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Treaties and National Security Exceptions

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March 7, 2007

Questions:

- I. Is there an implicit exception for national security under the OECD Convention?
- II. How are national security exceptions/concerns handled in treaty contexts?

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- I. Is there an implicit exception for national security under the OECD Convention?

Short Answer

There is no formal doctrine establishing an implicit national security exception that applies across all international treaty law. In particular, with respect to the OECD Convention, there are three reasons to conclude that no implicit national security exception exists.

- First, explicit security exceptions are commonly included in treaties, they vary from treaty to treaty, and they often vary in their treatment of different provisions within a given treaty.
- Second, an analysis of GATT disputes discussing the explicit security exception (Article XXI) of the GATT treaty both demonstrates that there is no inherent right to except to a treaty on national security grounds separate from the explicit exception provisions of Article XXI and strongly suggests that when a country invokes the exception under Article XXI, that decision is reviewable.
- Third, other doctrines of exceptions to treaties exist and are codified in the Vienna Convention on the Law of Treaties and the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles"). Neither of these includes a national security exception, and they place specific limits on the exception doctrines they do include. These doctrines have been reviewed by courts and are not left to unilateral discretion.

Discussion

Explicit National Security Exceptions

National security concerns frequently take the form of explicit national security exceptions written into treaties. This suggests that where a treaty contains no explicit exception, there simply is no exception because there seems to be no reason why such an exception wouldn't simply be written into the treaty. Indeed, there is clearly little disincentive to including such an exception provision in a treaty because it will only make it easier to elicit signatures. Additionally, the fact that the nature of such exceptions varies across treaties further suggests that any exception must be given form within the treaty in question and that there is no uniform doctrine of national security exceptions that applies to all treaty contexts. Rather, where explicit national security exceptions exist, they are tailored to the specific treaty. Moreover, in treaties that contain explicit national security exceptions, such exceptions often apply differently to different provisions, and some provisions are identified as non-derogable.

A prominent example is Article 4 of the International Covenant on Civil and Political Rights. Article 4(2) of the ICCPR identifies seven articles within the treaty as being non-derogable. Article 4(1) also identifies antidiscrimination norms as being non-derogable. 4(3) establishes a process for announcing the public emergency justifying any derogations and provides that reasons must be given for any derogations. Another example is Article XXI of the GATT, which affords a broader national security exception to the furnishing of information, considered a secondary duty under the GATT, than it does to derogations from primary obligations.¹

We next analyze the four cases regarding national security exceptions that reached the formal dispute resolution stage under the GATT. These decisions both demonstrate that there is no inherent right to except to a treaty on national security grounds separate from the explicit exception provisions of Article XXI, and strongly suggest that a member state's decision to involve the exception under Article XXI is reviewable.

Disputes over GATT Article XXI

In 1949 Czechoslovakia disputed a U.S. ban on the export of certain products from the United States to Czechoslovakia, which the United States defended on national security grounds. The complaint was nearly unanimously rejected, and the discussion of the contracting parties referred to the provisions of Article XXI in general terms.² For example, the U.K. delegate argued that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort relating to its own security."³ Still, the specific provisions of the article were mentioned,⁴ and the U.S. delegate responded to a charge by Czechoslovakia that the U.S.'s construction of the term "war material" in Article XXI(b)(ii) was too expansive with a defense on the merits, arguing that the US export control regime was "highly selective."⁵

In *Nicaragua v. United States* (1984) (*Nicaragua I*), Nicaragua challenged an aspect of the Reagan administration's Central American policy drastically reducing the share of sugar

¹ Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 582-84 (1990-1991).

² Hannes L. Schloemann and Stefan Ohlhoff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 Am. J. Int'l L. 424, 433 (1999).

³ Quoted in Hahn, *supra* note 1, at 570.

⁴ See Hahn, *supra* note 1, at 570.

⁵ Schloemann and Ohlhoff *supra* note 2, at 433

imports allocated to Nicaragua. The United States declined to invoke Article XXI, opting instead to pursue a jurisdictional defense that claimed that its actions were beyond the scope of GATT.⁶ Because the United States did not invoke Article XXI, the panel did not examine its applicability and simply held the United States in violation of GATT.

In *Nicaragua v. United States (1985-1986) (Nicaragua II)*, Nicaragua requested that a panel review a complete import and export embargo imposed by the United States. The United States this time invoked Article XXI (specifically, Art. XXI(b)(iii)), but argued that invocations of the article were unreviewable by the panel both by the “clear terms” of the article and by the terms of reference of the panel, which explicitly instructed the panel not to “examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States.”⁷ These restricted terms of reference were the result of U.S. efforts and the consensus requirement in the GATT resolution mechanism. Such a move is no longer possible under the WTO dispute resolution mechanism, which does not require the consent of the defendant to establish a panel.⁸ The panel determined that it was limited by its terms of reference not to examine the United States’ invocation of Article XXI(b)(iii), but made clear that it was not generally prevented from reviewing invocations of Article XXI.⁹ The panel observed that reading Article XXI in conjunction with the rest of the treaty cut against the possibility of Article XXI being non-reviewable:

If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that provision, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2?¹⁰

That provisions of treaties must be interpreted in conjunction with other provisions in the same treaty is a well-established principle of national and international law.¹¹ The acknowledgment of this rule, which forces national security exceptions to be interpreted in light of other treaty provisions, severely undermines the argument that such exceptions are mere reflections of a general limitation on treaties; i.e. that there is a general implicit national security exception that exists independently of explicit provisions provided in particular treaties.¹² Thus, the general force of jurisdictional defenses to national security exceptions is weakened since the source of the exception, or at least its form, must come from the treaty itself, which will be subject to review according to the terms of the treaty.

In 1991 the former Socialist Federal Republic of Yugoslavia invoked the GATT dispute settlement mechanism in response to restrictions on trade imposed by the European Community in light of the Yugoslavian civil war. The EC explicitly grounded its action in Article XXI. Although panel proceedings were suspended in 1993 in light of the uncertainty surrounding the status of the new Federal Republic of Yugoslavia (Serbia and Montenegro), the Council agreed

⁶ *See Id.* at 433-34.

