 2, at Title III, s(s) 301-306, 110 Stat. 814.
23. *Id.*, Title IV, s. 401, 110 Stat. 822.

This is the first opportunity to consider the issue under the new dispute-resolution mechanism, annexed to the WTO Agreement and part of the 'single undertaking approach' to which all WTO members are obliged to adhere.[24] As such, the US would not be able to block the creation of a panel to consider the dispute or limit such a panel's mandate to exclude consideration of this issue. The panel's decision would become effective within 60 days, unless disapproved by consensus or appealed.[25] Although the 'losing' party would have an opportunity to appeal the decision on points of law, it would be unable to unilaterally block the adoption of the panel's report. Thus, this dispute offers the first real opportunity for a panel to pronounce on this important issue.

If a panel is established to consider this dispute, it should seize the opportunity to clarify that the invocation of the security exception by WTO members is subject to supervision in order to ensure that the requirements established for its utilization are adequately fulfilled. There should, therefore, be a threshold analysis. While the panel would, in all probability, not be able to comment on the first requirement (that the US consider the measures necessary for the protection of its essential security interests), as this seems to be judged exclusively by the invoking member, it should give at least a cursory examination as to whether the second requirement (that the measures are taken in time of war or other emergency in international relations) is met. The panel should not transpose its perception of the conflict for that of the invoking member, but it should examine whether from that member's perspective there is a situation that constitutes a time of war or other emergency in international relations. Even given this limited scope of review, the US's measures against Cuba

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24. There are numerous articles on the WTO's dispute resolution mechanism. *See, e.g.*, E. Vermulst & B. Driessen, *An Overview of the WTO Dispute Settlement System and Its Relationship With the Uruguay Round Agreements - Nice on Paper but too Much Stress for the System?*, 29 Journal of World Trade 131 (1995); N. Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, 29 Journal of World Trade 5 (1995); A. Porges, *The New Dispute Settlement: From GATT to the WTO*, 8 LJIL 115 (1995); A.F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AJIL 477 (1994); and E.-U. Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 CMLRev. 1157 (1994).

25. Art. 16 of the DSU, Annex 2 WTO Agreement, *supra* note 3. As concensus requires the 'winning' party to agree not to adopt the panel's report, this will probably be a rare occurence.

would, in all likelihood, be found not to fulfil the requirements necessary for reliance on Article XXI(b.iii) GATT. Although relations between the US and Cuba are certainly not friendly, it is doubtful whether the situation constitutes an 'emergency in international relations'. The situation of war is clearly inapplicable. While the goal of furthering human rights and democracy is admirable, and a unified multilateral approach is more effective than unilateral measures,[26] these goals must be achieved within the confines of the parameters set by the multilateral trading regime.

As Cuba's largest trading partner and investor,[27] the EC evidently has a keen interest in seeing this matter adjudicated, and in the absence of a proceeding in a well-respected international forum such as the WTO, individual member states, as well as other US allies such as Mexico, have indicated their willingness to take unilateral retaliatory measures.[28] Their desire for a tough response is no doubt heightened by recently passed US legislation applying similar measures to Libya and Iran.[29] Such individual retaliations are clearly not in the best interest of the multilateral trading regime or, for that matter, the trans-Atlantic alliance.[30] Although this is a highly political issue, and one closely tied to state sovereignty, the WTO should seize the opportunity not only to diffuse the possible consequences, but also to clarify the parameters of one of the most ambiguous, and seemingly unlimited, exceptions to the rules governing international trade.

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26. *See,* among others, M. Smeets, *Economic Sanctions Against Iraq: The Ideal Case?*, 24 Journal of World Trade 105, 106 (1990), in which he notes that the use of multilateral sanctions makes it considerably easier to reach the ultimate objectives.
27. *See* Parliamentary Resolution on the Communication to the Council and the European Parliament on the Relations Between the European Union and Cuba, OJEC 1996, C 32/58.
28. *See Kinkel Warns on Sanctions*, *supra* note 1, at 6; Fidler, *supra* note 5, at 4; L. Barber & R. Graham, *EU Summit Warns US on Sanctions*, Financial Times, 24 June 1996, at 2.
29. *See* A. Mitchell, Clinton Signs Bill Against Investing in Iran and Libya, New York Times, 6 August 1996, at 1.
30. Klaus Kinkel, the German Foreign Minister, recently noted the possibility of a trans-Atlantic conflict over these measures. *See* Agence Europe, 'Europe' No. 6727, 13-14 May 1996, at 16.

5. CONCLUSION

The EC decision to bring the US before the WTO in response to its enactment of legislation extraterritorially extending its embargo against Cuba will, in all probability, offer the WTO an ideal opportunity to define the limits of the security exception contained in GATT, as well as GATS and TRIPs. The WTO should use this opportunity under its new dispute-resolution mechanism to make clear that it will ensure that the requirements for the utilization of the security exception are fulfilled. If it does take this opportunity and applies the criteria to the US's measures, it should find that in this case, the requirements of the security exception are not met.