

## THE IMPACT OF SECURITY CONCERNS UPON INTERNATIONAL ECONOMIC LAW

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### I. INTRODUCTION

In approaching the intersection of national security and trade policies, the underlying issue is the extent to which trading nations are prepared to permit the transfer of production functions deemed important to national security to more efficient producers in another country. Two examples are often raised in order to show how difficult it is to define "national security." Japan and Switzerland protect their agriculture.<sup>1</sup> Sweden protects its shoe producers. Armies need to be both well fed and well soled.<sup>2</sup> When the least expensive source of food or of shoes lies in another country, even a reliable ally, the importing government may nevertheless prefer internal sources of supply to be available in a moment of crisis. In democracies, public clamour for internal capacity may exist. Indeed, the more open the national economy, the greater the need for adaptive capabilities in case of disruptions to the international marketplace. Reducing vulnerability to such external pressures depends upon the adaptability of a nation's economic structure.

Less adaptable economies utilise protectionism to shield the economy from external pressures. If domestic industries are either unable or unwilling to adjust, the demand for protection rises.<sup>3</sup> It is a difficult empirical question to determine how much of the domestic demand for protection is a function of defence preparedness and how much is a response to local inefficiencies and the vagaries of an open, interdependent world economy.

Countries in the Soviet bloc have largely insulated themselves from these fluctuations. Soviet exports decline when business in

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1. Japan, U.S. EXPORT WEEKLY (BNA) 82 (Apr. 20, 1982), 813 (Sept. 7, 1982); Reservation in the Protocol for the Accession of Switzerland to the General Agreement on Tariffs and Trade, 14 BASIC INSTRUMENTS AND SELECTED DOCUMENTS [BISD] 6 (1966).

2. See, e.g., Santos, *The National Security Exception to Free Trade*, 30 FED. BUS. NEWS & J. 293 (1983).

3. MALMGREN, *Threats to the Multilateral System*, in TRADE POLICY IN THE 1980S 189, 191 (W. Cline ed. 1983) [hereinafter cited as CLINE].

the capitalist world is depressed. Foreign exchange dealings with the West and commodity imports therefrom are controlled within the scope of the prevailing economic plan. For imports such as grain and high technology goods which are used to fill significant gaps in domestic supply, however, the Soviet Union is dependent on the availability of imports from the West.

Within the Western World, the United States now shares economic preeminence with both the European Economic Community (EEC) and Japan. Much consultation occurs. However, while united as allies for defence policy purposes, policies with respect to the organisation of world markets do not form a cohesive unit. In the 1980's, no lead for liberalisation of trade policies can be unambiguously identified. Economies at different stages of historical development, with dissimilar resource endowments and a variety of cultures and political systems, can, when left rudderless in the wind, develop a sense of vulnerability and defenciveness.<sup>4</sup>

Professor Heinz Arndt, writing during the Second World War, analysed the pre-War policies of Germany, Japan, and Italy along similar lines:

[S]o long as countries have reason to fear the recurrence of war, no emphasis on the economic benefits of international trade will induce them to forego such a measure of economic self-sufficiency as their governments consider feasible and desirable for their military security.<sup>5</sup>

Although the United States, the EEC and Japan conducted much of the Tokyo Round of Multilateral Trade Negotiations without involving middle and lower ranking trading nations, the dominant three developed neither stellar nor confluent policies. The "lesser" nations were disappointed at being so excluded. Their confidence in an open world economy was neither restored nor boosted after the Tokyo Round.<sup>6</sup> A failure to identify and grapple with the growing diffusion of economic and political interests has left open the possibility of a recurrence of the fear-influenced policies of the past.

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4. Cf., Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 95, 96 (1978).

5. H. ARNDT, *THE ECONOMIC LESSONS OF THE NINETEEN-THIRTIES* 274 (1944).

6. Jackson, *supra* note 4, at 95-98.

## II. ECONOMICS, TRADE AND SECURITY INTERESTS

### A. A COST-BENEFIT MODEL FOR TRADE AND SECURITY INTERESTS

Trade is only entered into when perceived benefits outweigh perceived costs. When core values are seen to be at risk, whether or not they indeed are, the costs are seen to outweigh the benefits of trade. In this balance must lie a recognition that powerful nations can induce others to trade with them. Although both gain from the exchange they do not gain equally.<sup>7</sup> The more efficient economy incorporates gains from trade more effectively than its inferior trading partner. Realising this, less efficient economies are tempted to adopt autarkic policies in the hope of improving their industries, and later more profitably, rejoining the currents of world trade. It is not surprising that the two great champions of the market mechanism in modern times have been Great Britain in the nineteenth century and the United States in the twentieth.<sup>8</sup> Nation-States with differing economic structures can be expected to inject differing doses of protectionism into their trade policies.

In analysing international economic history and the jurisprudence of international economic law, it is important to keep these differences in mind. Whether the differences lead to entropy in the society of nations or to convergent goals, lies within and not beyond the capacity of our leaders and policy makers.

### B. SUSTAINING A LIBERAL WORLD ECONOMY

The Ricardian theory of international trade turned upon a static approach to comparative advantage. Countries with abundant land would export primary produce. Those with abundant labour would produce and sell human wares. The relatively more technological-ly advanced would sell the produce of their know-how. This theory was challenged by Alexander Hamilton in his *Report on the Subject of Manufactures*.<sup>9</sup> Hamilton emphasized that relative factor

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7. K. KNORR, *BRITISH COLONIAL THEORIES 1570-1870* 248 (1944).

8. With respect to the growing roles of both the EEC and Japan, see BERGSTEN & CLINE, *Trade Policy in the 1980s: An Overview*, in CLINE, *supra* note 3, at 59; PATTERSON, *The European Community as a Threat to the System*, in CLINE, *supra* note 3, at 223; Grey, *A Note on U.S. Trade Practices*, *id.* at 243.

9. The Report was presented to the United States House of Representatives in 1791.

endowments<sup>10</sup> were fluid and dynamic. For example, the encouragement of immigration causes a shift in relative trading capabilities with respect to labour intensive goods. Less efficient nations become more efficient not by trading with their superiors but by deliberately altering their mix of factor endowments and relative efficiency levels.

Hamilton's theory lies behind much of the economic nationalism of developing countries in both the past and present. According to Professor Richard Gilpin:

Economic nationalism, both in the nineteenth century and today, is a response to the tendency of markets to concentrate wealth and power as well as to establish dependency relations between strong and weak economies. Although markets over time stimulate the diffusion of economic activities and industries, the tendency in the short run is for the concentration of wealth in the advanced economies to take place faster than the spread of economic activities in the developing economies. In order to protect its nascent industries and safeguard domestic interests against external market forces, the government of the developing economy tends to pursue protectionist and related nationalistic policies.<sup>11</sup>

As the strong gain more from trade than the weak, the gulf between them widens. The weak become jealous. The strong become anxious. Transposing the argument of Professor John Kenneth Galbraith in *The Affluent Society*<sup>12</sup> to the world scene, the more the rich have to lose, the more afraid they are of losing their preferred position. Nationalistic pressures in the weak and defensiveness of the strong, lead to autarkic reorientation by governments.<sup>13</sup> Each feels a sense of insecurity and takes various protective measures which tend toward entropy in international relations.

The alternative to what shall in this paper be termed "entropic autarky" is an open system in which the strong actively assist the weak in becoming more efficient at incorporating the gains from trade in mutually beneficial ways. The ultimate goal is to maximise

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10. These endowments are Land, Labour, Capital/Technology and Enterprise (Management Skills).

11. GILPIN, *Economic Interdependence and National Security in Historical Perspective*, in *ECONOMIC ISSUES AND NATIONAL SECURITY* 404-41 (K. Knorr & F.N. Trager eds. 1977). See generally H. JOHNSON, *ECONOMIC NATIONALISM IN OLD AND NEW STATES* (1967).

12. J.K. GALBRAITH, *THE AFFLUENT SOCIETY* (3d ed. 1976).

13. See generally MALMGREN, *supra* note 3, at 191; Jackson, *supra* note 4, at 93.

the gains from trade while catering to the development needs of weaker economies. The empirical questions of identifying, evaluating and utilising the fluid components of comparative advantage are beyond the scope of this paper. It is the thesis of this paper that the process of entropic autarky brings into full view the interface between trade policy and national security.<sup>14</sup> The system of international economic law cannot profitably ignore the problem and indeed its progressive development can only benefit from a reasoned approach to both the national security issue and the process of entropic autarky to which it is related.

### III. THE ROLE OF INTERNATIONAL ECONOMIC LAW IN NATIONAL SECURITY ISSUES

#### A. LAW AND INTERNATIONAL ORDER

International law survives by consensus. The Nation-States which form the constituency of international law do not legislate through a parliament or congress, seldom litigate their differences before a court or tribunal, and are not the subjects of a supranational executive or sovereign. Professor Louis Henkin has concluded:

Nations sometimes have to determine law for themselves from ambiguous precedents, in circumstances rendering objectivity difficult and where the area of permissible conduct is not obviously defined. . . . That the action will never in fact be passed upon by such [an international] tribunal, that some may question the very concept of impartiality of an international tribunal, that lawfulness is in fact determined for their own purposes by governments inevitably more-or-less partial, may modify but does not vitiate the basic conception of lawfulness or unlawfulness in the behaviour of nations.<sup>15</sup>

Professor Roger Fisher has argued that compliance with law by governments (and persons) does not depend on the availability of organised force to coerce compliance. Rather, the subjects of law assess for themselves their long-term interests and find that compliance and orderly conduct are beneficial thereto.<sup>16</sup> An order which serves the perceived interests of a majority or dominant section of its constituency is enduring. So long as disobedience is the ex-

14. MALMGREN, *supra* note 3, at 199-200.

15. L. HENKIN, *HOW NATIONS BEHAVE* 41-42 (2d ed. 1979).

16. Fisher, *Bringing Law to Bear on Governments*, 74 *HARV. L. REV.* 1130 (1961).

ception rather than the rule, the system functions smoothly. Professor Fisher of Harvard Law School considers that coerced compliance lubricates but does not fuel the wheels of a legal system. The international system, however, lacks this lubricant. International law does lack that element of precision which might assist its usefulness in preventing as well as tempering the breach of or interference with trading obligations on national security grounds. As Sir Hersch Lauterpacht has observed:

[O]nce we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principle—even this may be an overestimate in some cases—there is no semblance of agreement in relation to specific rules and problems.<sup>17</sup>

In the international arena, it is states practice, more often than judicial decisions, which serves to concretise the principles. Resistance to legal restraints based upon an insistence that lacunae or gaps in the law exist and so, a matter is purely political, has been short-lived even at the instance of great powers. The Soviet Union could not survive without trade and diplomacy. She has asserted customary principles such as territorial integrity, sovereign and diplomatic immunities, and the binding effect of treaties often under the rubric of "peaceful coexistence."<sup>18</sup> Similarly, as China continues to incorporate herself into the society of nations, she has invoked and applied international law, even with respect to security concerns.<sup>19</sup>

This reference to law gives a framework in which states may further their interests, even their vital interests. Law can also engender order and peaceful processes for the resolution of disputes. Entropic autarky is more likely to proceed when nations' senses of insecurity lead to not only distrust of other nations, but of the legal framework in which international relations are conducted. In urging, as Professor John Jackson has, a revival of "rule diplomacy" rather than "power diplomacy," it is the reversal of the process

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17. Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 17 (1955); see J. STONE OF LAW AND NATIONS 211-12 (1974).

18. L. HENKIN, *supra* note 15, at 108-09.

19. See, e.g., N.Y. Times, Oct. 21, 1962, at 1, col. 6. China challenged her border with India charging that the so-called McMahon line was an illegally drawn border.

of entropic autarky which is sought.<sup>20</sup> Because it is states' vital interests which are at stake, the international lawyer needs to proceed delicately. This, however, is not to say that these fundamental issues should be sidestepped or ignored.<sup>21</sup>

It has often been stated that international law, including international economic law, does not operate in times of war or of serious crisis.<sup>22</sup> Yet this margin beyond which the rule of law may not venture forth is seldom defined. Though many have called for an expanded use of international arbitration as a means of settling international disputes, the call has "rather symbolised the messianic hope of subjecting the sovereign State, with its claim to be its own sole judge, to the olympian impartiality of third party judgement as a means of abolishing war."<sup>23</sup> While hopes for third party prevention of war may be forlorn, the removal of security issues from international forums by the unilateral decisions of states can only impair the dispute resolution process.

International law is enforced by the subtle means of peer pressure. Once the problem receives an airing in an international forum, resolution without formal adjudication may occur as the states involved listen to and perhaps better understand their neighbour's interests. Indeed, states may be more willing to place security concerns on the table for discussion if they have no need to fear a formal adjudication against their interests. Without arising grievances, resolution by less than peaceful means is more inviting an option if only because mutual understanding has not been given a chance to develop.

So it is in international economic law. By providing a framework for economic activity undertaken to protect national security to be discussed, international as well as national objectives can be pursued. An act of protectionism or a currency restriction does not lose its economic character because it also has a security flavour.

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20. JACKSON, *GATT Machinery and the Tokyo Round Agreements*, in CLINE *supra* note 3 at 159-87; see also JACKSON, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 *LAW & POLY INT'L BUS.* 21 (1980); JACKSON, *The Crumbling Institutions of the Liberal Trade System*, 12 *J. WORLD TRADE L.* 93 (1978).

21. J. STONE, *Law and Force: Some Tasks for Survival*, in *OF LAW AND NATIONS* 443, 446 (1974).

22. See, e.g., H. MORGENTHAU, *POLITICS AMONG NATIONS* 282-83 (4th ed. 1967).

23. J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 98 (1959).

B. WAR, COLD WAR AND THE LAW OF PEACE

International relations are replete with examples of unfriendly relations not accompanied by similar hostilities. Jessup suggested three characteristics of such "cold war."<sup>24</sup> First, a hostility and strain between opposing parties would be identified.<sup>25</sup> Second, no solution of a focal issue would restore friendly relations.<sup>26</sup> Finally, the opposing parties would exhibit a reluctance to resort to armed force at least for extended periods of time.<sup>27</sup> According to Jessup, the replacement of an illusion of peace with a legal declaration of the "state of intermediacy" would clarify international legal relations.<sup>28</sup> Negotiations for limited objects would not be accompanied by disappointment at incomplete resolution since the state of intermediacy would be a "normal" condition.<sup>29</sup> Professor McDougal has rejected even this trichotomy arguing for a recognition by international decisionmakers that "peace" and "war" are but polar extremes of a continuum of degrees of coercion.<sup>30</sup>

The identification of the degree of coercion is a prerequisite to, but not the same task as, evaluating a conflict from the decisionmaker's perspective and then developing a policy response. International law can come into play at the evaluation stage. By categorizing the permissibility of the initial conduct, the law may prohibit, permit or mandate a response. It is this functional deficiency which caused Professor Julius Stone to remark:

Besides its lamentable effects in discouraging efforts to mitigate human sufferings, the well-intentioned refusal to recognise the obstinate complexity of the role of war also prevents recognition of the extent to which this role projects itself into times of peace.<sup>31</sup>

The Soviet response to the suggestions of Professors Jessup and McDougal has been given by Professor Tunkin in his Hague

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24. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War*, 48 AM. J. INT'L L. 98 (1954).