⁷ Non-violation complaints under GATT Article XXIII:2 MTN.GNG/NG13/W/31, 14 July 1989, 23. Available at <http://gatt.stanford.edu/page/home/>.

⁸ Schloemann and Ohlhoff *supra* note 2, 434, n61.

⁹ *Id.* at 435.

¹⁰ Quoted in *Id.* at 435.

¹¹ *Id.* at 435.

¹² *See Id.* at 435.

to establish a panel to review the EC's invocation of Article XXI, and the EC did not claim that such review was barred.¹³

One other case is worth mentioning, although it did not reach a panel. In 1982, in response to the attempted annexation of the Falkland/Malvinas Islands by Argentina, the European Community, Australia, and Canada imposed trade restrictions on Argentina. In discussions at the GATT Council, the EC, Australia, and Canada stated that "they had taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement was a reflection."¹⁴ The Council did not accept this view and issued a "Decision concerning Article XXI of the General Agreement." The relevant part read as follows:

Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;
Noting that recourse to Article XXI could ... affect benefits accruing to contracting parties under the General Agreement;
Recognizing that ... until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application;
The CONTRACTING PARTIES decide that:

1. Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.
2. *When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.* [Emphasis added].¹⁵

Schloemann and Ohlhoff observe that many delegates were concerned with the *carte blanche* that the identification of such "inherent rights" would have. The Brazilian delegate echoed these concerns, but agreed with the EC that essential security interests should be defined by the state invoking them.¹⁶ Schloemann and Ohlhoff respond to this concern by proposing that states be allowed to define their essential security interests subject to review for good faith. They would require states to provide substantive justification on the merits to demonstrate such good faith. This solution, they claim, balances sovereignty concerns, which require a state to be allowed to define its own security interests, with the need to prevent abuse. They observe that both of these competing concerns are central to the viability of the treaty system.

To summarize these cases, no GATT panel has ever declared any part of Article XXI to be solely under the discretion of a state party and no GATT panel has ever accepted an argument that an implicit national security exception prevents a derogation from being a violation (this was essentially the US's claim in *Nicaragua I*). Even where there have been discussions to this effect—for example, in the *Czechoslovakia* case—such views were not unanimous and were motivated by the desire to maintain the integrity of the specific treaty system.¹⁷ Moreover, given the facts in the *Czechoslovakian* case, the result reached was arguably in line with the textual provisions of Article XXI. It is impossible to say that the same result would have been reached under a different fact pattern that presented a more obvious violation of the text of Article XXI. Where a party argued a complete jurisdictional defense, essentially by alluding to an implicit exception, the dispute resolution body did not abdicate jurisdiction, but rather found the party in violation of the treaty (*Nicaragua I*; *Falklands* case). Where a party argued that an explicit

¹³ *Id.* at 436.

¹⁴ Quoted in *Id.* at 436.

¹⁵ Quoted in *Id.* at 437.

¹⁶ *See Id.* at 437.

¹⁷ *See Id.* at 433; 434, n61.

national security exception was unreviewable, the panel suggested that such exceptions should be read in the context of the treaty in question, and not as specific expressions of a general principle reserving questions of national security to individual states. In the most recent case, the party invoking Article XXI did not claim that such an invocation was barred from review.

Although there has been no WTO jurisprudence and no decision by a competent WTO body relating to invocations of Article XXI since the establishment of the WTO,¹⁸ it is fair to assume that arguments for reviewability of national security concerns are even stronger now.¹⁹

Customary International Treaty Law

Aside from the universal, implicit exceptions claimed and rejected in the Argentina and Nicaragua I cases, customary international law does identify some exceptions that may be applied to all treaties, even when not mentioned in the specific treaty. The four exceptions most likely to be invoked in connection with national security concerns are *clausula rebus sic stantibus*, the law of reprisal, self-defense, and the doctrine of necessity. The first stands for the proposition that a treaty may become inapplicable due to a fundamental change of circumstances. The law of reprisal may entitle a party to suspend or terminate a treaty in response to a breach by another party. Both of these principles are widely accepted expressions of customary international law relating to treaties and have been codified in the Vienna Convention on the Law of Treaties.²⁰ The doctrines of necessity²¹ and self-defense,²² while not codified in the Vienna Convention, are given expression by the International Law Commission²³ in its Draft Articles on State Responsibility for Internationally Wrongful Acts, which have arguably achieved the status of customary international law.²⁴ The presence of these and other implicit exceptions²⁵ to treaties and other international obligations in customary international law undermine claims that there exists another implicit national security exception that should be read into treaties. Moreover, all of these exceptions impose justiciable restrictions on the states invoking them.

¹⁸ See http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm.

¹⁹ See Schloemann and Ohlhoff, *supra* note 2, at 439-41 (“[T]he DSU itself is not subject to a national security exception. To the contrary, its Article 23 requires members, ‘[w]hen [they] seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, [to] have recourse to, and abide by, the rules and procedures’ of the DSU....”)

“By not including a provision excluding the application of the DSU to disputes in which one of the members invokes the national security exceptions or a provision defining particular standards of review or any other particular rule applying to the resolution of such disputes, the members presumably decided that such disputes should not, in principle, be treated differently from other disputes under the covered agreements.”)

²⁰ See Vienna Convention on the Law of Treaties, Articles 60 and 62.

²¹ See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Article 25.

²² See *Id.*, Article 21.

²³ “Established in 1948, the International Law Commission's mandate is the progressive development and codification of international law, in accordance with article 13(1)(a) of the Charter of the United Nations.” Web site of the International Law Commission, available at <http://www.un.org/law/ilc/>, accessed 2/28/07.

²⁴ See Andrea K. Bjorklund, *Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness*, 1-3, UC Davis Legal Studies Research Paper No. 99, Oxford Handbook of International Investment Law, Peter Muchlinski & Federico Ortino, eds., (Oxford University Press 2007).

²⁵ See e.g. Vienna Convention, *supra* note 20, §2: Invalidity of Treaties (Articles 46-53) and §3: Termination and Suspension of the Operation of Treaties (Articles 54-64).

