

1994

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## Suggested Bluebook Citation

Donald N. Zillman, *Energy Trade and the National Security Exception to the GATT*, 12 J. Energy & Nat. Resources L. 117 (1994).  
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# Energy Trade and the National Security Exception to the GATT

By Donald N Zillman\*

Three topics combine in this paper: international trade, national security, and energy. The specific focus of the paper is the General Agreement on Tariffs and Trade (GATT) and the “essential security interests” exception contained in Article XXI. The provisions of the GATT set out the structure of a system to encourage international trade by reducing tariffs and other trade barriers.

More broadly, many aspects of international trade in energy have developed outside the structure of GATT or with the implied assumption that Article XXI or another GATT exception would take them out of normal GATT arrangements. National security matters have often played a role in energy law and policy in a way that overrides free trade objectives. Nonetheless, several recent treaties and decisions have imposed free trade goals to override national security claims involving energy trade.

This article examines Article XXI and its application. The law of Article XXI has been created by non-energy trade. We then turn to energy trade. Using United States law as an example, we examine some of the areas in which alleged national security reasons have set a policy other than the full working of an international free market. We conclude with a look at the changing meaning of national security in the post-Cold War world.

## **GATT national security exception**

Article XXI defines one limitation on the application of GATT. In essence, Article XXI suggests that other values may supplant the goals of trade liberalisation. In its entirety the article reads:

“Nothing in the 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

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- war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”

Subsection (a) has been characterised by one recent commentator as allowing abstention from action.<sup>1</sup> The provision leaves the decision as to what are “essential security interests” to the nation asserting the claim. The obvious categories involve military weaponry and plans. In the late 1940s when the provision was drafted, atomic technology was the most visible example. The provision appears to have excited little contention in the half century since.

Subsection (b) allows actions contrary to GATT’s trade liberalisation goals.<sup>2</sup> A nation can claim that an obligation under GATT can be ignored because of “essential security interests”. Again, the language of the provision indicates that nations are able to decide for themselves (“taking any action it considers necessary”) as to what matters fit within the exception. The three subsections appear to move from the specific to the general. Subsection (i)’s coverage of fissionable materials or the materials from which they are derived was directed at the most significant military weaponry in any country’s arsenal. Recall that until the mid-1950s there was little peaceful use of the atom. The nuclear electric generating industry came after the drafting of GATT Article XXI. Subsection (ii) involves traffic in arms, ammunition, and “other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”. Here the range of products is far wider. The supplies to run a modern military organisation touch a vast range of manufacturing establishments. Nonetheless, the “purpose of supplying a military establishment” provides some limit to the provision. Subsection (iii) is the most troubling and open-ended provision. “Any action . . . taken in time of war or other emergency in international relations” is so broad as to allow almost any measure as an exception to the GATT. If the definition is left to the nation asserting the exception, nothing may be outside the language. “Time of war” is at least definable by events other than a nation’s desire to avoid a GATT responsibility. “Other emergency in international relations” lacks that specificity.

Subsection (c) has also been of little consequence. It provides that the UN Treaty obligations involving peace and security are superior to conflicting GATT obligations. Quite likely, any matters arising under United Nations Charter obligations could also be justified under the “time of war or other emergency in international relations” language of (b)(iii).

Scholarly commentators have been troubled by the open-endedness of the

<sup>1</sup> Michael Hahn, “Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception”, 12 *Mich J Int L* 558, 579 (1991) (Hahn).

<sup>2</sup> Hahn at 579.

national security exceptions.<sup>3</sup> They have argued for a legal rule that Article XXI does not give carte blanche to a state to justify any breach of the GATT based on security grounds. Their discomfort may be both that the provision “brings the politics of international disputes into the legal world of trade and business”<sup>4</sup> and that it clearly suggests that international politics trumps matters commercial. An author has expressed concern that Article XXI “would allow the exception to emasculate the rule of liberal trade orders”.<sup>5</sup> Another author observes that GATT contracting parties tend to declare Article XXI as “an unqualified escape clause” but in practice it has been applied “only in reaction to what was perceived to be an internationally wrongful act”.<sup>6</sup> A half dozen actual disputes over 40 years put Article XXI in context.<sup>7</sup>