25. *Id.* at 100-01.

26. *Id.* at 101.

27. *Id.*

28. *Id.*

29. *Id.* at 102. Normalcy, in fact, is not desirable as a value.

30. McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 AM. J. INT'L L. 63 (1955).

31. J. STONE, *supra* note 23, at xxxvi.



lectures.<sup>32</sup> The recognition of an underlying condition of hostility was anathema to the stated Soviet preference for "peaceful coexistence." The difference between East and West on ideological issues is not, according to Professor Tunkin, "an insurmountable obstacle to reaching an agreement relating to accepting specific rules as norms of international law."<sup>33</sup> Perhaps the most famous test of the relevance of law in time of crisis is the case of the Cuban quarantine in October 1962. The facts need not be recounted here; suffice to say that war did not break out.<sup>34</sup> Nevertheless, former U.S. Secretary of State Dean Acheson reported to the American Society of International Law: "I cannot believe that there are principles of law that say we must accept destruction of our way of life. No law can destroy the state creating the law. The survival of states is not a matter of Law."<sup>35</sup>

Yet it appears that international law was referred to extensively in conditioning the means whereby survival interests were to be upheld by the Kennedy administration.<sup>36</sup> The effects on trade relations of a cold war (or state of intermediacy to use Professor Jessup's term) may validly be compared to the effects of war upon economic obligations. The legal outbreak of war creates changes in the legal force of international transactions regardless of the state of hostilities.

As to treaties such as defence accords, it may be safely suggested that the threat or existence of hostilities will activate rather than diminish their applicability. Treaties dealing with matters such as neutrality and economic cooperation, including friendship, commerce and navigation treaties, will almost certainly be abrogated in a state of belligerency.<sup>37</sup> Between these two classes, international law has little clarified the grey areas of the spectrum. In particular, modern trade and economic cooperation agreements,<sup>38</sup> including the

32. Tunkin, *Co-Existence and General International Law*, 95 *ACADEMIE DE DROIT INTERNATIONAL RECUEIL DES COURS* [A.D.I.R.C.] 1, 72-74 (1958).

33. *Id.* at 59.

34. See E. McWHINNEY: "PEACEFUL COEXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW 72-85 (1964). See generally *id.* at 73-74, nn.2, 5 & 6 (sources cited in footnotes).

35. Acheson, *Law and Conflict: Changing Patterns and Contemporary Challenges*, [1963] *PROC. AM. SOC'Y INT'L L.* 13, 14.

36. See E. McWHINNEY, *supra* note 34, at 78-79, nn. 21-26.

37. J. STONE, *supra* note 23, at 448.

38. See *infra* note 127.

General Agreement on Tariffs and Trade (GATT), make allowance for breakdown of peaceful relations presumably in order to ensure survival of the agreement up to restoration of peaceful relations.<sup>39</sup> The comparative effects of war and cold war upon economic relations can be seen by reviewing the cold war of the 1950's and 1960's.

In the immediate post-World War II period, Denmark agreed to supply the Soviet Union with a tanker. The United States pressed Denmark to break its agreement. Delivery could lead to termination of aid to Denmark under the so-called "Battle Act." Denmark remained unwilling to terminate its agreement, and the United States did not terminate aid because to do so would have been "detrimental to the security of the United States." There was an acknowledgement that U.S. security interests were better served by maintaining East-West trade links and upholding treaty obligations than by utilising coercion, albeit in support of American defence policy but in violation of international law. This is not to say that defence policy is always subordinated to legal restraints, but rather, that it is tempered by them. George Keenan, a distinguished American diplomat, stressed that the role of law in ensuring the smooth functioning of international life was minimal at best where states' vital interests or military security were concerned, but limited these exceptional circumstances to "those elementary upheavals that involve the security of great political systems or reflect the emotional aspirations and fears of entire nations."<sup>40</sup>

This extreme condition did not surround that recent attempt by President Reagan to block the flow of goods and technology to the Soviet Gas Pipeline being built to link the Soviet Union and Western Europe. In this example, too, U.S. measures were unsuccessful. The legal arguments of Western Europeans,<sup>41</sup> adequately canvassed elsewhere, were persuasive.<sup>42</sup>

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39. General Agreement on Tariffs and Trade, art. XXI, done Oct. 30, 1947, 61 Stat. A-1, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (effective Jan. 1, 1948). Summary Record of the Eighteenth Meeting, Sixth Committee: Organization, U.N. Doc. E/CONF. 2/CONF. 2/C.6/SR. 18.

40. G. KEENAN, REALITIES OF AMERICAN FOREIGN POLICY 38-39 (2d ed. 1966).

41. Commission of the European Communities, Legal Service, *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, reprinted in 21 I.L.M. 891 (1982).

42. Aide-Memoire of the Commission of the European Communities and the Embassy of France presented to the U.S. Department of State, Mar. 20, 1984, at 3.

C. NATIONAL SECURITY IN PUBLIC INTERNATIONAL LAW

In accepting national security as a valid objective of states and as a jurisprudential concern, it is postulated that international economic law may look to the more general public international law as a model for developing its rules.

Article 16 of the Covenant of the League of Nations sought to deem war against one League member to be a war against all League members automatically requiring a complete economic embargo against the state breaching the Covenant by a declaration of war. Of course consensus was most elusive on the initial question of whether a breach of the Covenant had actually occurred. This question was left for each state's subjective determination.<sup>43</sup> This subjective element effectively defeated the collective nature of the international security arrangement. So long as one state of some influence opposed sanctions, collective control could not work. Self-protection, though formally a residual remedy was, in fact, a more futile response than awaiting the unravelling of collective process. In recognition of this, the United Nations (UN) order embodies both individual and collective defence mandates. The collective mandate can only be effected by the Security Council and is subject to veto, an approach more realistic than that of the League Covenant.<sup>44</sup>

In particular, the doctrine of self-preservation appears to be readily adaptable to the economic scene. This doctrine stems from the negotiations relating to the Destruction of the *Caroline* between the then British rulers of Canada and the United States. The facts of the *Caroline* case are as follows:

The case rose out of the Canadian Rebellion of 1837. The rebel leaders, despite steps taken by U.S. authorities to prevent assistance being given to them, managed on December 13, 1837, to enlist at Buffalo, in the U.S., the support of a large number of American nationals. The resulting force established itself on Navy Island in Canadian waters from which it raided the Canadian shore and attacked passing British ships. The force was supplied from the U.S. shore by an American ship, the *Caroline*. On the night

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43. Assembly Res. VI.2, The Economic Weapon, LEAGUE OF NATIONS O.J. Spec. Supp. No. 6, at 24 (1920-21).

44. Neff, *The Law of Economic Coercion: Lessons from the Past and Indications of the Future*, 20 COLUM. J. TRANSNAT'L L. 411, 428-31 (1981).

of December 29-30, the British seized the *Caroline* which was then in the American port of Schlosser, fired her, and sent her over Niagara Falls. Two U.S. nationals were killed. The legality of the British acts was discussed in detail in correspondence in 1841-42 when the U.K. sought the release of a British subject, McLeod, who had been arrested in the U.S. on charges of murder and arson arising out of the incident.<sup>45</sup>

In defence of the British action, Lord Ashburton pleaded necessity but cautioned "[t]his must always be a subject of much delicacy, and should be considered by friendly nations with great candor and forbearance."<sup>46</sup>

For the United States, Secretary of State Webster stated the conditions for a legitimate act of self-preservation which have now become an axiom of international law:

Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation'.<sup>47</sup>

Curiously, Mr Webster hinted that the rule was not limited to military situations and self-defence in that sense. This hint has been taken up most recently in the case concerning the Air Services Agreement of March 27, 1946, between the United States and France.<sup>48</sup> Arbitrators Riphagen, Ehrlich and Reuter applied the rule to a case of reprisal for alleged breach of a commercial treaty.

In considering the question of proportionality, the Tribunal took into account the relative injuries suffered and the importance of the questions of principle arising from the alleged breach.<sup>49</sup> The Tribunal rejected the plea that a duty to negotiate first, in order not to aggravate the dispute, had to be satisfied to legitimate the

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45. 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 409, 412 (1842); *c.f.*, *Naulilaa Case* (Port. v. Ger.) 2 R. INT'L ARB. AWARDS 1012, 1016 (1928).

46. Letter from Lord Ashburton, British Plenipotentiary to Mr. Webster, Secretary of State for the United States (July, 28, 1842), *reprinted in* J. MOORE, *supra* note 45, at 411-12.

47. Letter from Mr. Webster, Secretary of State for the United States, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), *reprinted in* J. MOORE, *supra* note 45, at 412 (emphasis added).

48. Case Concerning the Air Service Agreement of 27 March (U.S. v. Fr.) 54 I.L.R. 303 (Arbitral Tribunal established by a *Compromis of Arbitration* 1979).

49. *Id.* at 338, para. 83.

reprisal.<sup>50</sup> However, the reprisals had to be withdrawn as a sign of good faith when the dispute was set down for arbitration or judicial settlement.<sup>51</sup> Legitimacy did not depend upon necessity of response. It seems that economic reprisal may be distinguished from its military equivalent in that the only condition for legitimacy where armed force is not involved is that of proportionality. Whether this rule can be transposed to the frameworks of the GATT and the International Monetary Fund (IMF) remains a topic for exploration in succeeding sections of this paper.

Even in the general context, it is surprising that the Tribunal found no duty to postpone retaliatory action until less inflammatory yet practicable pressures had been exhausted. Articles 2(3) and 33 of the United Nations Charter impose a duty of pacific settlement in cases where international peace and security are endangered.<sup>52</sup> United Nations General Assembly Resolution 2625 being a "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter"<sup>53</sup> has added body to the principle and extended it, *de lege ferenda*, to less serious disputes. The principles have been reaffirmed in the Manila Declaration on Peaceful Settlement of International Disputes.<sup>54</sup> The norm derives from Security Council Resolution 188 condemning reprisals "as incompatible with the purposes and principles of the United Nations."<sup>55</sup>

Differences of opinion exist between eminent jurists as to whether there is a norm of obligation expressing a condition of necessity for legitimacy of retaliatory action<sup>56</sup> or a norm of aspiration with whose compliance legitimacy is better grounded but

50. *Id.* at 338-39, paras. 84-89.

51. *Id.* at 340-41, para. 96.

52. See generally Blum, *Economic Boycotts in International Law*, 12 TEXAS INT'L L.J. 5, 13-15 (1977); Brosche, *The Arab Oil Embargo and U.S. Pressure Against Chile: Economic and Political Concern and the Charter of the United Nations*, 7 CASE W. RES. J. INT'L L. 3, 31-32 (1974).

53. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR (1833d plen. mtg), U.N. Doc A/4355, Pt. VIII, at 1, *reprinted in* 65 AM. J. INT'L L. 243 (1971).

54. Draft, Manila Declaration on the Peaceful Settlement of International Disputes, U.N. Doc. A/AC.182/L.32/Add.1 (March 18, 1982), *reprinted in* 21 I.L.M.449 (1982).

55. Resolution adopted by the Security Council, U.N. Doc. S/5650 (1964).

56. See generally P. JESSUP, A MODERN LAW OF NATIONS 166 (1948); SKUBISZEWSKI, *Use of Force by States, Collective Security, The Law of War and Neutrality*, in MANUAL OF PUBLIC

neither a necessary nor sufficient condition of legality.<sup>57</sup> Professor Riphagen appears to have considered the doctrines of necessity and exhaustion of more pacific means of redress to be no more than norms of aspiration from which states were entitled to deviate.

During the preparation of Resolution 2625, "the complete or partial interruption of economic relations" was argued to be at least as much in need of regulation as military action.<sup>58</sup> This argument was resisted by Western delegates for whom economic measures were to be considered valid means of influencing other states' policies.<sup>59</sup> To the former group of states, insisting upon prior exhaustion of direct negotiations promoted compromise of competing interests; whilst to the latter, freedom to experiment with means of settlement was of higher priority.<sup>60</sup> For the law to channel states' actions taken for self-preservation, a consensus was needed as to when the threshold threat to national security would be sufficiently evident to be effectively controlled. This consensus remained absent. Proscription of such defensive action can only be chimerical.<sup>61</sup> Short of proscription, the legal channelling of self-help into less disruptive yet effective behaviours remains a desirable if challenging goal. Doctrines of peaceful settlement stemming from Article

INTERNATIONAL LAW 745-46 (M. Sorensen ed. 1968); Henkin, *Force, Intervention and Neutrality in Contemporary International Law*, [1963] PROC. AM. SOC'Y. INT'L L. 147.

57. See Case Concerning Air Services Agreement, *supra* note 48 and accompanying text; Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 A.D.I.R.C. 500 (1952); D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 191 (1958); J. STONE, *supra* note 17, at 1-38.

58. See, e.g., Speech of Mr. Dadzie (Ghana), U.N. Doc. A/AC.119/SR.5 at 17 (Oct. 16, 1964); Speech of Dr. Khalil (Egypt), U.N. Doc. A/AC.119/SR.8 (Oct. 16, 1964); Speech of Dr. Pechoto (Czech.), U.N. Doc. A/AC.119/SR.8 at 4-6 (Oct. 16, 1964); and Speeches of Dr. Krishna Rao (India), U.N. Docs. A/AC.119/SR.3 at 7-8, (Oct. 16, 1964), A/AC.119/SR.23 at 6 (Oct. 22, 1964). These speeches were made to the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States.

59. See, e.g., Speeches of Sir Kenneth Bailey (Aust.), U.N. Docs. A/AC.119/SR.10 at 7 (Oct. 16, 1964), A/AC.119/SR at 14-15 (Oct. 22, 1964); Speech of Mr. Colombo (Arg.), U.N. Doc. A/AC.119/SR.19 at 18 (Oct. 19, 1964); Speeches of Mr. Schwebel (U.S.), U.N. Docs. A/AC.119/SR.3 at 12 (Oct. 16, 1964), A/AC.119/SR.15 at 17-18 (Oct. 19, 1964), A/AC.119/SR.22 at 19 (Oct. 22, 1964); Speeches of Mr. Sinclair (U.K.), U.N. Docs. A/AC.119/SR.5 at 12-13 (Oct. 16, 1964), A/AC.119/SR.16 at 13 (Oct. 19, 1964), A/AC.119/SR.19 at 5-8 (Oct. 21, 1964). These speeches were made to the Special Committee of International Law Concerning Friendly Relations and Co-operation among States.

60. McWhinney, *The "New" Countries and the "New" International Law: The Union Nations' Special Conference on Friendly Relations and Cooperation Among States*, 60 AM. J. INT'L L. 1, 17-18 (1966).

61. J. STONE, *supra* note 17, at 2-3; J. STONE, *supra* note 23, at 243-46.

2(3) of the UN Charter can provide a springboard for further developments.

Resolution 2625 is ambivalent between its dual roles of codifying classical legal principles and developing a peaceful world order. It speaks to independent rather than interdependent states.<sup>62</sup> International economic law, as developed through the jurisprudence of the GATT, is arguable more consonant with international interdependence. The difference shows up in GATT practice a that practice deviates from the aforementioned practice under the doctrine of self-preservation.