For example, Iceland challenged the International Court of Justice's ("ICJ") jurisdiction in the *Fisheries Jurisdiction Case*,²⁶ by invoking a fundamental change in circumstances. The ICJ not only rejected this challenge to its jurisdiction, but also suggested that it would review a claim of fundamental changes in circumstances as a question of fact when it reached the merits:

40. The Court, at the present stage of the proceedings, does not need to pronounce on this *question of fact*, as to which there appears to be a serious divergence of views between the two Governments. If, as contended by Iceland, there have been any fundamental changes in fishing techniques in the waters around Iceland, *those changes might be relevant for the decision on the merits of the dispute, and the Court might need to examine the contention at that stage....* But the alleged changes could not affect in the least the obligation to submit to the Court's jurisdiction, which is the only issue at the present stage of the proceedings. It follows that *the apprehended dangers for the vital interests of Iceland, resulting from changes in fishing techniques, cannot constitute a fundamental change with respect to the lapse or subsistence of the compromissory clause establishing the Court's jurisdiction.* (Emphasis added).²⁷

Iceland seems not to have raised the fundamental change of circumstances claim at the merits stage.²⁸

The law of reprisals has also been reviewed by international tribunals and is subject to well-settled limits. *The Naulilaa Case (Portugal v. Germany)*²⁹ specifies the following limits: "Specifically, reprisals (1) can only be executed by agencies or instrumentalities of a State; (2) must be proportionate; and (3) must follow a failed attempt to resolve the violation by peaceful negotiation."³⁰ The Vienna Convention requires that the breach eliciting the response be "material,"³¹ and defines a "material breach" as "(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."³² Articles 49 through 54 of the Draft Articles specify additional limitations on countermeasures that may be taken in response to international law violations by other parties.

The doctrine of necessity is also subject to strict limits, so strict in fact that at least one commentator has suggested the possibility that it may be so "stringently limited that its successful invocation is virtually impossible."³³ As articulated in the Draft Articles, to successfully invoke a necessity defense, a state must show that the act in question "(a) [i]s the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) [d]oes not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."³⁴ Once these requirements have been satisfied, the state must show that neither "(a) [t]he international obligation in question excludes the possibility of invoking necessity; or (b) [t]he State has contributed to the situation

²⁶ United Kingdom of Great Britain and Northern Ireland v. Iceland, Jurisdiction of the Court, International Court of Justice, 2 February 1973, available at: <http://www.oceanlaw.net/cases/fishj1jur.htm> .

²⁷ *Id.* at para. 40.

²⁸ See United Kingdom of Great Britain and Northern Ireland v. Iceland, Merits, International Court of Justice, 25 July 1974, available at: <http://www.oceanlaw.net/cases/fishj1mer.htm> .

²⁹ Responsabilité de L'Allemagne a Raison des Dommages Causés dans les Colonies Portugaises du Sud de L'Afrique, 8 Trib. Arb. Mixtes 409 (1928) (Portugal v. Germany) (The Naulilaa Case), reprinted in 2 R. Int'l Arb. Awards 1011 (1949)

³⁰ Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 Mil. L. Rev. 155, 158-59 (2001).

³¹ Vienna Convention, *supra* note 20, Article 60(1).

³² *Id.*, Article 60(3).

³³ Bjorklund, *supra* note 24, at 3.

³⁴ Draft Articles, *supra* note 21, Article 25(1).

of necessity.”³⁵ Andrea Bjorklund discusses three recent cases dealing with the necessity defense—two ICSID cases relating to the 2001 Argentine economic crisis³⁶ and one ICJ case dealing with a dispute between Hungary and Slovakia relating to a system of locks on the River Danube.³⁷ All of the tribunals in these cases considered claims of necessity to be reviewable and two rejected the claims.³⁸ As Andrea K. Bjorklund concludes her detailed analysis of emergency exceptions to international foreign investment obligations, “[a]ll tribunals to date have determined that circumstances precluding wrongfulness under the ILC Articles are not self-judging.”³⁹

The Draft Articles include the doctrine of self-defense in Article 21 and reference the Charter of the United Nations to define the scope of the exception. Article 51 of the UN Charter outlines a right to “self-defense if an armed attack occurs...until the Security Council has taken measures necessary to maintain international peace and security” and requires immediate reports to the Security Council when it is invoked.

A few other universal exceptions could conceivably be invoked in relation to national security concerns. These include the doctrines of distress,⁴⁰ impossibility,⁴¹ and *force majeure*.⁴² The doctrine of distress is related to that of necessity,⁴³ but operates on a smaller scale, protecting “lives”⁴⁴ rather than “essential interest[s].”⁴⁵ Likewise, the doctrines of impossibility and *force majeure* are related in that the latter requires that performance of the obligation be made “materially impossible” as a result of an “irresistible force” or “unforeseen event.”⁴⁶ The Vienna Convention limits the application of the impossibility doctrine to situations where “the permanent disappearance or destruction of an object indispensable for the execution of a treaty” renders performance impossible.⁴⁷ Likewise, distress and *force majeure* are subject to stringent limits. Neither can be invoked if the state invoking the exception has contributed to the situation, and both, unlike the doctrine of necessity, relate only to situations where there is no choice but to breach the obligation.⁴⁸ Additionally, distress requires that there be “no other reasonable way” to save the lives in question.⁴⁹

Prosecutorial Discretion

The preceding discussion sought to demonstrate that there is no implicit national security exception to treaty obligations. Because the British government has invoked just such an exception in halting the Al Yamamah investigation, this finding is obviously relevant. However, it is important to be aware that the UK government has invoked this implicit exception in a

³⁵ *Id.*, Article 25(2).

³⁶ *CMS Gas Transmission Co. v. Argentina*, ICSID (W. Bank) Case No. ARB/01/8 (Award) (12 May 2005); *LG&E Energy Corp v. Argentina*, ICSID (W. Bank) Case No. ARB/02/1 (Decision on Liability) (3 Oct. 2006).

³⁷ Case Concerning the Gabčíkovo-Nagymaros Project, 1997 I.C.J. 7.

