

ARTICLES

LEGAL AND POLICY RESPONSES TO NATIONAL SECURITY MEASURES IN INTERNATIONAL ECONOMIC LAW

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ABSTRACT

In recent years, national security rhetoric has gained particular prominence, partly due to the geo-economic and geopolitical developments that have raised the stakes of international competition and new forms of economic warfare. As these developments unfold, economic interdependence is no longer viewed as a guarantee for growing prosperity and stability in the global order but as a source of threats to national security. While such concerns have provoked many reforms and strategic policies, by attempting to restore their sense of security, states at times enlarge insecurity in the global economy. All in all, the international community is left at a crossroads. If security exceptions under international economic law are drafted and interpreted too narrowly, there is a risk that they will not cover essential emerging security threats, including cyber threats, the vulnerability of critical infrastructure, climate change, and states' legitimate geo-economic concerns. If, however, such security exceptions are drafted and interpreted too broadly, they can allow anything under the sun, making states' international commitments meaningless.

The contribution of this Article is twofold. First, it steers a middle path between discipline and flexibility in addressing states' security concerns, stressing the role of not only adjudicators but also the World Trade Organization (WTO), the United Nations, and national governments in fostering transformation and cooperation in dealing with emerging and re-emerging threats to national security and free trade. Second, it expands the rulebook on the application of security exceptions, including their procedural safeguards, and suggests how to improve cooperation between the WTO and the U.N. and incentivize states to use trade and investment restrictions more efficiently, thereby permitting more policy space for calibrated responses to new externalities while reinforcing the function of security exceptions to shield states from responsibility only in extreme situations. Such reforms can contribute to strengthening the

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legitimacy of international economic law, rebuilding trust in the multilateral trading system and its dispute settlement function, and overcoming possible deadlocks in regional and bilateral negotiations.

I.	INTRODUCTION: GROWING THREATS TO NATIONAL SECURITY & INTERNATIONAL ECONOMIC LAW	167
II.	FROM INSECURITY TO SECURITY	172
III.	ENHANCED CONTROL OVER THE APPLICATION OF SECURITY MEASURES	182
	A. <i>Role of the WTO Ministerial Conference & the General Council</i>	182
	B. <i>Role of Transparency & Accountability Rules</i>	185
	C. <i>Role of the U.N.</i>	189
	D. <i>Role of Economic Incentives</i>	192
	1. Rebalancing Under WTO law	194
	a. <i>Rebalancing Under Article 22 of DSU in case of Violation Complaints</i>	196
	b. <i>Rebalancing Through Non-Violation Complaints</i>	199
	c. <i>Rebalancing Based on Safeguards Model</i>	202
	2. Rebalancing Under RTAs	204
	3. Compensation to Foreign Investors Under IIAs	205
IV.	SECURITY EXCEPTIONS REVISITED	206
	A. <i>Directions for Reforming Article XXI of GATT (1994)</i>	207
	1. Conventional Security Measures	208
	2. Novel Security Measures	209
	a. <i>Ensuring a Good Faith Application of Novel Security Measures</i>	210
	b. <i>Rebalancing Through Compensation or Retaliation</i>	213
	B. <i>Alternative Approach to Drafting Security Exceptions Under RTAs</i>	217
	C. <i>Alternative Approach to Drafting Security Exceptions Under IIAs</i>	222
V.	CONCLUSION	225

I. INTRODUCTION: GROWING THREATS TO NATIONAL SECURITY &
INTERNATIONAL ECONOMIC LAW

State leaders and scholars in international affairs,¹ political science,² and law³ have frequently addressed national security threats posed by wars, armed conflicts, terrorism, and espionage. In 1937, Cordell Hull, the Secretary of State in the United States, declared that “enduring peace and the welfare of nations are indissolubly connected with . . . the maximum practicable degree of freedom in international trade.”⁴ His firm belief in the linkage of trade and peace gave the United States an ideological direction during the negotiations of international agreements in the 1940s.⁵ It was based on the conviction that deeper economic integration would mitigate conflicts between nations⁶ and, therefore, would serve to protect their national security interests.

Yet, in recent years, national security rhetoric has gained particular prominence, partly due to the geo-economic and geopolitical developments that have raised the stakes of international competition⁷ and new forms of economic warfare.⁸ The importance of emerging technology has surpassed the role of pure military power.⁹ The international system has faced unprecedented challenges related to cybersecurity, technological nationalism, climate change, supply chain crises, and migration flows. The Russia-Ukraine war and states’ responses to the COVID-19 pandemic have further escalated opposition to the current manifestation of globalization and urged selective economic cooperation. As these developments unfold, economic interdependence is no

1. See, e.g., CHRIS C. DEMCHAK, *WARS OF DISRUPTION AND RESILIENCE: CYBERED CONFLICT, POWER, AND NATIONAL SECURITY* (2011).

2. See, e.g., Arnold Wolfers, “National Security” as an Ambiguous Symbol, 67 *POL. SCI. Q.* 481 (1952).

3. See, e.g., Shin-Yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 *J. INT’L ECON. L.* 449 (2015).

4. DOUGLAS A. IRWIN ET AL., *THE GENESIS OF THE GATT 10* (2008).

5. *Id.* at 11.

6. J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 *YALE L.J.* 1020, 1047–48 (2020).

7. This Article assumes that geo-economics and geopolitics are distinct but related types of geostrategy and that the mix of both usually applies to interstate relationships. See Sören Scholvin et al., *Conclusion*, in *GEO-ECONOMICS AND POWER POLITICS IN THE 21ST CENTURY: THE REVIVAL OF ECONOMIC STATECRAFT* 219, 222 (Mikael Wigell et al. eds., 2018).

8. JUAN C. ZARATE, *TREASURY’S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* 385 (2013).

9. Joel Slawotsky, *National Security Exception in an Era of Hegemonic Rivalry: Emerging Impacts on Trade and Investment*, in *HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY* 545, 578 (Julien Chaisse et al. eds., 2021).

longer viewed as a guarantee for growing prosperity and stability in the global order but as a source of possible threats to national security.¹⁰ While such concerns have provoked reforms and strategic policies, by attempting to restore their sense of security, states at times enlarge insecurity in the global economy.

As things stand now, states claim to use trade and investment restrictions in response to their national security concerns with the aim of pursuing various policy objectives, from fighting armed conflicts to urging the counterparties to engage in trade negotiations (hereafter, the Security Measures). In the interests of national security, the United States introduced additional tariffs on imports of steel and aluminum products, claiming that existing import flows were adversely affecting the U.S. steel industry.¹¹ In response to Russia's invasion of Ukraine, several members of the World Trade Organization (WTO), such as the United States and the EU, have adopted "unprecedented" economic sanctions, which include sanctioning Russia's central bank and restricting its access to the dollar-dominated global financial system.¹² In addition, with the rise of emerging economies, such as China and Brazil, and developments in cutting-edge technologies, artificial intelligence, and machine learning, many countries are increasingly tightening restrictions on foreign direct investment (FDI) based on national security concerns.¹³ The concerns are particularly related to the FDI of state-owned enterprises and sovereign wealth funds due to suspicions that such investments might no longer follow a strictly market-based logic but also be utilized for geopolitical ends.¹⁴

Nevertheless, Security Measures might violate states' numerous commitments under international economic law. To illustrate, Russia's

10. Wolfgang Weiß, *Interpreting Essential Security Exceptions in WTO Law in View of Economic Security Interests*, in GLOBAL POLITICS AND EU TRADE POLICY: FACING THE CHALLENGES TO A MULTILATERAL APPROACH 255, 258–59 (Wolfgang Weiß & Cornelia Furculita eds., 2020).

11. See, e.g., Proclamation No. 9759, 83 FR 25857 (May 31, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-4/>.

12. See, e.g., Press Release, U.S. Dep't of the Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth (Feb. 28, 2022), <https://home.treasury.gov/news/press-releases/jy0612>.

13. Anastasia Ufimtseva, *The Rise of Foreign Direct Investment Regulation in Investment-Recipient Countries*, 11 GLOB. POL'Y 222, 223 (2020).

14. Giacomo Rojas Elgueta & Benedetta Mauro, *The Paradoxical Relationship Between "Foreign Direct Investment Screening" and International Investment Law: What Role for Investor-State Arbitration?*, KLUWER ARB. BLOG (Apr. 30, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/04/30/the-paradoxical-relationship-between-foreign-direct-investment-screening-and-international-investment-law-what-role-for-investor-state-arbitration/>.

restrictions on traffic in transit across the Ukraine-Russia border imposed different treatment depending on the origin of the goods,¹⁵ and thus, could be found in breach of Russia’s core commitments under WTO agreements, including the most favored nations (MFN) and national treatment principles.¹⁶ In the same vein, investment restrictions (such as Colombia’s seizure of the property of U.S. investors in the interests of national security)¹⁷ can violate the principles of MFN and national treatment under international investment agreements (IIAs). Such restrictions can also run afoul of the guarantee to foreign investors against expropriation without compensation and the principles of fair and equitable treatment and full protection and security.¹⁸

International law does not include an implicit, open-ended exception that applies across all treaties, allowing states to disregard their international commitments in the interest of national security.¹⁹ Such an exception can only be derived from the specific treaty in question. Within the international trade regime, the relationship between trade and national security is governed primarily by Article XXI of the General Agreement on Tariffs and Trade (GATT), which justifies the violations of GATT commitments when WTO members’ “essential security interests” are at stake (hereafter the Security Exceptions).²⁰ In many instances, regional trade agreements (RTAs) and IIAs can also excuse the non-performance of contractual obligations when required by the national security interests of a contracting party.²¹

15. See Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.12, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter Panel Report *Russia—Traffic in Transit*].

16. See General Agreement on Tariffs and Trade 1994 art. I, III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

17. See generally *Seda v. Republic of Colom.*, ICSID Case No. ARB/19/6, Claimants’ Memorial on the Merits and Damages (June 15, 2020), <https://www.italaw.com/sites/default/files/case-documents/italaw11635.pdf>.

18. See, e.g., Trade Promotion Agreement, Colom.-U.S., art. 10.3–10.5, 10.7, Nov. 22, 2006, https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file630_10143.pdf [hereinafter Colom.-U.S. TPA].

19. See Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT’L L. & POL. 437, 439 (2008).

20. GATT 1994 art. XXI.

21. See, e.g., Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. XI, Nov. 14, 1991, TIAS 94-1020.

For a long time, states seemed to follow the assumption that Security Exceptions should be narrowly construed and rarely invoked.²² They understood that such exceptions were challenging to regulate and that, if they were interpreted broadly, they would ultimately undermine states' mutual trade and investment commitments.²³ Since 2017, however, such assumptions have started coming under strain, rendering Security Measures a typical response to the tension between states and culminating in several proceedings at the WTO when the Security Exceptions under the WTO agreements were expressly invoked.²⁴

Notably, the United States took the stance that Security Exceptions under international trade law are non-justiciable. Disregarding five adverse rulings by the WTO panels in the *US—Steel and Aluminum Products* disputes and in *US—Origin Marking (Hong Kong, China)*, the United States continues to emphasize that “the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide range of threats to its security.”²⁵ In particular, U.S. officials state that the United States “strongly rejects the flawed interpretation and conclusions” in the panel reports not accepting its national security defense and reiterate that “[t]hese WTO panel reports only reinforce the need to fundamentally reform the WTO dispute settlement system.”²⁶ The ability of the United States to reach an agreement with the EU, Mexico, and Canada on lifting its challenged Security Measures outside the WTO process and the rejection by the United States of adverse WTO rulings on its national security defense confirms the U.S. stance against the intervention of the WTO when its national security is at stake. In particular, the United States seems to believe that domestic authorities, rather than market forces and international institutions, should define the “correct” level of imports and the necessary

22. See PETROS C. MAVROIDIS, *THE REGULATION OF INTERNATIONAL TRADE*, VOLUME 1: GATT 480–87 (2016).

23. Anthea Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT'L ECON. L. 655, 658 (2019).

24. See generally Panel Report *Russia—Traffic in Transit*; Panel Report, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (June 16, 2020) [hereinafter Panel Report *Saudi Arabia—IPRs*].

25. Press Release, Off. U.S. Trade Rep., Statement from USTR Spokesperson Adam Hodge (Dec. 9, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge?s=03>; see also Press Release, Off. U.S. Trade Rep., Statement from USTR Spokesperson Adam Hodge (Dec. 21, 2022), <https://mailchi.mp/394146669449/statement-from-ustr-spokesperson-adam-hodge?s=09>.

26. Press Release, Off. U.S. Trade Rep., Statement from USTR Spokesperson Adam Hodge (Dec. 9, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge?s=03>.

compliance with the international rules-based system whenever the issues of members' national security are involved.²⁷

National security is a compelling concept and tool that can be potentially borderless and inherently dangerous, primarily because of its unspecified, subjective nature. Some degree of indeterminacy is inevitable in any body of rules.²⁸ However, the costs of such indeterminacy are diminishing the input legitimacy²⁹ and creating legal uncertainty. In other words, it can undermine the effect of international rules on states and society in general.³⁰ Indeterminate normative standards make it harder to know what is expected from the players of the trading system and, consequently, make it easier to justify any non-compliance with international rules. This lack of clarity elevates the risk that, in this world of increased competitiveness and global interdependence, the invokers of Security Exceptions might be more eager than ever to conclude that they are always right and can resort to the exceptions whenever it favors their economic agendas and strategic interests to do so.³¹

To a great extent, the international community is left at a crossroads. If Security Exceptions are drafted and interpreted too narrowly, there is a risk that they will not cover essential emerging security threats, including cyber threats, the vulnerability of critical infrastructure, climate change, and states' legitimate geo-economic concerns. If, however, Security Exceptions are drafted and interpreted too broadly, they can allow anything under the sun, making states' international commitments meaningless.

Such a dilemma has provoked no shortage of proposals for reforms.³² While they all provide insightful attempts to overcome some of the most compelling problems arising from the invocation of Security Exceptions, most go to extremes and either suggest tightening trade and investment legalism³³ or leaving the question of national security

27. IAN HURD, *HOW TO DO THINGS WITH INTERNATIONAL LAW* 32 (2017).

28. *Id.*

29. *Id.*

30. See Thomas Cottier, *The Legitimacy of WTO Law*, in *THE LAW AND ECONOMICS OF GLOBALISATION: NEW CHALLENGES FOR A WORLD IN FLUX* 11, 18 (Linda Yueh ed., 2009).

31. See Wesley A. Cann Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 *YALE J. INT'L L.* 413, 416 (2001).

32. See, e.g., Simon Lester & Huan Zhu, *A Proposal for "Rebalancing" to Deal with "National Security" Trade Restrictions*, 42 *FORDHAM INT'L L.J.* 1451, 1469 (2019); Heath, *supra* note 6, at 1020; Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 *AM. J. INT'L L.* 622, 623 (2021).

33. See, e.g., Cann, *supra* note 31.

to domestic politics and diplomacy.³⁴ Conversely, this research begins with the hypothesis that WTO members will be given the most space for dialogue if they admit that some national security questions are more prone to stricter regulation than others. To this end, this Article differentiates between different categories of security responses and suggests different ways to balance states' rights to regulate and the binding laws in case of the application of conventional and novel Security Measures.

This Article proceeds as follows. Part II draws on the solid, theoretical foundation of economic contract theory and the theories of international relations, such as realism, institutionalism, and constructivism, and discusses the problems arising from the securitization of states' policy objectives. Part III explores how additional legal and policy tools might enable Security Exception clauses to accommodate the competing demands of national security and trade and investment liberalization. Part IV expands the rulebook on the application of Security Exceptions, thereby permitting more policy space for calibrated responses to new externalities while reinforcing the function of Security Exceptions to shield states from responsibility only in extreme situations (rather than in situations of normality). Part V concludes.

II. FROM INSECURITY TO SECURITY

As things stand now, WTO agreements incorporate Security Exception clauses that use self-judging language yet limit the definition of national security to military and defense-related goods and situations of war or other emergency in international relations. The wording of such exceptions has remained the same since 1947. Such Security Exceptions arguably lack the flexibility to justify responses to imminent cybersecurity concerns or to emerging concerns arising from the need to protect critical infrastructure or prevent the consequences of climate change and pandemics because it would be difficult to prove that they meet the requirements of one of the sub-paragraphs of Article XXI(b) of GATT (1994).

The approach to drafting Security Exceptions in RTAs and IIAs depends on the contracting parties at issue and has been changing over time. To illustrate, the EU prefers to follow the approach used in WTO

34. See, e.g., Roger P. Alford, *The Self-Judging WTO Security Exception*, UTAH L. REV. 697, 705 (2011); Sandeep Ravikumar, *The GATT Security Exception: Systemic Safeguards Against Its Misuse*, 9 NUJS L. REV. 322, 334–37 (2016); Arie Reich, *The Threat of Politicization of the WTO*, 26 U. PA. J. INT'L ECON. L. 779, 802 (2005).

agreements.³⁵ Conversely, the tendency of the United States is to include a broad self-judging Security Exception concerning trade matters and a non-reviewable Security Exception concerning investment matters.³⁶ Such Security Exceptions might provide insufficient control over states' behavior and grant excessive scope for permissible action in dimensions other than national security.