*1949 United States v Czechoslovakia* The dispute followed shortly after the drafting of the GATT and the Communist takeover in Czechoslovakia. The United States imposed export control licences to prevent the shipment of goods to Czechoslovakia. The Czechs contended that the United States had violated the GATT. The United States defended in part on the exception provided in Article XXI. The United States took the position that Article XXI gave it wide scope to define matters within its national security needs. The Czechs argued for a narrower exception. The United States argued to the Contracting Parties that “every country must have the last resort relating to its own security”. The Contracting Parties rejected the Czech complaint. Mr Hahn’s summary of the dispute suggests he was less disturbed by the decision on the merits than by the expansive United States position that suggested a nation might define almost anything as related to national security.<sup>8</sup> He argues that the matters identified in subsections (i), (ii), and (iii) of subsection (b) encompass the range of matters which may be asserted under a Section XXI claim.

*1961 Ghana v Portugal* Ghana, one of the first of the independent black nations of Africa, restricted trade with Portugal by banning certain Portuguese products. The Ghanaian representative stated: “It might be observed that a country’s security interests may be threatened by a potential as well as an actual danger. The Ghanaian Government’s view was that the situation in [Portuguese colony] Angola was a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana”.<sup>9</sup> Ghana also asserted the position that each nation was the “sole judge” of its essential security interests under GATT Article XXI.

<sup>3</sup> See Hahn; Note, “The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defence in the Context of the US Embargo of Nicaragua”, 19 *Law and Policy in International Business* 603 (1987) (Politics of Procedure); David Knoll, “The Impact of Security Concerns Upon International Economic Law”, 11 *Syracuse Journal of International Law and Commerce* 567 (1984) (Knoll).

<sup>4</sup> Hahn at 580.

<sup>5</sup> Knoll at 587.

<sup>6</sup> Hahn at 569.

<sup>7</sup> They are usefully summarised in Michael Hahn’s article in the *Michigan Journal of International Law* and in a Note in *Law & Policy in International Business*. I borrow liberally from the authors’ summaries. See notes 1 and 3.

<sup>8</sup> Hahn at 569–70.

<sup>9</sup> Summary Record of the Twelfth Session Held at the Palais des Nations, Geneva, GATT Doc 5R. 19/12 at 196 (1961).

*1974 Germany v Iceland* The German Government and the governments of four German coastal states banned the landing of fresh fish from Icelandic trawlers. Iceland claimed Germany had violated the GATT. Germany responded that Iceland had violated international law in its unilateral extension of its fishing zone to the disadvantage of German and other nations' fishing fleets. Backed by a favourable opinion from the International Court of Justice, Germany asserted that its act was a legitimate countermeasure. Iceland responded that even if its action were illegal under international law, that did not provide a basis for Germany to violate the GATT. Germany retorted that a legally justified countermeasure under international law could not be illegal under the GATT. The German argument continued: "[t]he General Agreement did not represent an isolated legal system. Rather, it was embedded in the general rules of international law. Otherwise, any State could constantly violate the economic interests of its neighbouring State which would be forced to renounce any countermeasure it wanted to take".<sup>10</sup> Hahn notes his surprise that Germany declined to accept the application of the GATT rules "to a highly political dispute, thus even refusing to use the possibilities offered by article XXI".<sup>11</sup>

*1975 Sweden* In November 1975 Sweden introduced a quota on certain footwear. Sweden cited what commentators refer to as the "spirit of Article XXI" in its defence.<sup>12</sup> Sweden noted that "the decrease in domestic production has become a threat to the planning of Sweden's economic defence in situations of emergency as an integral part of its security policy. This policy required the maintenance of a minimum domestic production capacity in vital industries".<sup>13</sup> The Swedish position was greeted with widespread skepticism. It was terminated by unilateral Swedish action 18 months later. Hahn distinguished this case as the baldest assertion of "economic" as contrasted to "political" reasons.<sup>14</sup> He suggests, without further elaboration, that the Swedish dispute raises the question of whether other GATT escape clauses (for example, Article XIX with its more stringent requirements) limit the scope of Article XXI.

