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## The New National Security Challenge to the Economic Order

**ABSTRACT.** National security policies increasingly threaten the rules that govern trade and investment flows. This problem is deeper and far more intractable than recent high-profile controversies, such as disputes over the Trump Administration's steel and aluminum tariffs, suggest. Governments worldwide have adopted national security policies that address an increasingly wide array of risks and vulnerabilities, including climate change; pandemic disease; cybercrime; terrorism; and threats to infrastructure, industry, and the media. These policies are also increasingly likely to conflict with trade and investment rules. In other words, while today's high-profile controversies center on alleged *abuses* of national security in economic law, it is the potential for *good-faith but novel* national security claims that poses a more significant and permanent threat to the system.

This Article is the first to map the new national security challenge and consider its implications for reforming the economic order. It demonstrates that the twenty-first-century expansion of national security policy undermines existing models for separating security measures from ordinary economic regulation. What is needed, it argues, is a new model for reintegrating the economic order with the national security state. To that end, this Article identifies reforms that allow for some oversight of increasingly novel national security claims while preserving flexibility for governments to redefine their security policies in response to twenty-first-century threats.

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## INTRODUCTION

National security rhetoric is increasingly infiltrating global economic affairs. In the United States, the Trump Administration has embraced an expansive national security policy to justify aggressive economic measures abroad and discriminatory immigration restrictions at home.<sup>1</sup> But the United States is hardly alone. In 2019, the World Trade Organization (WTO) faced challenges to measures taken by Russia, Japan, the United Arab Emirates, and the United States, all of which were justified on security grounds.<sup>2</sup> Other observers have noted a disturbing intertwining of economic and military objectives in Chinese trade and investment policy.<sup>3</sup> Similar developments have taken place across Europe, Africa, and other parts of Asia.<sup>4</sup> These developments have provoked considerable anxiety about the future of the international economic order, as many

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1. For discussion of economic measures, see Stuart S. Malawer, *Trump's Tariff Wars and National Security: A Political and Historical Perspective*, 2018 CHINA & WTO REV. 351; and *National Security Strategy of the United States of America*, WHITE HOUSE 17-20 (Dec. 2017) [hereinafter 2017 NSS], <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<https://perma.cc/VD3V-WC2C>]. For a discussion of immigration restrictions, see HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 22-33 (2018).
  2. See, e.g., Request for Consultations by the Republic of Korea, *Japan – Measures Related to the Exportation of Products and Technology to Korea*, ¶ 7, WTO Doc. WT/DS590/1 (Sept. 16, 2019); Request for the Establishment of a Panel by the Bolivarian Republic of Venezuela, *United States – Measures Relating to Trade in Goods and Services*, at 1, WTO Doc. WT/DS574/2 (Mar. 15, 2019); Request for the Establishment of a Panel by Switzerland, *United States – Certain Measures on Steel and Aluminium Products*, at 5, WTO Doc. WT/DS556/15 (Nov. 8, 2018); Request for the Establishment of a Panel by Qatar, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, ¶¶ 3.1-3.15, WTO Doc. WT/DS526/2 (Oct. 6, 2017); Request for Consultations by Ukraine, *Russia – Measures Concerning Traffic in Transit of Ukrainian Products*, at 2 & n.1, WTO Doc. WT/DS512/1 (Sept. 21, 2016).
  3. See, e.g., Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html> [<https://perma.cc/6235-FJYD>] (reflecting concerns that Chinese foreign investment and loans are being used to gain leverage over foreign countries, particularly with respect to strategically located infrastructure projects). For a skeptical take on this “debt-trap” narrative about Chinese Belt and Road projects, see Agatha Kratz, Allen Feng & Logan Wright, *New Data on the “Debt Trap” Question*, RHODIUM GROUP (Apr. 29, 2019), <https://rhg.com/research/new-data-on-the-debt-trap-question> [<https://perma.cc/R9RV-83U2>].
  4. See generally Diane Desierto, *Protean ‘National Security’ in Global Trade Wars, Investment Walls, and Regulatory Controls: Can ‘National Security’ Ever Be Unreviewable in International Economic Law?*, EJIL: TALK! (Apr. 2, 2018), <https://www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us> [<https://perma.cc/N8ET-G783>] (discussing increased invocations of national security in international trade law).

fear that the existing rules of the road could crumble under a series of tit-for-tat security claims.<sup>5</sup>