It follows that existing Security Exception clauses are either drafted too broadly, making it difficult to control the good faith application of Security Measures (such as "self-judging" or non-reviewable exceptions),³⁷ or too narrowly, arguably excluding the novel and emerging security threats from their scope (such as WTO-like Security Exceptions).³⁸ There is a risk that both approaches might undermine the balance between states' sovereignty and international economic law by either unjustifiably limiting the ability of WTO members to take security actions or nullifying the benefits of free trade and investment liberalization by allowing any measure that a state considers necessary. Looking at the approaches of major schools of thought on the power or strategically invoked economic discourses lends support to this argument.

From the perspective of realism, power politics always prevails over legalism.³⁹ Conventional and emerging security threats, protectionism, the securitization of different policy areas, and the lack of trust among states intertwine and mutually nourish one another. Competing narratives and strategic politics signal not only the pursuit of relative power

35. *See, e.g.*, Decision 2018/1907, of the Council 20 December 2018 on the Conclusion of the Agreement Between the EU and Japan for an Economic Partnership, E.U.-Japan, art. 1.5, Dec. 27, 2018; Decision 2019/753, of the Council 30 March 2020 on the Conclusion of the Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, E.U.-Viet., art. 9.3, June 12, 2020; Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, E.U.-U.K., art. 415, Dec. 30, 2020 [hereinafter E.U.-U.K. Trade and Cooperation Agreement].

36. *See, e.g.*, United States – Singapore Free Trade Agreement, Sing.-U.S., art. 21.2, May 6, 2003; Australia – United States Free Trade Agreement, Austl.-U.S., art. 22.2, May 18, 2004; The Agreement Between the United States of America, the United Mexican States, and Canada art. 32.2, Nov. 30, 2018 [hereinafter USMCA].

37. *See, e.g.*, Seda v. Republic of Colom., ICSID Case No. ARB/19/6, Respondent's Rejoinder, ¶¶ 6–18 (Feb. 16, 2022), <https://www.italaw.com/sites/default/files/case-documents/italaw16514.pdf>.

38. *See, e.g.*, Panel Report *Russia—Traffic in Transit*, ¶¶ 7.130–7.138; Panel Report *Saudi Arabia—IPRs*, ¶¶ 7.241–7.255.

39. Duncan S. A. Bell, *Anarchy, Power and Death: Contemporary Political Realism as Ideology*, 7 J. POL. IDEOLOGIES 221, 228 (2002).

and security by individual states but also the significance of relative economic competitiveness within the current global order and its impact on interstate cooperation. In particular, politically and economically powerful states might seek to rebalance the international trade order to better reflect their current perceived interests and reinforce their sense of security. They are expected to push the boundaries of Security Exceptions under the WTO and other trade agreements if it is necessary to achieve their national objectives. They are also more likely to claim that security matters are overwhelmingly political in nature and thus non-justiciable, advocating for a broader scope of national security defense under international law. The U.S.-China strategic rivalry that justifies the use of economic institutions and rules at the service of U.S. foreign policy is a good example of such realistic premises. On the flip side, politically and economically “weaker” states might view Security Exceptions as a shield from the economic coercion used against them by “powerful” states,⁴⁰ preferring to limit their scope to specific situations.

In the realists’ scenario, it might be in the interests of the global international trade regime to permit the most powerful states to temporarily modify their commitments in situations they consider to be extreme and dangerous for their existence while maintaining their continued participation in treaties. This is not to say that Security Exceptions should be transformed into an open escape clause that has no limits. Security defenses should continue to be available in extremely rare situations with the idea that the concerned states would return to compliance as soon as possible and other governments would continue to perceive a security defense as an exception rather than a rule. Yet, while looking at international trade and investment agreements through enforcement lenses can help establish who is more convincing in proving the urgency to protect national interests, it would doubtfully encourage compliance by or affect the opportunistic tendencies of certain governments.

Since states define their national security interests differently, and their approach to the determination of a threat to national interests cannot be set in stone, the exact limits of Security Exceptions should rather be clarified *ex post* through a dialogue between interested parties rather than adjudication. For example, the United States seems to follow such an approach. It claims that it has complete discretion to take any measures it considers necessary to protect its national security interests, yet it is ready to negotiate and, where required, lift such

40. Alford, *supra* note 34, at 756.

measures for like-minded partners. In contrast, it might be close to impossible to start a dialogue and reach an agreement on Security Measures imposed against strategic rivals, such as China. Thus, the dialogue alone should not be seen as a way to tame certain states' "national security" interests without any additional guidance on the limits of Security Exceptions agreed upon *ex ante*.

Distinct from realism, institutionalism turns attention away from the power narrative to the global legal, political, and economic architecture that shapes states' behavior. From the institutionalism lens, the preference for multilateralism or unilateralism will always remain a political choice of governments, biased due to WTO members' economic and political structures and the multi-government construction of international politics.⁴¹

Allowing any WTO member to escape its trade commitments based on false security concerns will undermine the credibility of this member and the incentive of other members to cooperate with it. Yet, states can be expected to violate treaties when their interests are strong enough to outweigh their sense of obligation and where they do not perceive their reputational costs and the risk of non-cooperation as the more significant threat. It follows that should all legitimate security concerns be adequately accommodated under international agreements, states would have less incentive to push the boundaries of existing Security Exceptions and be more careful with advancing clearly illegitimate claims. Reputational costs might not be enough to preclude a state from adopting effective Security Measures in breach of its treaty commitments where it has no other legitimate way to protect its interests. However, where other legitimate options exist, a state might be more reluctant to securitize its policy objectives or undermine the legitimacy of international organizations and dispute resolution systems from which it also profits. Thus, optimal Security Exceptions should be broad enough to allow states to address their essential concerns, where there is no other legitimate way to protect national interests but narrow enough not to undermine the existing international trade regime.

In some cases, providing credible information might be enough to encourage states to adopt measures more in line with their international commitments.⁴² To illustrate, reforming the regulation of

41. Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 390 (1998).

42. Timothy Meyer, *Cooperating Without Sanctions: Epistemic Institutions Versus Credible Commitments Regimes in International Law*, in INTERNATIONAL LAW AS BEHAVIOR 45, 61 (Harlan Grant Cohen & Timothy Meyer eds., 2021).

Security Measures under WTO law by creating a WTO committee on national security measures (hereafter the Committee on Security Measures) and/or cooperating more closely with the United Nations can provide states with better guidance and space to exchange information and views, develop best practices, and improve the framework for better cooperation when addressing national security concerns and the possibility of invoking Security Exceptions under different circumstances.

From the perspective of constructivism, beyond the substantive, procedural, and evidential controls over the application of Security Measures, there appears to be an additional form of control besides the mere textual interpretation of a treaty—the development of common or shared interests as a method of setting boundaries on unilateral state discretion.⁴³ Shared ideas and norms shape expectations about the appropriate behavior of actors and give structure to the international order. When shared norms become internalized in actor's beliefs and identities, they go unchallenged.

The proliferation of economic statecraft and national security rhetoric, resulting in the more frequent use of Security Exceptions under international law, suggests a fracturing of the global economic order partly due to conflicting norms and interests. Different governments seem to adopt different discursive strategies. While some continue to package trade and investment liberalization as a necessary response to external economic imperatives (e.g., the EU), others present economic interdependence as a threat to their national security (e.g., the United States). Choosing one of these strategies plays a key role in shaping domestic political processes and has implications for a state's interaction with other states, including its approach to drafting Security Exceptions under RTAs and IIAs and the invocation of Security Exceptions under WTO law.

If a state perceives that others share its values, it is more likely to cooperate on the boundaries of Security Measures. This can be illustrated by the example of the United States, which managed to reach an agreement with the EU and several other states on the application of the controversial tariffs on steel and aluminum.⁴⁴ If, however, a state perceives the values of other actors as too different, even alien, it is

43. Ilona Cheyne, *Deference and the Use of the Public Policy Exception in International Courts and Tribunals*, in *DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION* 38, 56 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

44. See, e.g., Recourse to Article 25 of the DSU, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/19 (Jan. 21, 2022).

more likely to portray its actions as an existential threat to its place in the international system and to use extreme responses to defend its interests. To take just one obvious example, notwithstanding the concerns raised at the WTO level, the United States continues to securitize trade with China and put significant effort into restraining China's development of technologies that are critical for its technological and military advancement.⁴⁵ On this view, existing linkages between trade and the security of cyberspace, the environment, health, or domestic stability can be portrayed as either a security issue or normal state policy, depending on a state's perception of other actors and the reliability of the international trading system as a whole.

As advanced by the concept of securitization, where an issue becomes a part of the domestic security discourse, extreme responses become more credible, at least at the domestic level.⁴⁶ In this case, governments might also be more eager to portray such an issue as necessary for its national security interests at an international level and invoke a Security Exception. Security Exceptions subject to international review can provide some necessary guidance on the restraint of unnecessary securitization by embodying the rules of a just securitization theory. Such rules could differentiate between an objectively existing and a perceived existential threat to national security and establish the moral legitimacy of domestic interests to be protected by the measure and its appropriateness.⁴⁷ Such a test can be embodied in treaties by allowing adjudicators to review the existence of security threats subject to objective determinations and the appropriateness of the response to them. Yet, where the objective determination of the threat by an adjudicator is impossible or not desired by the parties, Security Exceptions would not be able to separate the extraordinary circumstances when emergency actions should be allowed from the normal times when states should rely on ordinary policy measures. In this case, states might defer to power politics.

From the economic contract theory perspective, being unable to predict all future emergencies and their effects on interstate cooperation,

45. See, e.g., Press Release, Dep't of Commerce, Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC) (Oct. 7, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file>.

46. Thierry Balzacq et al., "Securitization" Revisited: Theory and Cases, 30 INT'L REL. 494, 495 (2016).

47. Rita Floyd, *Can Securitization Theory Be Used in Normative Analysis? Towards a Just Securitization Theory*, 42 SEC. DIALOGUE 427, 429-30 (2011).

states will always be reluctant to accept Security Exceptions that are governed by specific *ex ante* rules, leaving no or little room for maneuver. States choose to cooperate in their interest, but if circumstances change (costs and benefits), states may prefer to renegotiate or deviate from their obligations.⁴⁸ Developments in the national security policies and trade agendas of different WTO members and a new geo-economic reality contribute to the changes in the costs and benefits of the performance of states' trade and investment commitments under international law. Such developments might require states to renegotiate their commitments or use more flexibility to deviate from them. In practice, when the core values of a state are at stake, such as national security, the costs of non-performance outweigh the benefits of trade.⁴⁹ In this case, the best international law can do is to allow a state to suspend its obligations for the period of such an extraordinary situation and encourage it to return to its performance as soon as the situation normalizes.

Existing Security Exceptions generally permit WTO members to use trade restrictions to protect their national security without bearing direct monetary costs while putting the burden of reduced market access on the members affected by such restrictions. If adopting a Security Measure were, however, made more costly for an invoking state, it would be more likely to avoid fostering the excessive securitization of domestic policies and, in the case the state's WTO obligations were suspended because of the necessity to address security threats, it will still have the incentive to continue performing its obligations as soon as it becomes feasible. Thus, focusing on the costs of Security Measures, instead of establishing the "correct" balance between national security interests and commitments under international law, could encourage WTO members to estimate in advance the price they would need to pay for adopting Security Measures and thus behave more efficiently.⁵⁰

Asking different theories to share common assumptions about the role of Security Exceptions in international law and politics is unrealistic. Yet, looking at their approaches to power, interstate relations, and global order, one can see a common view that it might be practically impossible to completely segregate the approaches toward, on the one hand, the scope of a national security defense under international

48. JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 259 (2008).

49. David D. Knoll, *The Impact of Security Concerns upon International Economic Law*, 11 INT'L ECON. L. 567, 569 (1984).

50. Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793, 812 (2020).

economic law and, on the other, developments in national security policies and the international trading system. The securitization of additional policy areas, the changes in the costs and benefits of performance under treaties due to emerging concerns and the instability of the international trade order, and the erosion of the norms of self-restraint confirm that states' perception of threats to their national security has broadened and most likely will continue to change. States might appreciate policy space to respond to novel technological, social, and geopolitical changes or the rising importance of new actors in the global economy, including the non-state actors that act entirely in cyberspace.⁵¹ Yet, the current Security Exceptions under WTO law do not reflect the portrayed developments in states' understanding of national security and the transitions that have happened in geopolitical and geo-economic contexts since 1947.

Even in the absence of a formal exception justifying its action, where a state genuinely perceives that a threat to its national security exists, there is no ground to believe that it would choose to comply with its international commitments rather than address a pressing domestic concern. In a similar vein, a state should not be expected to withdraw its Security Measure in compliance with the court or tribunal's ruling. It would thus be counterproductive to ignore emerging security concerns by not recognizing their validity under international economic law, thereby putting the Security Measures adopted to address such concerns outside the international treaty regime. Instead, it can be suggested that international economic law should be flexible enough to encompass a broad set of rationales for unilateral measures aimed at protecting states' security interests while discouraging opportunism and maintaining a sustainable balance between reciprocal commitments and states' unilateral interests.

Establishing such a balance based on the existing approaches to drafting Security Exceptions might be difficult in practice for the following reasons. In the 1950s, Security Exceptions under the GATT (1947) were designed both to ensure a balance between national autonomy and states' international responsibilities and to diminish possible abuse by giving each contracting party flexibility to determine when their Security Measures were necessary while limiting ex ante the specific situations in which such measures could be justified. The incorporation of such exceptions encouraged the parties to invest in the

51. Geraldo Vidigal & Stephan W. Schill, *International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception*, 48 *LEGAL ISSUES ECON. INTEGRATION* 109, 116 (2021).

contractual relationship in the first place. The GATT and earlier WTO practices also reaffirm that such narrowly tailored exceptions could function reasonably well, despite their self-judging language, as long as they reflected the most prominent security concerns faced by GATT contracting parties/WTO members.⁵²

Yet, Security Exceptions were narrowly tailored *ex ante* (at the time of treaty conclusion) to address legitimate national security concerns only with respect to a limited number of situations where all states are ready to justify emergency actions at the time of negotiations. Such an agreement is not prepared to address all future contingencies or, as the current practice reaffirms, be impossible to adhere to because of the ever-evolving threats to national security and different perceptions of their urgency by different WTO members, which is fostered nowadays by the emergence of new technologies and diverse risks that novel global concerns pose to different states. When the scope of Security Exceptions cannot be reasonably limited *ex ante*, the cost-benefit analysis informed by the economic contract theory favors the creation of broader standards that would leave states with more space to define their security concerns *ex post* (at the time of the adoption of a Security Measure).

However, the inclusion of broadly drafted Security Exceptions not limited *ex ante* to specific goods or situations creates more opportunities for non-performance. Furthermore, the problem with adjudicators demarcating the scope of states' legitimate security concerns *ex post* is that the standard of review of the measures adopted in response to such concerns and the standard of their proof would invoke additional hurdles inherent in the interpretation of highly volatile concepts that are subject, at least to a certain extent, to the privilege of secrecy.⁵³ International adjudicators would not always have access to the information necessary to verify the true motives or the effectiveness of Security Measures aimed to deal with such concerns or the availability of less trade-restrictive alternatives. It follows that traditional mechanisms used to balance national interests and binding law, such as a necessity test, proportionality test, or rationality test, might be of little help for adjudicators dealing with such cases. At the same time, requiring a

52. See generally Panel Report *Russia—Traffic in Transit*; Panel Report *Saudi Arabia—IPRs*.

53. The Security Exception under Article XXI(a) of GATT (1994) states that “[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.” GATT 1994 art. XXI(a). Thus, it protects members' right to refuse the disclosure of information that could affect their essential security interests.

responding state to only demonstrate a good faith invocation of Security Exceptions or making Security Measures non-reviewable increases the chances of states' opportunistic behavior. Such an open escape clause would be especially challenging to control when a state invokes emerging security concerns that are more difficult to define and verify with precision than the objective conditions of the emergency associated with wars or arms trafficking. The result could be vague standards that create unclear expectations for contracting parties and verification problems for adjudicators.

Drawing on the discussed theories and the portrayed problems arising from the application and adjudication of existing Security Exceptions, this research suggests that international rules should seek to distinguish the validity of security concerns on the basis of context. On the one hand, threats to national security produced by unforeseen externalities that are reasonably clearly defined in the agreement, such as the situation of war under Article XXI(b) of GATT (1994), subject to objective review, allow an adjudicator to verify their genuine invocation and thus leave less room for abuse. The virtue of such an approach is that it preserves a broad degree of policy space for states to pursue their security interests under well-defined and observable circumstances while ensuring that they do not deliberately impose high costs on other contracting parties. On the other hand, this Article argues that international law should also address other situations of unforeseen extraordinary contingencies that would compel government officials to deviate from their international commitments even in the absence of a formal exception. The virtue of incorporating the exception for such other situations is that it would permit temporary deviation from the commitments to preserve long-term cooperation. Yet, incentivizing politically efficient policy choices in the presence of an open-ended exception clause not clearly defined might be more challenging if such an exception is left completely unconstrained. In this case, it would make an international treaty too expensive to enforce.