³⁸ See Bjorklund, *supra* note 47, at 39.

³⁹ *Id.* at 51.

⁴⁰ See Draft Articles, *supra* note 21, Article 24.

⁴¹ See Vienna Convention, *supra* note 20, Article 61.

⁴² See Draft Articles, *supra* note 21, Article 23.

⁴³ See Bjorklund, *supra* note 24, at 16, n87.

⁴⁴ *Id.*, Article 24(1).

⁴⁵ *Id.*, Article 25(1).

⁴⁶ *Id.*, Article 23(1).

⁴⁷ Vienna Convention, *supra* note 20, Article 61(1).

⁴⁸ See Bjorklund, *supra* note 24 at 50 (“Necessity involves the element of volition in that a State chooses not to comply with its obligation, albeit for good reason, whereas force majeure involves an inability to comply with the obligation); *Id.* at 6 (referring to “situations of distress where the notion of volition is nullified because the action is necessary to save a life”).

⁴⁹ Draft Articles, *supra* note 21, Article 24(1).

context where States Parties to the OECD convention do have some discretion—specifically, prosecutorial discretion. As such, it is important to examine the relevant provision of the treaty—Article 5, the enforcement provision—as well as the relevant Official Commentary.

Article 5 reads:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

The fact that the enforcement provision places affirmative obligations on state parties regarding prosecutions raises the issue of prosecutorial discretion. This opens up the possibility that, despite the fact that the treaty allows for no national security exception, such an exception could make its way in through prosecutorial discretion. That is, a prosecutor could decline to prosecute in cases where national security concerns are implicated. The Official Commentary provides some guidance on this topic:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.

Although recognizing the “fundamental nature” of prosecutorial discretion, the Commentary points out that prosecutorial discretion must go along with prosecutorial independence and that this independence must be protected and not be subject to improper influence. However, “improper” in the Commentary is not a self-defining term. Of some help is the clause “by concerns of a political nature.” This would suggest that influence by political concerns is inherently improper. The extent to which political concerns can be differentiated from security concerns is up for debate. “Political concerns”, interpreted broadly, might be read as a category where security concerns fit as a sub-category. Interpreted narrowly, “political concerns” might be interpreted to exclude pure security concerns and include only concerns related to partisanship or the protection of the reputations of individuals or the government. Returning to the text of Article 5, inter-state relations are expressly excluded as concerns that may properly influence investigations and prosecutions of the bribery of a foreign public official: “[Investigations and prosecutions] shall not be influenced by...the potential effect upon relations with another State.” Thus, although states retain discretion in initiating and pursuing prosecutions, it seems inconsistent with the purpose of the treaty and the wording of Article 5 for states to be able to assert a national security interest as a blanket and unreviewable exception to their enforcement strategy.

II. How are national security exceptions/concerns handled in treaty contexts?

Short Answer

The discussion that follows is meant to be helpful in several ways. First, it provides concrete examples of how certain treaties deal with national security exceptions. Second, it demonstrates that treaties deal with such exceptions in varying ways that depend upon the nature of the treaties’ legal obligations and upon the strength of informal enforcement mechanisms. Third, despite the variation among treaties, the national security exceptions that exist point to some general principles. These principles include:

- The identification of a threshold of harm to the interests of a Party that must be met in order to exercise an exception.
- A notice requirement.
- A giving reasons requirement.
- A narrow-tailoring requirement.
- A means for review.

Discussion

GATT/WTO

See discussion above in *Disputes over GATT Article XXI*.

NAFTA

NAFTA contains an explicit national security exception that is similar to Article XXI of the GATT. According to the North American Free Trade Agreement Implementation Act, Statement of Administrative Action (1993), this exception is “self-judging” in nature. However, there is a requirement that the exception be exercised in good faith:

2. National Security

Article 2102 governs the extent to which a government may take action that would otherwise be inconsistent with the NAFTA in order to protect its essential security interests. The article does not apply to energy trade between the United States and Canada or to measures related to government procurement. Articles 607 and 1018, respectively, establish specialized national security exceptions in those areas.

Article 2102 is based on CFTA Article 2003, which in turn tracks in major part GATT Article XXI. The NAFTA provision departs from the CFTA by including among the types of measures subject to the exception those related to services and technology transactions. This expansion reflects the broader sweep of the NAFTA as compared to the CFTA. *The national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith.*⁵⁰ (Emphasis added).

This good faith requirement is a reflection of the doctrine of *pacta sunt servanda*, which has the status of customary international law and is codified in Article 26 of the Vienna Convention.⁵¹ Whether a given invocation of national security concerns satisfies the good faith requirement seems to be reviewable under the NAFTA dispute resolution procedures laid out in Chapter 20 (Institutional Arrangements and Dispute Settlement Procedures). Before resorting to formal dispute resolution procedures,⁵² however, parties are encouraged to resolve their disagreements informally through cooperation and consultations.⁵³ Such a consultation was initiated by Canada with regard to the Helms-Burton Act.⁵⁴ We have not been able to find whether the dispute continued beyond this stage, but it seems unlikely. President Clinton exercised his authority under the Act to suspend much of its effect, which may have been sufficient to quell the dispute.

⁵⁰ Reprinted in H.R. Doc. 103-159, 666.

⁵¹ “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

⁵² See NAFTA, Article 2004: Recourse to Dispute Settlement Procedures.

⁵³ See *Id.*, Article 2003: Cooperation; Article 2006: Consultations.

⁵⁴ Richard W. Stevenson, “Canada, Backed by Mexico, Protests to U.S. on Cuba Sanctions” 3/14/96 NYT 7 (noting that “[a] request for consultations is the first step in resolving trade disputes under Nafta, and could lead to a formal ruling on whether the American legislation violates the pact.”)

Antonella Troia presents arguments for each side and concludes that were the dispute to have reached a formal dispute resolution, Mexico or Canada would likely have won a challenge to the Helms-Burton Act.⁵⁵

To recap, although the explicit security provision in NAFTA gives parties considerable discretion in defining their national security interests, this discretion is subject to a good faith requirement, which does have some teeth. It is noteworthy that recourse to formal dispute resolution is available, in addition to a formal procedure for consultations and information sharing, despite the fact that there are only three parties, which would seem to greatly increase the incentives not to be perceived as violating the treaty.