*1982 European Community, Australia, and Canada v Argentina* In response to the Argentine seizure of control in the Falklands (Malvinas), Community and Commonwealth nations suspended imports from Argentina. The suspending nations asserted their rights under UN Security Council Resolution and "on the basis of their inherent rights of which Article XXI . . . is a reflection . . .". Hahn again notes the reluctance to base the claim directly on the GATT.<sup>15</sup> Several nations among the Contracting Parties criticised the reliance on unspecified inherent rights rather than precise provisions of Article XXI. The suspending nations argued that the GATT was the wrong forum to be resolving a major military-political issue. A statement of the Contracting Parties appeared to recognise merit in both

<sup>10</sup> GATT Council, Minutes of Meeting held 18 February 1975, GATT Doc C/M/103 (18 February 1975) at 16.

<sup>11</sup> Hahn at 573.

<sup>12</sup> Politics of Procedure at 619.

<sup>13</sup> Minutes of Meeting Held in the Palais des Nations, Geneva, on 31 October 1975, GATT Doc C/M/109, at 9 (1975).

<sup>14</sup> Hahn at 578.

<sup>15</sup> Hahn at 574.

positions and, in Hahn's phrase, left "almost everything as obscure as it was before".<sup>16</sup>

*1985 United States v Nicaragua* United States relations with the Sandanista regime in Nicaragua festered throughout the 1980s. Initial trade restrictions by the United States were not justified under any exceptions to the GATT. On 1 May 1985, President Reagan issued an Executive Order that declared actions of the Nicaraguan Government to constitute "an unusual and extraordinary threat to the national security and foreign policy of the United States".<sup>17</sup> The order declared "a national emergency to deal with that threat". The President prohibited imports and exports from Nicaragua. Nicaragua claimed a violation of the GATT.

The United States declaration was greeted with considerable skepticism in the world of GATT. The United States response was seen as excessive in the particular circumstances and wrong in asserting the unilateral right to determine national security exceptions. Even parts of the United States business community were opposed to the United States position.<sup>18</sup>

Eventually Nicaragua secured reference of the dispute to a Panel created by the GATT Council. However, the Panel's power was constrained considerably by the agreement that it could not consider the validity of the United States' invocation of Article XXI(b)(iii). The Panel eventually reported to the Council on 5 November 1986. It did express criticism of the United States embargo noting that it flew in the face of GATT's goal of promoting free trade. In guarded terms, the Panel also suggested that the United States had wrongly balanced its national security interests against the need for stability and growth in international trade. However, even the opponents of the United States position on policy grounds seemed to concede that the United States had the right to impose the embargo under existing law. The Council concluded by asking further study of the scope of the national security exception. It proposed two options to resolve the embargo. Either the United States could end the embargo or Nicaragua could retaliate. The Contracting Parties did not accept the Report due to United States opposition. In 1990, after the electoral defeat of the Sandanista government, the United States lifted its embargo.

### **Energy and national security**

The ideal world of GATT envisions free movement of goods and services among nations. Tariffs are low or nonexistent. Other laws and customs do not hinder the movement of goods and services. In theory the commodities and services that compose energy could operate in that fashion. In practice, they have not. Even in the United States, with its considerable dedication to the 'free market' and its distrust of public ownership, government regulation or involvement has characterised segments of the energy sector. Often national security reasons explain the deviation from free market and free trade goals. Some of these national security justifications fit within the language of GATT Article XXI. Others go well beyond it. In both cases, analysis of law and policy suggest that national security reasons may be only a

<sup>16</sup> Hahn at 575.

<sup>17</sup> Executive Order 12513 of 1 May 1985.

<sup>18</sup> See *Beacon Products Corp v Reagan*, 814 F 2d 1 (1 Cir 1987).

part of the explanation for the trade restraint. Three aspects of United States energy law illustrate national security restraints on trade.

#### *Petroleum import-export controls*

The crucial nature of petroleum in running a modern armed force has been visible in several government actions limiting open trade in petroleum. The Mandatory Oil Imports Programme from 1959 to 1973 sought to limit the amount of low cost foreign oil that reached the United States.<sup>19</sup> The programme was justified on questionable national security grounds. Excessive foreign imports could make the United States hostage to the demands of politically unpredictable foreign suppliers. The cheap foreign oil could also destroy parts of the domestic oil industry. In consequence the United States bought far less Middle Eastern oil than it could have purchased in a market free of government control at pre-1973 embargo prices.