#### IV. THE GENERAL AGREEMENT ON TARRIFFS AND TRADE (GATT)

##### A. THE NATIONAL SECURITY EXCEPTION

Originally drafted contemporaneously with the Charter of the proposed International Trade Organization (ITO), the GATT was fashioned to be the embodiment of the results of tariff negotiations held in Geneva from April to October, 1947.<sup>63</sup> It contained clauses to protect against the harms of evasions of tariff commitments. The general GATT clauses were comparable with, yet subsidiary to, the ITO Charter. Following upon delays and difficulties in obtaining American Congressional approval of the ITO Charter, the ITO was stillborn, and in order to accommodate lengthy parliamentary approval procedures in other countries, the GATT itself was not brought into force.

Instead, the GATT was brought to life through a "Protocol of Provisional Application" signed in 1947 and effective on January 1, 1948.<sup>64</sup> So, by this circuitous route the focal body of international trade law was born.<sup>65</sup> The Protocol activates the GATT with two main differences from the text of the treaty. These are first, a grand-

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62. Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L. L. 713, 735 (1971).

63. See General Agreement on Tariffs and Trade, *supra* note 39.

64. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, done Oct. 30, 1947, 61 Stat. A-2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308 (effective Jan. 1, 1948).

65. See generally E. MCGOVERN, INTERNATIONAL TRADE REGULATION 3-4 (1982); J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 369-89 (1977) [hereinafter cited as JACKSON 1977]; J. JACKSON, WORLD TRADE AND THE LAW OF GATT § 3.2 (1969) [hereinafter cited as JACKSON 1969].

father clause<sup>66</sup> immunising inconsistent legislation existing on October 30, 1947, and second, a shorter notice requirement for withdrawal from the GATT, namely sixty days rather than six months as in the GATT proper.<sup>67</sup> Neither of these differences affect the following discourse. In effect, the states' party to the Protocol apply the GATT treaty itself.

The object and purpose of the GATT are primarily to be garnered from the text of the treaty and particularly the preamble.<sup>68</sup> The GATT has a concise preamble. It expresses the purpose, scope and genus of tools embodied in the agreement. Economic wealth maximisation is to be achieved by a liberalisation of international trade barriers including tariffs, quantitative restrictions and discriminatory treatment. Article XXI reads as follows:

*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 UN Charter for the maintenance of international peace and security.<sup>69</sup>

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66. Protocol of Provisional Application, *supra* note 64, art. 1(a).

67. See, Protocol of Provisional Application, *id.* art. 5; *c.f.* General Agreement on Tariffs and Trade, *supra* note 39, art. XXXI.

68. I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 75 (1973) (citing Jacobs, *Varieties of Approach to Treaty Interpretation with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318 (1969); *c.f.*, Certain Expenses of the United Nations (Article 17(2) of the Charter), 1962 I.C.J. 150, 186 (Advisory Opinion of 20 July 1962) (J. Spender, separate opinion).

69. General Agreement on Tariffs and Trade, *supra* note 39, art. XXI.



Ninety nations are party to the GATT.<sup>70</sup> One, Tunisia, has acceded provisionally, and twenty-eight maintain *de facto* application of the GATT.<sup>71</sup> This is arguably equivalent to one hundred and nineteen contemporary, identical declarations by those states of their understanding of the state of law, at least *de lege ferenda*. This understanding cements into *lex lata* as their subsequent behaviours converge in compliance with the Treaty.<sup>72</sup> It is not clear whether this cementation has occurred for part of all of the GATT. An "extensive and virtually uniform" states practice is required.<sup>73</sup> A sense of legal obligation or *opinio juris sive necessitas* need accompany the behaviour.<sup>74</sup> However, as Professor Baxter has observed:

The hard fact is that States more often than not do not refer to or exhibit any sense of legal obligation in their own conduct. Mention of 'obligation' and 'duty' is more often to be found in statements about what other States should do than in a State's assertions about what it itself is doing.<sup>75</sup>

Difficulty in identifying a real sense of obligation has plagued the legal interpretation of General Assembly resolutions such as Resolution 2625 on Friendly Relations averted to above.

In the economic sphere, the problem is an acute one. Having different economic structures and in particular, different exchange mechanisms, the rules of and exceptions in the GATT system may be interpreted according to competing legal principles whose applications reflect a variety of value laden choices. A formal absence of restriction on certain conduct renders the conduct legally neutral but also has the effect of permitting it.<sup>76</sup> An aura of normalcy may develop so long as the neutrality of the law continues. This aura hides the structural differences between economies and the variety of values embedded in a pluralistic international constituency. Because much secrecy surrounds the national security policies of states, the problems of identifying, analysing and consensually reconciling these policies is compounded.

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70. E. MCGOVERN *supra* note 65, at 45-46.

71. *Id.* at 46.

72. Baxter, *Treaties and Custom*, 129 A.D.I.R.C. 25, 55 (1970).

73. North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 43 (Judgment of Feb. 20, 1969).

74. *Id.* at 44.

75. Baxter, *supra* note 72, at 68.

76. See J. STONE, *supra* note 17, at 83-86; Goldie, *Legal Pluralism and "No Law" Sectors*, 32 AUSTL. L.J. 220 (1958).

B. APPROACHING THE INTERPRETATION OF GATT ARTICLE XXI

Whether or not Article XXI and other provisions of the GATT have evolved into customary international law is a matter of interest because over one-third of the family of nations are neither party to nor apply the GATT, yet have significant economic and security interests. Before ascribing to the norm a customary character, identification of its content needs to be undertaken.

Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>77</sup> prescribe an order for assessing the relative value of the materials available for treaty interpretation.<sup>78</sup> Much doctrinal dispute surrounds the issue of treaty interpretation.<sup>79</sup> The very existence of relevant guiding principles has been challenged.<sup>80</sup> In any text one can find ambiguities and imprecisions.<sup>81</sup> The GATT is no exception. What follows will be an attempt to apply the interpretative process of the Vienna Convention without submerging the value laden choices which arise.

Article 31 of the Vienna Convention requires an examination of text, context, and relations between the parties following treaty formation. This article has arguably achieved the status of customary international law.<sup>82</sup>

Seven key issues will be investigated in an effort to interpret the GATT in relation to the Vienna Convention:

(1) The role of "good faith" in interpreting the national security exception to GATT obligations, including the use of Article XXI to excuse the impeding of the attainment of GATT objectives.

(2) The scope of Article XXI and the subject-matter to which it applies.

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77. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), reprinted in 63 AM. J. INT'L L. 875, 885 (1969).

78. I. SINCLAIR, *supra* note 68, at 73.

79. *See, e.g.*, Jacobs, *supra* note 68.

80. Stone, *Fictional Elements in Treaty Interpretation*, 1 SYDNEY L. REV. 344 (1955).

81. *See* D. O'CONNELL, INTERNATIONAL LAW FOR STUDENTS 108 (1971); Address by W. W. Bishop Jr., Seminar on the Law of Treaties, University of Michigan (Mar. 19, 1984); *c.f.* Report of the International Law Commission, 21 U.N. G.A.O.R. Supp. (No. 9) at 50 U.N. Doc. A/6309/Rev.1 (1966).

82. *See, e.g.*, *Opinion of Her Majesty's Law Officers*, Cmnd. 4589 at 15; I. SINCLAIR, *supra* note 68, at 14-23; Sixth Report on the Law of Treaties, [1966] 2 Y.B. INT'L L. COMM'N at 94, U.N. Doc. A/CN.4/186 (1966).

(3) The interrelationship between the most favoured nation rule (MFN) and security concerns.

(4) The use and abuse of security concerns in excusing a "nullification or impairment" of a contracting party's benefits under the GATT.

(5) Differentiation between restrictions on imports and restrictions on exports pursuant to Article XXI.

(6) The interpretation of Article XXI as a "waiver" clause additional to Article XXV.

(7) The issue of reference of political issues to the UN and of the Contracting Parties declining to pass upon politically sensitive issues.

### C. TWO GATT DISPUTES RAISING ARTICLE XXI ISSUES

The national security exception is of special relevance to U.S. defence policies. This is because U.S. policies are directed at both the interests of the United States and its allies. The United States remains the fulcrum of Western defence policies.<sup>83</sup> It is not surprising then to find the United States as the respondent in the two major GATT disputes involving Article XXI. The search is for cases, subsequent interpretative or applicative agreements, and states practice evidencing what states party to the GATT understand to be the meaning of Article XXI.

In the first case, very early in GATT history, Czechoslovakia complained to the GATT Council that the United States was in violation of its GATT obligations because American export licences were preventing certain exports to Czechoslovakia on a discriminatory basis. The United States relied upon Article XXI to excuse the effective removal of MFN to Czechoslovakia. Indeed, the U.S. action was a political statement aimed at the whole Soviet bloc. The Czechoslovakian government expressed concern at the tendency towards autarky which a broad reading of Article XXI would involve. The

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83. See, e.g., Report on the Effects of Oil Imports on National Security, Department of Treasury, 44 Fed. Reg. 18,818 (1979). Within the report, see a letter from Robert B. Pirie, Jr., Principal Deputy Assistant Secretary of Defense (MRAEL), to the Honorable Robert H. Mundheim, General Counsel, Department of Treasury (Feb. 26, 1979), 44 Fed. Reg. 18,828 (1979), that discusses an investigation of oil imports conducted under section 232(b) of the Trade Expansion Act of 1962. Within the report, see also a letter from Richard N. Cooper, Acting Secretary of State, to the Honorable Robert H. Mundheim, General Counsel, Department of Treasury (Apr. 3, 1978), 44 Fed. Reg. 18,841 (1979).

U.S. action was to be seen as an undue control based upon a pretext of national security.<sup>84</sup>

In the second case, by Presidential Proclamation No. 4941 of May 5, 1982, the President of the United States imposed an import quota on sugar.<sup>85</sup> Nicaragua was allocated a share of 2.1 percent of the total imports by volume. This share was in line with Nicaragua's market share for the period 1975-81. The quota took effect on May 11, 1982. A year later on May 10, 1983, the Nicaraguan quota was reduced from 58,000 short tons to 6,000 short tons. The U.S. action was part of a policy of supporting the government of El Salvador in a border dispute with Nicaragua. The economic sanction of cutting sugar imports from Nicaragua was designed to weaken the regional influence of the leftist Nicaraguan government. The difference was allotted to El Salvador, Honduras and Costa Rica, nations which are not party to the GATT. Nicaragua unsuccessfully sought consultations with the United States and then complained under GATT Article XXIII that the United States had, by its action, discriminated against Nicaragua and "nullified or impaired" Nicaragua's GATT benefits. The United States declined to accept GATT jurisdiction over the matter. It saw the dispute as politically sensitive and beyond the expertise of a technical economic organisation.

By Presidential Proclamation No. 5104 of September 23, 1983, a decision was implemented to further reduce the quota. Paragraph four included the following statement: "I find [that] the additional modifications of the quantitative limitations . . . give due consideration to the interests in the United States' sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade."<sup>86</sup> Whether this opinion is well grounded in the jurisprudence of the GATT is examined in the following discussion.

#### *D. THE DOCTRINE OF "GOOD FAITH" IN GATT JURISPRUDENCE*

The important condition of "good faith" is too often glossed over by commentators and becomes particularly relevant at the

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84. GATT Doc. CP.3/SR.22 at 4 (June 8, 1949); cf., GATT Docs. CP.3/SR.20, CP.3/23, CP.3/38, CP.3/39.

85. Proclamation No. 4941, 47 Fed. Reg. 19,661 (1982), *reprinted in* 96 Stat. 2740 (1982).

86. Proclamation No. 5104, 48 Fed. Reg. 44057 (1983), *reprinted in* 97 Stat. \_\_\_\_ (1983).

margin of the law of peace. The interpreter should be wary of the exercise of a legal right bestowed upon one constituent to the detriment of the communal whole.<sup>87</sup> Similarly, improper motive vitiates the legitimacy of permitted conduct.<sup>88</sup> An interpretation which condones acts which endanger international peace and security or constitutes illegal force is not in good faith. Even though the definitions of these two limitations upon state sovereignty have proven particularly elusive<sup>89</sup> a "good faith" interpretation of provisions such as GATT Article XXI require a limiting role to be recognised for the "good faith" principle.<sup>90</sup> This is so that the exception should not be validly invoked in support of action which makes a negative contribution to world peace.

International or national peace and security are not the primary objects and purposes of a treaty concerned with the liberalisation of trade. Recognising that the two concerns intersect, the treaty provides for its own continuity in crisis circumstances. The simple opening words of Article XXI can only be given a wide literal meaning at the expense of the object and purpose of the GATT. Article XXI is an exception to and not a rule of GATT law. Permitting unilateral interpretation without recourse to multilateral overview may appear to be value-neutral. It would allow the exception to emasculate the rules of a liberal trade order.

The International Court of Justice has been presented with an opportunity to pass upon the good faith limitation to unilateral interpretation of international law. In the *Case of Certain Norwegian Loans*,<sup>91</sup> Norway objected to the jurisdiction of the Court. She relied, in part, upon the French declaration accepting the compulsory jurisdiction of the Court which reserved from the Court's purview matters "which are essentially within the national jurisdiction as understood by the French government."<sup>92</sup> The Norwegian acceptance of compulsory jurisdiction was limited by a condition of

87. H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 286-88 (2d ed. 1966).

88. *Fur Seal Arbitration*, 1 *Moore's Arbitrations* 875, 890 (1893); Ilyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 *HARV. INT'L L.J.*, 47, 74 (1975).

89. See generally J. STONE, *CONFLICT THROUGH CONSENSUS* (1977).

90. *Accord* J. BRIERLY, *THE LAW OF NATIONS* 295-97 (4th ed. 1949).

91. *Case of Certain Norwegian Loans (Fr. v. Nor.)*, 1957 *I.C.J.* 9 (Judgment of July 6, 1957).

92. *Id.* at 21 (quoting the French Declaration).

reciprocity.<sup>93</sup> Norway was therefore entitled to withdraw from the Court's jurisdiction matters validly reserved therefrom by the French. Pursuant to Article 36(6) of its statute, the Court was faced with an enquiry into its own jurisdiction. By twelve votes to three, the Court held for Norway. Nine of the majority judges delivered a joint opinion which uncritically upheld the Norwegian objection. However, Judge Sir Hersch Lauterpacht held the French acceptance to be illusory and of no legal effect because a state could not validly accede to compulsory jurisdiction whilst withholding from the Court the judicial power to delimit that jurisdiction.<sup>94</sup> A similar analysis pertained to other instruments of acceptance of jurisdiction, notably those of the United States, Mexico, Pakistan, India, South Africa, Liberia and possibly the United Kingdom.<sup>95</sup> The United Kingdom limited the subject matter of its reservation to "national security." Nevertheless, if Judge Lauterpacht's analysis is to be accepted, the U.K. reservation is also invalid because the state rather than the Court is formally accorded the power to delimit the scope of its own reservation.<sup>96</sup>

The dissentients did not accept as legally valid such a withholding, but preferred to uphold the validity of the French acceptance by construing it as subject to an ultimate judicial power to delimit jurisdiction.<sup>97</sup> Norway could not be understood to have interpreted a legal document so as to give unreasonable or absurd consequences to that document.<sup>98</sup>

Judges Basdevant and Read (dissenting) applied the legal presumption of good faith by inserting a sense of objectivity into the reservation. The doctrinal differences reflect disagreement as to the value of compulsory jurisdiction relative to unilateral interpretations of international law in achieving a peaceful evolution of world public order. The majority did not enquire into the good faith of the French reservation. Its rule was that a state may decide for

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93. Statute of the International Court of Justice, art. 36(3), *reprinted in* [1972] Y.B.U.N. 1190.