International Criminal Court (ICC)

The Rome Statute for the International Criminal Court includes national security exceptions for providing information. Article 72 applies in the following circumstances:

- (1) [I]n any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.
- (2) When a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

Article 93(4) states:

In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

The interaction of these provisions presents some ambiguity. Article 93(4) is in Part 9 of the Statute that lays out ways in which the States Parties must cooperate with and assist the Court and the Prosecutor in their investigations and prosecutions. Viewed from a structural perspective, Article 93(4) merely identifies an exception to these obligations and points toward a procedure (Article 72) in the section of the Statute dealing with trial procedures (Part 6). As will be argued below, this is clearly the proper interpretation. Article 72 lays out the subject matter to which a national security exception is available, as well as the procedures for exercising the exception, and 93(4) merely sets out the only procedures available for excepting to it.

However, the specific wording of these provisions may be used to cast doubt on this interpretation since they differ slightly in their specific description of the subject matter that is subject to exception. Article 72 refers to materials that “prejudice” national security interests while Article 93(4) refers to materials that “relate[]” to national security. Additionally, Article 72 refers to “disclos[ing]” or “giv[ing]” information, whereas Article 93(4) refers to “produc[ing]” same. Additionally, Article 93(5)-(6) provide safeguards against the abuse of the exception that overlap with the safeguards provided in Article 72.

Although these seem to be merely examples of inexact drafting, one might, instead, posit that 93(4) creates a separate exception that applies to different obligations of the States Parties. One might further argue that these different obligations are subject to different safeguards than those that apply to the subject matter eligible for exception under Article 72. Although we

⁵⁵ Antonella Troia, *Note: The Helms-Burton Controversy: An Examination of Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 Violates U.S. Obligations under NAFTA*, 23 *Brook. J. Int'l L.* 603 (1997).

believe such an argument is incorrect and that Article 72 covers all subject matter that may be excepted to on national security grounds as well as all procedures available to exercise such an exception, we analyze the two articles as if they referred to different obligations, conclude that even if the subject matter of 93(4) differs from that covered by Article 72(1)-(2), 93(4) is still meant to incorporate the procedures and protections under Article 72 for excepting to that subject matter. First, however, consider the structural argument that suggests that Article 72 is exhaustive in its reference to subject matter subject to an exception on national security grounds as well as in laying out the procedures available to exercise such an exception.

Structural Argument

Article 72 fits within Part 6 (The Trial) of the Rome Statute, which sets out procedural guidelines for carrying out a trial. Article 93 is in Part 9 (International Cooperation and Judicial Assistance), which details how States Parties must cooperate with and assist the Court and Prosecutor in their investigations and prosecutions. Part 9 lays out ways in which States Parties are obligated to cooperate with and assist the Court; Article 72 lays out a procedure within the trial through which States may seek exceptions.

With these roles in mind, we can see that the purpose of 93(4) is to relate a treaty obligation to a procedure for seeking an exception to that obligation. Paragraphs (4)-(6) of Article 93 thus make clear that certain obligations in Article 93 can be excepted to under Article 72. Notably, no equivalent of paragraphs 4 through 6 exists in any of the other articles in Part 9 which spell out obligations of States Parties. This makes sense because the other articles spelling out such obligations refer not to providing information, but rather to the requirements that States Parties have procedures available under national law to assure cooperation (Article 88), that States Parties comply with requests to surrender persons to the Court (Article 89), that States Parties deal with competing requests (from other states) for the surrender of persons in a certain way (90), and that States Parties comply with requests for the provisional arrest of persons (92). Article 93 is a catch-all provision that refers to other forms of assistance. Importantly, most of the examples of other types of assistance given in 93(1)(a)-(l) relate to the provision of information. The inclusion of 93(4)-(6) makes considerably more sense, despite their imprecise drafting, when Article 93 is viewed in context. Article 93 is the only article that lays out obligations of States Parties with regard to the provision of information. It follows that while 72 should not apply to the other obligations to cooperate laid out in Part 9—i.e. there is no exception from these provisions except as might be provided within those provisions themselves—it should apply to certain parts of Article 93—those that pertain to the provision of information—and not to others.

To conclude, the ICC imposes a number of obligations on its parties. To a large class of these obligations (e.g. Articles 88-92) no national security exception applies. A national security exception does apply to a sub-class of obligations (some, but not all, of the obligations laid out in Article 93), and the scope of this exception, procedures for its invocation, and procedures for review of its invocation, are spelled out in Article 72.

Article 72

Although the language, “in the opinion of that State,” appears throughout the article, this does not seem to suggest that the question of which information prejudices national security interests is ‘self-judging.’ Rather, an opinion of a state to the effect that the disclosure of certain information would undermine its national security interests is enough to activate Article 72, which then spells out steps the State can take to resolve the matter cooperatively with the Court

or the Prosecutor.⁵⁶ If an agreement is not reached through cooperation, the State is obligated to give “specific reasons” for its desire to withhold the information, unless such reasons themselves would “necessarily...prejudice...the State’s national security interests.”⁵⁷ If the Court determines that the information is necessary and relevant, various other options are available to it.⁵⁸ Where a request for information or cooperation is made under Part 9, which lays out the obligations of the States Parties, or under 72(2), which applies to individuals requested to provide information, and an exception is attempted under 93(4), the Court may request further consultations that may involve ex parte or in camera hearings,⁵⁹ refer the matter to the Assembly of States Parties or the Security Council for resolution,⁶⁰ or make factual inferences in the trial.⁶¹ Where a State Party refuses on other grounds, the Court may order disclosure⁶² or draw appropriate inferences in the trial.⁶³ Importantly, by identifying the possibility that a State Party may except on other grounds outside of the explicit national security exception included in the treaty and explicitly reserving the power to order disclosure in such cases, the Statute eliminates the possibility of any implicit national security exception external to the treaty. If a State Party is to except on national security grounds, it must do so through Article 93(4); any other exceptions are violations of the treaty and subject to an order from the Court to comply.