All this considered, the dialogue between states over a revised approach toward Security Exceptions might start with the proposal to draw a line between conventional security matters (hereafter the Conventional Security Measures), for which there is an *ex ante* agreement among all WTO members to justify extreme responses and other security matters that might arise in the future or that are of concern for some states but where the agreement between all WTO members over their urgency has not yet been reached (hereafter the Novel Security Measures). Given the evolving character of security concerns and the discussed difficulties of enforcing strict limits on their scope by adjudicators *ex post*, states might consider introducing new mechanisms to

rebalance the right of a contracting party to adopt a Novel Security Measure and the substantive rights of other contracting parties in trade and investment liberalization.

III. ENHANCED CONTROL OVER THE APPLICATION OF SECURITY MEASURES

This research adopts a comprehensive view of governance over Security Measures, which addresses the role of domestic and international institutions that can be potentially involved in revisiting the scope of Security Exceptions under international economic law. First, in light of the rise of emerging issues potentially related to the national security of at least some states, WTO members might choose to clarify at the WTO level the list of policy areas and activities that can fall within the scope of their “essential security interests” within the meaning of the WTO Security Exceptions. Such an approach would reassure members that Security Exceptions will be legitimately relied on when a threat is posed to the areas that WTO members agree to view as essential for their national security while concurrently decreasing unnecessary securitization of states’ policies in other areas. Second, WTO members could ensure better transparency and accountability in the application and maintenance of Security Measures by adopting additional procedural safeguards for Security Exceptions. Third, the oversight of Security Measures might draw upon centralized security governance at the U.N. level. Fourth, the abusive use of Security Exceptions might be tamed through domestic policies and diplomacy that address the non-cooperative behavior of specific states. Finally, drawing on the economic contract theory, additional rebalancing mechanisms might incentivize WTO members to use Security Measures more efficiently.

A. *Role of the WTO Ministerial Conference & the General Council*

Given the lack of convergence among WTO members on the scope of some concepts used in existing Security Exceptions and the fear that the judicialization of national security matters could compromise the credibility of international adjudicators and undermine the treaty regime, it can be suggested that it would be better for the scope of Security Exceptions to be clarified by WTO members collectively rather than through litigation.⁵⁴ To illustrate, the Ministerial Conference or the General Council can adopt an official interpretation of Article XXI(b) of

54. Ernst-Ulrich Petersmann, *WTO Negotiators and Academics Analyze the Doha Development Round of the WTO: Overview and Summary of the Book*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 3, 35 (Ernst-Ulrich Petersmann & James Harrison eds., 2005).

GATT (1994), which would include an illustrative list of policy areas that would naturally come within the ambit of Security Exceptions.⁵⁵

Such a proposal would encourage WTO members to seek a common understanding of the scope of Security Exceptions and ensure that national or regional regulatory objectives and practices in terms of the application of Security Measures are as transparent and detailed as possible.⁵⁶ When a state invokes a Security Exception to protect one of the areas from the list, it is more easily to be found to have acted in good faith. In this sense, the adoption of the list could help address several flaws of existing Security Exceptions: it would discourage the abuse of Security Exceptions and the use of Security Measures in the areas that are already covered by other exceptions while also recognizing that certain other areas whose coverage by the existing exceptions remains questionable (such as activities in cyberspace or activities aimed to protect states' critical infrastructure) could receive legitimate protection in certain cases.

Yet, it is important to acknowledge that such a consensus might be difficult to reach in practice among all WTO members. First, a problem with this approach is the constant emergence of new threats to national security. Any decision of the Ministerial Conference or the General Council could only temporarily satisfy the legitimate need of WTO members to address their security concerns.

Second, establishing the list means recognizing that national security threats differ in magnitude, and only particular concerns can reach the threshold to be justified under Security Exceptions. While this argument is entirely correct from the analytical perspective, national security might mean different things to different countries. This also implies that the magnitude of a threat to national security posed by the same type of concern might be seen differently by different governments. Cybersecurity might be considered a primary security concern for developed countries, such as the United States and EU member states, but it may be less relevant for some developing and least-developed countries.

Third, the decision to adopt an interpretation of Article XXI of GATT (1994) shall be taken by consensus, meaning that no WTO member present at the meeting where the decision is taken formally objects to the decision. Only where a decision cannot be reached by consensus

55. GATT 1994 art. XXI(b).

56. U.N. Conference on Trade and Development [UNCTAD], *The Protection of National Security in IIAs*, at 24–25, UNCTAD/DIAE/IA/2008/5 (2009), https://unctad.org/system/files/official-document/diaeia20085_en.pdf.

shall the matter be decided by majority voting.⁵⁷ In practice, the decisions in GATT/WTO have been taken mostly through consensus.⁵⁸ Thus, to reach a convergence of minds on the security areas would mean drafting a list that includes security concerns that all WTO members acknowledge. Consensus decisions better reflect the views of different WTO members and ensure that decisions and agreements are reached after careful discussions, which is appreciated by democracy theory.⁵⁹ At the same time, it allows a few uncooperative members to block any progress for long periods. Given that certain WTO members prefer to keep the scope of Security Exceptions narrower than others, the probability of reaching a consensus on the more concrete limits of national security defenses in the current geopolitical environment seems relatively low.

While reaching a consensus at the WTO level over the exact scope of all Security Exceptions *ex ante* might be close to impossible, WTO members might be more willing to cooperate on the clarification of the scope of the exception for Conventional Security Measures. *Russia—Traffic in Transit* and *Saudi Arabia—IPRs* lend support to the assumption that disputes over security matters that are related to armed conflict or heightened tension or crisis that fall under narrowly drafted Security Exceptions can be resolved through traditional adjudicative mechanisms, which are used to balance national interests and binding law.⁶⁰ The approach of WTO panels to interpret Security Exceptions in these cases can be a basis for dialogues between WTO members on further clarification of the scope of Conventional Security Measures. The adoption of the list could be an attractive option for those WTO members who want to ensure greater certainty and predictability in the application of existing Article XXI(b) of GATT (1994) by limiting it to specific areas, such as military and defense-related matters. But it could also be in the interests of those members that would prefer to expand its scope to additional areas, such as activities in cyberspace and areas related to critical infrastructure. The compromise between the two approaches seems more probable when, in addition to the narrowly drafted and

57. GATT 1994 art. XXI(b).

58. Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. INT'L ECON. L. 51, 51 (2005).

59. Bashar Malkavi, *Guest Post: Consensus as the Hallmark of the WTO: Time to Change*, INT'L ECON. L. & POL'Y BLOG (June 23, 2022, 6:28 AM), <https://ielp.worldtradelaw.net/2022/06/guest-post-consensus-as-the-hallmark-of-the-wto-time-to-change.html>.

60. *See generally* Panel Report *Russia—Traffic in Transit*; Panel Report *Saudi Arabia—IPRs*.

interpreted Article XXI(b), the WTO law granted members other exceptions, such as those covering Novel Security Measures.

If adopted, the decision of the Ministerial Conference or the General Council on the clarification of the scope of Article XXI(b) of GATT (1994) might also guide other trade and investment tribunals dealing with Security Exceptions modeled on the WTO law.

B. Role of Transparency & Accountability Rules

WTO members might help normalize the extensive use of Security Measures by agreeing on general procedural requirements that make Article XXI(b) of GATT (1994) more difficult to invoke if the measure does not have a clear national security nexus. Procedural requirements might also control the timely lifting of Security Measures, thereby offering an alternative mode for unilateralism based on transparency and peer monitoring.

WTO agreements already provide a sophisticated infrastructure for transparency and peer review concerning specific trade-restrictive measures. For example, the WTO Agreement on the Application of Sanitary or Phytosanitary Measures (SPS Agreement) was adopted to encourage reliance on and participation in international standards, guidelines, and recommendations developed by relevant international organizations,⁶¹ thereby reducing unilateral incentives and promoting harmonization of SPS measures. One of its control mechanisms is to ensure transparency through the notification procedure that requires a member to give advance notice before adopting a standard.⁶² “[W]here urgent problems of health protection arise or threaten to arise for a Member,” such a notification can be made after the particular regulation is adopted.⁶³ Annex B of the SPS Agreement clarifies, *inter alia*, that a member has to publish a notice introducing an SPS regulation, identifying the products to be covered by the regulation and including a brief indication of its objective and rationale, thereby providing a basis for debate with other members.

61. Gabrielle Marceau & Joel P. Trachtman, *A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade*, 48 J. WORLD TRADE 351, 366 (2014).

62. Agreement on the Application of Sanitary and Phytosanitary Measures art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

63. *Id.* Annex B ¶ 6.

The Technical Barriers to Trade (TBT) Agreement also specifies the notification procedure for technical barriers, including those taken to address national security concerns.⁶⁴ As in the case of the SPS Agreement, the information about TBT measures shall be published *ex ante* before their adoption.⁶⁵ Yet, “where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member,” that state is only required to give notice about the adoption of the TBT measure at a later stage after the measure has been adopted.⁶⁶ Such notification should contain a brief indication of the objective of and rationale for the measure.⁶⁷ Notably, the presence of the equivalent of Article XXI(a) of GATT (1994) under the TBT Agreement might also impede the effectiveness of such a procedure.⁶⁸

Finally, the Agreement on Safeguards also imposes obligations on members to notify the WTO Committee on Safeguards about an intent to apply a safeguard measure and to enter consultations with other members, allowing them to, among others, review the provided information and exchange views on the measure.⁶⁹

To ensure more transparency in the application of Security Measures and to avoid the perpetual struggle of drawing the line between Security Measures and other public policy measures or protectionist measures, WTO agreements, RTAs, and IIAs might subject the invocation of Security Exceptions to more specific procedural requirements drawn on the principles prescribed for TBT, SPS, and safeguard measures, taking into account the sensitivity of the information related to states’ security concerns. Notifying trading partners of a Security Measure is a starting point for interactions between WTO members. Governments could be required to give notice about the intent to adopt a Security Measure. Yet, where urgent problems of national security arise or threaten to arise for a member, governments should be allowed to submit a notification after the adoption of the Security Measure as soon as practically possible.

64. Agreement on Technical Barriers to Trade art. 2.9, 5.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

65. *Id.* art. 2.11, 2.12, 5.8, 5.9.

66. *Id.* art. 2.10, 5.7.

67. *Id.* art. 2.10.1.

68. *Id.* art. 10.8.3; *see generally* Mona Pinchis-Paulsen, *Let’s Agree to Disagree: A Strategy for Trade Security*, 25 J. INT’L ECON. L. 527, 540 (2022).

69. *See* Agreement on Safeguards art. 12, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter Agreement on Safeguards].

Similar to safeguard measures, it could be required that in order to fall under Article XXI of GATT (1994), “a measure must present certain constituent features,” without which it could not be considered a Security Measure.⁷⁰ For one, domestic authorities could be allowed to invoke Security Exceptions only if the measure were characterized as a Security Measure under domestic law; namely, the domestic procedures that led to its adoption were related to dealing with national security threats, and the measure had been notified to the WTO. There might be some additional specific requirements to the form of notifications; for example, a state might have to substantiate that it had specific security purposes for the application of such measures or to reveal such factual elements as may be required to show that it either was at war or had another emergency.⁷¹ Unlike in the case of safeguard, TBT, or SPS measures, domestic authorities should not be expected to make publicly available an investigation report or a report explaining the conclusion reached before applying the national security measure. Instead, they should be able to refer to the domestic regulations and procedures according to which the measure was established and their relevance to national security considerations. In case of a dispute, a WTO panel could review all these aspects of the measure to determine whether a WTO member could justify it under Security Exceptions.

This proposal comes with some carve-outs. First, the practice of the application of other trade measures reveals the problem with the “chronic low level of compliance with existing notification requirements” under many WTO agreements.⁷² Second, it implies that states are expected to design the domestic process of adopting Security Measures in a way that ensures that such measures are directed at genuine and pressing national security concerns. This, of course, requires economic measures to have clearly articulated security goals and procedures for their adoption—a questionable proposition in many cases.

The lack of articulated or achievable security goals questions the good faith application of Security Measures. The non-transparent decision-making process of some governments, the exclusion of national

70. Appellate Body Report, *Indonesia—Safeguard on Certain Iron or Steel Products*, ¶ 5.60, WTO Doc. WT/DS490/AB/R & WT/DS496/AB/R (adopted Aug. 15, 2018).

71. Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 618–19 (1991).

72. Communication from Argentina, Australia, Canada, Costa Rica, The European Union, Israel, Japan, New Zealand, The Separate Customs Territory Of Taiwan, Penghu, Kinmen And Matsu, United Kingdom, and the United States, *Procedures To Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, pmbL., WTO Doc. JOB/GC/204/Rev.5, JOB/CTG/14/Rev.5 (June 25, 2021).

security issues from the review of domestic courts, and past examples of controversial Security Measures adopted to satisfy the interests of domestic political elites also signal little incentive to elaborate on domestic procedural safeguards that would prevent the abuse of security discourse. Finally, when states see economic warfare as a way to gain a competitive advantage in technological, agricultural, or vital industries, they care about the immediate costs and benefits of such measures rather than their moral value. It follows from such realists' premises that domestic control over Security Measures is not an idealistic postulate that could tame states' growing appetite to escape from their obligations under international economic agreements.

Nevertheless, requiring an *ex ante* notification for Security Measures would make WTO members think more carefully about the scope of Security Exceptions and the design of their regulations and would incentivize them to consider the nature of potentially illegal measures before actually adopting them. Even a retrospective disclosure following the adoption of a Security Measure, as is the case for urgent TBT or SPS measures, can encourage proper debate and discussion before litigation and open the door for more dialogue. The practice of the application of SPS measures confirms such a view.⁷³

The WTO could also improve the interaction among WTO members by facilitating periodic reviews and consultations concerning the need to adopt and maintain Security Measures.⁷⁴ Based on the examples of safeguard, TBT, and SPS measures, the Committee on Security Measures could help oversee the discussions.⁷⁵ Similar periodic reviews and consultations could occur among the contracting parties of RTAs and IIAs, supervised by the security committees created under the respective agreements. For instance, in the case of an economic crisis, contracting parties could agree to regularly assess during committee meetings whether the crisis was still severe enough to justify applying trade or investment restrictions.⁷⁶

Taking together, strengthening the procedural safeguards for invoking Security Exceptions and ensuring transparency in the identification of the objectives of both Conventional and Novel Security Measures and their qualification under domestic law could be an acceptable

73. See Henrik Horn et al., *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees*, 47 J. WORLD TRADE 729, 753 (2013).

74. UNCTAD, *supra* note 56, at 132.

75. Simon Lester & Inu Manak, *A Proposal for a Committee on National Security at the WTO*, 30 DUKE J. COMP. & INT'L L. 267, 269 (2020).

76. UNCTAD, *supra* note 56, at 132.

compromise—albeit no doubt imperfect—between oversight and policy discretion in national security disputes for two reasons. First, it would ensure the basis for dialogue between all WTO members about the nature of Security Measures and their impact before any litigation process starts. Second, it would allow international courts and tribunals to focus on procedural judicial review, thereby resolving the most striking problems related to the lack of adjudicator expertise to decide foreign and security matters, restricted access to classified material, and the shortage of necessary personnel to assess specific questions. The turn to procedural limitations on the invocation of Security Exceptions thus could be seen as a method to ensure Security Measures are applied in good faith.

C. *Role of the U.N.*

With its focus on international trade, the WTO can use the expertise of the U.N. to make more sensible decisions on national security-related matters. For example, instead of or in addition to international trade and investment courts, the oversight of Security Measures can be conducted by the U.N., a joint U.N.-WTO committee, or a mediated settlement supervised by the U.N.⁷⁷ Thereby, improved interaction between the WTO and the U.N. can also help retain control over the use of Security Measures without undermining the legitimacy of the international trade regime and its dispute resolution function.

Proposals for enhanced cooperation between the U.N. and the WTO on security matters are not new. To ensure the proper use of Article XXI(b) of GATT (1994), Raj Bhala has suggested increasing coordination between the WTO and the U.N. Security Council by establishing a joint WTO-Security Council committee on security measures, which could render at least a non-binding, non-precedential opinion in each case that addresses the security-related questions.⁷⁸ To this end, Perez has argued that “the WTO legal order should look to the practices of the United Nations to ascertain the circumstances under which a state could legitimately invoke [Security Exceptions,] in particular, to whether the [United Nations] Security Council has ever found a similar situation to warrant international enforcement action.”⁷⁹ The other,

77. Heath, *supra* note 6, at 1080.

78. In particular, the questions of whether the use of Security Measures comply with the terms of Article XXI(b), and whether such Security Measures are reasonable in relation to the threat or actual danger posed. See Raj Bhala, *National Security and International Trade Law: What GATT Says, and What the United States Does*, 19 U. PA. J. INT'L L. 263, 276 (1998).

79. Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 306 (1998).

more ambitious proposal is to encourage the use of Security Measures only after an appropriate resolution of the U.N. Security Council.⁸⁰

The international trading system has undergone substantial transformations since the negotiations over the creation of the intended predecessor of the WTO—the failed International Trade Organization (ITO)—a forum the U.N. considered the only right body to decide on security matters.⁸¹ WTO panels and the Appellate Body are regularly asked to review WTO members’ non-economic concerns, which are political in nature. Furthermore, the dichotomy between “political” and “legal” disputes is not reflected in the text of current trade and investment agreements.

One prominent flaw in allowing the U.N. to have a final word on states’ security issues is the concerns over the U.N. Security Council voting system and the possibility of five permanent members (comprised of China, France, Russia, the United Kingdom, and the United States) vetoing substantial resolutions.⁸² The permanent members have almost always been divided into geopolitical blocs, which led to one of them, mostly the Soviet Union—now Russia—or the United States, exercising its veto on the most crucial decisions.⁸³ A recent example is the U.N. Security Council voting on a draft resolution that condemned the Russian occupation of four regions of Ukraine in September 2022. The resolution was not adopted because of the veto by Russia.⁸⁴ In addition, greater involvement by the U.N. in questions at the intersection of national security and economic law might require the broadening of the definition of force or aggression to capture extensive unilateral sanctions so as to bring Security Measures more clearly within the U.N.’s ambit.⁸⁵

Nevertheless, the U.N. might take the lead in coordinating states’ responses to security threats by facilitating the flow of information,

80. Bhala, *supra* note 78, at 276.

81. See U.N. Conference on Trade & Employment., Final Act and Related Documents, U.N. Doc. E/Conf.2/78, U.N. Sales No. 1948.II.D.4 (1948).

82. See LORAINIE SIEVERS & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 296–364 (OSAIL, 4th ed. 2014).

83. See generally U.N. Security Council Meetings & Outcomes Tables, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/docs/sc/quick/meetings/2022> (last visited Oct. 20, 2022).

84. Edith M. Lederer, *Russia Vetoes U.N. Resolution Calling its Referendums Illegal*, WASH. POST (Sept. 30, 2022) <https://www.washingtontimes.com/news/2022/sep/30/russia-vetoes-un-resolution-calling-its-referendum/>.

85. See IRYNA BOGDANOVA, UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS: THE IMPACT OF THE PRINCIPLE OF COMMON CONCERN OF HUMANKIND 68–78 (2022).

coordinating efforts according to the nature of the crises, and collecting and preserving valuable data during and after the emergency. In particular, the existence of a resolution of the U.N. General Assembly that recognizes a specific situation as an emergency and calls states to urgent actions could also make a good faith invocation of the Security Exceptions with respect to novel and emerging security threats more credible.⁸⁶

The U.N. and the WTO have agreed on cooperation, which, among others, includes the provision and exchange of relevant information.⁸⁷ The General Assembly has the power to “discuss any questions relating to the maintenance of international peace and security” and to “recommend measures for the peaceful adjustment” of various situations.⁸⁸ It has to be acknowledged that U.N. members might have divergent views on novel security threats. Yet, as practice demonstrates, debates in the U.N. mostly focus on the perceived aims of new policy directions rather than on whether or not climate change, energy, or other emerging concerns have security implications.⁸⁹ On multiple occasions, the decisions of the U.N. General Assembly have invited its members and/or relevant international organizations to adopt policies or take certain actions with respect to the protection of the environment,⁹⁰ human life and health,⁹¹ cybersecurity and critical information infrastructures,⁹² or to consider and address possible security implications of climate change.⁹³ Different from the resolutions of the U.N. Security Council that can be

86. “A [r]esolution of the [U.N.] General Assembly . . . has always some ‘political effect’ . . . particularly, when, being addressed to a certain [m]ember or [m]embers of the [U.N.]” See D.H.N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT Y.B. INT’L L. 97, 121 (1955-1956). Not taking the course recommended in such a resolution presents “the risk of losing the political friendship and understanding of [those members] who voted for [it].” See *id.*

87. Communication from the Director-General, *Arrangements for Effective Cooperation with Other Intergovernmental Organizations: Relations between the WTO and the United Nations*, WTO Doc. WT/GC/W/10 (Nov. 15, 1995).

88. U.N. Charter art. 11, 14; see also Cóman Kenny, *Responsibility to recommend: the role of the UN General Assembly in the maintenance of international peace and security*, 3 J. USE FORCE INT’L L. 3, 5 (2016).

89. See Lyn Jaggard, *Climate Change Politics, the UN and National Interests*, 38 ENV’T POL’Y L. 230, 230 (2008).

90. G.A. Res. 76/300, *The Human Right to a Clean, Healthy and Sustainable Environment* (July, 28, 2022).

91. G.A. Res. 74/270, *Global Solidarity to Fight the Coronavirus Disease 2019 (COVID-19)* (Apr. 2, 2020).

92. G.A. Res. 58/199, *Creation of a Global Culture of Cybersecurity and the Protection of Critical Information Infrastructures* (Dec. 23, 2003).

93. G.A. Res. 63/281, *Climate Change and Its Possible Security Implications* (June 3, 2009).

blocked by the veto of one of the permanent members, decisions of the U.N. General Assembly on important questions, such as recommendations with respect to the maintenance of international peace and security, shall be made by a two-thirds majority of the members present and voting.⁹⁴ The General Assembly is expressly authorized to make recommendations (up to and including collective measures) in the face of a threat to international peace and security, even when the U.N. Security Council is unable to act because of the lack of unanimity of the permanent members.⁹⁵ This leaves more room for addressing security concerns and emergency situations where one of the most powerful U.N. members opposes the decision for political reasons.

The world is only at the beginning of the learning curve when it comes to dealing with emerging security threats other than wars or armed conflicts, such as threats posed by cyber-attacks or climate change. The availability of U.N. resolutions on international emergencies and regional crises can discourage powerful countries from sabotaging their trade commitments in “normal” times when there is no recognized state of emergency or the probability of such an emergency in the future. It can also assist international adjudicators in deciding on the lawful invocation of Security Exceptions by releasing them from the need to characterize the situation as either rising to the level of an emergency or not. The reliance of a WTO panel in *Russia—Traffic in Transit* on the evidence and findings provided by the U.N. General Assembly⁹⁶ can be viewed as the first step to such growing cooperation and coordination between the U.N. and WTO.

D. *Role of Economic Incentives*

In principle, trade-restrictive measures of a WTO member reduce market access or otherwise restrict trade with certain partners, making the latter bear the costs of such measures. Compensation under IIAs is a key protection for foreign investors and might be available even if a treaty exception applies.⁹⁷ Yet, the availability of compensation for investors in the case of the adoption of Security Measures by a host state depends on the exact treaty language. To illustrate, the tribunal in *Copper Mesa v. Ecuador* confirmed, referring to the *Methanex v. United States* and *Tecmed v. Mexico* awards, that non-discriminatory bona fide

94. U.N. Charter art. 18(2).

95. G.A. Res. 377 (V), *Uniting for Peace* (Nov. 3, 1950).

96. *See, e.g.*, Panel Report *Russia—Traffic in Transit*, ¶ 7.137.

97. Heath, *supra* note 6, at 1045.

public purpose regulations are non-compensable.⁹⁸ Such a conclusion is in line with the police power doctrine as a justification for non-payment of compensation in cases of expropriation of investments for public purposes. The Devas tribunal also referred to the CMS annulment committee decision and the award in *Continental v. Argentina* to confirm that if a state properly invokes a Security Exception under an IIA, it cannot be liable for compensation of damages.⁹⁹ Given that the relationship between the police power doctrine and Security Exceptions remains undecided,¹⁰⁰ as a practical matter, the lack of just compensation for foreign investors in the case of any emergencies, either objectively defined or perceived as such by a host state, might discourage investors from investing in host states, especially ones with unstable economies.

Both international trade and investment regimes provide little incentive for the responding state to reduce the costs of Security Measures and their possible adverse effect on the other party. Economic contract theory assumes a commensurability between the damage suffered from the breach and a monetary payment or other forms of compensation.¹⁰¹ Nothing under international law precludes compensation when the breach by a state is justified under one of the exceptions or a circumstance without wrongfulness under international law. It can be argued that a successful necessity defense imposes costs on a party other than the party acting under necessity because the party in breach protects a vital interest of higher value than the interest in the performance of its international commitments.¹⁰² Yet, Article 27 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) expressly states that the invocation of a circumstance precluding wrongfulness under international law, such as the customary defense of necessity, does not preclude the possibility of compensation for the aggrieved state. The commentary to this Article clarifies that compensation might be required in certain cases to discourage a state seeking “to shift the burden of the defence of its own interests or

98. *Copper Mesa Mining Co. v. Republic of Ecuador*, PCA Case Repository No. 2012-2, Award, 141 (Perm. Ct. Arb. 2016).

99. *CC/Devas (Mauritius) Ltd. v. Republic of India*, PCA Case Repository No. 2013-09, Award on Jurisdiction and Merits, 79 (Perm. Ct. Arb. 2016).

100. See Catharine Titi, *The Right to Regulate in International Investment Law (Revisited)*, 18 INT'L & COMPAR. L. RSCH. CTR. 1, 53 (2022).

101. Trachtman, *supra* note 48, at 143.

102. See Cynthia C. Galvez, *Necessity, Investor Rights, and State Sovereignty for NAFTA Investment Arbitration* 46 CORNELL INT'L L. J. 143, 146 (2013).

concerns onto an innocent third [s]tate.”¹⁰³ The provisions of ARSIWA on compensation might supplement otherwise applicable treaty provisions unless contracting parties have agreed to a different legal rule as a matter of *lex specialis*.

In a similar vein, several academic commentators support the view that international trade agreements can be reviewed to at least partially shift the costs of Security Measures from the affected party to the invoking state by imposing the compensation requirement.¹⁰⁴ Such a proposal could also be tailored to the particularities of the international investment regime.¹⁰⁵ This section further discusses the challenges and prospects of the implementation of a compensation mechanism for Security Measures under WTO law, RTAs, and IIAs separately.

1. Rebalancing Under WTO law

Given that the legal consequences of a breach of WTO law are regulated by the Dispute Settlement Understanding (DSU), the provisions of ARSIWA on compensation for damages do not regulate the breach of WTO law.¹⁰⁶ As things stand now, nothing in the DSU provides that a WTO member shall either comply with its obligations under the WTO agreements or pay damages.¹⁰⁷ Trade compensation under WTO law is allowed but only under specific conditions: first, in case of non-compliance with the WTO ruling to withdraw or modify a WTO-inconsistent measure (compensation for non-compliance); second, for disputes concerning a claim that a measure nullifies or impairs the benefits that a member was expecting to receive (non-violation complaints);¹⁰⁸ and third, where trade liberalization causes or threatens to cause serious injury to domestic producers (safeguard measures).¹⁰⁹ In all these cases, trade compensation becomes the preferred option, or if such compensation could not be agreed, trade retaliation is preferred. Joost

103. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, at 86, U.N. Doc. A/56/10 (2001).

104. See, e.g., Lester & Zhu, *supra* note 32, at 1469.

105. See generally Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296 (2015).

106. As a matter of *lex specialis*, see PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS* 223 (5th ed. 2022) (explaining that “[T]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”).

107. See MICHELLE LIMENTA, *WTO RETALIATION: EFFECTIVENESS AND PURPOSES* 14 (2017).

108. See GATT 1994 art. XXIII.

109. See *id.* art. XIX.

Pauwelyn discusses the variable nature of the goal of GATT/WTO retaliation, concluding that in addition to inducing compliance, such retaliation might pursue other objectives, such as temporary rebalancing of trade concessions, some form of political or economic compensation, or the deterrence of possible future violations.¹¹⁰

Several commentators argue against the analogy between WTO agreements and private contracts prescribing compensation in case of non-performance because it can lead to a misunderstanding of the identity of the WTO.¹¹¹ A two-part objection may reasonably be put forward to the suggestion of introducing monetary compensation or a more efficient trade compensation mechanism into the WTO system. First, it can be argued that the lack of an interstate system of expectation damages has forced states to “design their legal agreements ex ante to balance the expected gains from [breaches that can be prevented] with the expected losses from undeterr[able breaches].”¹¹² Second, the compensation mechanism ignores domestic political factors.¹¹³ Requiring a member to pay either monetary or trade compensation does not address a free-rider problem or the possibility that domestic authorities would manipulate the mechanism to serve interests other than preserving a treaty balance.¹¹⁴ Nor does it incentivize a violating state to punish the groups that instigated the trade violation or an affected state to benefit the groups that suffer from such a violation.¹¹⁵ Instead, the option to violate an agreement and pay the compensation might encourage domestic lobbyists to put more pressure on their governments,¹¹⁶ leading to even more inefficient and politically charged decisions when enforcing WTO obligations.

On the flip side, in the case of legitimate security threats (either objective or genuinely perceived ones), the compensation for the harm caused by Security Measures would happen under circumstances where there is little ground to believe that a member would withdraw its

110. See Joost Pauwelyn, *The Calculation and Design of Trade Retaliation in Context: What Is the Goal of Suspending WTO Obligations?*, in *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 34 (Chad P. Bown & Joost Pauwelyn & eds., 2010).

111. See LIMENTA, *supra* note 107, at 14.

112. Timothy Meyer, *The Political Economy of WTO Exceptions*, 99 WASH. U. L. REV. 1299, 1325 (2022).

113. Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 319, 340–45 (2008).

114. *Id.* at 323–24.

115. *Id.* at 322.

116. KRZYSZTOF J. PELC, *MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW* 33–39 (2016).

WTO-inconsistent measures in compliance with the court's or tribunal's ruling until it perceives that a threat to its national security no longer exists and/or reaches agreement with the affected counterparties. In this situation, compensation does not replace the performance of WTO obligations. Instead, it attempts to re-establish the balance under the agreement for the period of a security threat by inducing a violating party to comply with its commitments when it can, offering a way of compensating the affected parties (at least partially) and deterring possible future violations where WTO members might otherwise attempt to abuse the overbreadth of Security Exceptions. Furthermore, a compensation requirement might reduce the incentive of certain WTO members to carry out irresponsible policies and accept the remote risk of WTO litigation in the future by making them consider the effect of Security Measures on their counterparties and the costs they would have to compensate for before actually adopting such measures.

This section further explores the possibility of introducing rebalancing mechanisms for Security Measures drawing upon the existing compensatory and retaliatory mechanisms under WTO law. Compensation/retaliation under Article 22 of DSU might attempt to restore the contractual balance initially negotiated by the parties under the agreement but distorted by the breach.¹¹⁷ Furthermore, both non-violation complaints¹¹⁸ and safeguard measures¹¹⁹ represent an attempt to solve the contractual incompleteness of WTO agreements by allowing WTO members to adjust their legal commitments when unforeseen contingencies upset the contractual balance. It thus might provide insights valuable for restoring the balance between trade and security concerns of WTO members without focusing on the legitimacy of their national interests. Each of these rebalancing mechanisms will be further discussed in turn.

a. Rebalancing Under Article 22 of DSU in case of Violation Complaints

In principle, where a WTO panel (and potentially the Appellate Body) finds that the measure of a WTO member is in breach of WTO law and is not satisfied under the invoked treaty exception (if invoked), such a breach must be remedied by restoring compliance: either withdrawing or modifying the inconsistent measure. If the responding member refuses to restore compliance, the WTO law allows the parties

117. Lester & Zhu, *supra* note 32, at 1469.

118. Robert W. Staiger & Alan O. Sykes, *How Important Can the Non-Violation Clause Be for GATT/WTO?*, 9 AM. ECON. J. 149, 149 (2017).

119. Sykes, *supra* note 105, at 304–06.

to negotiate compensatory trade concessions or authorizes the complainant to retaliate by suspending “equivalent” trade concessions vis-à-vis the respondent in accordance with Article 22 of DSU.¹²⁰ The DSU clarifies that performance is the preferred remedy, while trade compensation or retaliation are only temporary measures.¹²¹

Several issues arise from such rebalancing under the WTO agreements after Security Measures are found in breach of international commitments and where a violating member refuses to comply with a WTO ruling. First, because of the sensitivity and the political nature of national security concerns, the disputes regarding the legitimacy of Security Measures put a higher burden on WTO adjudicators. Second, as the outcomes of the *United States—Steel and Aluminium Products* disputes confirm, compliance with adverse findings over national security matters remains questionable. If a WTO panel, or potentially the Appellate Body, rules that the Security Measures of a WTO member are not justified under Article XXI(b), it is unlikely that this member would comply with the ruling as long as the conditions triggering it to adopt such Security Measures remain, or unless the parties settle the dispute through diplomatic means. In this case, trade compensation or retaliation remains the only remedy. Third, Article 22 of DSU can be invoked only if the Dispute Settlement Body (DSB) adopts a panel ruling (or an Appellate Body ruling) against a WTO member and such a member fails to bring its inconsistent measure in compliance with WTO law “within [the] reasonable period of time.”¹²² It is not available in cases where the panel report is unadopted, for example, because of the absence of a functioning Appellate Body to hear the appeal and where the expedited arbitration under Article 25 of DSU is not available.¹²³

In order to sharpen and reify the issues, this section further presents the example of the United States refusing to comply with the adverse

120. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

121. *Id.* art. 22.1.