94. *Case of Certain Norwegian Loans*, 1957 I.C.J. at 44-48.

95. *Id.* at 62-63.

96. *Id.* at 63; *see also id.* at 67-69 (J. Guerrero, (dissenting)).

97. *Id.* at 69 (J. Guerrero, dissenting). *See id.* at 71, 75-77 (J. Basdevant, dissenting); *id.* at 79, 94-95 (J. Reed, dissenting).

98. *Id.* at 94. *Accord* *Polish Postal Service in Danzig*, 1925 P.C.I.J. ser. B, No. 11, at 39 (Advisory Opinion of May 16, 1925); *Competence of General Assembly regarding admission to the United Nations*, 1950 I.C.J. 4, 8 (Advisory Opinion of Mar. 3, 1950).

itself what matters it will submit to third party or multilateral overview. Article XXI allows action which the acting state considers necessary for its national security. While the action must be taken in good faith, it is doubtful whether the element of good faith could be made the subject of judicial review.

In the GATT context, the withholding of information which contributes to trade liberalisation, albeit at some harm to national security, will not always concord with the smooth, pacific alleviation of trade disputes.<sup>99</sup> In Articles XXII and XXIII, the GATT emphasises consultative dispute resolution. For the process to be effective, frank disclosures and full discussion of the issues is required. Withholding information on security grounds can hinder this process.

Similarly, clause (b) excepts action taken by a state subjectively considered to be "necessary" for that state's self-protection. This clause does not, on its face, admit action to assist an ally or action which is desirable yet not necessary. The selection of these words suggests that a state is to endeavour to act in the manner least disruptive of international trade. Non-military emergencies,<sup>100</sup> defense supplies even in a non-weapons category<sup>101</sup> and the inputs to the nuclear weapons cycle<sup>102</sup> are included in the subject matter of this clause. States are given a broad scope for actions taken in self-protection. A supplier of natural resources such as iron ore and uranium would want to restrict supply to nations which might process these inputs for weapons manufacture and use the weapons against the original supplier.<sup>103</sup>

Finally, clause (c) excepts action mandated by the UN Security Council and possibly the General Assembly<sup>104</sup> to keep peace.<sup>105</sup> The example of sanctions against Rhodesia in 1965 would fall into this category.<sup>106</sup> Leaving such a broad exception for unilateral interpretation runs the risk that the exception will be invoked in a manner

99. GATT Doc. L/5426 (Dec. 2, 1982).

100. General Agreement on Tariffs and Trade, *supra* note 39, art. XXI(b)(iii).

101. *Id.* art. XXI(b)(ii).

102. *Id.* art. XXI(b)(i).

103. Comments of the Australian Delegate, U.N. Doc. E/PC/T/A/SR.40(2) at 9 (1947); U.N. Doc. E/CONF.2/C.6/12 at 24 (GATT *travaux préparatoires*).

104. JACKSON 1969, *supra* note 65, at 748.

105. *See, e.g.*, U.N. CHARTER arts. 36, 39-50.

106. *See, e.g.*, 21 U.N. SCOR (1340th mtg) at 7, U.N. Doc. S/232 (1966).

inconsistent with the object and purpose of the GATT and without regard to the collective interest in international peace and security. This risk is an Achilles heel of the GATT.

Amending Part I of the GATT, which contains the MFN obligation of unanimity,<sup>107</sup> to allow single states to apply the principle only at those times when a self-perceived threat to national security is absent, seems overly permissive of unilateral suspensions of MFN. Indeed, Article XXI does not literally prevent suspension or termination of MFN to states to which the perceived threat is not sourced. This seems to be a particularly dangerous loophole. Nevertheless, the loophole persists. Such action, would, however, be an impediment to attaining an objective of the GATT: trade on the basis of MFN, and a valid basis for complaint under Article XXIII.

*E. THE SCOPE AND SUBJECT MATTER OF GATT ARTICLE XXI*

The scope and subject matter of Article XXI was raised by Czechoslovakia in the abovementioned complaint against the United States. To Czechoslovakia, the subject matter of Article XXI was "arms, ammunition and implements of war and other goods and materials for purposes of supplying a military establishment" and items of that genus. Because the U.S. definition of "war material" covered all goods for which the significant disclosure requirements for an export licence were not satisfied, it was argued by Czechoslovakia to be too indefinite a condition to pass muster. The commodities controlled were but 200 items of a list of 3,000 classified exports.<sup>108</sup> The United States did not, in its reply, clarify its legal definition of goods covered by Article XXI. Still, at the twenty-second meeting of the Contracting Parties in 1949, the British, Cuban, and Pakistani representatives all supported the U.S. position that the definition of goods in Article XXI covered dual-use items (which could be diverted from peaceful to hostile uses) and that that definition was a matter for each state to determine for itself.<sup>109</sup>

Czechoslovakia's commitment to free trade, being herself a socialist rather than market economy, may be questionable. Nevertheless, the interpretation of Article XXI proffered by the

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107. General Agreement on Tariffs and Trade, *supra* note 39, art. XXX.

108. GATT Doc. CP.3/SR.20 at 8.

109. *Id.* at 4.



Czechoslovakian representative, Mr. Augenthalier, seems less conducive to autarky and disorder.<sup>110</sup> However, a more restrictive interpretation would be rendered unworkable without a commitment from the militarily more powerful Western nations to objective rules. In deciding against the Czech complaint, the approach taken accorded the GATT no impact upon the development of pre-existing law. Permitting each state to follow an autarkic security policy without overview left the Article XXI exception open to abuse. The floodgates had been opened. An element of entropy had been introduced into a system whose stability depended upon effective consultations to resolve disputes. GATT rules could effectively be ignored on "security" grounds. On March 11, 1953, Peru restricted imports from non-market economies as a political measure. Article XXI was relied upon in support.<sup>111</sup> After lengthy consultations and reviews, the decree was lifted on August 1, 1967.<sup>112</sup> The loophole established by the earlier decision was given full play.

In 1959, the United States began limiting oil imports, ostensibly for national security reasons.<sup>113</sup> Though not raised in the GATT context, the U.S. trade embargo against Cuba in 1962.<sup>114</sup> would also seem to utilise the loophole.

At the sixteenth session of the Contracting Parties in 1960, the United Kingdom, Netherlands, Malaya and Australia reported on the relaxation of import restrictions.<sup>115</sup> Restrictions maintained under Articles XX and XXI were considered a distinct category whose bounds remained beyond regulations and undefined.<sup>116</sup> A year later, Ghana invoked Article XXI openly relying upon the loophole which emerged from the United States—Czechoslovakia dispute.<sup>117</sup> Ghana considered that Portugal's involvement in the war in Angola threatened peace in Africa. A perceived threat to African peace was equated with a danger to the essential security interest of

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110. Cf., McDougal, *International Law and the Future*, 50 *Miss. L.J.* 259, 310-14 (1980).

111. GATT Doc. SR.9/27 at 10 (1955).

112. See GATT Doc. L/2844 (1967).

113. GATT Doc. L/1774 at 9 (May 21, 1962).

114. Proclamation No. 3447, 27 *Fed. Reg.* 1085 (1962), reprinted in 76 *Stat.* 1446 (1962).

115. GATT Doc. SR.16/5 at 56 et *passim* (June 13, 1960).

116. *Id.* at 56 (Mr. Jardine for the United Kingdom); *id.* at 57 (Mr. de Bruyne for the Federation of Malaya).

117. GATT Doc. SR.19/12 at 196 (Dec. 12, 1961).

Ghana. That the threat to Ghana was political more than military was considered no objection to the validity of Ghana's invocation of Article XXI. Ghana did not, however, oppose the full membership in the GATT at that time being proposed for Portugal. The view seems to have been taken by Ghana that bringing Portugal into the GATT fold and applying Article XXI would be progressive in both economic and political terms. The trend towards entropy continued. In 1962, Australia declined to notify its restrictions on ships as required by then residual-restrictions-reporting-requirements because these restrictions were "applied pursuant to article XXI."<sup>118</sup>

None of these claims were questioned or reviewed to test the validity of the reliance on Article XXI. Not until November 1982, did the Contracting Parties as a whole recognise that the exception was in need of limitation. Initial procedural guidelines were announced and a formal interpretation heralded. States were to be "as fully informed as possible," "subject to the exception in clause (a)" of action taken under Article XXI.<sup>119</sup> The decision is significant because it publicly noted the potentially disruptive effects of trade restrictions grounded upon Article XXI. Being a first step, the decision was expressed in tentative, hortatory language. The pressure to reverse the entropic effects of the now standing interpretation of Article XXI has lately come to a head following the recently completed investigation of Nicaragua's complaint against U.S. import restrictions on Nicaraguan sugar.

The Ministerial Declaration of 1982,<sup>120</sup> which sought to dampen the damages of the literal construction of Article XXI, was reportedly referred to by Nicaragua. Nicaragua would no doubt have construed the U.S. action as contrary to the spirit of that Declaration.

Although the Nicaragua-El Salvador border disturbances could legitimately be viewed as a threat to the national security of El Salvador, an ally of the United States, any threat to the United States was, at most, remote. Article XXI permits a state to take action with respect to "*its* essential security interest."<sup>121</sup> The protection of the interests of allies would not seem to ground invoca-

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118. GATT Doc. L/1774 at 4 (May 21, 1962).

119. GATT Doc. L/5426 (Dec. 2, 1982).

120. *Id.* at 295.

121. General Agreement on Tariffs and Trade, *supra* note 39, art. XXI (emphasis added).

tion of the *national* security exception. An attempt to except intergovernmental agreements for military supply<sup>122</sup> did not survive into the final text of the GATT.<sup>123</sup> Further, the subject-matter or range of products to which Article XXI applies would need to be tested. Sugar would seldom be even an indirect input into defence preparedness.<sup>124</sup>

Although the issue whether sugar was a commodity within the subject-matter of Article XXI was not faced in the U.S.-Nicaragua dispute before the GATT Panel, the U.S. position seems, at least at first sight, to be overbroad. In the context of U.S. restrictions on the export of high technology, the EEC has protested that "foreign policy" as opposed to "national security" restrictions are contrary to the GATT and also far from encouraging for the supporters of the market exchange mechanism in international trade.<sup>125</sup> Extrapolating from this, the EEC would consider the U.S. action against Nicaragua similarly inexcusable.

The U.S. position provides quite an analytical challenge. It cannot be assumed that the American action was unjustifiable under the GATT without further enquiry. One can but speculate as to why Article XXI was not specifically invoked. The climate of U.S.-Nicaraguan relations has been neither friendly nor peaceful in recent times. To discover whether the GATT is intended to apply in such an atmosphere, an examination of the *travaux préparatoires* of the GATT rather inconclusively suggests that the exception is limited to the subset of political disputes concerned with national security. Arguably, that exception is the only legal excuse provided for.

It is worth noting that pre-GATT U.S. reciprocal trade agreements generally contained exceptions for restriction of military supply, emergency and military self-protection, and the

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122. Report of the Joint Sub-committee, Fifth Committee: Inter-governmental Commodity Agreements and Sixth Committee: Organization, U.N. Doc. E/CONF.2/C.5/14 and U.N. Doc. E/CONF.2/C.6/45 (1948); Comment of Australian Delegation, U.N. Doc. E/CONF.2/C.6/12 at 24-5 (1948).

123. See *supra* notes 99-100 and accompanying text.

124. *Contra* Comment of the Australian delegation, U.N. Doc. E/CONF.2/C.6/12 at 24-25; see *infra* text accompanying note 136.

125. Aide-Memoire of the Commission of the European Communities and the Government of France presented to the U.S. Department of State, Apr. 28, 1983 at 2-3 and of Mar. 14, 1983 at 6.

maintenance of neutrality.<sup>126</sup> These agreements influenced the U.S. suggestion for an International Trade Organization (ITO) which was made in September 1946, and included a draft charter which formed a basis for the first draft of the Preparatory Committee of the UN Conference on Trade and Employment. It included exception for the "adoption or enforcement" of measures *inter alia*

- c. relating to fissionable materials;
- d. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- e. in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; . . .
- k. undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.<sup>127</sup>

In the Geneva draft of the Charter, produced at the Preparatory Committee's second session in 1947, Article 94 entitled "General Exceptions" included exceptions in the very terms of the ultimate GATT Article XXI.<sup>128</sup> Earlier that year the Drafting Committee had prefaced the exceptions with the present opening words of Article XX.<sup>129</sup> The same words were inserted into both the proposed ITO Charter<sup>130</sup> and GATT<sup>131</sup> agreements. The records of the Preparatory Committee show that the problem of interpreting subparagraph (e) was raised by the Dutch delegate. The Committee Chairman, His Excellency Erik Colban, suggested "that the spirit in which Members of the Organisation would interpret these provisions was the only guarantee against abuse."<sup>132</sup> Consensual rather than

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126. See, e.g., Agreement between the United States of American and Mexico respecting reciprocal trade, Dec. 23, 1962, 57 Stat. 833, art. XVII(f), (g)(h), at 850 E.A.S. No. 311; Agreement and supplemental exchange of notes between the United States of America and Uruguay regarding reciprocal trade, July 21, 1942, 56 Stat. 1624, art. XV(f) (g) and (h), at 1637-38, E.A.S. No. 276.

127. Dept. of State, Suggested Charter for an International Trade Organisation, Pub. No. 2598, reprinted in The Report of the First Session of the Preparatory Committee of the United Nation's Conference on Trade and Employment, U.N. Doc.E/PC/T/33 at 60.

128. See Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. Doc. E/PC/T/186 at 56.

129. See generally Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference of Trade and Employment, U.N. Doc. E/PC/T/34 and Rev. 1.

130. *Id.* at 31, art. 37.

131. *Id.* at 77, art. XX.

132. U.N. Doc. E/PC/T/A/SR/33 at 3.

unilateral regulation of the operation of the security exceptions was not pursued at the meeting. At this stage, the exception for non-disclosure of security sensitive information was also added.<sup>133</sup>

In 1948, a number of amendments to the exception were proposed to the Fifth and Sixth Committees. They were not expressed in the final text. However, the record does not disclose whether they were substantively rejected or simply put in the "too hard" basket. They included: (1) A Joint Subcommittee of the Fifth and Sixth Committees agreed to except intergovernmental agreements for essential military supplies and the liquidation of military stockpiles.<sup>134</sup> (2) Australia was concerned to see that *any* goods, whether directly or indirectly used for military purposes, be covered. The example given was iron ore, a raw material for most weapons systems and for whose supply Australia was a major source.<sup>135</sup> One might speculate whether, had the export of sugar been considered the word "any" would have been qualified.<sup>136</sup> (3) Costa Rica proposed to specifically exempt tariff readjustments made necessary by currency fluctuations and to add an exception for the maintenance of state monopolies.<sup>137</sup> This was withdrawn in the light of discussion of other charter provisions.<sup>138</sup> (4) India proposed a broad exception for state action in support of essential non-military, political interests. The strained relations between India and the Republic of South Africa were cited as a subject of the proposed exception.<sup>139</sup> Iraq made a separate yet similar proposal.<sup>140</sup> (5) Egypt sought specific exception for "severance of diplomatic relations or existence of a state of belligerency."<sup>141</sup> This was presumably

133. *Id.* at 4.