To summarize, with regard to information, the Rome Statute explicitly discounts the possibility of an implicit national security exception. Although the Court itself does not have the power to order the disclosure of information when the State invokes the explicit national security exception, the Assembly of States Parties and the Security Council have the power to review such exceptions. Additionally, the Court has the power to request further consultations with the State Party making the exception and to draw inferences from the refusal to provide information.

⁵⁶ The Rome Statute of the International Criminal Court, Article 72(5).

⁵⁷ *Id.*, Article 72(6).

⁵⁸ At the 2000 Annual Meeting of the American Bar Association, an “all-star cast of American and English lawyers” carried out an oral argument that simulated the prosecution of a head of state in front of the ICC. The following excerpt from the transcript, reprinted in Pieter H. F. Bekker and David Stoelting, *The ICC Prosecutor v. President Medema: Simulated Proceedings Before the International Criminal Court*, 2 *Pepp. Disp. Resol. L.J.* 1, 38-39, nicely lays out the workings of Article 72(7)(a):

“Article 93 is then the Article to which we have to have some reference, for that is the ability of states to deny the provision of assistance where matters concern, or rather, as the terminology of the section is, relate to national security. There are terms slightly different from that used as we shall see in Article 72, where the phrase ‘prejudice its national security interests’ is replied upon.

“So going back to the beginning, an assumption that people will work together is a first working step that states will behave honorably, if and when they decline to provide materials. We better have a quick look at the detail of Article 72 although, as His Honor Judge Leigh correctly said, it is pretty complex and would take a full five minutes to go through or more. But what Article 72 and Article 73 does, in short form, is to recognize that the documents of the type required by any defendant or by a prosecutor for the thing is mutual as between defense and prosecution, may lie with the interested party claiming prejudice, may lie with another party. The combination of Articles 73 and 72 effectively brings the Court in, gives it jurisdiction, whenever a claim is made by either that particular type of party, a party whose documents they are, or a party into whose hands they have fallen. We then see, very quickly, that the first approach to the problem is to resolve it by cooperative means. Various means or methods of cooperation are referred to. If, at that stage, by cooperation it is not solved, and if the Court determines that the documents are relevant, then further orders may be made under Article 72(7)(a). As you can see, under Article 72(7)(a), where disclosure of the information is sought and national security has been invoked, the Court may request further consultations and it may conclude that by invoking national security “the requested State is not acting in accordance with its obligations.” It may then refer the matter being the ultimate sanction to the other state parties or to the Security Council. But in either case, whether it makes that sort of order or whether it is simply faced with the failure to disclose by some other party, appropriate inferences may be drawn.”

⁵⁹ Rome Statute, *supra* note 56, Article 72(7)(a)(i).

⁶⁰ *Id.*, Article 72(7)(a)(ii); Article 87(7).

⁶¹ *Id.*, Article 72(7)(a)(iii).

⁶² *Id.*, Article 72(7)(b)(i).

⁶³ *Id.*, Article 72(7)(b)(ii).

As former Ambassador-at-Large for War Crimes Issues David Scheffer recounts:

Article 72 (Protection of national security information) raised issues of particular concern to the United States. Our experience with the International Criminal Tribunal for the former Yugoslavia (ICTY) showed that some sensitive information collected by the U.S. Government could be made available as lead evidence to the prosecutor, provided that detailed procedures were strictly followed. We applied years of experience with the ICTY to the challenge of similar cooperation with a permanent court. It was not easy. Some delegations argued that the court should have the final determination on the release of all national security information requested from a government. Our view prevailed: a national government must have the right of final refusal if the request pertains to its national security pursuant to Article 93(4). In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council pursuant to Article 87(7).⁶⁴

Ambassador Scheffer not only refers to the authority of the Assembly of States Parties and the Security Council to review invocations of the national security exception, but he also points to experience with another international tribunal where the court had even more authority to demand information from State participants. The ICTY handed down a ruling to this effect in *Prosecutor v. Blaskic*,⁶⁵ in which it stated:

[T]o grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and defeat its essential object and purpose.... To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'être* of the International Tribunal would then be undermined. (Internal quotation marks omitted).

William Bradford alludes to the possibility that the ICC might decide to follow this decision and also points to the availability of review by the Security Council or the Assembly of States Parties:

Whether the ICC would follow this precedent is uncertain; however, if it concludes that an invocation of Article 93(4) as grounds to refuse a request is not in accordance with obligations under the Rome Statute, the ICC may refer the alleged breach to either the Assembly of States Parties or, in the case of non-parties, the Security Council. In other words, United States unwillingness to share sources and methods with the ICC might lead to a Security Council vote on whether the United States has a duty to share national security information with potential adversaries. (Internal citations omitted).⁶⁶

Article 93(4)

Article 93 (Other Forms of Cooperation) outlines forms of assistance that States Parties must supply to the Court in carrying out investigations and prosecutions. Article 93(4) seems clearly to limit the ability of State Parties to invoke national security as a reason for refusing to comply with requests for assistance by the Court—national security can be invoked only with respect to the production of documents or disclosure of information relating to national security.

⁶⁴ David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 A.J.I.L. 12, 16 (1999).

⁶⁵ I.C.T.Y. IT-95-14-AR-108, P 65 (Oct. 29) (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997). Available at: <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>, accessed 2/21/07.

⁶⁶ William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 Miss. L.J. 639, 919, n603 (2004).