The United States has also imposed export controls on petroleum. A notable example was the ban of exports on Alaskan oil after the Prudhoe Bay discoveries of the 1960s. Current law forbids the export of crude oil transported through the Trans-Alaska Pipeline subject to Presidentially initiated exceptions.<sup>20</sup> The statute reflects a mix of national security (the need to preserve a scarce resource for essential purposes), political, and environmental reasons.<sup>21</sup>

These petroleum policies are the product of unilateral action by the United States. Federal statute also supports United States participation in the International Energy Agreement. This Agreement codifies the determination of the major industrial nations to deal with a repetition of the oil producers' boycott of 1973.<sup>22</sup>

#### *Network bound export-import controls*

Cross border trade in natural gas and electricity has the potential to be a major contributor to energy needs. Federal regulation of both natural gas under the Natural Gas Act and electricity under the Federal Power Act includes such transnational regulation.<sup>23</sup> A federal licence issued by the Federal Energy Regulatory Commission is needed for exports. National security considerations are a rather small factor in permitting product movement among Canada, the United States, and Mexico. Securing uninterrupted energy supplies from Canada was a major United States objective in negotiations leading to the Canada-United States Free Trade Agreement. Article 907 of the Agreement limits the availability of the national security exception.

National security was the major factor in the Reagan Administration's attempt to impede construction of the natural gas pipeline from the Soviet

<sup>19</sup> Presidential Proclamation No 3279, 12 March 1959.

<sup>20</sup> 50 USC App 2406(d).

<sup>21</sup> Having won a bitter political fight to build the 800 mile pipeline through environmentally sensitive terrain, the government could not afford the perception that the oil was supplying foreign markets objectives.

<sup>22</sup> 42 USC 8501. The President is given power to take actions when he finds "with respect to any energy sources for which [he] determines a severe energy supply interruption exists or is imminent or that actions to restrain domestic energy demands are required in order to fulfill the obligations of the United States under the international energy programme".

<sup>23</sup> 15 USC 717b (natural gas); 16 USC 824a(e) (export of electricity).

Union to Western Europe in the early 1980s.<sup>24</sup> The national security concerns ranged from Soviet access to militarily useful technology to strengthening of the Soviet economy through the infusion of hard currency from the gas sales to the potential for a Soviet political embargo of a crucial energy resource. Eventually, the United States gave up its effort to stop the project having harmed primarily its own manufacturers.

### *Nuclear energy*

Nuclear power has always been a special case. Even the most devoted free marketeers and free traders hesitate at the prospect of uncontrolled nuclear commercial activity. The United States Atomic Energy Act reflects the delicate balances among military and peaceful uses and promotion and protections. The statute's Declaration of Policy observes that atomic energy "shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the permanent objective of making the maximum contribution to the common defence and security".<sup>25</sup> Likewise, the statute encourages the international peaceful use of the atom "to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defence and security will permit".<sup>26</sup>

Further sections of the Act forbid issuing commercial nuclear licences to an "alien or foreign controlled corporation"<sup>27</sup> and prohibit various activity if it is "inimical to the common defence and security".<sup>28</sup> International exports are subject to provisions of legislation discouraging proliferation of materials useful in the making of nuclear weapons.<sup>29</sup>

The recently enacted Energy Policy Act of 1992 sheds light on current Congressional thinking on energy, trade, and national security.<sup>30</sup> The House Report on the Act describes a "comprehensive national energy policy that gradually and steadily increases US energy security in cost-effective and environmentally beneficial ways".<sup>31</sup> Among its goals are the reduction of petroleum imports,<sup>32</sup> an increase in the size of the Strategic Petroleum Reserve<sup>33</sup> and the encouragement of nuclear electric power through such programmes as more expeditious nuclear plant licensing,<sup>34</sup> resolution of the site for long-term nuclear waste disposal,<sup>35</sup> and creation of a new private-sector-based nuclear fuel enrichment corporation.<sup>36</sup>

<sup>24</sup> See *Public Papers of President Ronald Reagan 1982* at 831-32.

<sup>25</sup> 42 USC 2011.

<sup>26</sup> 42 USC 2013(c).

<sup>27</sup> 42 USC 2133.

<sup>28</sup> See eg, 42 USC 2074(b) (plutonium distribution); 2112(b) (foreign distribution of byproducts material); 2133 (commercial licences).

<sup>29</sup> 42 USC 2153; see generally, Nuclear Nonproliferation Act of 1978, Public Law 95-242.