134. See generally Report of the Joint Sub-Committee, Fifth Committee: Intergovernmental Commodity Agreement; Sixth Committee: Organization U.N. Doc. E/CONF.2/C.5/14 (1948) and U.N. Doc. E/CONF.2/C.6/45 (1948); Report of Sub-Committee I (Article 94), Sixth Committee: Organization U.N. Doc. E/CONF.2/C.5/93 (1948). The Australian delegation, in particular, pressed for a wide exception covering supply to both a primary nation's defense establishments and those of its allies. See Comment of the Australian delegation, *supra* note 124.

135. See Comment of the Australian Delegation, *supra* note 124.

136. See Comment of the Australian Delegation, *supra* note 125 and accompanying text.

137. *Id.*

138. See Report of Sub-Committee I (Article 94) U.N. Doc. E/CONF.2/C.6/93 at 1 (1948).

139. See Comment of the Australian Delegation, *supra* note 124.

140. Iraq Amendment to Article 94 (General Exceptions) U.N. Doc. E/CONF.2/C.6/12/Add.9 (1947).

141. Annotated Draft Agenda U.N. Doc. E/CONF.2/C.6/12 at 26 (1947).

designed to cover the gap in Arab-world relations with Israel. It too was withdrawn prior to the establishment of the subcommittee.<sup>142</sup>

In reviewing the subcommittees' reports, M. de Gaiffier of Belgium suggested that only military security rather than national security should be the scope of the exception.<sup>143</sup> The French text, "ordre Militaire," may have been read to suggest that military interference with trade was at the hub of the exception. This suggestion was quickly withdrawn following opposition from the British, Chilean, American and Costa Rican delegates.<sup>144</sup> Poland on the other hand opposed provision for unilateral measures for political reasons in the commercial field.<sup>145</sup>

The compromise in the final text is broader in scope than an exception for military matters might be, but it does not extend to political sanctions not primarily protective of the sanctioning nation's own security. The apparent confinement of the exception to matters of only national security concerns confirmed by the *travaux preparatoires* does not appear to have influenced the conduct of the more powerful nations led by the United States. Without the support of dominant states, customary law, as regards both the elements of usage and obligation necessary to giving a treaty norm creating effect, does not appear to have crystallized. The *travaux preparatoires* do not register a consensus upon the more closely defined issues of Article XXI. Although information flows, as well as the movement of goods could be validly restricted, the limitation of scope and subject-matter to the subset of political issues encapsulated in the description "national security" was not given an element of specificity. Some states, notably Australia, saw the relevant items of trade to which Article XXI could be applied rather broadly. There was no decision to approach this definitional issue on a multilateral basis. Nevertheless, the principle of multilateral trade regulation does not automatically translate from peacetime to periods of crisis.

The effect of hostilities upon the obligation to accord MFN treatment has even recently been placed in the "too hard" basket

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142. See Report of Sub-Committee I (Article 94) U.N. Doc. E/CONF.2/C.5/93 at 1 (1948).

143. Summary Record of the Nineteenth Meeting, Sixth Committee U.N. Doc. E/CONF.2/C.5/SR.19 at 1 (1947).

144. *Id.* at 2.

145. *Id.* at 4.

by the International Law Commission.<sup>146</sup> It seems that commercial treaties generally do not survive a declaration of war.<sup>147</sup> This is so because performance of obligations becomes impossible, or at least of lower priority, than the war effort. Survival interests take precedence. In a cold war situation, however, the climate is one of crisis, but it is unlikely to involve survival interests in an objective sense. While states may struggle for influence over others in the course of a cold war, their very survival as states is generally not at risk. If national security is construed narrowly to mean such survival, the Article XXI exception may not validly be invoked to deal with cold war pressures. If, however, a wider construction is to be preferred, GATT obligations may validly be departed from in dealing with cold war crises.

Given that the Protocol of Provisional Application permits withdrawal from the GATT upon sixty days notice, non-withdrawal from the GATT indicates a willingness to be bound by the GATT upon the resolution of the crisis. So, on either approach to Article XXI, it seems that GATT treaty obligations are designed to survive a cold war situation. The content of the rule during a cold war does appear to have been flexibly interpreted. GATT obligations have generally been modified but not abrogated in crises short of war.

*F. THE IMPACT OF SECURITY CONCERNS ON THE MOST FAVOURED NATION OBLIGATION*

In the Czechoslovakia-United States dispute, the United States argued that Article XXI did admit the suspension of MFN.<sup>148</sup> The Cuban and Pakistani delegates on the GATT Panel explicitly agreed that Article XXI did admit suspension of MFN.<sup>149</sup> Czechoslovakia, on the other hand, did not concede that security restrictions necessarily had to be applied in a discriminatory manner.

The issue, not fully dealt with during the discussion in the GATT, appears to be whether it is trade in certain products or trade

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146. Report of the International Law Commission on its Thirtieth Session [1978] 2, Pt. 2, Y.B. INT'L L. COMM'N 71, para. 4, U.N. Doc. A/33/10 (1978). (Commentary to Draft Article 27 on the Most Favoured Nation Clause).

147. See J. STONE, *supra* note 23.

148. *Contra* GATT Doc. CP.3/SR.22 at 4-5.

149. *Id.* at 5 (Mr. Herrera-Arango of Cuba), at 6 (Mr. Hasnie of Pakistan).

with certain countries, regardless of the products involved, which is to be restricted in a valid exercise of Article XXI. If the former, then discriminatory restrictions are illegitimate. If the latter, they are quite valid. The ultimate rejection of the Czech complaint impliedly tilted the balance in favour of the latter view.

However, in view of the centrality of the MFN clause to the GATT and the absence of explicit decision on this point, the question cannot be said to have been resolved. The problem also bubbled beneath the surface in the recent U.S.-Nicaragua dispute.

The reduction of Nicaragua's quota was an economic sanction implemented for political reasons. It accorded Nicaragua treatment less favourable than the United States Schedule of Concessions under Article II of the GATT. Indeed, for the 1983-84 year, Nicaragua had anticipated being able to ship 61,950 short tons to the United States, its main export market. Worse still, GATT Contracting Parties shipping sugar to the United States now had a relatively smaller share of the U.S. sugar market because the nations to which the Nicaraguan quota had been reallocated were not party to the GATT. Although only 2.1 percent of U.S. imports, the sugar trade was an important component of Nicaragua's export trade. Among other arguments,<sup>150</sup> a violation of Article XIII was alleged.

Article XIII prohibits discrimination on the basis of nationality in applying quantitative restrictions. Even where quotas are imposed, MFN is upheld. Under the GATT every Contracting Party, for any particular product, is to treat every other Contracting Party as favourably as it does its most favoured trading partner. A single tariff level is to apply to imports whatever their source. With respect to quotas no foreign supplier is to suffer more than any other as a result of the imposition of quotas.

Since the seventeenth century, MFN clauses have been included in commercial treaties.<sup>151</sup> MFN involves a claim to rights available to another state whether or not that other state exercises its entitlement. For when the Nicaraguan sugar quota was reallocated, GATT members could claim a right to treatment at least

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150. Nicaragua also claimed violation of art. XI and Part IV of the GATT.

151. Report on the Most Favoured Nation Clause, [1978] 2, Pt. 1, Y.B. INT'L L. COMM'N 5, U.N. Doc. A/CN.4/309 (Nikolai Ushakov, Special Rapporteur). See MCGOVERN, *supra* note 65, at 197.



as favourable as that accorded to El Salvador, Honduras and Costa Rica whether or not those states were, in fact, able to fill the Nicaraguan quota. Had no such reallocation occurred, the MFN standard would not have shifted. Although the shift in the MFN standard has not resulted in claims by other GATT parties, the reallocation, as a step additional to the cutback in the Nicaraguan quota, does not appear to be a breach of MFN which is excusable under Article XXI. Reference to GATT obligations appears to have been outweighed by political considerations in constructing the sanction.

The United States' focus was not upon restricting sugar imports as a means of safeguarding its national security, rather it was upon reallocating a GATT member's quota to other suppliers whose political bent was preferred by the United States. The United States saw such a measure as beyond the jurisdiction of the GATT Contracting Party even though its fellow GATT members were losing the benefits of MFN in the sugar trade. As a precedent, the actions of the United States are not conducive to healthy operation of the MFN principle.

#### *G. THE SETTLEMENT OF GATT DISPUTES INVOLVING SECURITY CONCERNS*

This section examines the relationship between GATT Articles XXI and XXIII. Can an action excusable under Article XXI nevertheless constitute a "nullification or impairment" for which a GATT remedy is to be had? Phrased differently, does the valid invocation of Article XXI excuse the invoking state from compliance with GATT dispute resolution mechanisms? At the Geneva sessions drafting the charter for the proposed ITO, the answer was that action taken to protect the national security could give rise to a remediable complaint.<sup>152</sup> After all, restriction of exports to a target state forces the target to pay more for its imports by virtue of the volume of available supply falling relative to demand. Restriction of imports from a target results in the target being paid less for its exports as demand falls relative to the available supply. Cutting off finance or aid to a target state reduces the target's ability to develop its own industries. Unable to produce at home, the target becomes dependent on supply from abroad.

However, just as Rhodesia circumvented most of the economic sanctions placed upon it for over a decade, so can most target states

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152. E/PC/T/A/SR.33 at 5; see also JACKSON 1969, *supra* note 65, at 748.

mitigate, but not wholly escape, the ill effects of actions taken pursuant to Article XXI.<sup>153</sup> The availability of mitigation does not negative a legal claim of "nullification or impairment." Also, it matters little to the affected state that exports or imports are the subject of unwarranted action. Unilateral restrictions for national security reasons may seldom be anticipated by the target state.<sup>154</sup> Whether or not excusable under Article XXI, the target, as in the case of Nicaragua discussed above, can usually show a *prima facie* nullification or impairment. The use of quantitative restrictions or a violation of a GATT obligation shifts the burden of providing damage away from the target state.

The sanctioning state needs to then excuse its action.<sup>155</sup> In the U.S.-Nicaragua sugar dispute, the United States elected not to follow this procedure but rather declined to accept the jurisdiction of the GATT Panel over an action taken for security reasons. The Panel felt duty bound to find in Nicaragua's favour. It did not condone the U.S. stance of declining the GATT's jurisdiction in a case where an overt economic measure violated a GATT obligation.

In the Czechoslovakia-U.S. case, the United States did defend its sanctions which did not so much ban exports as place a heavy administrative burden on persons seeking an export licence. The complainant state, faced with the respondent's reliance on Article XXI, has little by way of relief to look forward to until the crisis has passed.

To the Czech claim that the information requested by the officials administering the export controls had been supplied, the Cuban representative on the Panel replied that the rigour and stringency of those officials was not a ground for complaint to the GATT. The appellate procedures of U.S. law were designed to constrain excesses.<sup>156</sup> Any misapplication of the controls to goods neither imported into Czechoslovakia for war purposes (nor otherwise covered by Article XXI) should be the subject of further direct

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153. G. HUFBAUER & J. SCHOTT, ECONOMIC SANCTIONS IN SUPPORT OF FOREIGN POLICY GOALS 29-30 (1983).

154. See Report adopted by the GATT Contracting Parties on Apr. 3, 1950 on The Australian Subsidy on Ammonium Sulphate, pursuant to a complaint by Chile, GATT Doc. DP.4/39, II BISD 188 (1952), Report adopted by the GATT Contracting Parties on Feb. 26, 1955 on Swedish Anti-dumping Duties, pursuant to a complaint by Italy, GATT Doc. L/428, 3 BISD 81 (1955).

155. See JACKSON 1969, *supra* note 65, at 182.

156. E/PC/T/A/SR.33 at 5.

negotiations between the United States and Czechoslovakia rather than of a GATT investigation.<sup>157</sup>

The rigorous manner in which U.S. export controls are enforced has continued to cause concern in the international arena. The pending amendments to the Export Administration Act<sup>158</sup> have met with sharp criticism from both inside and outside the United States. For example, the EEC has protested the "negative implications . . . for international trade" of the proposed increase in the administrative burden upon holders of export licences.<sup>159</sup> Governmental interference with technological data flows has drawn criticism from the scientific community.<sup>160</sup> A heightened intensity of customs inspections under the export controls of "Operation Exodus" has done little to enamour customs officials to American business.<sup>161</sup>

In contributing to the GATT Panel discussion of the Czech claim against the United States, the United Kingdom representative hedged, arguing that "every country must have the last resort on questions relating to its own security. On the other hand, the Contracting Parties should be cautious not to take any step which might have the effect of undermining the General Agreement."<sup>162</sup> The decision of the Contracting Parties was that the United States "had not failed to carry out its obligations under the Agreement through its administration of the issue of export licences."<sup>163</sup> So, it seems that rigorously enforced licence procedures may withstand a complaint that they constitute a nullification or impairment.<sup>164</sup>

The U.S. Department of Commerce has recognised that "should the security exception be invoked, it could not necessarily foreclose a successful challenge under Article XXIII by G.A.T.T. members claiming impairment of tariff concessions."<sup>165</sup> The Commerce Department view may not represent the U.S. viewpoint if and when the

157. *Id.* at 6-7.

158. H.R. 3231, 98th Cong., 1st Sess. 129 Cong. Rec. S4183 (1983); and S.979, 129 Cong. Rec. H3660.

159. See Aide-Memoire, *supra* note 42.

160. See, e.g., Zonderman, *Policing High-Tech Exports*, N.Y. Times, Nov. 27, 1983, § 6 (Magazine), at 100 *passim*.

161. *Id.*

162. See *supra* note 156, at 7.

163. *Id.* at 9.

164. At least insofar as the GATT discussion and decision influence future decisions.

165. United States Department of Commerce, *The Effect of Imports of Nuts, Bolts and Large Screws on the National Security* (Feb. 1983) at 57.

GATT Contracting Parties require the United States to offer compensation for action excusable, yet causing a nullification or impairment of GATT benefits to other members. However, the United States does not have the domestic legal authority to pay compensation.<sup>166</sup>

#### H. DIFFERENTIATION BETWEEN IMPORTS AND EXPORTS

From the perspective of a state on the receiving end of sanctions, the principles involved are to be viewed similarly for export controls and for import controls.<sup>167</sup> Although the economic parameters differ, the legal limits to Article XXI action will differ little between import and export restraints.

Where export controls are in place, they are generally applied to goods for which demand exceeds supply. To be effective, a withholding of exports cannot afford to be mitigated from alternative sources of supply. Being a major supplier of high technology items in ever increasing demand around the world, the United States can use restrictions on the export of "know-how" to pressure other states. This is particularly so in cases where the U.S. need for export markets is exceeded by overseas demand for U.S. know-how. Where an import control is applied, an excess of supply over demand is conducive to effectiveness. The glut in world sugar markets also aided U.S. sanctions against Nicaragua.

#### I. WAIVER OF ACTIONS TAKEN TO PROTECT SECURITY

GATT Article XXV allows the Contracting Parties to waive any GATT obligation in exceptional circumstances not otherwise provided for. A two-thirds majority of votes cast which must include over half the GATT membership is required to approve a waiver. Waivers may be for a limited duration but need not be.<sup>168</sup>

In 1951, the United States suspended MFN towards the Soviet bloc states, an action broader than the earlier restriction of export licences. On this occasion, the Contracting Parties ruled that the U.S. and Czech Governments "shall be free to suspend, each with respect to the other, the obligations of the General Agreement on Tariffs and Trade."<sup>169</sup> This ruling would seem to reflect the classical

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166. *Id.* at 57.