As noted above, this would seem merely to incorporate Article 72 and make clear that it applies to exceptions taken to Article 93. Paragraphs 5 and 6 then confuse matters.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

The first, and lesser, source of confusion is the reference to denials of requests for “assistance” without specifying what kind of assistance is being denied. Read alone, it would seem that any request for assistance that falls under the types of assistance listed in paragraph 1 might be deniable subject only to the limitations in these paragraphs. However, reading paragraphs 5 and 6 with 4, it can be inferred that references to denials of “request[s] for assistance” can only refer to requests for “the production of any documents or disclosure of evidence” from paragraph 4. Paragraph 4 and its use of the phrase “only if” defines the scope of the two paragraphs that follow. Moreover, whereas paragraph 4 affirmatively states that “a State Party may deny a request,” paragraphs 5 and 6 contain no language that conveys the ability to make a denial, but rather simply refer to denials that are or may be made out of an authority defined elsewhere. The only commentary that we could find on this point supports this view, referring to the three paragraphs together: “Articles 72 and 93(4)-(6) permit a state to refuse assistance if the request concerns the production of any document or disclosure of evidence that relates to its national security.”⁶⁷

More troubling are the requirements laid out in the rest of these paragraphs, which seem to echo requirements mentioned in Article 72. Although the cross-reference to Article 72 at the beginning of (93)4 seems to apply the Article to paragraphs 4-6 and therefore apply the same standards and procedures to denials of requests for the “*production* of any documents or disclosure of *evidence*” (the subject of Article 93.4) as apply to the “*disclosure* of information or documents” under Article 72(1), what are we to make of these new requirements that resemble but differ slightly from those from Article 72? Do these requirements laid out in Article 93(5)(6) replace, repeat, or supplement those from Article 72?

Paragraph 5 of Article 93 mentions a State’s duty to consider whether the requested assistance can be provided “subject to...conditions,” “at a later date,” or “in an alternative manner.” Article 72, paragraph 5 states that States shall take “all reasonable steps...to seek to resolve the matter by cooperative means,” and specifically mentions “conditions” in subparagraph (d). Although the reference to “conditions” is parallel between the two Articles, Article 72 does not mention the “later date” or “alternative manner” options. This does not necessarily render the provisions inconsistent, since the later date and alternative manner options clearly could be fit into the general language referring to “all reasonable steps” and “cooperative means.” However, it is puzzling that paragraph 5 contains this language when Article 72 seems to cover the same ground. More puzzling still is paragraph 6, which parallels the Article 72(6) in requiring that the State Party making the denial notify the Court or prosecutor of the reasons for the denial:

72(6). Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific

⁶⁷ *Id.* at 919, n603.

description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

A comparison of the two paragraphs raises the question: why 93(6) is necessary at all if 72(6) already establishes a giving reasons requirement and Article 72 is meant to apply to 93(4)-(6)? In our view, the most likely answer is that it is not necessary and is merely the product of poor and redundant drafting. However, if we assume perfect drafting, its inclusion would have to be for the purpose of specifying that reasons should be provided “promptly,” or that the “unless a specific description of the reasons would itself necessarily result in such prejudice to the State’s national security interests” language is not meant to apply to the giving reasons requirement for denying assistance in the form of “production of any documents or disclosure of evidence” under 93(4). If, indeed, there is a difference in subject matter between 93(4) and 72(1), then this would seem to make the giving reasons requirement more stringent with regard to denials coming under the former. Assuming still that these provisions do refer to different kinds of assistance, we might find a justification for the higher stringency in 93(6) in the fact that 93(4) seems a bit more open ended than does 72(1) and (2) in that 93(4) refers to materials or assistance that “relate[] to” national security, whereas the paragraphs from 72 require that a State deem the provision of such material or assistance as “prejudic[ial]” to its national security.

International Convention on Civil and Political Rights (ICCPR)

The ICCPR in Article 4 allows derogation from certain obligations of State Parties under extreme circumstances and forbids derogation altogether for certain other provisions. Compliance with the ICCPR is subject to review by the Human Rights Committee through reports that States Parties are required to submit at the Committee’s request.⁶⁸ Further, if a State Party declares that it recognizes the competence of the Committee to receive and consider communications to the effect that that State Party is not fulfilling its obligations under the treaty, that State Party may make such communications regarding other States Parties that have also made such a declaration.⁶⁹ Additionally, with regard to States Parties to the ICCPR that are also parties to the First Optional Protocol, the Committee can receive and consider communications from individuals claiming to be the victims of violations of any of the rights in the Covenant.⁷⁰

The General Comment on Article 4 begins by acknowledging the importance of the Article in balancing the need to temporarily derogate from its obligations under the Covenant and the need to prevent abuses of the derogation provisions by establishing safeguards:

1. Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards.⁷¹

Within the Article, we can identify four categories of safeguards: a threshold for the intensity of interests that must be threatened in order to exercise the ability to derogate, a notice requirement, a requirement to give reasons, and a narrow-tailoring requirement.

Under Article 4 threats to a State Party’s interests must exceed an exceedingly high threshold before derogation is possible. Such threats must constitute a “public emergency which

⁶⁸ International Covenant on Civil and Political Rights, Article 40(1).

⁶⁹ *Id.*, Article 41.

⁷⁰ Optional Protocol to the International Covenant on Civil and Political Rights.

⁷¹ General Comment No. 29, States of Emergency (Article 4) CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 1.

threatens the life of the nation.”⁷² The General Comment elaborates on what constitutes such a situation:

3. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1.... The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.⁷³

The Committee has frequently criticized State Parties for derogating from treaty provisions in situations that fail to meet this threshold.⁷⁴

Paragraph 2 of the General Comment observes that such a situation is only one of two requirements that a State Party must meet before derogating from treaty obligations: “Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.” In addition to officially proclaiming a state of emergency, this notice requirement also demands that States “immediately inform the other States Parties” of their intent to derogate “through the intermediary of the Secretary-General of the United Nations.”⁷⁵ Along with this notice the derogating party must specify “the provisions from which it has derogated and of the reasons by which it was actuated.”⁷⁶

This requirement of giving reasons is meant to support both the Committee’s official monitoring role as well as the informal monitoring role that other State Parties play:

17. In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee’s functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant.... [T]he Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law.⁷⁷

As conveyed by paragraph 17, perhaps the most important review function of the Committee is to determine that the measures taken in derogation from the Covenant are narrowly tailored “to the extent strictly required by the exigencies of the situation.”⁷⁸ Further buttressing this narrow-tailoring requirement is an emphasis on the “exceptional and temporary nature”⁷⁹ of such derogations as well as the directive that “[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party

⁷² ICCPR, *supra* note 68, Article 4(1).