<sup>30</sup> Public Law 102-486, Energy Policy Act of 1992.

<sup>31</sup> House Report No 102-1018, 1992 US Code Cong & Admin News 1953, 1955.

<sup>32</sup> Public Law 102-486, Title XX.

<sup>33</sup> *Id.*, Title XIV.

<sup>34</sup> *Id.*, Title XXVIII.

<sup>35</sup> *Id.*, Title VIII.

<sup>36</sup> *Id.*, Title IX.



### **Evolving meanings of national security**

For half a century from 1940 to 1990 “essential security interests” centered on the use of military force to preserve national sovereignty, if not the nation itself. The World War II attempts at military domination by Japan and Germany were followed by the Soviet Union’s imposition of military control over Eastern Europe and the worldwide competition between the Communist and capitalist blocs. From approximately 1947 to 1989 two threats dominated national security planning by the Western nations. The first was the risk of massive nuclear war brought about by design or accident. The United States and the Soviet Union built enormous nuclear arsenals targeted at both military and civilian targets. While opinions differed as to how bad the “worst case” nuclear exchange might be, no serious analyst doubted that a major exchange of nuclear weapons by the superpowers could work the largest destruction of any conflict in human history. The second threat was the conventional military assault on Western Europe. The prime scenario for ground combat for NATO forces was a massive Russian attack through the Fulda Gap in Germany with the goal of military and political domination of all of Europe. This threat compelled the positioning of 300,000 United States troops in Europe (primarily West Germany) for almost half a century.

These two events helped define other United States assertions of security interests over the last half century. Only the worldwide struggle against Communism explains the massive American interventions in Korea in 1950–53 and in Vietnam from approximately 1961 to 1973. It explains the crises-short-of-war exemplified by threats to Berlin in 1948 and 1961 and, most memorably, the Cuban Missile crisis of 1962. It also explains the various small wars (Grenada in 1983) and covert actions (CIA involvement against the Mossadegh Government in Iran in 1954 and destabilisation of the left-leaning regimes in Guatemala in the 1950s, Chile in the 1970s, and Nicaragua in the 1980s).

National security policies involving nuclear weapons sought equivalence, if not superiority, over the other super-power with considerable attention given to the alternative means of delivery (the nuclear triad of bombers, ballistic missiles, and submarine launched missiles) and sought to discourage proliferation of nuclear weapons to other countries. Efforts by the superpowers to limit the number and potency of nuclear weapons were largely unsuccessful for most of the Cold War.

The events of 1989–91 changed the Western definitions of “essential security interests”. By conventional definitions the NATO alliance “won” the 50 year struggle. It is worth recalling that few Western leaders of the mid-1980s could have anticipated so total a victory. By the standards of 1985, Western leadership would probably have conceded Communist domination of Eastern Europe and parts of the third world, Soviet military equivalency, and the perpetual continuation of Communism in return for an agreement that would have reduced the tensions and economic burdens of the warfare society. By 1993 far more had been achieved. Eastern Europe had achieved independence. The Soviet Union itself had fractured. Communism as a governing ideology had virtually collapsed. The Russian military threat had receded and Communist regimes elsewhere (Cuba, North Korea) appeared economic basket cases and ideological anachronisms. All in a span of five years.

The half century of conflict has left its legacy in the United States and elsewhere. Although popular enthusiasm varied, the United States asserted "essential security interests" to justify a wide variety of Government actions. A hardly inclusive list could include elaborate programmes controlling government employee loyalty, various controls on product imports and exports, national defence educational programmes and highway systems, a covert national security apparatus, and the direct military expenditures on a "second to none" nuclear force and a conventional military with worldwide projection abilities. The last was designed to have the capacity to fight a minimum of one and a half wars at the same time — resisting a Russian assault in Europe and fighting a smaller war (possibly Soviet inspired) elsewhere in the world. National security took on an expansive meaning and one that was often asserted to override other values and normal constitutional processes.