167. *See supra* note 78 and accompanying text.

168. *See e.g.*, Waiver to the United States regarding the restrictions under the Agricultural Adjustment Act, 3 BISD 32 (1955); *cf.* GATT Doc. L/339, 3 BISD 141 (1955).

169. GATT, II BISD 36 (1952).

legal position wherein the only regulation of international economic sanctions was each state's desire to be seen as a good faith participant in its relations with other states. The ruling operated as a waiver of U.S. GATT obligations to Czechoslovakia but did not conform to GATT Article XXV(5).

It does seem that the waiver authority in GATT Article XXV was not invoked because of some parties' doubts as to the very relevance of the GATT to a political dispute. The cold war atmosphere clearly pervaded the matter and the GATT Panel's investigation. A similar climate surrounded the U.S.-Nicaragua dispute before the GATT Panel in 1983-84.

Differing from the Panel's approach in the dispute between the United States and Czechoslovakia, even an informal waiver of GATT obligations as between the United States and Nicaragua, was not examined by either the Panel or Contracting Parties. This difference may have been influenced by the Ministerial Declaration of November 30, 1982.<sup>170</sup> The initial step back towards multilateral rather than bilateral or unilateral interpretive mechanisms having been made, the Contracting Parties did not desire to condone a sanction of doubtful legality. Perhaps a more limited role for waiver of GATT obligations, even if outside the lines of Article XXV(5), is in the offing. One that recognises that the waiver should indeed be limited to exceptional circumstances not otherwise provided for in, for example, Article XXI.

*J. JURISDICTIONAL DEFENSE ES EN ALTERNATIVE TO ARTICLE XXI*

If one were to apply the law on self-preservation in the economic arena, the legal reasons why the United States viewed its action as justifiable would need to be based upon an illegal act by Nicaragua validly construed as opposable to the United States. The U.S. redistribution of Nicaragua's sugar quota then would be a reasonable proportionate reprisal. Dr. Alan Gerson, for example, has argued that because Nicaragua was engaged in the subversion of El Salvador, there is an illegal act to which El Salvador may validly respond with U.S. assistance. The legality of the U.S. action is derived from the legality of the El Salvadoran response.<sup>171</sup>

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170. GATT Doc. L/5426.

171. Gerson, *U.S. Acts Lawfully*, N.Y. Times, May 4, 1984, at A31, col. 1.

The U.S. action involved both military measures, such as involvement with the laying of mines in Nicaraguan ports, and economic measures, such as the restriction of sugar imports. As to the former, the matter has been partially litigated before the International Court of Justice (ICJ). The United States chose not to rely upon its reservation to ICJ jurisdiction, known generally as the Conolly Amendment.<sup>172</sup> This is surprising, given the Court's approval of this type of reservation in the Franco-Norwegian Loans Case.<sup>173</sup> Instead, an abortive attempt was made to modify the American acceptance of ICJ jurisdiction. The ICJ did not pass upon the validity of this modification in ordering, as a preliminary measure, the cessation and non-resumption of the blocking of or endangering access to Nicaraguan ports by the United States.<sup>174</sup> The ICJ has not declared the U.S. action to be an illegal use of force. The Court did reaffirm the principles applicable to the use of force and recommended against further action which might aggravate the dispute.<sup>175</sup> The United States claimed it had already ceased the mining and declared its intention to abide by the ruling.<sup>176</sup> It has also continued to support El Salvador, Costa Rica and Honduras in their dispute with Nicaragua. Notably these are the very states to whom the Nicaraguan sugar quota was "reallocated." The support has continued to include military and economic measures.

Before the GATT Panel the United States argued that because its action was not economically motivated, the dispute could not be resolved within the field of relations covered by the GATT. Arguments with respect to the discriminatory nature of the restrictions were reserved by the United States. The Panel found that the U.S. action constituted illegal discrimination and concluded that the United States was in breach of its obligations having violated GATT Article XIII. It did not decide the other issues raised by Nicaragua. The effect of both the GATT Panel and ICJ findings, contrary to American submissions, has not been a cessation of U.S. involvement nor a return to stability in the region. In the present

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172. See 1978-1979 I.C.J.Y.B. 56 (1979).

173. Case of Certain Norwegian Loans, 1957 I.C.J. 9. For a discussion of this case see *supra* note 83 and accompanying text.

174. *Text of World Court's Ruling on Nicaragua*, N.Y. Times, May 11, 1984, at A9, col. 1.

175. *Id.*

176. *Court's Ruling Acceptable, State Department Declares*, *id.* at A8, col. 1.

177. Report of Sub-Committee I (Article 94) U.N. Doc.E/CONF.2/C.6/93 at 3-4 (1948).

absence of a ruling by the ICJ upon the ultimate legitimacy of U.S. involvement, one can conclude only that the GATT Contracting Parties consider the U.S. in violation of at least its GATT obligations. The overall legality of its action may also fall under a cloud given the thrust of the provisional measures adopted by the ICJ.

Insofar as an economic body was not an appropriate forum, the American submissions derive some support from the GATT *travaux preparatoires*, in particular, the records of the Subcommittee of the Fifth and Sixth Committees dealing with this question. The Subcommittee was overall of the view that political matters including politically motivated economic measures were within the jurisdiction of the UN, the jurisdiction of which the proposed ITO ought not interfere.<sup>177</sup> Although regulation of such measures through the proposed ITO was disavowed, regulation by the United Nations was considered by the Subcommittee to be preferable to unilateral governance.<sup>178</sup>

In the Sixth Committee, the Subcommittee's position was the subject of some debate. The Australian, Belgian and Swedish delegates considered that the ITO should not be left without capacity to act upon economic measures taken for political reasons where the UN did not or would not involve itself.<sup>179</sup> The delegates of the United Kingdom, Greece, the United States, South Africa, Iraq and India argued that a technical, economic organisation ought to decline jurisdiction over political matters. Indeed, Mr. Holloway of South Africa remarked, "[i]f an economic measure which led to a complaint was related to a political dispute which was itself not important enough to come before the United Nations, there was a presumption that the political aspects of the dispute were not significant."<sup>180</sup>

Perhaps the essence of the debate is best summarised in the remark of Mr. Paiva of Brazil. He suggested that declining jurisdiction for the ITO provided a pragmatic and generally acceptable solution for states most concerned with the problem.<sup>181</sup> These nations could not be coerced to submit to a jurisdiction upon whose

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177. Report of Subcommittee I (Article 94) U.N. Doc. E/CONF.2/C.6/93 at 3-4 (1948).

178. Statement of the Chairman of the Sub-Committee I U.N. Doc. E/CONF.2/C.6/104.

179. See Summary Record of the Thirty-Seventh Meeting, Sixth Committee U.N. Doc. E/CONF.2/C.6/SR at 3-5, (1948).

180. *Id.* at 4.

181. *Id.* at 5.

parameters agreement could not be reached. Even so, these differences of opinion related directly to the ITO, which was stillborn. The GATT has become a reluctant replacement. Not all states are willing to submit security concerns to multilateral regulation. The powerful nations reserve unto their unilateral governance a category of political questions which is broader than the exception ultimately granted for "security" measures. Yet the exception for intergovernmental security arrangements between allies did not survive through to the ultimate text of the GATT. The non-provision for excepting the actions of allies to protect each other's security cannot be taken to involve a prohibition of such actions. The position of the more powerful states was that an ITO ought to decline to decide political questions. This stance effectively vetoed the evolution of a customary norm of prohibition and left the interpretative problems of Article XXI to remain unresolved in the GATT context.

#### K. THE FUTURE OF ARTICLE XXI

States practice under Article XXI is in a parlous condition. The warning given by Professor Jackson in 1969 still rings true:

The existence of practice that is inconsistent with legal rules, particularly when such divergent practice results in profit of one kind or another, usually increases the incentive for other departures from the rule and, therefore, the number of other departures. Consequently, one of the values of a legal rule—the enhancement of stability and predictability—is lost.<sup>182</sup>

The value of Article XXI in stabilising the trade liberalisation process even when the security of trading nations is threatened has depreciated ever since the last cold war. The *de facto* waiver of GATT obligations as between Czechoslovakia and the United States may have been a pragmatic solution for the times. Jurisprudentially, it opened the floodgates for unilateral actions which are only ostensibly excusable under Article XXI.

Having sought a wider forum than the economic institution into which the GATT evolved, the U.S.-Nicaragua dispute went before

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182. JACKSON 1969, *supra* note 65, at 757.



the International Court of Justice. In an expeditiously rendered interim decision, this forum subtly condemned the military action of the United States in the dispute. So, on two fronts, the United States has been found wanting in the eyes of the law. Arguments which present the U.S. actions as legitimate reprisals have been put forth by Deputy Secretary of State Kenneth Dam.<sup>183</sup> These arguments were not developed before the GATT Panel, nor did they form the basis of the U.S. case before the ICJ. The United States was unwilling to submit its actions to either the GATT Panel or judicial scrutiny.

In the immediate post-World War II period, the United States provided constructive leadership in espousing the value of rules for dealing with environmental, telecommunications, human rights, economic and security issues. Nations with diverse economic structures were persuaded of the mutual benefits in developing convergent policies.<sup>184</sup> The United States remains a world leader. By not relying upon the very principles it helped develop to justify or excuse its actions, the system of rules is weakened. As the example of a leading nation showing disregard for legal forums is followed by others, divergent policies emerge and entropy sets in. The U.S. position has been heavily criticised even within the United States.<sup>185</sup>

A sense of vulnerability is fostered when the leading market economy prefers protection of traditional values to the gains from trade. The resurgence of reciprocity as a key trade mechanism for the United States may well be in the offing. Contemporaneous with introverted national policies is the intermediate state of nature between war and peace. Introversion, protectionism and a cold war climate seem to feed upon one another while awaiting a superior initiative to break the cycle and restore an open world economy and peace. Realisation of the consequences of a deteriorating political climate often provides the impetus for reversal of the process of entropic autarky.

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183. Tolchin, *U.S. Aide Defends Mining Without Acknowledging It*, N.Y. Times, Apr. 12, 1984, at A10, col. 1; cf.; Ledeen, *When Security Preempts the Rule of Law*, N.Y. Times, Apr. 16, 1984, at A21, col. 1.

184. Nimitz, *Respect World Law*, N.Y. Times, Apr. 19, 1984, at A19, col. 2.

185. See *id.* Ullman, *World Court Evasion*, N.Y. Times, Apr. 11, 1984, at A27, col. 1. Tolchin, *supra* note 183 (giving a summary of American Congressional opinions).

## V. THE INTERNATIONAL MONETARY SYSTEM

### A. NATIONAL SECURITY FROM THE PERSPECTIVE OF THE IMF

In making a comparison of GATT practice with the practice of the IMF, it is important to remember that, although the institutions were conceived together, they have generally engaged in little visible cooperation. The conventional wisdom that trade and payments problems should be kept as distinct as possible appears to have survived repeated challenge.<sup>186</sup>

The IMF is designed to regulate the actions of governments affecting exchange rates. It has three tiers in its structure. The Board of Governors, upon which all member states are represented, usually meets annually. This Board delegates most of its powers to the Executive Directors, known collectively as the Executive Board, who are responsible for the general operations of the IMF. The Managing Director and his staff conduct the daily operations of the IMF.

The Articles of the International Monetary Fund have become the governing norms of international monetary law. Under Article VIII(2)(a), currency restrictions upon current international transactions require IMF approval. The decision is one for the Executive Board of the Fund.<sup>187</sup> This Executive Board may be viewed as the Fund's key administrator, beneath the Board of Governors whose role is more one of policy-making. The Board of Governors passes by-laws with which the decision of the Executive Board must be consistent.<sup>188</sup> The Executive Board usually acts by consensus. Formal votes, if taken, require a simple majority of weighted votes cast.<sup>189</sup>

The imposition of restrictions for national security reasons came before the Board as the cold war between the United States and the Soviet Union built up in the 1950's. Whereas the Fund was responsible for currency restrictions even if not adopted for balance of payments reasons, it recognised its own lack of expertise in

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186. See, e.g., CLINE, *Introduction and Summary*, TRADE POLICY IN THE 1980'S 13 (1983).

187. I.M.F. BY-LAWS s.15 (36th issue, 1979).

188. J. GOLD, THE RULE OF LAW IN THE INTERNATIONAL MONETARY FUND, 5 (1980) (IMF Pamphlet Series No. 32).

189. Weighting is by a quota that is measured by contribution to the Fund and arguably proportionate to the perceived relative prominence of each nation's currency. See generally J. GOLD, VOTING MAJORITIES IN THE JUND (1977) (IMF Pamphlet Series No. 20).

evaluating security issues. The solution arrived at is contained in Executive Board Decision No. 144-(52/51).<sup>190</sup> Pursuant to this decision, member countries imposing currency restrictions for security reasons are required to notify the Fund not later than thirty days after imposition of the restrictions. Unless the Fund raises an objection within thirty days thereafter, the restriction is treated as approved, retrospective to the date of notification. The approval is effective for an indefinite time period. By contrast, restrictions taken for economic reasons are usually only approved for limited, yet renewable periods.

In December 1950, prior to Decision 144-(52/51), the United States notified the IMF of the imminent restriction of certain payments and transfers to China, North Korea and their nationals. Offering the opinion that the legality of the move was not for the IMF to decide, the United States made clear its disinclination to accept IMF regulation of its action. In 1951, Cuba notified the IMF of politically motivated restrictions of its own. The IMF adopted Decision 144-(52/51) to protect its political neutrality without abdicating its regulatory duties in a cold war crisis climate. It effectively condoned the U.S. and Cuban restrictions.

Article VIII(2)(b) makes restrictions approved under Article VIII(2)(a) enforceable in the territories of any other member. So, whereas Article XXI of the GATT excuses defensive sanctions legally effective only to the extent of the claimant state's jurisdiction, this jurisdictional limit is overcome in the IMF context by giving approved restrictions international enforceability. The operation of this Article became the focus of world attention during the Iranian assets freeze imposed by the United States. The freeze provides a useful vehicle for the analysis of the impact of security concerns upon international monetary law. The facts behind the legal struggle are worth recounting.

In response to the taking hostage of U.S. diplomats in Iran and in anticipation of attempts by Iran to undermine the strength of the U.S. dollar in international markets, the United States Department of the Treasury, on November 14, 1979, froze all transactions in U.S. dollars to which the government of Iran and its subsidiary

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190. INTERNATIONAL MONETARY FUND, *SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND AND SELECTED DOCUMENTS* 133 (8th issue, 1976).

units, including the central bank, were party.<sup>191</sup> The central bank, Bank Markazi Iran, commenced litigation in London and Paris to force banks outside the United States to release Iranian U.S. dollar deposits to Bank Markazi. The correct construction of Article VII(2)(b) would have been at issue. The issues, however, were rendered moot by the successful mediation of Algeria in the dispute.<sup>192</sup> Iranian funds were released in exchange for the hostages.