⁷³ General Comment No. 29, *supra* note 71 at para. 3.

⁷⁴ See the following comments/concluding observations: United Republic of Tanzania (1992), CCPR/C/79/Add.12, para. 7; Dominican Republic (1993), CCPR/C/79/Add.18, para. 4; United Kingdom of Great Britain and Northern Ireland (1995), CCPR/C/79/Add.55, para. 23; Peru (1996), CCPR/C/79/Add.67, para. 11; Bolivia (1997), CCPR/C/79/Add.74, para. 14; Colombia (1997), CCPR/C/79/Add.76, para. 25; Lebanon (1997), CPR/C/79/Add.78, para. 10; Uruguay (1998), CCPR/C/79/Add.90, para. 8; Israel (1998), CCPR/C/79/Add.93, para. 11.

⁷⁵ ICCPR, *supra* note 68, Article 4(3).

⁷⁶ *Id.*

⁷⁷ General Comment No. 29, *supra* note 71 at para. 17.

⁷⁸ ICCPR, *supra* note 68, Article 4(1).

⁷⁹ General Comment No. 29, *supra* note 71 at para. 2.

derogating from the Covenant.”⁸⁰ Elaborating further on this narrow-tailoring requirement, the Committee observes:

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation.... [T]he obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.

Conclusion

International law doctrine does not include an implicit national security exception that applies across all international treaty law. There are at least three reasons why exceptions to national security must derive from the specific treaty in question. First, many treaties contain explicit security exceptions, belying the existence of an inherent, implicit exception, and these explicit exceptions vary both between treaties and within particular treaties with respect to different provisions. Second, GATT dispute resolution panels have rejected an inherent right to except to a treaty on national security grounds. Even though it is a state’s prerogative under the GATT to define what it considers a national security concern, GATT panels can review whether such concerns are being expressed in good faith. Third, there is a body of treaty law which applies across treaty contexts and which is codified in the Vienna Convention on the Law of Treaties and the Draft Articles on Responsibility of States for Internationally Wrongful Acts. This body of law does not include a national security exception, and the exceptions it does include are reviewable.

The GATT, NAFTA, the Rome Statute of the International Criminal Court, and the International Covenant on Civil and Political rights all contain explicit national security exceptions. These provisions differ in their content, in when and how they are invoked and applied, and in provisions for review, suggesting that no single inherent, implicit exception would be adequate to capture their variations. However, the national security exceptions in each of these treaties do display certain structural similarities. Each of them describes a threshold which threats to national security interests must reach before an exception can be legitimately claimed. For the ICCPR, that threshold is very high, in accord with the fundamental rights that the treaty protects. For NAFTA, the bar is set lower, likely because individual rights are not implicated and because the likelihood of illegitimate derogation is greatly reduced by the small number of parties to the treaty. Still, a good faith requirement provides a backstop even for this treaty’s exception, as it does for all other treaties. Each, with the possible exception of NAFTA, provides a notice requirement of some kind, and along with this notice requirement comes a demand that reasons must be provided. In the case of NAFTA, the small number of parties and the concentrated interests of each party in enforcing the treaty greatly facilitate the spread of information. It seems exceedingly unlikely that a party would be unaware of another’s derogation, and it seems just as unlikely that reasons would not have to be provided, given the provisions relating to consultations and dispute resolution. Additionally, the requirement that derogation measures be tailored is present in all the treaties. The ICCPR emphatically repeats in Article 4 and in its General Comments that measures taken be “strictly required by the

⁸⁰ *Id.*, at para. 1.

exigencies of the situation.” The Rome Statute suggests specific measures that will tailor derogation as well as promote cooperation between the treaty body and parties. The GATT and NAFTA likewise promote cooperation and consultation between parties as a means to minimize the magnitude of derogations. Finally, and significantly, each of these treaties provides a means for review. The ICCPR requires reports to the Human Rights Committee and encourages peer review among parties. It has also enacted an optional protocol through which individuals can bring complaints. The GATT has long had a panel system that has reviewed claims for exemptions based on national security grounds, and that treaty’s dispute resolution mechanism has been strengthened with the creation of the World Trade Organization. NAFTA provides for consultation followed by dispute resolution between the parties on any matter of interpretation or application of the treaty and also provides less formal, yet powerful, means to encourage compliance through consultations and cooperation. The Rome Statute provides for review of requests for such exemptions by the International Criminal Court, the Security Council, and the Assembly of States Parties.

Relevant Treaty Provisions

GATT

Article XXI

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 such traffic in other goods and materials as is carried on directly 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.

NAFTA

Article 2102: National Security

1. Subject to Articles 607 (Energy - National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed:

- (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
- (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests
 - (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
 - (ii) taken in time of war or other emergency in international relations, or
 - (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
- (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article 2003: Cooperation

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

Article 2004: Recourse to Dispute Settlement Procedures

Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

Article 2006: Consultations

1. Any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

2. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.
3. Unless the Commission otherwise provides in its rules and procedures established under Article 2001(4), a third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to its Section of the Secretariat.
4. Consultations on matters regarding perishable agricultural goods shall commence within 15 days of the date of delivery of the request.
5. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the consulting Parties shall:
 - (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation of this Agreement;
 - (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information; and
 - (c) seek to avoid any resolution that adversely affects the interests under this Agreement of any other Party.

Vienna Convention on the International Law of Treaties

Article 26 Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 60 Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
 - (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
 - (i) in the relations between themselves and the defaulting State, or
 - (ii) as between all the parties;
 - (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
 - (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
 - (a) a repudiation of the treaty not sanctioned by the present Convention; or
 - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 62 Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
 - (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
 - (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
 - (a) if the treaty establishes a boundary; or
 - (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Rome Statute of the International Criminal Court

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

- (a) Modification or clarification of the request;
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
 - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;
 - (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations

under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7,⁸¹ specifying the reasons for its conclusion; and

- (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
- (b) In all other circumstances:
 - (i) Order disclosure; or
 - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) The questioning of any person being investigated or prosecuted;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

...

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

⁸¹ Art. 87.7: Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

...

International Covenant on Civil and Political Rights

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.