122. *Id.*

123. Arbitration under Article 25 of DSU is available if both parties agree. Several WTO members set up an interim appeal arbitration arrangement pursuant to Article 25. Yet, the U.S. does not participate in it. See Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, WTO Doc. DSB/1/Add.12 (Apr. 30, 2020).

WTO panel rulings on its national security in the *United States—Steel and Aluminium Products* disputes.¹²⁴ The United States has further appealed such rulings “into the void.” It means that the panel reports against the United States cannot be adopted because of the lack of a functioning Appellate Body to hear such appeals. Consequently, the DSB will not be able to allow complainants to retaliate should the US fail to negotiate “mutually acceptable compensation” with them.

Notably, several WTO members, including China, Turkey, and Russia, have already retaliated against the United States in response to U.S. Measures without waiting for the panel recommendations and the DSB’s authorization.¹²⁵ The United States has further challenged such retaliatory measures before the WTO.¹²⁶ It remains to be seen how the findings in the *United States—Steel and Aluminium Products* cases will affect the outcomes of such disputes brought by the United States. It also remains unclear how China, Norway, Switzerland, and Turkey will react to the United States’ refusal to comply with the panel rulings and their appeal “into the void.”

The refusal to comply with the adverse WTO rulings on national security issues, the lack of a functioning Appellate Body, and retaliation outside the WTO procedures can have far-reaching consequences for the stability and integrity of the WTO Dispute Settlement System (DSS), leading to further proliferation of national security defenses and de facto leaving an essential part of international trade outside the control of the WTO regime. One of the ways to mitigate such consequences is to allow WTO members to use the trade compensation and retaliation mechanisms under Article 22 of DSU in national security disputes without waiting for the adoption of a WTO panel report by the DSB and the refusal by such a WTO member to comply with its ruling (immediate rebalancing).

124. See Press Release, Off. U.S. Trade Rep., Statement from USTR Spokesperson Adam Hodge (Dec. 9, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge?s=03>; see also Press Release, Off. U.S. Trade Rep., Statement from USTR Spokesperson Adam Hodge (Dec. 21, 2022), <https://mailchi.mp/394146669449/statement-from-ustr-spokesperson-adam-hodge?s=09>.

125. See *Foreign Relations Timeline*, INT’L TRADE ADMIN., <https://www.trade.gov/feature-article/foreign-retaliations-timeline> (last visited April 4, 2023).

126. See, e.g., Communication from the Panel, *Turkey—Additional Duties on Certain Products from the US*, WTO Doc. WT/DS561/4 (Sept. 11, 2019) (panel composed on Feb. 28, 2019); Communication from the Panel, *China—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS558/4 (Sept. 11, 2019) (panel composed Jan. 25, 2019); Communication from the Panel, *Russian Federation—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS566/4 (Sept. 11, 2019) (panel composed Jan. 25, 2019).

In the past, WTO members have been willing to offer compensation instead of compliance with DSB rulings,¹²⁷ implying that, at least in some instances, violating members might prefer immediate compensation for the use of Security Measures to the burdensome litigation that undermines their security concerns and the legitimacy of the WTO dispute settlement function. Domestic legislation of WTO members also introduces new tools that enable their governments to retaliate in response to the trade and security policies of other governments without waiting for a definite WTO DSB resolution. The most recent example is the new legislation in Brazil allowing the government to unilaterally suspend concessions under the WTO agreements if a responding state appeals the WTO panel report “into the void” because of the lack of a functioning Appellate Body.¹²⁸ Such practices suggest that even though prescribing immediate rebalancing rules for Security Exceptions would doubtfully help overcome all concerns related to the invocation of a security defense, it might, nevertheless, keep governments at the bargaining table, save time and costs of burdensome litigation, and channel the responses of other WTO members to Security Measures into legal processes to limit the abuse.

b. Rebalancing Through Non-Violation Complaints

Article XXIII(1)(b) of GATT (1994) allows for a non-violation complaint where a WTO member considers that “any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . . the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement.”¹²⁹ The drafters of the GATT (1947) borrowed the concept of a non-violation complaint from various earlier bilateral treaties, keeping in mind the concerns that the U.S. economy might return to the depression conditions preceding World War II or other unforeseen circumstances.¹³⁰ When the conditions of Article XXIII(1)(b) are met, there is no need for a panel to determine that a respondent has breached WTO law or to require a respondent to withdraw the

127. Nicolas Lamp, *At the Vanishing Point of Law: Rebalancing, Non-Violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars*, 22 J. Int’l Econ. L. 721, 731 (2019).

128. Lei N° 14.353 de 26 de Maio de 2022, Diário Oficial da União [D.O.U.] de 27.5.2022 (Braz.), http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/L14353.htm (discussing a breach of obligations by WTO member); Pinchis-Paulsen, *supra* note 68, at 532.

129. GATT 1994 art. XXIII(1)(b).

130. Robert W. Staiger & Alan O. Sykes, *Non-Violations*, 16 J. INT’L ECON. L. 741, 744 (2013).

measure. Instead, WTO members have an opportunity to negotiate for compensatory adjustments, withdraw their own concessions if negotiations fail, or withdraw from the agreement.¹³¹

In *EC—Asbestos*, the Appellate Body rejected the argument that non-violation complaints are limited to matters not explicitly addressed elsewhere in the GATT (1994),¹³² suggesting that claims for compensation for non-violation nullification or impairment are allowed even in cases where a measure is permissible under the Article XX(b) exception for protection of human health.¹³³ By the same token, a non-violation complaint followed by compensation or retaliation should not be prevented when a member can rely on Security Exceptions under Article XXI(b). To support this view, the panel in *United States—Steel and Aluminium Products* has reviewed the negotiating history of the ITO, which confirms “the shared understanding among negotiators that ITO members affected by security measures could submit non-violation complaints.”¹³⁴ The EU, Switzerland, Turkey, and even the United States, being the most vigorous proponent of the “self-judging” Security Exceptions, also seem to believe that Article XXI does not prevent or limit non-violation complaints (to the exclusion of claims of a breach).¹³⁵ According to the United States, non-violation complaints would be the only available remedy for a complainant in the case of the invocation of Security Exceptions by a respondent.¹³⁶

Pursuing non-violation complaints under Article XXIII(1)(b) instead of challenging a measure proclaimed to be justified under Security Exceptions allows for circumvention of discussions about the breach of WTO commitments and compliance with the Security Exceptions test and the political problems arising from that. Such an approach could recognize the nullification or impairment caused to other members by Security Measures and allow for appropriate compensation, which would restore the balance of concessions that existed before the Security Measures were imposed while respecting the respondent’s discretion in national security matters.¹³⁷ Furthermore,

131. *See id.*

132. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 187, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

133. Staiger & Sykes, *supra* note 130, at 750.

134. Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, ¶¶ 2.42, 3.30–3.37, WTO Doc. WT/DS544/R/Suppl.1 (Dec. 9, 2022) (under appeal on Jan. 26, 2023).

135. *Id.* ¶¶ 2.22, 2.42.

136. *Id.* ¶ 2.22.

137. Tatiana Lacerda Prazeres, *Trade and National Security: Rising Risks for the WTO*, 19 WORLD TRADE REV. 137, 145 (2020).

Nicolas Lamp argues in favor of non-violation complaints because “almost by definition,” Security Measures “will nullify or impair benefits under the GATT 1994[,]” making it faster for claims to be adjudicated.¹³⁸

The discussion over the application of non-violation complaints to Security Measures was raised in *United States—Trade Measures Affecting Nicaragua*. Both Nicaragua and the United States claimed that an invocation of a Security Exception under Article XXI of GATT (1947) did not prevent recourse to XXIII(1) (b) of GATT (1947).¹³⁹ Yet, given that the challenged embargo prohibited not only imports from Nicaragua into the United States but also exports from the United States to Nicaragua, the panel found that no decision under Article XXIII could re-establish the balance of advantages that had accrued to Nicaragua under the GATT (1947) before the U.S. embargo, and thus proposed no ruling on the inquiry of whether actions under Article XXI could nullify or impair GATT benefits,¹⁴⁰ leaving many questions arising from its application open.

Notably, pursuing non-violation complaints under Article XXIII(1) (b) instead of challenging a measure proclaimed to be justified under Security Exceptions poses its own set of challenges.¹⁴¹ The United States in *United States—Trade Measures Affecting Nicaragua*, for example, argued that “nullification or impairment could not be presumed in cases in which [Security Exceptions were] invoked” but should be “made dependent on the facts and circumstances of the particular case[.]”¹⁴² Even though non-violation complaints do not require WTO adjudicators to establish a breach of WTO commitments or follow the test of Article XXI, they do not necessarily prevent a need to consider the facts of the case.¹⁴³ The difficulty of meeting the burden of proof by a complainant when a non-violation complaint is invoked is confirmed by the fact that

138. Nicolas Lamp, *Guest Post: Why WTO Members Should Bring Pure Non-Violation Claims Against National Security Measures*, INT’L ECON. L. & POL’Y BLOG (Oct. 15, 2018, 10:24 AM), <https://ielp.worldtradelaw.net/2018/10/guest-post-why-wto-members-should-bring-pure-non-violation-claims-against-national-security-measures.html>.

139. Report of the Panel, *United States—Trade Measures Affecting Nicaragua*, ¶¶ 4.8-4.9, L/6053 (Oct. 13, 1986) [hereinafter *US—Nicaraguan Trade*].

140. *Id.* ¶ 5.11.

141. See Simon Lester, *Non-Violation Claims Against National Security Measures*, INT’L ECON. L. & POL’Y BLOG (Oct. 31, 2019), <https://ielp.worldtradelaw.net/2019/10/non-violation-claims-against-national-security-measures.html/>

142. *US—Nicaraguan Trade*, ¶ 4.9.

143. See Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45, 49 (2019).

throughout GATT and now WTO practice, non-violation complaints have been infrequent and often not adjudicated, and those adjudicated were often not successful.¹⁴⁴ By December 2018, in seven out of eight cases, “panels concluded that complainants failed to meet the appropriate burden of proof.”¹⁴⁵ Thus, given fewer incentives on the side of complainants to resort to non-violation complaints in the case of Security Measures, it remains questionable whether non-violation complaints would help to circumvent the need to resort to specific violations.

c. Rebalancing Based on Safeguards Model

Different from other exceptions under WTO law, the safeguard exceptions allow for measures that are not motivated by public interest but by a genuine protectionist intention. Article XIX of GATT (1994), as implemented by the Agreement on Safeguards, requires an invoking member to compensate the losses of an affected member from non-performance, as agreed by the parties, or allows the affected member to retaliate even in the absence of a WTO panel or Appellate Body ruling on the breach.¹⁴⁶ As a matter of practice, perhaps in part because of the strict substantive and procedural conditions for the invocation, WTO members use safeguard measures infrequently.¹⁴⁷

The idea of rebalancing in response to the safeguard measures was born in the reciprocal trade agreements negotiated by the United States and other countries in the 1930s and further transferred to GATT negotiations.¹⁴⁸ It resembles the standard U.S. remedy for most contract breaches—expectation damages—that facilitates efficient breach where the contractual performance is not in the interests of the party due to unforeseen contingencies.¹⁴⁹ The conditions for deviating from trade commitments under the safeguard mechanism—such as the existence of “unforeseen development” or “serious injury”—are vague and imprecise, making it difficult to observe and verify a genuine economic emergency.¹⁵⁰ This problem has been addressed by introducing the compensation requirement and making safeguard measures subject to specific procedural rules aimed at limiting and discouraging

144. Staiger & Sykes, *supra* note 130, at 775.

145. Prazeres, *supra* note 137, at 146.

146. VAN DEN BOSSCHE & ZDOUC, *supra* note 106, at 694, 715.

147. WTO, *Safeguard Measures*, https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm#statistics.

148. Lester & Zhu, *supra* note 32, at 1466.

149. Sykes, *supra* note 105, at 300.

150. *Id.* at 305–06.

opportunism. When the WTO member prefers to compensate the affected state for the lost performance value rather than perform the contract, the contract should allow for an efficient breach.¹⁵¹ In the same vein, safeguard measures under WTO law represent an attempt to encourage an efficient breach under WTO agreements in specific cases by allowing a WTO member to disregard some of its commitments for a limited period of time as long as it compensates or is willing to bear the costs of retaliation.¹⁵²

It can be argued that different from compensation/retaliation under Article 22 of DSU, the safeguards rebalancing is “the ‘price’ to be paid for breach” rather than “a ‘sanction’ to induce compliance.”¹⁵³ Such a distinction can explain, for example, why the country imposing the safeguards is subjected to “substantially equivalent” suspensions of concessions, while the country that does not comply with the WTO ruling in accordance with Article 22 of DSU is subjected to “equivalent suspensions of concessions.”¹⁵⁴

As a current practice demonstrates, certain domestic measures aimed at protecting national security pose similar challenges to the international community as safeguard measures. First, they are adopted in circumstances where there is little or no hope of achieving compliance with treaty commitments as long as a perceived security threat continues to exist. Second, they rely on imprecise standards that are difficult to verify in practice. There are no grounds to expand the existing safeguards’ rebalancing rules under Article XIX of GATT (1994) and the Agreement on Safeguards beyond their scope to include all types of Security Measures. Furthermore, this research does not attempt to put Security Measures and safeguard measures into the same category. Yet, it can be argued that the revised Security Exceptions can accept the logic of efficient breach while discouraging opportunism by including a new rebalancing mechanism explicitly designed for Security Measures that allows WTO members to adopt temporary measures when they consider it necessary to protect their national security, subject to a trade compensation (retaliation) requirement. To this end, Security Exceptions can draw on principles from the safeguard measures.

Such a proposal has apparent flaws. Security Measures can either be protectionist in nature and address temporal economic emergencies

151. See Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance,” and Related Issues*, 110 MICH. L. REV. 243, 258 (2011).

152. Sykes, *supra* note 105, at 304–06.

153. Pauwelyn, *supra* note 110, at 60.

154. *See id.*

rather than protecting genuine and pressing national security concerns. Yet, the rebalancing based on a safeguards model does not consider the motives of the state's actions and thus does not differentiate between genuine national security measures and measures that are protectionist in nature, which in combination with domestic political pressure, might, in some cases, result in less efficient use of Security Exceptions.

Furthermore, the difference between the emergency actions allowed under Article XIX of GATT (1994) as safeguard measures and the measures adopted in response to the emergencies in the sense of the narrowly interpreted Article XXI(b) of GATT (1994) is that the former aims to address regulatory challenges arising from the long-term economic effects of temporal irregularities of the international trading system, while the latter was designed to deal with the need to protect states' non-economic legitimate concerns. Where the long-term economic effects of the application of WTO agreements are difficult to foresee, WTO members can reasonably anticipate that their counterparty affected by war or other comparable emergencies might not be able to meet its trade commitments. In this sense, narrowly tailored Security Exceptions under Article XXI(b) of GATT (1994) aimed to address states' traditional security concerns are more similar to the measures allowed under the general exceptions of Article XX than Article XIX of GATT (1994).

All this suggests that, in certain situations, rebalancing drawn upon safeguard measures could limit the overbreadth of broadly drafted Security Exceptions. Specifically, it might be considered a valuable tool to ensure an efficient invocation of Security Exceptions where there is no clear agreement over the exact scope of such a defense *ex ante* and where the adjudication of the legality of Security Measures *ex post* might create more tension between governments and undermine the credibility of the WTO DSS, as will be further explored.

2. Rebalancing Under RTAs

In the international trade regime, safeguard measures are incorporated in many RTAs, providing an escape mechanism for parties seeking a temporary excusal from their trade concessions to address the adjustment needs of the domestic industry harmed by trade liberalization.¹⁵⁵ Some RTAs provide additional rebalancing mechanisms for specific exceptions. For example, the exception regarding cultural industries in Article 32.6 of USMCA (2018) allows the parties to adopt

155. Chad P. Bown & Mark Wu, *Safeguards and the Perils of Preferential Trade Agreements: Dominican Republic–Safeguard Measures*, 13 *WORLD TRADE REV.* 179, 180–82 (2014).

measures to protect cultural industries but to agree that the other parties may “take a measure of equivalent commercial effect in response.”¹⁵⁶ However, such a mechanism is not subject to any procedural requirements or control apart from general dispute settlement provisions under the agreement.¹⁵⁷ Under WTO law, the incorporation of similar rebalancing mechanisms for Novel Security Measures, authorizing either compensation or retaliation and prescribing clear procedural safeguards and institutional control over their implementation, can be the first step toward revitalizing the role of national security in bilateral and regional trade negotiations.

3. Compensation to Foreign Investors Under IIAs

Similar to trade agreements, by focusing on the costs of Security Measures, a compensation requirement in investment treaties could encourage the host state to use a security defense as a last resort and look for alternatives to respond to national concerns rather than immediately limiting FDI. It could ensure that a potential host state would prohibit FDI only when compensating an investor for the damage caused by such a measure.