*B. IMF REVIEW OF THE SECURITY EXCEPTION IN INTERNATIONAL MONETARY LAW*

Sir Joseph Gold, Senior Consultant and formerly General Counsel and Director of the Legal Department of the IMF, considers any measure which directly regulates international monetary payments or transfers to be within the scope of Article VIII(2)(b).<sup>193</sup> Indeed, UN mandated actions are cited as measures within the scope of the Article.<sup>194</sup> In 1979, the IMF approved a loan to Nicaragua. The Honorable Henry F. Reuss, Chairman of the Committee on Banking, Finance and Urban Affairs, United States House of Representatives, criticised the decision for failing to take into account its political consequences. Secretary of the Treasury Blumenthal supported the decision of the U.S. appointed Executive Director who voted in favour of the loan. Political considerations are not to be taken into account by the IMF whose international standing depends in part upon its non-interference in the political affairs of its member states.<sup>195</sup> Secretary Blumenthal wrote:

Members cannot be expected to fulfill their obligations to the I.M.F. and to the international community if their rights can be denied

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191. The regulations as first promulgated appear at 44 Fed. Reg. 65,956 (1979) and as amended at 45 Fed. Reg. 45,594 (1980). They were "lifted" to conform with and implement the Algeria-U.S.-Iran settlement on Feb. 24, 1981 retroactive to Jan. 19, 1981. 46 Fed. Reg. 14,330 (1981).

192. See *Agreement on the Release of the American Hostages*, 81 DEPT STATE BULL. No. 2047 (Feb. 1981); *Settlement of the Iran Hostage Crisis: Official Documents*, 75 AM. J. INT'L L. 418 (1981); *Iran-United States Settlement of the Hostage Crisis*, 20 I.L.M. 223 (1981).

193. See, e.g., Gold, *The Fund Agreement in the Courts-XV*, 27 I.M.F. STAFF PAPERS 601, 612-17 (1980).

194. *Id.* See also GOLD, *The Fund Agreement in the Courts-XIV*, 26 I.M.F. STAFF PAPERS 609 (1979).

195. J. GOLD, *supra* note 189, at 59. This consideration is made explicit in art. IV(10) of the Articles of Agreement of the International Bank for Reconstruction and Development ("the World Bank"). See Articles of Agreement of the International Bank for Reconstruction and Development, done Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. 1502, 2 U.N.T.S. 134.

them on political grounds. The prospect of a smoothly functioning world economy, with responsible international behaviour in terms of economic and financial policy by I.M.F. member governments, would be greatly lessened. All nations would lose by the introduction of political disputes into the I.M.F., and it would be a particularly grave error for the United States to lead the way.<sup>196</sup>

Although the thrust of Secretary Blumenthal's view would seem to require that politically tainted disputes be not resolved by the IMF, its result was not a "hands-off" approach by the IMF. Rather, there evolved a concrete decision to apply the standing tests to Nicaragua's loan application. These tests were of economic performance criteria only. The decision had undeniable political consequences just as inaction might have had. Nevertheless, it was a politically value-neutral application of legal rules which enhanced the IMF's stature as an international organisation actively pursuing the goals of its charter.<sup>197</sup> Sir Joseph Gold's analysis of Article VIII continues to be followed by the IMF.<sup>198</sup>

Some academic commentators have supported a "hands off" approach. They argue that a control designed to pressure a foreign government into a policy shift rather than to ballast the currency of the state imposing the control is not "an exchange control regulation" within the meaning of Article VIII(2)(b).<sup>199</sup> They argue that the IMF is only concerned with actions taken to protect a currency from destabilising exchange fluctuations and not actions taken for other reasons. This view remains a minority view.

Curiously, Decision 144-(52/51) was taken in the same cold war pressures that surrounded the adoption of a different and more permissive approach by the GATT in the U.S.-Czechoslovakia dispute.<sup>200</sup> By adopting objective criteria and ignoring the attempt to avoid

196. *House Comm. on Banking, Finance and Urban Affairs, Blumenthal, Replies to Congressman Reuss' Criticism of IMF Loan to Nicaragua*, News Release (Washington, D.C., June 13, 1979).

197. GOLD, *supra* note 188, at 66-67.

198. Letter from George P. Nicoletopoulos, Director, Legal Department, International Monetary Fund to Professor Richard W. Edwards J., Professor of Law, University of Toledo (Jan. 9, 1981), *reprinted in* 75 AM. J. INT'L L. 900-02 (1981).

199. F. MANN, THE LEGAL ASPECT OF MONEY 444-45 (3d. ed. 1971) Krispis, *Money in Private International Law*, 120 A.D.I.R.C. 191, 293 (1967); Recent Development, *The Iranian Assets Control Regulations and the International Monetary Fund: Are the Regulations "Exchange Control Regulations?"* 4 B.C. INT'L COMP. L. REV. 203 (1981).

200. Compare the GATT Panel's approach in the later U.S.-Nicaragua sugar dispute.

what was then still a new world of international economic law, IMF practice has promoted respect for its norms. The effectiveness of the norms depends upon the extent to which members are convinced that the norms promote their interests. The strength of Decision 144-(52/51) lies in the clear procedure, consensually developed, for obtaining IMF approval with respect to restrictions prompted by security concerns. Nations seeking to enforce international currency restrictions enacted for security reasons are obliged to place the restrictions before Executive Board scrutiny for thirty days. The importance of such an obligation is explained by Sir Joseph Gold:

If it is agreed that states are reluctant to incur international odium as a violator of obligations, a conclusion can be drawn for the formulation of obligations. The greater the precision that can be given to obligations, the less likely members will be to engage in conduct in violation of them. The violation of a precise obligation will be obvious, and members will have little or no opportunity to argue that a violation is not occurring.<sup>201</sup>

More subtly, international lending creates a dependency bond between debtor and creditor. A comfortable monetary position protects a state from the influence of others. During the Suez crisis in 1956, Egypt, the United Kingdom and the United States restricted payments and transfers without notifying them to the IMF. British involvement in the unsuccessful military action to reopen the Suez ceased after the selling pressure against her currency was compounded by the refusal of the United States to defend the pound.<sup>202</sup> The United States was the one nation financially able to stabilise the pound in the absence of IMF approval. The United States deference to the IMF process sealed the fate of the pound. In the absence of IMF approval, Britain was unable to legally seek and obtain international cooperation for her restrictions. Her monetary position weakened: external influences had greater impact than would have otherwise been the case.<sup>203</sup> It may be that expectation of non-approval was one factor influencing the United Kingdom not to seek approval for its 1956 actions.

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201. J. GOLD, *supra* note 189, at 32.

202. H. THOMAS, SUEZ 146-47 (1967).

203. INTERNATIONAL MONETARY FUND, ANNUAL REPORT ON EXCHANGE RESTRICTIONS 117, 287-88, 337 (1957); Favcett, *The International Monetary Fund and International Law*, 40 BRIT. Y.B. INT'L L. 32, 65 (1964).

The IMF loan to Nicaragua in 1979 was opposed in Congress partly in the hope of placing Nicaragua in a dependency relation with the United States for the key currency of trade, the U.S. dollar. By making itself the creditor of Nicaragua, the IMF made Nicaragua dependent instead upon an apolitical lender.

In the case of the Iranian assets freeze, it had been widely publicized in the press that strategic withdrawals of U.S. dollar deposits around the world by Iran were being planned with the stated purpose of undermining the U.S. dollar.<sup>204</sup> Protecting against this not only safeguarded the U.S. currency, but prevented a destabilisation of international monetary relations. The United States was not so much making Iran dependent upon its political foes for cash flow, but rather maintaining the stability of a world peace geared for U.S. dollar payments.

No analogy can be borne with the imposition of sugar quotas against Nicaragua by the United States contrary to GATT Article XIII. That action was not conducive to the furtherance of friendly relations or at least not focal thereto. The standard for good faith action is necessarily a loose one. Still, the British currency restrictions during the Suez crisis and the U.S. sugar quota restriction are less persuasively conducive to international peace and security than the Iranian assets freeze.

Following World War II, the Eurodollar market evolved at least partly due to fears of an assets freeze in the then prevailing cold war climate. Governments of both East and West declined to keep their U.S. dollar funds in the names of their governments or central banks in New York.<sup>205</sup> By diversifying the location of their deposits, governments reduced the risk that an assets freeze by any one state would undermine their overall dealings. The failure of the revolutionary authorities in Iran to learn this lesson left the stage open for the crisis in international monetary law in 1979-81.

The Iranian assets freeze required IMF approval because Article VIII(3) of the Articles of Agreement of the IMF involves the proscription of discriminatory currency restrictions. Article XIX(i) includes within the proscription:

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204. Pardieu, *The Carter Freeze Order: Specific Problems Relating to the International Monetary Fund*, 9 INT'L. BUS. LAW. 97, 98 n.13 (1981). See also *America's Blood Approaches Boiling Point*, THE ECONOMIST, Nov. 17, 1979, at 27.

205. Berlioz, *The Iranian Crisis: The Implication for International Financial Law*, 1 INT'L CONTRACT—L. FINANCE REV. 10, 11 (1980).

[P]ayments which are not for the purpose of transferring capital, and . . . without limitation:

- (1) All repayments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
- (2) Payments due as interest on loans and as net income from other investments;
- (3) Payments of moderate amounts for amortization of loans of for depreciation of direct investments;
- (4) Moderate remittances for family living expenses.<sup>206</sup>

Lump sum repatriation of capital arguably falls outside IMF regulation.<sup>207</sup> Nevertheless, insofar as the Iranian assets freeze went beyond capital controls, it would seem that without IMF approval, its discriminatory nature would render it inconsistent with the Articles of the IMF and, therefore, needing to be approved to be a restriction internationally enforceable under Article VIII(2)(b).

### C. THE SETTLEMENT OF MONETARY DISPUTES INVOLVING SECURITY CONCERNS

The concept of "nullification of impairment" in the GATT does not appear in the Articles of Agreement of the IMF. Also, the procedure of exhausting consultations prior to a Panel investigation and subsequent decision of the Contracting Parties is not copied. Article XVIII of the Articles of Agreement gives the IMF power to interpret its own law where a dispute arises. Unlike the GATT, the emphasis is on action by the IMF as regulator rather than simply on facilitation of settlement between disputant states. It is the responsibility of the IMF to promote international monetary cooperation and collaboration on international monetary problems<sup>208</sup> through a permanent institution.

In institutionalising the regulatory process, the IMF has the power to tolerate or even condone illegal behavior whilst taking action to maintain or, in some cases, restore stable relations. This

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206. Article of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. 1501, 2 U.N.T.S. 39 at art. XIX(i) (came into force on Dec. 27, 1945, by acceptance).

207. IMF Executive Board Decision No. 541 (56/39) (1958), *cited in* Pardieu, *supra* note 204 at 99; J. GOLD, THE INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS 13 (1956) (IMF Pamphlet Series No. 3).

208. Articles of Agreement of the International Monetary Fund, *supra* note 206, art. 1(i).



centralised interpretative and decision-making power takes the member states one step away from having an immediate influence on the granting of approval for security based currency restrictions. Not only are states more willing to submit to an impartial authority than a forum of other partial states, but the institution, in maintaining its impartiality, will be influenced by considerations other than particular national sensitivities.

#### *D. THE IMF IN A COLD WAR*

Although the IMF does not have power to suspend the operation of all of the provisions of the Articles of Agreement, if an emergency arises or unforeseen events threatening the activities of the IMF prevent member nations from observing their obligations, the provisions imposing the obligations can be suspended from operation. Substitute rules can be adopted to deal with or adapt to the changed circumstances. It is IMF action rather than unilateral action which is the protective measure. Such suspension is to be distinguished from a waiver. A waiver is selective, applying only to certain member nations. It excuses otherwise violative conduct. A suspension applies to all member nations and removes the need for a member nation to excuse its action.<sup>209</sup>

The IMF also tolerates action which is legally invalid. For example, during the 1970's, there was an absence of consensus on whether the IMF should have authority to condone floating exchange rates, the rule then being fixed exchange rates. Violative action, particularly by the United States, was seen as an attempt to induce legal change. That change came with the Second Amendment to the Articles of Agreement.<sup>210</sup> This preference for centralised rather than unilateral decision-making is in contrast to the mechanism practised under the GATT in Articles XIX, XX and XXI. Unilateral action is the exception which became a rule in GATT practice. Both institutions are intended to survive a cold war albeit by different mechanisms.

In the three major cases brought to its attention under Decision 144-(52/51), the IMF has approved the restrictions imposed. In one case approval was not sought and the restrictions then

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209. J. GOLD, *supra* note 188 at 35-38.

210. In place on or before Nov. 30, 1983, cited in J.H. JACKSON 1983 SUPPLEMENTARY NOTES AND MATERIALS 31 (1983) (of use with JACKSON 1977, *supra* note 65).

imploded. In 1950, the United States restricted the making of payments and transfers to the People's Republic of China. Cuba adopted similar restrictions in 1951. After the adoption of Decision 144-(52/51), these restrictions were approved retroactively. In the absence of objection from another member, the IMF did not evaluate the claim that security concerns were involved. In the 1960's pursuant to UN Security Council Resolutions 221,<sup>211</sup> 232,<sup>212</sup> and 253,<sup>213</sup> restrictions imposed by members with respect to Rhodesia were approved by the IMF.<sup>214</sup> They were lifted upon the recognition of Zimbabwe in 1979.<sup>215</sup> When given the opportunity to do so, the IMF will defer to UN expertise in security matters.

These approvals, along with the approval for the Iranian assets freeze, need to be contrasted with situations in which approval was not sought. One can but speculate whether apprehension of disapproval led to any decisions not to seek approval. During the 1956 dispute over the nationalisation of the Suez Canal Company by Egypt, Egypt, the United Kingdom and the United States established restrictions, but did not seek approvals. The United Kingdom's action, in particular, foundered<sup>216</sup> confidence in the British pound causing it to drop in correlation with British handling of the Suez affair and the violation of the IMF Articles of Agreement.

More recently, some nations applying economic sanctions for political reasons against South Africa and Israel have not sought approval. Although the IMF has not adopted a definition of national security for the purposes of Decision 144-(52/51), the hesitancy of states to enter the procedure for approval of sanctions suggests some doubt as to the legality of their sanctions. To the extent that this doubt has acted as a brake upon the sanctions, the centralised approval mechanism of the IMF is contributing to international peace and security. Unfortunately, no empirical measure of this effect is available.

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211. Apr. 9, 1966.

212. Dec. 16, 1966.

213. May 27, 1968.

214. INTERNATIONAL MONETARY FUND, ANNUAL REPORT ON EXCHANGE RESTRICTIONS 3 (1969).

215. INTERNATIONAL MONETARY FUND, 1980 ANNUAL REPORT ON EXCHANGE ARRANGEMENTS AND EXCHANGE RESTRICTIONS 9.

216. INTERNATIONAL MONETARY FUND, ANNUAL REPORT ON EXCHANGE RESTRICTIONS, 117, 287, 337 (1957). See *supra* note 204 and accompanying text; cf., Fawcett, *The International Monetary Fund and International Law*, 40 BRIT. Y.B. INT'L L. 32, 65 (1964).