The end of the Cold War and the decline of the Soviet nuclear threat has not ended United States concerns about national security. In the narrowly military sense, the world remains a dangerous place at least as far as American interests are defined. We can identify a half dozen likely justifications for the use of force:

- (1) As operation Desert Storm has shown, the United States and much of the developed world regard a plentiful and stable flow of oil from the Middle East as a paramount national interest. The region's continued instability makes possible the prospect of further military actions to secure resource access.
- (2) The continuation of Arab-Israeli tensions (though lessened by the Israeli-PLO agreements) adds to the Middle Eastern tensions. For the United States and for much of Europe the survival of the Israeli democracy is an imperative to be defended with the use of military force. No other country that faces a plausible threat to its national integrity calls up such a degree of support.
- (3) The nuclear concern continues. Today any Russian or United States nuclear attack probably would be accidental rather than a conscious choice of national military strategy. The greater concern may shift to newer members of the nuclear club. Israel-Iraq, North Korea-South Korea and Pakistan-India all offer the realistic possibility of a nuclear attack. Clearly, the developed world has strong incentives to prevent such an exchange. What is less clear is the Western reaction if the exchange should take place.
- (4) Threats of major cross border wars continue. Some may have as their objective the virtual annihilation of the losing state. Others may seek more narrow territorial, resource, or political objectives. Again, the range of major power concern varies.
- (5) Numerous nations are threatened with disintegration on the basis of religious or ethnic identity. Russia and Yugoslavia are the most visible recent cases.
- (6) Humanitarian activity requiring military involvement may be gaining popularity. The Somalian intervention is the recent example. Law and the media combine to encourage humanitarian activity. Law has gradually eroded the assumption that a national leadership might treat its citizens (including the ethnic or religious minorities) however it wanted. Worldwide media coverage can force human rights violations on the public conscience in a way never before possible.

All of these examples suggest that major powers will continue to keep and use military force. A literal definition of an "essential security interest" may rule out certain of these actions as grounds for GATT obligations. Is the Somali intervention truly "essential" to the security of the United States if that term means the continuation of the United States as a political and economic entity? Most certainly not. However, a half century of exaggerating national security threats may leave some hard habits to break. As the GATT disputes over Article XXI suggest "essential security interests" remain in the eye of the beholder.

A second issue involves the extension of "essential security interests" beyond the purely military. Historian Paul Kennedy has addressed the point well. "[T]he definition of national security cannot refer simply to military policies or to military spending alone. I think it ought to refer instead to those sources, those underpinnings of long-term national strength in the state and power of our manufacturing, investment in science and technology, of educational skills, all of which ultimately the Armed Forces and defence policy of this country have to rest upon".<sup>37</sup> Article XXI itself is a mix of references to the narrowly military (eg "traffic in arms, ammunition and implements of war . . .") and the more expansive ("fissionable materials", measures taken "in time of . . . other emergency in international relations"). Over the last decade political discourse in the United States has defined "essential security" to include matters beyond purely military threats. The January 1992 National Military Strategy of the United States identifies four "national interests". The first is the predictable: "The survival of the United States as a free and independent nation, with its fundamental values intact and its institutions and people secure". The second is less obviously a justification for armed force: "A healthy and growing US economy to ensure opportunity for individual prosperity and resources for national endeavours at home and abroad". Its subhead is to: "Ensure access to foreign markets, energy, mineral resources, the oceans, and space".<sup>38</sup> The two most visible American examples would be the national economic decline and the threats to the environment. Neither the world in which the United States has lost its industrial competitiveness nor the one spoiled by pollution is a secure world. The damage to the structure of society from these harms is seen by some to be every bit as great as from a military defeat of all but the most cataclysmic type. This interpretation of "essential security" could justify almost any trade restriction under GATT Article XXI.

## Conclusion

Energy trade has been something of a special case. The importance of the energy product to buyer (securing an essential military or economic resource) and seller (sometimes securing a major portion of export earnings) has provided an incentive that has allowed trade to take place. At the same time

<sup>37</sup> American Economic Power: Redefining National Security for the 1990s, Hearings before the Joint Economic Committee, US Congress, 101st Cong, 1st Sess, 9 November 1989 at 23.

<sup>38</sup> Joint Chiefs of Staff, National Military Strategy of the United States, January 1992 at 5.

national security factors have intruded where domestic interests are threatened by unrestricted trade.

The end of the Cold War lessens but does not end national security claims. It surely expands the prospects for energy trade worldwide. But, such trade may now be more subject to the lengthy negotiations and cumbersome obstacles common to trade in "less strategic" commodities.