Admittedly, trade and investment agreements differ in many aspects. For one, reputational effects mitigating the moral hazard problem under IIAs might be less effective under WTO agreements and RTAs. Trade agreements regulate interstate relations and aim to increase trade liberalization and maximize absolute gains. A state that disregards its trade commitments because of an emergency situation can be generally presumed to be willing to continue to profit from the international trade regime and thus have the incentive to return to compliance in the future under normal circumstances. In other words, the costs of potential compensation for the violation are offset by the prospect of future cooperation.

The state’s primary goal in signing an investment treaty is to attract foreign investment by providing the assurance that these investments will receive at least a minimum level of protection enforced through international arbitration or domestic courts. If any changes in the state’s policy lead to a breach of the investment treaty, then an affected investor would expect monetary compensation for the damage caused by the state’s actions rather than the restoration of compliance. However, problems with compliance with tribunal rulings on the compensation due to investors have been raised on multiple occasions. To

156. USMCA art. 32.6.

157. Lamp, *supra* note 127, at 734.

take just one obvious example, the review of the necessity of the Security Measure in *Devas v. India* allowed the tribunal to differentiate between India's security interests and other public interests. The tribunal found that protecting essential security interests accounted for sixty percent of India's measures, while other public interest purposes accounted for forty percent.¹⁵⁸ Since Article 6 of India–Mauritius BIT (1998) provided that expropriation for public purposes should still be followed by fair and equitable compensation to investors, the tribunal decided that the compensation owed by India should be limited to forty percent of the value of Devas' investment not covered by Security Exceptions.¹⁵⁹ In the aftermath of the proceedings, to ensure that it did not have to pay the compensation, India's government filed corruption cases against Devas, arguing that the company was incorporated for fraudulent purposes (even though India had not raised the corruption issue before the Devas tribunal).¹⁶⁰

While the complicated questions arising from the compliance with the compensation requirement under investment law are outside the purview of this research, it can be argued that the problem might become even more acute if a tribunal requires a host state to pay compensation where a Security Exception applies to a challenged measure and where such a measure is taken in time of war or an emergency that affects the payment capacity of a host state.

IV. SECURITY EXCEPTIONS REVISITED

All in all, it seems that none of the policy and legal options raised above can individually or conclusively commensurate the role of Security Exceptions under international law. Yet, considering the different implications they might have for Conventional and Novel Security Measures, tailoring such options to the particularities of international trade and investment regimes might be helpful for framing the direction for future reforms of Article XXI of GATT (1994) and creating an alternative approach to drafting Security Exceptions in new RTAs and IIAs.

158. *CC/Devas (Mauritius) Ltd. v. Republic of India*, PCA Case Repository No. 2013–09, Award on Jurisdiction and Merits, 100 (Perm. Ct. Arb. 2016).

159. *CC/Devas (Mauritius) Ltd. v. Republic of India*, PCA Case Repository No 2013–09, Award on Quantum, 157 (Perm. Ct. Arb. 2020).

160. India uses the same strategy not to compensate foreign investors in *Deutsche Telekom v. India*. See Prabhash Ranjan, *Investor-State Dispute Settlement (ISDS) Cases and India: Affronting Regulatory Autonomy or Indicting Capricious State Behaviour?*, 21 J. INT'L TRADE L. & POL'Y 42, 52 (2022).

This research does not attempt to advance a reform of Security Exceptions that best fits all conceivable situations. Nor does it attempt to suggest the model clause of Security Exceptions that would fit under all WTO agreements, RTAs, and IIAs. The political economies of trade and investment differ among WTO members, as do the security concerns of different WTO members. The text of Security Exceptions under different treaty regimes and between different members would continue to differ in certain respects. Instead of suggesting one correct approach to balancing trade and security in state practice and adjudicatory decisions, this Article makes a contribution by suggesting the grounds for further dialogue between WTO members over the improvement of the constructed balance between normalities and Security Exceptions under trade and investment treaty regimes.

A. *Directions for Reforming Article XXI of GATT (1994)*

Rather than attempting to fit all national security concerns under the current Article XXI(b) of GATT (1994), which was not designed to deal with all emerging security threats and geopolitical uncertainties, WTO members are advised to renegotiate Article XXI of GATT (1994) to permit a range of measures that address emerging national security threats while incentivizing governments to decrease the sweeping application of the national security defense, or at least ensuring that such securitization occurs in a more calibrated and proportionate manner.

Drawing upon the discussed policy and legal options for reconsidering Security Exceptions under international economic law,¹⁶¹ this Article suggests differentiating between Conventional Security Measures (drafted based on existing Article XXI(b)) and Novel Security Measures (drafted as a separate paragraph of Article XXI) and attempts to bring more transparency and predictability in their adoption. Such a proposal can also be a basis for reforming other Security Exceptions under WTO law tailored to the particularities of each WTO agreement.

For greater certainty, this Article suggests that a WTO member should be able to invoke Security Exceptions under WTO agreements only if it notifies all WTO members and the Committee on Security Measures about the need to adopt such security actions and explains its security concerns.¹⁶²

161. *See supra* Part III.

162. *See supra* Section III.B.

1. Conventional Security Measures

This research proposes to preserve the current approach to drafting Article XXI(b) of GATT (1994) for Conventional Security Measures. The adjective “conventional” is used here not only to refer to the measures that are related to states’ military and defense concerns as negotiated at the time of GATT adoption but also to encompass the additional measures that states expressly agree to include under Article XXI(b) as reflected in the text of the clause, or in the subsequent practice of WTO members. To this end, WTO members might agree to incorporate additional grounds for the invocation of Article XXI(b) to ensure that, for example, the measures adopted to deal with certain cybersecurity threats or threats posed to members’ critical infrastructure are treated as Conventional rather than Novel Security Measures under WTO law.

Alternatively, the Ministerial Conference or the General Council are recommended to adopt the decision on the interpretation of current Article XXI(b) of GATT (1994) to establish the list of recognized security areas (hereafter Article XXI Addendum II).¹⁶³ This research does not attempt to second-guess the exact scope of security areas under the revisited Article XXI(b) of GATT (1994). WTO members might agree to limit them to military and defense-related matters (as it stands now) or to expressly acknowledge that, for example, the measures aimed to protect cyberspace or critical infrastructure might also, in certain cases, be considered as Conventional Security Measures. In both scenarios, the reliance on Article XXI Addendum II, together with the notification requirement encouraging transparency and peer review, would aid in the WTO panels’ adaptation towards establishing a better balance between trade liberalization and members’ security policies, even when applying a looser standard of review and proof because of the self-judging language of Article XXI(b) of GATT (1994).

Notably, the authoritative interpretations of the Ministerial Conference and the General Council can “clarify but not modify” the rights and obligations of WTO members.¹⁶⁴ This implies that the proposed Article XXI Addendum II would not be able to expand the scope of current Article XXI(b) to justify the measures that are aimed to address insidious, non-immediate threats to cyberspace or energy security and that are not adopted “in the time” of existing “emergency in

163. See *supra* Section III.A.

164. Tarcisio Gazzini, *Can Authoritative Interpretation under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?*, 57 INT’L & COMP. L. Q. 169, 180 (2008).

international relations.”¹⁶⁵ Should WTO members prefer to broaden the scope of Conventional Security Measures to embrace such concerns, they are recommended to modify the text of current Article XXI(b).

Finally, this Article does not suggest that the category of Conventional Security Measures should be set in stone. It cannot be excluded that some emerging security threats will become systematic concerns for governments in the future (e.g., the measures aimed to deal with climate change). In this case, even if WTO members initially might agree to see the responses to such threats as Novel Security Measures, over time, they might reach a consensus on viewing such measures as Conventional Security Measures. Such an approach reaffirms that any changes to the framework of Security Exceptions should be based on dialogue and cooperation between WTO members.

2. Novel Security Measures

This research recommends the exception for Novel Security Measures to be drafted in a broader manner in the sense that, different from Article XXI(b), it would not limit national security interests *ex ante* to specific goods or situations (similar to “self-judging” exceptions under several existing RTAs and IIAs). Yet, to ensure the balance of rights and obligations between the right of a member to invoke such a security defense and its substantive obligation to other WTO members, additional treaty tools should be incorporated to prevent states’ opportunistic behavior.

The challenge of deciding whether a trade restriction measure falls within the scope of an open-ended exception under WTO law is not unique to national security measures. To illustrate, Article XX(a) of GATT (1994) also preserves a fairly broad policy space for policies related to public morals. This exception is not restrained to specific goods or situations and cannot be adjudicated based on commonly accepted objective evidence. To limit the potential overbreadth of such an exception, Article XX(a) prescribes two doctrinal constraints: a trade restriction should be necessary to protect the interest at stake (e.g., the necessity requirement under subparagraph (a)), and it should be applied in good faith (the chapeau requirements). The WTO jurisprudence confirms that determining the legitimacy of the application of general exceptions requires a great level of scrutiny of the purpose, design, and application of the measure.¹⁶⁶

165. GATT 1994 art. XXI(b) (iii).

166. See e.g., Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 296–98, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005).

The most significant contrast between the exceptions for national security and other public values in this respect is that a general exception (such as prescribed under Article XX of GATT 1994) could apply in ordinary times, whereas a Security Exception is expected to be invoked in extraordinary circumstances.¹⁶⁷ This distinction can potentially justify the disproportionate responses to a national security threat and the refusal of an invoking state to provide information necessary to analyze the nature of its Security Measures. It is reinforced by the fact that existing Security Exceptions under WTO law expressly limit the intensity of adjudicatory review of the necessity of Security Measures. Following the same line, this research suggests that to limit the potential overuse of a broadly drafted exception for Novel Security Measures, the mentioned doctrinal constraints established for the general exceptions could be tailored to the particularities of Security Exceptions. This section discusses each of such constraints in turn.

a. Ensuring a Good Faith Application of Novel Security Measures

A WTO member should be allowed to invoke a Security Exception in order to justify a Novel Security Measure only if such a measure is “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between contracting parties where the same conditions prevail, or a disguised restriction on international trade”—a requirement that draws upon the chapeau of Article XX of GATT (1994).

The Appellate Body has reiterated on multiple occasions that the chapeau of Article XX of GATT (1994) embodies the principle of good faith,¹⁶⁸ or “a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions . . . of the GATT 1994[.]”¹⁶⁹ Interpreting existing Security Exceptions under Article XXI(b) (iii) of GATT (1994), the WTO panels have also noted that while deciding on the impact on international relations of situations falling under an “emergency in international relations” within the meaning of Article XXI(b) (iii), they were mindful of their mandate under the DSU, “as well as the

167. Caroline Henckels, *Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law*, 69 INT’L & COMP L. Q. 557, 564 (2020).

168. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 22, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996) [hereinafter AB Report *US—Gasoline*].

169. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 159, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter AB Report *US—Shrimp*].

balance of rights and obligations reflected in the terms of Article XXI of the GATT 1994.”¹⁷⁰ The panel’s statement suggests that the existing Security Exceptions under Article XXI(b)(iii) of GATT (1994) preserve such a balance by granting states broad discretion to decide the necessity of their actions while *ex ante* limiting the scope of the situations in which a WTO member can justify such actions. In a similar vein, this Article proposes to ensure the balance of rights and obligations under the WTO law in the case of the invocation of broadly drafted Security Exceptions for Novel Security Measures (not limited to certain situations *ex ante*) by prescribing additional preconditions for the manner in which such measures should be adopted, similar to Article XX of GATT (1994).

While analyzing whether the challenged measures meet the requirements of the chapeau of Article XX, the Appellate Body considers the efforts of respondents to establish international coordination and cooperation. In *United States—Gasoline*, for example, the Appellate Body, in finding that the U.S. measures constituted “unjustifiable discrimination” and a “disguised restriction on international trade,” took into account the fact that the United States had not sufficiently pursued the possibility of entering into cooperative arrangements with affected governments in order to mitigate the administrative problems that it raised in justification of its measures.¹⁷¹ The Appellate Body in *United States—Shrimp* also suggests that the appraisal of justifiable or unjustifiable discrimination depends on the respondent’s attempts to engage in “across-the-board negotiations with the objective of concluding bilateral or multilateral agreements” regarding the concern at hand.¹⁷² Thus, for example, the existence of an agreement between all or several WTO members on the specific concern may support the argument that a unilateral trade restriction is neither arbitrary nor unjustifiable.¹⁷³

“Arbitrary discrimination,” “unjustifiable discrimination,” and “disguised restriction” on international trade may, according to the Appellate Body, should “be read side-by-side”; “they impart meaning to one another.”¹⁷⁴ The fundamental theme in the analysis of these concepts is “the purpose and object of avoiding abuse or illegitimate use of

170. See, e.g., Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, ¶ 7.148, WTO Doc. WT/DS544/R (Dec. 9, 2022) (under appeal Jan. 26, 2023).

171. AB Report *US—Gasoline*, at 27.

172. AB Report *US—Shrimp*, ¶ 166.

173. Joel P. Trachtman, *WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes*, 70 NAT’L TAX J. 469, 481 (2017) (“The [UNFCCC], the Kyoto Protocol, and the Paris Agreement may provide a broad factual basis for argument that unilateral action is neither arbitrary nor unjustifiable.”).

174. AB Report *US—Gasoline*, at 25.

the exceptions[.]”¹⁷⁵ By the same token, the inclusion of an express good faith requirement for Novel Security Measures under the renegotiated Security Exceptions for Novel Security Measures could focus on the legitimacy of the objectives of such measures and the prevention of their abuse. To this end, a resolution of the U.N. General Assembly that recognizes the security implications of a specific situation or portrays it as a threat to international, regional, or national security and calls on U.N. members to take urgent action could be seen as confirmation that a measure adopted in response to such a situation “is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade” within the meaning of the chapeau of Article XX of GATT (1994). Such a qualification would also assist the governments and WTO adjudicators in categorizing the Security Measures into Conventional or Novel Security Measures and differentiating between Security Exceptions and other treaty exceptions.

Different from essentially unilateral measures, the unilateral measures that have emerged from the multilateral consensus are more likely to have no protectionist character and be adopted in good faith. The proposal for different regulations of these types of measures under WTO law is not new. According to Article 3.2 of the SPS Agreement (1994), “[s]anitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”¹⁷⁶ Likewise, the TBT Agreement (1994) generally requires WTO members to use relevant international standards as a basis for their technical regulations to diminish the trade-restrictive effect of technical barriers.¹⁷⁷ By the same token, this research suggests that WTO members can be allowed to adopt Novel Security Measures where the raised national security concern is recognized at the U.N. level.

Such an approach implies that the responses to emergencies and international, regional, or national security challenges recognized by multiple states are thoroughly incorporated into the larger texture of international law. It also incentivizes states to cooperate on their national security matters and, to the greatest extent possible, seek solutions at the multilateral level.

175. *Id.*

176. SPS Agreement art. 3.2.

177. TBT Agreement art. 2.4; see VAN DEN BOSSCHE & ZDOUC, *supra* note 106, at 1007.

b. Rebalancing Through Compensation or Retaliation

Additionally, a WTO member should be allowed to invoke the Security Exception to justify a Novel Security Measure, provided that it compensates for the harm caused to affected states or suffers the consequences of substantially equivalent retaliatory measures. The compensation (retaliation) requirement would encourage a WTO member to identify means for protecting its national security interests before adopting a Novel Security Measure. It would also incentivize a member to design such a measure in the least trade-restrictive way. In this sense, the readiness to pay the compensation would serve as proof—admittedly imperfect proof—that a WTO member genuinely considered its measure to be necessary to protect its national security interest.

Even if WTO members agree to incorporate rebalancing rules for Novel Security Measures, the question is how to calculate such compensation and supervise the potential retaliation. As a practical matter, compensation should ensure that the costs of violation make it beneficial to suspend performance temporarily when necessary but expensive enough to avoid abuse. In other words, it should provide for the “optimal levels of compensation.”¹⁷⁸ Under WTO law, the traditional form of compensation is trade compensation, either in case of non-violation complaints,¹⁷⁹ safeguard measures,¹⁸⁰ or non-compliance with a DSB recommendation to lift or amend an illegal measure.¹⁸¹ It follows that a member that has a duty to compensate must, for example, reduce the tariff barrier equivalent to the amount of harm suffered by other members because of its measure. Yet, the concept of monetary compensation has often been raised throughout the history of GATT/WTO.¹⁸² In practice, monetary compensation was used to resolve the dispute in *United States—Section 110(5) Copyright Act*, where the EU and the United States jointly agreed to suspend the arbitration proceedings under Article 22 of DSU, provided that the United States financially compensated the EU in exchange for allowing the continuance of the infringing practices.¹⁸³

178. See Krzysztof J. Pelc, *Seeking Escape: The Use of Escape Clauses in International Trade Agreements*, 53 INT'L STUD. Q. 349, 352 (2009).