Finally, if the IMF were to face the problem of defining "national security" (following an objection to a notification under Decision 144-(52/51) for example), the question arises whether the IMF would decline to pass upon that question. Sir Joseph Gold would appear to favour complete non-appraisal of political considerations. The last sentence of Article I setting out the purposes of the IMF directs the IMF to "be guided in all policies and decisions by the purposes set forth in this Article."<sup>217</sup> Sir Joseph argues that considerations inconsistent therewith may not be taken into account by the IMF.<sup>218</sup> Inductively reasoning from the obligations of the IMF to respect the domestic social and political policies of members in connection with the regulation of exchange rate policies<sup>219</sup> and par values,<sup>220</sup> the IMF is said to be impliedly required to take notice of such policies, but to refrain from passing judgment upon them.<sup>221</sup> However, in devising adjustment program for members with balance of payments problems, the IMF is permitted to conclude that economic considerations outweigh national political objectives if these objectives would prevent a use of IMF resources consistent with the Articles.<sup>222</sup>

Of course, that a decision has political consequences does not make it politically motivated. This element may be seen as inducing Decision No. 144-(52/51). The IMF, in line with the commitment to centralised rather than unilateral interpretations of international monetary law, reserves to the Executive Board, with appeal to the Board of Governors, jurisdiction to interpret the Articles.<sup>223</sup> Restrictions approved by the IMF pursuant to Decision 144-(52/51) cannot be challenged as inconsistent with the Articles. All of this begs the question whether the IMF could decline to adjudge one member's

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217. Articles of Agreement of the International Monetary Fund, *supra* note 206, art. I.

218. J. GOLD, *supra* note 188, at 58; *accord* Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 195, art. IV(b).

219. Second Amendment to the Articles of Agreement of the International Monetary Fund art. IV (3)(b), *done* Apr. 30, 1926, 29 U.S.T. 2204, T.I.A.S. 8932.

220. *Id.* art. IV(4).

221. J. GOLD, *supra* note 188, at 60.

222. Decision on Use of Funds, General Resources, and Stand-By Arrangements, Decision No. 6056-(79/38), Mar. 2, 1979, 1979 ANNUAL REPORT OF THE INTERNATIONAL MONETARY FUND 136-38.

223. Second Amendment to the Articles of the International Monetary Fund, *supra* note 220, art. XXIX. *See generally*, J. GOLD, INTERPRETATION BY THE FUND (1968) (IMF Pamphlet Series No. 11).

claim for national security restrictions in the face of an objection thereto by another. The toleration of restrictions imposed against Israel, for example, suggests that the IMF would decline to pass upon the substantive issues.

*F. A CASE STUDY: THE IRANIAN ASSETS FREEZE IN THE IMF*

The handling of the Iranian assets freeze is instructive to show the importance of the questions. Where currency exchange restrictions are concerned, the IMF does have exclusive jurisdiction over the problem. The U.S. regulations were adopted on November 14, 1979, and amended five days later. It may be that they were informally notified to the IMF at that time,<sup>224</sup> but they were formally notified only on November 29, 1979. Iran did try to persuade the Executive Board to object.<sup>225</sup> These efforts were unsuccessful.<sup>226</sup> The U.S. regulations were amended on April 7 and 17, 1980. These were notified on April 28, 1980, and also received automatic approval.<sup>227</sup> It needs to be remembered that the Managing Director, as Chairman of the Executive Board, prepares the agenda for Board meetings.<sup>228</sup> He must place on it any case which appears to him or another Executive Director to involve a member not fulfilling its obligations under the Articles.<sup>229</sup>

Iran seems to have lacked the support of even one Executive Director. The question being one upon which the IMF could request an advisory opinion from the International Court of Justice pursuant to Article VIII of the Agreement between the IMF and the UN,<sup>230</sup> it appears that, in the view of the Executive Board, the legitimacy of the U.S. action was not for judicial consideration.

When first promulgated, the U.S. actions were described as protective measures in the face of Iranian plans to undermine the international banking system. As time passed it became clear that the action was a reprisal for the hostage taking. Nevertheless, the

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224. Edwards, *Extraterritorial Application of the U.S. Iranian Assets Control Regulations*, 75 AM. J. INT'L L. 870, 875 (1981).

225. Washington Post, Dec. 28, 1979, A13, col. 1.

226. Letter from George P. Nicoletopoulos, *supra* note 198.

227. *Id.*

228. IMF, Rules and Regulations (36th issue, 1979) Rule C-6, in IMF BY-LAWS, Rules and Regulations at 24.

229. *Id.*; see also Rule K-1 at 44 and Rule S-1 at 62.

230. See *Selected Decisions of the International Monetary Fund and Selected Documents*, *supra* note 191, at 230-31.

IMF approval remained in place. Given the selective nature of UN involvement in world crises, calls for rendering IMF approval conditional upon UN approval or ratification<sup>231</sup> may not be a politically neutral brake on unwarranted restrictions. The IMF would then be subrogating its power to the political winds in the UN. While UN approval is a relevant factor, it ought not be a determinative one.

Restrictions not receiving the imprimatur of the IMF cannot be enforced extraterritorially under Article VIII(2)(b). By giving automatic approval after thirty days, the scope for operation of Article VIII(2)(b) is a wide one. Although the approval has not been sought by nations in doubt as to the legitimacy of their restrictions thus far, the policy of automatic approval effectively leaves the issue of substantive legitimacy for unilateral decision. This issue is the definition of the threshold state of nature sufficient to ground a claim for approval. This fits ill with the overall approach to centralised decision-making in the IMF.

On the other hand, rendering restrictions unapproved until brought before the Executive Board may leave the IMF in the position of declaring a politically expedient restriction economically unjustifiable. The IMF need never make decisions for ostensibly political reasons. However, by not passing an economic analysis over sanctions, the economic base of international peace and security becomes subject to not merely non-regulation but also the compounding nature of enforcement under Article VIII(2)(b).<sup>232</sup> The rendering moot of the litigation in London and Paris with respect to the application of this Article to the Iranian assets freeze has but stayed the crucial judicial test of Decision 144-(52/51).<sup>233</sup>

#### VI. A COMPARISON OF THE GATT AND IMF APPROACHES TO SECURITY CONCERNS

The bottom line of any comparison of the GATT and IMF approaches to the impact of security concerns upon world trade and

231. See, e.g., Edwards, *supra* note 224 at 897-98.

232. Outside of Article VIII(2)(b), extra-territorial enforcement would almost certainly be refused. See, e.g., *In re Westinghouse Uranium Contract* [1978] 2 W.L.R. 84.

233. There are earlier decisions pertinent to this issue. See Baker, *Enforcement of Contracts Violating Foreign Exchange Control Laws*, 3 INT'L TRADE L.J. 247 (1977); cf., Craigie, Oakes and L'Estrange, *The Presidential Order Freezing Iranian Assets—Some Extraterritorial Aspects*, 8 INT'L TRADE L. SEMINAR PAPERS 329, 341-45 (Austl. 1981).

monetary law is a test of the effectiveness of each in deterring those breaches of international economic law whose basis is a security concern of doubtful objectivity. Within the GATT it is the odium of the restricting states' trading partners which is the prime deterrent. Trade restrictions imposed under Article XXI operate territorially, excepting of course, the extent to which United States claims for extraterritorial jurisdiction gain international support. Only in the Ministerial Declaration of November 1982, was there an attempt to encourage states to legitimate their invocations of Article XXI.

In its dispute with Nicaragua, the U.S. restrictions would have been difficult to so legitimate. The United States, therefore, chose not to oppose the adoption of the GATT Panel's recommendations to hold its actions in violation of the GATT, and instead relied on its patent ability to withstand any consequent international pressures. This attitude implies a disinclination to submit to the system of multilateral regulation which the United States was so instrumental in establishing. The United States reaction to the interim decision of the ICJ in the recent dispute with Nicaragua evidences a similar policy.

By contrast, although the IMF has not had to face the definitional problem of determining which security claims do or do not validly fall within the ambit of Decision 144-(52/51), it has had somewhat more success in deterring questionable claims for legitimacy. Because exchange restrictions generally require international enforcement to be truly effective, and, because pursuant to Article VIII(2)(b) of the IMF Articles of Agreement approval is essential to such enforcement where restrictions are imposed for security reasons, Decision 144-(52/51) assumes focal importance. The decision throws claims for legitimacy into the limelight for thirty days. That decision to approve is centralised in the Executive Board. Its decision is exclusive and subject only to review by the Board of Governors.

The IMF process of legitimation is less subtle than under the GATT. As a result, some nations imposing restrictions have been deterred from seeking approval. Their action remains inconsistent with the Articles of the IMF unless approved. Action under GATT Article XXI bears no similar odium until successfully challenged. It is difficult to see how the IMF procedure could be effectively transposed to the GATT context. International enforcement of trade

restrictions is not an essential ingredient for those restrictions to have a real impact on the object state. Nicaragua's sugar industry is the definitive example. On the other hand, if unlegitimated restrictions could validly be mitigated by a centralised compensation mechanism administered by a politically neutral international institution associated with the GATT, illegitimate restrictions might be rendered ineffective. This would pressure the restricting state to submit to multilateral regulation of its actions. In the United States-Czechoslovakia dispute the cold war trade barriers established by the United States were effectively given a GATT waiver. The Czech grievance was given an airing. However, by accepting without reservation the principle that a state's unilateral identification of security crises could not be reviewed, the floodgates were opened for a limited exception to experience its unregulated growth. Thus, in the United States-Nicaragua dispute, the United States was not willing to discuss an economic sanction because it was imposed for security sensitive reasons. Only the allegation of breach of GATT obligations was investigated and confirmed without an examination of the validity of the U.S. excuse.

In both of these cases, the dispute may well have been beyond resolution. There was no discussion of a legal rule which might at least have helped the parties understand and perhaps reduce the economic ill effects of their actions. In the absence of a rule promoting consultation, power diplomacy has been given sway and neither the wealth maximization function of international economic law, nor the peace promotion function of public international law was advanced.

The IMF approach provides a thirty day period in which discussion may be pursued. While no substantive rule for limiting the use of national security as a ground for imposing currency restrictions has been developed, the system does not admit untrammelled unilateral interpretation. This alone appears to discourage some doubtful claims for legitimacy. By not according all claims of national security automatic legitimacy, the subtle processes of international opprobrium are allowed to operate upon the apparently illegitimate actions. Although these subtle mechanisms do not always have discernible effects, activating them through rules which distinguish the excusable from the illegitimate enhances world order better than a power-based system which does not require even a limited legitimation of certain international actions.

## VII. CONCLUSION

Having raised the question of whether differently structured economies can both gain from trade and retain a sense of national security, this paper has sought to analyse the progress of international economic law in regulating the interface between trade and defence policies. In the international legal system coercion can lubricate, but does not fuel the wheels of the legal system. Because international law often depends upon an imprecise consensus, states will only behave within the law if they see legally obedient behaviour to be in their interest. When nations' sense of insecurity leads not only to the distrust of other nations but of the legal framework in which international relations are conducted, this consensus dissipates. A process of entropic autarky sets in.

This distrust can best be dispelled by giving problems airing in international forums without necessarily requiring any formal adjudication. International law, after all, is enforced by the subtle means of peer pressures. Resolution can occur as the states involved listen to, and perhaps, better understand their neighbours' interests. They may then be more willing to discuss security concerns knowing that no formal adjudication against their interests will result.

Such an international forum needs to both be and appear to be an impartial, readily available and effective framework for facilitating the resolution of disputes. It at least gives the option of peaceful settlement without further aggravation of the atmosphere of tension and distrust which can lead to non-peaceful reprisals. Moreover, the availability of such a forum, actively supported by states practice, reduces the perceived normative legitimacy of less peaceful alternatives. Notwithstanding the finding by the arbitral tribunal in the United States-France dispute, discussed in Section III.C., that there is no duty to postpone retaliatory action until less inflammatory yet practicable means for dispute resolution had been exhausted, states prefer to be seen as pursuing non-inflammatory as well as legitimate avenues for redress.

Following the collapse of the ITO, the GATT emerged as the primary forum for resolution of international trade disputes. The rules of and exceptions in the GATT system may be interpreted according to competing legal principles. This reflects the different economic structures of the nations party to and applying the GATT. An effective consensus has not been achieved. Without effective



multilateral regulation, nations' behaviour under the GATT is likely to remain non-congruent.

This is precisely what has occurred in relation to GATT Article XXI. The exception, interpreted literally, is extremely broad and permits the emasculation of the very objectives of the GATT. The states' representatives who perform the task of interpretation are not always seen as impartial in their approaches to this task. It has been argued that the exception has not been interpreted in good faith and is proving to be an Achilles heel of the GATT.

The seeds of entropy were sown in the United States-Czechoslovakia dispute. Some three decades later in its dispute with Nicaragua, the United States declined the very jurisdiction of the GATT by adopting instead an overtly autarkic behaviour. The formal limitation of the exception in the drafting of the GATT to matters of a nation's own national security does not appear to influence the conduct of the United States. Arguably the non-congruent conduct of the United States has prevented the text of Article XXI from developing into customary international law. It is even possible to see the broad practice of claiming exemption under Article XXI as a declaration by the states concerned that they see GATT obligations as less than legally binding, both in war and cold war climates. Article XXI is thus unable to fully perform its role of preserving GATT obligations through periods of cold war. Moreover, once a leading nation shows disregard for legal forums, other nations will follow. The process of entropic autarky snowballs.

The IMF may be contrasted with the parlous state of GATT practice. In the IMF context, international enforceability of monetary sanctions taken for security reasons depends upon IMF approval. The sanctions will be ineffective without such approval. Former Secretary of the Treasury Blumenthal favoured an American approach which did not involve the IMF making political judgments, but did involve the IMF continuing to make economic decisions even where those decisions had political consequences — including national security consequences.

Under the Decision 144-(52/51) procedure, the subtle pressures of international opprobrium are given an opportunity to operate as states seeking to utilise the national security exception are required to face international scrutiny for at least thirty days. The IMF acts as regulator rather than as facilitator of settlement as is the case with the GATT. The decisionmaker is therefore an im-

partial institutional authority rather than a number of partial states' representatives. In the case of the Iranian assets freeze, it was the IMF action rather than unilateral action which legitimated the protection of the United States dollar from the Iranian threat to undermine that currency. Of course, that a decision has political consequences does not make it politically motivated. Perhaps the essential difference is one of perception. Decisions emanating from the GATT are not seen as impartial nor as having terribly much legal relevance. Decisions emanating from the IMF, however, receive a mark of respect from the international community.

Even if one accepts the argument that the process of entropic autarky in international economic law is at an advanced stage and, therefore, the establishment and evolution of a widely applicable control on claims for the national security exception could not remedy the situation quickly enough, it is certainly within the power of world leaders to congregate with a view to developing convergent policies rather than to continue airing unilateral expressions of distrust. A liberal world trade order along with a liberal world monetary order requires not only a lowering of barriers to international economic transactions, but also active promotion of economic development for the weak by the strong with a view to mutual advantage. Not only do the less developed economies gain by achieving development relevant to their own needs, but the stronger economies and the world economy as a whole gain by nations entering into their economic and political relations with a sense of security and willingness to cooperate. It is upon achieving such a reversal of the present trend towards autarky that international economic institutions can be developed to maintain a process of secure, peaceful and prosperous economic development. The process of developing convergence in place of autarky can feasibly be initiated at the present time. Once the foundations are laid, impartial multilateral regulation of the problems discussed in this article can be developed. The time has arrived where the interface between security and trade issues can no longer be profitably put in the "too-hard basket."