179. See GATT 1994 art. XXIII(1)(b).

180. See *id.*, art. XIX; see generally Agreement on Safeguards.

181. DSU art. 22.

182. See Nuno Limão & Kamal Saggi, *Tariff Retaliation Versus Financial Compensation in the Enforcement of International Trade Agreements*, 76 J. INT'L ECON. 48, 49 (2008).

183. See Bernard O'Connor & Margareta Djordjevic, *Practical Aspects of Monetary Compensation: The US-Copyright Case*, 8 J. INT'L ECON. L. 127, 127 (2005).

The introduction of monetary compensation under WTO law has been criticized for many reasons, not least because of the complications arising from its calculation.¹⁸⁴ Marco Bronckers and Naboth Van den Broek propose alleviating the problems arising from the calculation of monetary compensation through the establishment of liquidated damages, a proven technique in contract law.¹⁸⁵ Similarly, it can be suggested that to incentivize the efficient use of Security Exceptions, WTO members can pre-determine under the agreement the liquidated damages by which a member adopting a Novel Security Measure has to compensate affected members. Such monetary compensation could be pre-determined at a certain annual amount, being either one standard sum for all affected WTO members or a variable sum linked to the size of their economies.¹⁸⁶ The advantage of such a method is that if the damages are pre-determined, a member adopting a Security Measure can calculate with more certainty the total costs of its actions before deciding to take them. While not always offsetting all the damage caused to affected WTO members, such an approach would offer them at least some financial compensation to rebalance the contracting performance and might save the cost of negotiations over the adequacy of trade compensation or trade retaliation. In this way, specifying the amount of monetary compensation in advance can create appropriate incentives for a member to adopt Security Measures only when protecting the security interest at stake is less costly than the amount of liquidated damage it would have to compensate for.

However, implementing a system of monetary compensation whenever Novel Security Measures are applied would create several challenges for both the WTO and state administrations. For one, monetary compensation does not motivate a member to adopt a Security Measure for a limited period of time and return to compliance as soon as possible. If a member pays the pre-determined liquidated damages,

184. See Bryan Mercurio, *Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding*, 8 *WORLD TRADE REV.* 315, 317–20 (2009).

185. Marco Bronckers & Naboth Van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 *J. INT'L. ECON. L.* 101, 113 (2005). Sykes also discusses a system of monetary compensation for aggrieved exporters (rather than WTO members) concluding that this mechanism has many disadvantages in the WTO context, not least because of the costs of measuring the economic losses of individual exporters and the cost and volume of possible litigation. See Alan O Sykes, *Optimal Sanctions in the WTO: the Case for Decoupling (and the Uneasy Case for the Status Quo)*, in *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 350–54 (Chad P. Bown & Joost Pauwelyn eds., 2009).

186. See General Council, *China's Proposal on WTO Reform, Communication from China*, WTO Doc. WT/GC/W/773 (May 13, 2019); Bronckers & Van den Broek, *supra* note 185, at 125.

it has no further incentive to remove the measure as soon as possible. It follows that such compensation could allow rich nations to “buy out” their obligations whenever convenient.¹⁸⁷ Furthermore, pre-determining the amount of compensation in advance does not address cases where the price of the adoption of Security Exceptions is either too excessive or not high enough to prevent the sweeping application of Security Exceptions in the first place.

As an alternative to monetary compensation, China and the EU seem to support the idea that the invocation of the Security Exception should be followed by trade compensation or retaliation proportionate to the initial move.¹⁸⁸ Whether negotiating WTO agreements or responding to breaches of undertaken commitments, the WTO system relies on the paradigm of reciprocal concessions.¹⁸⁹ To require a member that adopts a Novel Security Measure to offer adequate means of trade compensation or to allow an affected member to suspend “substantially equivalent” (based on the safeguards model) or “equivalent” (based on the DSU retaliatory mechanism) concessions provides both an incentive for compliance and a mechanism for maintaining reciprocity under the WTO regime. Similar to the proposal of monetary compensation, such rebalancing of concessions cannot completely restore the status quo ex ante.¹⁹⁰ Yet, such rebalancing not only prevents a member from completely shifting its performance costs onto its trading partners but also incentivizes it to return to compliance as soon as possible and enables the maintenance of reciprocity in trade relations.

Given the similarities between safeguard measures and Novel Security Measures—in that they are both expected to deal with unforeseen contingencies that change the cost and benefits of performance under the GATT (1994)—and the discussed advantages of trade compensation over monetary compensation under WTO law, WTO members might adopt the rebalancing mechanism for Novel Security Measures drawn from the principles of safeguard measures. To this end, a member who adopts a Novel Security Measure (an invoking member) can be encouraged to engage in consultations with affected parties to agree on a mutually beneficial compensation bargain. Similar to the safeguard mechanism, the term “affected party” should be understood narrowly to include those WTO members that have a substantial interest in the trade of the product (service) restricted by a

187. Mercurio, *supra* note 184, at 334.

188. Prazeres, *supra* note 137, at 146–47.

189. ROBERT Z. LAWRENCE, CRIMES & PUNISHMENTS?: RETALIATION UNDER THE WTO 14 (2003).

190. *Id.* at 28.

Security Measure, making such compensation available to only a subset of WTO members.¹⁹¹ Forcing an invoking member to suggest possible compensation options could boost the negotiating process. Where the compensation cannot be agreed upon, an affected member should be allowed to retaliate under the authorization of the newly created Committee on Security Measures. Such retaliatory measures should be aimed at compensating the members affected by Novel Security Measures for the adverse effects of such measures on their trade while also encouraging an invoking member to search for less trade-restrictive alternatives and to return to compliance as soon as possible. Thus, even though the right of retaliation for safeguard measures shall generally not be exercised during the first three years, WTO members might agree to the suspension of “substantially equivalent concessions” starting from the first year that a Novel Security Measure is in effect.¹⁹² The Committee on Security Measures can oversee the negotiations on such compensation and retaliation and review “whether proposals to suspend concessions or other obligations are ‘substantially equivalent[.]’”¹⁹³ The Committee on Security Measures can also be designated to control a time-bound application of Security Measures and their periodic review.

It is important to acknowledge the difficulties in reaching an agreement between all WTO members on the creation of the Committee on Security Measures and the strategic interests of the members of such a committee that might affect its decision-making process.¹⁹⁴ All this considered, WTO members might opt for an alternative rebalancing mechanism for Novel Security Measures drawn upon the principles of compensation/retaliation in response to an established breach of the rules under Article 22 of DSU.¹⁹⁵ Based on such a model, it can be suggested that, initially, a WTO Member adopting a Novel Security Measure should enter into negotiations with affected parties¹⁹⁶ “with a view to developing mutually acceptable compensation.”¹⁹⁷ If no

191. PETROS C. MAVROIDIS, *TRADE IN GOODS: THE GATT AND THE OTHER WTO AGREEMENTS REGULATING TRADE IN GOODS* 651 (2d ed. 2012).

192. For prospects and hurdles of such a mechanism for safeguard measures, see MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 424–26 (3d ed. 2015).

193. Compare with the Committee on Safeguards under Article 13 of Agreement on Safeguards. See *generally* Agreement on Safeguards art. 13.

194. The Committee on Safeguards follows the practice of consensus. See FERNANDO PIÉROLA-CASTRO, *WTO AGREEMENT ON SAFEGUARDS AND ARTICLE XIX OF GATT: A DETAILED COMMENTARY* 342–43 (2022).

195. DSU art. 22.

agreement on satisfactory compensation has been reached, any affected party may request authorization from the DSB “to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”¹⁹⁸ The level of the suspension of concessions or other obligations authorized by the DSB shall be “equivalent to the level of the nullification or impairment” suffered by the affected parties.¹⁹⁹ The DSB decides on the authorization to retaliate by reverse consensus, which means that the DSB must approve the decision unless there is a consensus against it.²⁰⁰ Unlike in the safeguards model, in case of any disputes over the level of suspension proposed under Article 22 of DSU, the matter can be referred to arbitration (usually carried out by the original panel).²⁰¹

B. *Alternative Approach to Drafting Security Exceptions Under RTAs*

As existing practice demonstrates, the introduction of new rules under the multilateral trade regime might start with bilateral or regional initiatives. Negotiations on e-commerce are an example. Many WTO members have started beyond the WTO multilateral framework and inserted e-commerce regulation chapters in their RTAs before initiating exploratory work toward future WTO negotiations on trade-related aspects of e-commerce.²⁰² Such RTA chapters reveal the prospects for potential compromise between WTO members on e-commerce regulations. Given that the United States, the EU, China, and Japan are considered powerful digital behemoths, reconciling their positions on e-commerce would bolster prospects of reaching an agreement on e-commerce at the WTO level.²⁰³

Likewise, it can be argued that the prospects for integrating any new equilibrium into Security Exceptions will start with RTAs. While discussing the introduction of novel clauses to a system of treaties, Pauwelyn and others point out that trade agreements are more likely to

196. The reference to “affected parties” here is drawn on the safeguards model, as discussed above.

197. DSU art. 22.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. See Robert Wolfe, *Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP*, 18 WORLD TRADE REV. 63, 63 (2019).

203. Simon Abendin & Pingfang Duan, *Global E-Commerce Talks at the WTO: Positions on Selected Issues of the United States, European Union, China, and Japan*, 20 WORLD TRADE REV. 707, 707–08 (2021).

incorporate novelties when they involve parties with diverse legal and structural experiences in the respective area.²⁰⁴ Security Exception clauses under RTAs signal the differences in the approaches of major trading partners toward the scope of desirable security defenses. The United States and the EU have a specific preference for the type of Security Exceptions they incorporate in their RTAs and different understandings of the scope of Security Exceptions under WTO agreements. Given the unprecedented attention paid to Security Measures over the last couple of years and their impact on the existing international trading system, these WTO members are also expected to pay more attention to drafting Security Exceptions under future RTAs. If the United States (as the most vigorous proponent of the “self-judging” exceptions) and the EU (that follows the current WTO model for drafting Security Exceptions) decide to renew or start negotiations on the RTA and compromise on the language of Security Exceptions, it could be seen as the first step toward reconciling the positions of different WTO members and reaching agreement on the clarification of the scope of Security Exceptions under WTO law. Future negotiations on the trade pillar within the Indo-Pacific Economic Framework for Prosperity (IPEF) (between the United States, Australia, Brunei, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, and Vietnam) might also shed some light on the direction that WTO members are ready to take in the negotiation on security matters.²⁰⁵

When negotiating national security issues, governments are generally risk averse and reluctant to alter the status quo or take bold initiatives, yet they are more eager to compromise while negotiating trade agreements from which they also seek to profit.²⁰⁶ This does not exclude states involved in RTA negotiations from using the security discourse to either delay the negotiations or shape the content of the resulting RTA. To illustrate, the negotiations might become problematic when the negotiating states in symmetrical power positions are in opposition

204. See, e.g., James Hollway et al., *Structural Conditions for Novelty: The Introduction of New Environmental Clauses to the Trade Regime Complex*, 20 INT’L ENV’T AGREEMENTS: POL. L. & ECON. 61, 77–78 (2020).

205. IPEF partner countries together represent over 40% of the global economy. See Press Release, Off. of the U.S. Trade Rep., United States and Indo-Pacific Economic Framework Partners Announce Negotiation Objectives (Sept. 9, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/united-states-and-indo-pacific-economic-framework-partners-announce-negotiation-objectives>.

206. Daniel Druckman, *Turning Points in International Negotiation: A Comparative Analysis*, 45 J. CONFLICT RESOL. 519, 521 (2001).

over the scope of Security Exceptions (such as in the potentially renewed negotiations between the United States and the EU). Then, negotiators will either face a deadlock or attempt to achieve a substantial compromise.²⁰⁷

The negotiation history of NAFTA's Security Exceptions is a good example of such a compromise. At the time of negotiations, the United States' preferred approach was to incorporate "self-judging" type Security Exceptions. Yet, Canada initially preferred a Security Exception clause that entailed a stricter adjudicatory review. The parties reached a compromise by incorporating a different type of Security Exception in each of the three areas: investment measures, energy-related restrictions, and other trade measures.²⁰⁸

The successor of NAFTA (USMCA) further confirms that the outcome of RTA negotiations may not last for subsequent negotiations. The USMCA (2018) does not incorporate the constraints on the exceptions prescribed in either WTO law or NAFTA with respect to trade matters, presumably to give the U.S.—the only USMCA party that has invoked the Security Exceptions before the WTO—desirable flexibility in using Security Exceptions to maintain its economic security.²⁰⁹ Notably, Mexico and Canada were exempted from U.S. national security tariffs under Section 232 of the Trade Expansion Act because both countries were refusing to move forward on ratifying the USMCA as long as the tariffs imposed by the United States remained in place.²¹⁰ Furthermore, the parties to USMCA have agreed on additional procedural and substantive limitations on the application of Security Measures by the United States under Section 232 of the Trade Expansion Act.

The examples of NAFTA and USMCA illustrate that when negotiating parties have different preferences over the scope of Security Exceptions but are nevertheless interested in increased trade cooperation under an RTA, they might be ready to compromise by enhancing procedural control over the application of Security Measures and/or

207. See Larry Crump & Don Moon, *Precedents in Negotiated Decisions: Korea–Australia Free Trade Agreement Negotiations*, 33 NEGOT. J. 101, 123 (2017).

208. Org. Am. States, Draft Treasury Annex Composite Investment, INVEST.722 (July 22, 1992), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-14.pdf>.

209. DAVID A. GANTZ, AN INTRODUCTION TO THE UNITED STATES-MEXICO-CANADA AGREEMENT: UNDERSTANDING THE NEW NAFTA 214–15 (2020).

210. *Id.*; White House, A Proclamation on Adjusting Imports of Aluminum Into the United States (Feb. 1, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/01/a-proclamation-on-adjusting-imports-of-aluminum-into-the-united-states/>.

subjecting their Security Measures in different areas to different legal tests. In this way, negotiating states can ensure that each of them has enough policy space to take action in the areas most essential for their security interests while ensuring stricter legalism and compliance in other areas.

Following the example of NAFTA and USMCA, WTO members with different security concerns and views on the scope of national security defenses can attempt to reach a compromise on drafting Security Exceptions under future RTAs by differentiating between different Security Measures and prescribing different preconditions for their lawful application. The approach that puts Conventional Security Measures and Novel Security Measures into different buckets can be seen as a middle path between the two extreme positions that either limit Security Exceptions to traditional military and defense matters or tolerate the securitization of any policy objective of the invoking state.

Similar to the proposal for the reform of Article XXI of GATT (1994), Conventional Security Measures under RTAs can be considered those related to the products and areas that are expressly agreed upon by the parties and specified in the Security Exception clause. For example, the parties can agree that “conventional” measures are those measures that fall under the exceptions based on current Article XXI(b) of GATT (1994) or additionally specify that Conventional Security Measures cover energy-related restrictions based on the example of NAFTA.

Concurrently, similar to the proposal for Novel Security Measures under WTO law, the parties can still be allowed to adopt other Security Measures, provided that they are taken in a timely manner and meet the two following requirements. First, such Novel Security Measures shall not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination” against the other party/parties “or a disguised restriction on international trade.”²¹¹ This requirement is already prescribed in the Security Exception clauses under certain RTAs concluded by Russia and India.²¹² While the lack of adjudicatory practice does not shed light on possible hurdles and challenges arising from their application, the existing drafting practice suggests that, as of now, at least several WTO members view such a requirement as appropriate to control the legitimacy of Security Measures. Second, Novel Security Measures shall be subject to trade compensation or potential

211. GATT 1994 art. XX.

212. *See, e.g.*, Treaty on the Eurasian Economic Union art. 65, May 29, 2014; The Comprehensive Economic Partnership Agreement, India-S. Kor., art. 6.14, Aug. 7, 2009.

retaliation. Differentiating between Conventional Security Measures and Novel Security Measures would give contracting parties a reasonable expectation that their counterparties would shift onto them the costs of non-performance of contractual obligations under RTAs only under certain conditions or with respect to a specified range of products expressly agreed upon. Should any contracting party be urged to protect its security interests in a broader range of areas and decide to adopt a Novel Security Measure, it should be ready to bear the costs of such a measure itself.

As in the case of WTO agreements, the parties under RTAs are also advised to agree on specific notification requirements and agree on which authority would supervise compliance with the compensation (retaliation) requirement. Some current RTAs already incorporate the notification requirement. Clear procedural safeguards and institutional control ensuring transparency and predictability in enforcing such rebalancing mechanisms would be essential for the good faith invocation of such renegotiated Security Exceptions.

At the same time, it is important to acknowledge that bilateral and regional arrangements mostly occur between like-minded WTO members with fewer concerns about the application of Security Exceptions.²¹³ Contracting parties that have similar approaches toward drafting their Security Exceptions or have no strong preference for the type of Security Exceptions in their RTAs might not need to compromise and thus might decide not to differentiate between Conventional and Novel Security Measures but rather continue with existing Security Exception clauses in their future RTAs.

Alternatively, the contracting parties modeling their Security Exceptions on the existing Article XXI of GATT (1994) might agree on additional security objectives that would be justified under such treaty exceptions. Several RTAs adopted by the EU, China, and India already follow such an approach by incorporating additional grounds for the reliance on the need to protect their essential security interests, along with military and defense-related matters, such as the protection of critical infrastructure or the need to address a domestic emergency.²¹⁴

213. Tania Voon, *Multilateral Rules on Trade in Goods – Exceptions and Regulatory Autonomy*, in *THE INTERNATIONAL LAW OF ECONOMIC INTEGRATION* (Julien Chaisse & Christoph Hermann eds., forthcoming 2023) (manuscript at 8), <https://ssrn.com/abstract=4274671>.

214. *See, e.g.*, Free Trade Agreement Between the European Union and the Republic of Singapore, E.U.-Sing., art. 16.11, Oct. 19, 2018; Australia – India Economic Cooperation and Trade Agreement, Austl.-India, art. 11.2, Apr. 2, 2022; Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China art. 13, Nov. 4, 2002.

C. *Alternative Approach to Drafting Security Exceptions Under IIAs*

The interests and bargaining power of negotiating parties also determine the credibility of commitments under the investment regime. Unlike the trade regime, where the rights and obligations of the parties are based mainly on the mutual exchange of concessions, IIAs do not aim to equally allocate the rights between private investors from a home state and public authorities of a host state.²¹⁵ The primary function of IIAs is to constrain the political actions of a host state, thereby allowing foreign investors to construct a business plan on the expectation that the relevant legal environment of a host state will ensure investors' access to its market.²¹⁶ In this sense, it can be argued that power asymmetries imply pressures on host states (capital importers) to make concessions to powerful home states (capital exporters).²¹⁷

At the same time, the parties negotiating current and potentially future IIAs often have a great national interest in the protection of inward investments but also outward investments, leaving more room for reciprocity.²¹⁸ Also, a growing number of investor-state disputes focus on the exercise of social and political responsibilities of host states' governments for which they are held accountable to their people.²¹⁹ This practice suggests that future IIAs may pay more attention to preserving enough flexibility for host states to address their regulatory concerns. In light of such developments, both a host state and a home state may be willing to and capable of bargaining with each other to establish the appropriate investment regime that balances investors' reasonable reliance on expectations of market access in a host state and the right of a host state to regulate.

As things stand now, Security Exceptions under the IIAs can be divided into two categories: (i) the exceptions that are drafted in a broad manner (self-judging exceptions) or that exclude the adjudication of national security disputes;²²⁰ and (ii) the exceptions that are modeled on trade law and limit the invocation of Security Exceptions to specific

215. Beth A. Simmons, *Bargaining Over BITs*, *Arbitrating Awards: The Regime for Protection and Promotion of International Investment*, 66 *WORLD POL.* 12, 41–42 (2014).

216. W. Michael Reisman, *Negotiating and Maintaining Investment Treaties: Mechanisms for Anticipating and Controlling Textual Drift*, 6 *J. INT'L & COMP. L.* 75, 76, (2019).

217. Simmons, *supra* note 215, at 40.

218. *See, e.g.*, China and the U.S.; Joel P. Trachtman, *The Internet of Things Cybersecurity Challenge to Trade and Investment: Trust and Verify?* 35 (April 18, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3374542>.

219. Simmons, *supra* note 215, at 42.

220. *See, e.g.*, Colom.-U.S. TPA art. 22.2 n.2.

situations or include an objective necessity requirement.²²¹ The parties can be expected to opt for the first category when they want to ensure that they have enough policy space to restrict foreign investments whenever they are forced to undertake emergency actions. Should the parties be willing to profit from the guidance and relative predictability of WTO law, they can be expected to choose the second category. Put this way, the proposed solutions to revisiting these two categories of Security Exceptions would also differ.

Regarding the first category, where a treaty provides no or fewer tools to differentiate between good faith actions to protect national security and opportunistic behavior toward investments, it would be unreasonable to expect investors to bear all the risks arising from the adoption of Security Measures. Placing the costs of Security Measures on an investor and its home state rather than the host state would give a host state little incentive to minimize the costs of investment restrictions and the possible detriment to an investor. Furthermore, given the lack of clarity about cases when a host state might proclaim a threat to its national security, it would disrupt a foreign investor's reasonable reliance on expectations of market access in a host state. Under such circumstances, investors would not be able to accurately estimate all the commercial and political risks of their investments, while host states would have to bear additional costs from frequent investor-state disputes.

Because of such implications, this section proposes to internalize the costs of Security Measures under IIAs and to incentivize host states to calibrate Security Measures as narrowly as possible by clarifying that a host state is required to provide just monetary compensation to a foreign investor whenever its measures cause damage, even if such measures are justified under the treaty-based Security Exceptions. For greater clarity and reliability, IIAs can also clarify that the court or tribunal can review the matters arising from the calculation and enforcement of the compensation. Several IIAs concluded by India already do this by specifying that a foreign investor who has suffered losses in the territory of a host state due to war, other armed conflict, or other extreme situation can claim compensation or any other settlement; and disputes over damages and/or compensation due to the application of Security Measures may be submitted to adjudication, even if a Security Measure is non-reviewable.²²²

221. *See, e.g.*, E.U.-U.K. Trade and Cooperation Agreement art. 415

222. Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, India-Sing., art. 6.12, June 29, 2005.

Regarding the second category, the WTO members that prefer either to incorporate, in their IIAs, exception clauses modeled on current trade law or to impose a strict necessity requirement should accept the risk that their Novel Security Measures would potentially fail to meet the Security Exceptions test. Alternatively, they can ensure either that such measures fall under other exceptions specifically drafted for such situations or that they are allowed as Novel Security Measures subject to the compensation requirement, similar to the proposal for trade agreements discussed above.²²³

Reputational constraints aside, one might argue that such a proposal would create a situation where a host state would have to compensate a foreign investor for the damage caused by investment restrictions either when it is found in breach of its treaty commitments or when it invokes a Security Exception. Such an approach is problematic for several reasons. First, optimal investment treaties are not expected to shift all the risks from investors to a host state. Whenever possible, IIAs should give foreign investors the incentive to hedge against typical economic risks that are usually a part of business practice rather than shifting all the risks to a host state.²²⁴ Second, an investor who makes investments in reliance on an IIA and who is guaranteed its expected return in the case of any breach will be induced to make excessive investments, even if a significant probability exists that future developments would justify the restriction of such investments for security reasons.²²⁵ Third, demanding compensation from a host state in a time of war or other emergency might be unreasonable because of its limited payment capacity. All this considered, the alternative approach should only entitle foreign investors to partial compensation rather than full compensation when a host state violates its treaty commitments to protect its national security interests.

Tribunals have avoided addressing the issue of the limited payment capacity of a host state directly, though it can be implied that the paying capacity of a host state has been considered in assessing compensation. To illustrate, in *CMS v. Argentina*, the tribunal held that it was unrealistic to believe that no adjustments could have been made to a pay-or-ship contract as a result of Argentina's financial difficulties.²²⁶

223. See discussion *supra* Section IV.A.

224. Anne Van Aaken, *On the Necessity of Necessity Measures: A Response to Alan O. Sykes*, 109 AJIL UNBOUND 181, 185 (2015).

225. See Sykes, *supra* note 105, at 321.

226. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 444 (May 12, 2005).

Alternatively, some academic commentators argue for the desirability of postponing the payment until a host state is no longer in a state of emergency or until it has recovered from the emergency so as to be in a position to compensate.²²⁷

This Article does not propose one correct approach to calculating compensation that would apply across treaties. Investment tribunals are generally granted broad discretion in deciding on the standards and methodologies used to determine monetary compensation to investors for a breach, which also presents challenges and hurdles.²²⁸ The ultimate goal of such compensation should be to remedy the negative consequences of the non-performance by a host state of its contractual obligations by compensating the actual damage suffered by an investor.²²⁹ Given the discussed implications of Security Measures, IIAs can clarify that a host state is required to compensate for actual damage to a foreign investor caused by Security Measures but may mention that the amount of this compensation can be adjusted depending on a host state's payment capacity, the investor's behavior, the sector in question, and other relevant circumstances. For greater clarity and reliability, IIAs can draw upon the example of India's investment chapters in India–Singapore CECA (2005), India–South Korea FTA (2009), and India–Malaysia CECA (2011). More specifically, future IIAs can specify that even if Security Exceptions apply, foreign investors are entitled to compensation or any other settlement that is “no less favourable than that which [a host state] accords to its own investors or to investors of any non-Party, whichever is more favourable to the investor.”²³⁰

V. CONCLUSION

This Article starts with the recognition that WTO members view Security Exceptions as a shield from international responsibility when they need to take efficient security actions. Yet, recent developments in national security policies and international economic law confirm the increasing intertwinement between states' trade and investment agendas and national security. This intertwinement can further transform Security Exceptions into a weapon to facilitate protectionist or populist

227. See Sykes, *supra* note 105, at 320.

228. Gabrielle Kaufmann-Kohler, *Compensation Assessments: Perspectives from Investment Arbitration*, in *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 623, 634–35 (Chad P. Bown & Joost Pauwelyn eds. 2009).

229. Patrick Dumberry, *Compensation for Moral Damages in Investor-State Arbitration Disputes*, 27 J. INT'L. ARB. 247, 274 (2010).

230. See Free Trade Agreement, India-S. Kor., art. 10.13, Aug. 7, 2009.

economic measures aimed at gaining an advantage in negotiations or competition with trading partners. Allowing governments to use security exceptionalism to change global trade governance presents unprecedented challenges to global security and the global economy. All this considered, this Article suggests that the problem with the existing Security Exceptions can be addressed by reinforcing the ability of international economic agreements to shield states from responsibility in extreme situations, but meanwhile requires updated tools and mechanisms to prevent the weaponization of security defense.

The proposal is, in essence, a plan to bring more flexibility and predictability to security actions by splitting Security Exceptions into two categories. First, narrowly tailor the Security Exceptions for Conventional Security Measures, thereby strengthening the need to leave a broad policy space for WTO members to act in the case of well-defined and observable extraordinary circumstances. Second, it is proposed to recognize the right of each WTO member to respond to other national security concerns not considered “conventional,” provided that they are recognized at the U.N. level and that such a WTO member is ready to compensate for the harm it might cause to other WTO members with its measures. The introduced concept of Novel Security Measures would address such emerging security concerns and would further delimit the scope of Conventional Security Measures. Besides, this Article recommends the specific procedural conditions for invoking the exception for such Novel Security Measures with the aim of incentivizing cooperation and dialogue among WTO members, thereby ensuring that such measures are adopted only in rare circumstances.

Based on such a proposal, the scope of Conventional Security Measures should be clarified at the WTO level *ex ante*. The idea behind including an exception for Conventional Security Measures remains the same as at the time of drafting Security Exceptions for the GATT (1947), namely that there is an agreement between all WTO members as to the situations in which they can use security defense as a shield from responsibility for the non-performance of their WTO commitments. Such situations should be expressly specified in the existing and/or additional subparagraphs to Article XXI(b) of GATT (1994). To this end, WTO members might agree to incorporate additional grounds for the invocation of existing Article XXI(b) of GATT (1994) (e.g., to address the imminent threats posed to cyberspace that do not readily come under existing exceptions) or rely on its authoritative interpretation by the Ministerial Conference or the General Council—potential Article XXI Addendum II.

Admittedly, the U.S. backlash against the review of Security Measures by the WTO, the lack of a cohesive authority to review the panel reports because of the paralyzed Appellate Body, and the difficulties of fact-finding in security matters also call for strengthening the procedural requirements encouraging transparency and peer review in the adoption of Conventional Security Measures. Such requirements might aid in the WTO panels' adjudication of sensitive national security issues, even when applying a low standard of proof.

Additionally, this research proposes to introduce a category of Novel Security Measures under a new paragraph of Article XXI of GATT (1994) that should be broad enough to include all other legitimate security concerns of each WTO member. Unlike the exception for Conventional Security Measures, an open-ended exception for Novel Security Measures that defers to states' determinations of essential security interests would require revised tools that could balance a member's interest in protecting national security against the interests of other members in trade liberalization. For one, the existence of an agreement between majority states on the security implications of a specific situation, as reflected in the resolution of the U.N. General Assembly, would lend support that such Security Measures are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" and thus are adopted in good faith.²³¹ Given that the adjudication of the necessity of such measures, including the availability of less trade-restrictive alternatives, would be difficult in practice, such an exception should preserve a self-judging language limiting the intensity of adjudicatory review of the necessity of Novel Security Measures. Yet, introducing a duty to compensate would incentivize a WTO member to identify less trade-restrictive alternatives first and adopt a Novel Security Measure only if its costs were lower than the costs of complying with its treaty commitments or the costs of less trade-restrictive alternatives. Combined with a threat of retaliation, such a compensation requirement could help deter possible abuses of Security Exceptions.

Notably, while acknowledging that the prospects for reaching a new consensus at the WTO level might emerge from the current regional and bilateral initiatives, this Article suggests that a final agreement at the WTO level, if reached, could eventually serve as a way to encourage more WTO members to follow the revised approach to drafting Security Exceptions in future bilateral and regional trade arrangements. Thus, it

231. GATT 1994 art. XX.

could also contribute to a greater degree of harmonization among trade agreements on the approach to Security Measures, thereby reducing market uncertainty and stumbling blocks to regional trade liberalization where contracting parties have different approaches to the scope of Security Exceptions.

Internalization of costs of Novel Security Measures in the political decisions of WTO members, coupled with institutional oversight over the time-bound adoption of such measures and the payment of trade compensation or retaliation, can restrain unnecessary securitization of policy objectives or at least ensure that such securitization occurs in a more calibrated and proportionate manner and for a specific period of time, rather than indefinitely. In this sense, it would incentivize governments to manage one another's expectations better and to pay more attention to the possible consequences of their Security Measures while negotiating or renegotiating Security Exceptions under WTO agreements and future RTAs. By taking a middle path and combining deference to a state's decision to apply a Novel Security Measure with international control that is procedure- and efficiency-oriented, such a proposal for trade agreements attempts to prevent further aggravation of interstate tension and distrust and to reduce unproductive coercion in the international trading system.

The foregoing is not meant to suggest that legitimizing Novel Security Measures under international economic law will solve all challenges facing the WTO and states. Yet rather than leaving security responses to power politics alone, it would place evolving national security issues within the control of the treaty regime, incentivizing states to use trade restrictions transparently, temporarily, and efficiently.

The tax regime can be a good example of how peer review and diplomacy can diffuse global tension and build normative consensus by coordinating unilateralism through encouraging and managing compliance rather than strictly policing it through a judicialized mechanism.²³² This is also achieved to some extent in the practice of adopting TBT and SPS measures under WTO law by encouraging proper debate and discussion between WTO members before they litigate the legitimacy of such measures.²³³ Similarly, shifting the task of controlling Security Measures from the DSB alone back to governments by creating the Committee on Security Measures and facilitating dialogues before any litigation might

232. See generally Wolfgang Alschner, *Shifting Design Paradigms: Why Tomorrow's International Economic Law May Look More Like The Tax Regime than the WTO*, 114 AJIL UNBOUND 270 (2020).

233. See VAN DEN BOSSCHE & ZDOUC, *supra* note 106, at 1012–14, 1066–69.

help accommodate the diverse interests of different WTO members and keep them at the bargaining table.

By the same token, this Article argues that existing IIAs provide inadequate incentives for optimal behavior by host states. Either their Security Exceptions are drafted in a very broad manner which fosters protectionism or opportunism in connection with foreign investment, or they do not grant host states enough flexibility to act in response to emerging cybersecurity threats or other threats arising from key sectors like critical infrastructure. A possible response to this problem is to grant host states enough policy space to restrict FDIs in extreme circumstances while encouraging them to act efficiently. This can be achieved, for example, by requiring host states to compensate foreign investors for the actual damage caused to them due to the application of Security Measures.

Similar to trade agreements, the compensation requirement would incentivize host states to use Security Measures in a narrower range of situations and look for less restrictive options to protect their national interests. Where states prefer to incorporate broadly drafted non-reviewable Security Exceptions in IIAs, the compensation requirement should apply to both Conventional and Novel Security Measures. Alternatively, states can continue to model their Security Exceptions on trade law and adopt the proposal that differentiates between Conventional Security Measures and Novel Security Measures, while subjecting the latter to the compensation requirement. In both cases, states are advised to clarify in IIAs that a court or tribunal can decide over the amount of monetary compensation owed to foreign investors, potentially adjusting such an amount to the particularities of each case and the payment capacity of the host state affected by an emergency or another security threat.

Admittedly, the avenue of inquiry is far from exhausted. This Article does not provide a comprehensive and exclusive account of how renegotiated Security Exceptions could work, much less an infallible means of resolving all questions about the role of national security concerns for international economic law in the future. Going forward, international communities are yet to see re-emerging and emerging global concerns related to technological developments, unmitigated climate change, and global supply shocks leading to food and energy insecurity, which might require new treaty, procedural, and institutional tools to deal with them. The legal and policy responses to Security Measures under international economic law examined in this Article could be a starting point for such renewed and ever-growing discussions.