The response in the legal literature to the national security challenge has focused on whether and how international tribunals can apply trade and investment treaties to sift legitimate claims from abusive ones.<sup>6</sup> Today, these arguments arise most frequently regarding the Trump Administration's tariffs on steel and aluminum and its threat to impose similar measures on automobiles and other products.<sup>7</sup> This intensive focus on the Trump Administration's poli-

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5. See, e.g., *Ambassadors Warn that WTO is at a Breaking Point, but Chasm Remains*, INSIDE U.S. TRADE (Aug. 3, 2018) (on file with author); Tom Miles, *WTO Chief Makes Rare Warning of Trade War over U.S. Tariff Plan*, REUTERS (Mar. 2, 2018, 10:30 AM), <https://www.reuters.com/article/us-usa-trade-wto/wto-chief-makes-rare-warning-of-trade-war-over-u-s-tariff-plan-idUSKCN1GE28P> [<https://perma.cc/M8RR-J4HC>]; Ana Swanson & Jack Ewing, *Trump's National Security Claim for Tariffs Sets Off Crisis at W.T.O.*, N.Y. TIMES (Aug. 12, 2018), <https://www.nytimes.com/2018/08/12/us/politics/trumps-tariffs-foster-crisis-at-the-wto.html> [<https://perma.cc/6GHD-FXUR>].
  6. See, e.g., Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 378-402 (2003) (offering an approach to GATT Article XXI that "would allow legitimate action to be taken to protect security whilst guarding against abuse"); Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 704-06 (surveying possible interpretations of the security exception); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 378-81 (2008) (proposing a standard for "good faith review" of self-judging security exceptions); 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, 439-67 (2001) (outlining standards for the invocation of security exceptions); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 584-97 (1991) (interpreting GATT Article XXI(b)); Markus A. Reiterer, *Article XXI GATT – Does the National Security Exception Permit "Anything Under the Sun"?*, 2 AUSTRIAN REV. INT'L & EUR. L. 191, 197-203 (1997) (searching for justiciable limits on the scope of GATT Article XXI); Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 120-38 (2009) (constructing a standard of review for self-judging clauses based on procedural principles drawn from domestic administrative law); Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 443-47 (1999) (suggesting a framework for adjudication under GATT Article XXI); Olivia Q. Swaak-Goldman, *Who Defines Members' Security Interest in the WTO?*, 9 LEIDEN J. INT'L L. 361, 371 (1996) (arguing that the WTO must define the limits of the security exception in GATT).
  7. See, e.g., Yong-Shik Lee, *Three Wrongs Do Not Make a Right: The Conundrum of the US Steel and Aluminum Tariffs*, 18 WORLD TRADE REV. 481, 488-91 (2019); Jennifer A. Hillman, *Trump Tariffs Threaten National Security*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/opinion/trump-national-security-tariffs.html> [<https://perma.cc/A7WF-LHCB>].

cies might lead a casual observer to think that a relatively precise division between ordinary economic activity and national security concerns can be restored, if only those particular abuses could be put in check.<sup>8</sup>

This Article challenges that assumption. The global economic order and the concept of national security are today deeply intertwined and difficult to disentangle. Major geopolitical disputes now play out within trade and investment institutions rather than outside them. In particular, and in contrast to the Cold War period, major strategic rivals such as China, Russia, and the United States are also economic competitors within the same multilateral trading system. At the same time, the concept of national security has transformed from its relatively stable Cold War meaning anchored in the context of interstate conflict. Today, national security has evolved to address a range of threats, including non-state actors and nonmilitary and nonhuman threats, such as economic crises, cybersecurity, infectious disease, climate change, transnational crime, and corruption, which are often unmoored from interstate rivalries. These developments give rise to the “new” national security: a growing collection of security practices agnostic to the source or nature of a threat, unbounded by time and space, and decentered from any overriding great-power or interstate conflict.<sup>9</sup>

The new national security presents an acute challenge for international economic institutions. Contemporary security policy provides a deep reservoir of potential justifications for departing from ordinary trade and investment rules. The changing shape of trade politics also provides incentives for states to invoke those new security justifications. Moreover, in contrast to some of the recent invocations of national security by the Trump Administration, these new security claims may be both wide-ranging in their effects and difficult to reject out of hand. In other words, this Article argues that while the high-profile debates about the Trump Administration’s tariffs have focused on alleged *abuses* of national security in economic law, it is the potential for *good-faith but novel* national security claims that may pose a more significant and permanent threat to the system. This Article sets out the challenges posed by the new national security and identifies implications for the design and reform of the international economic system.

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8. *But see* Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45, 45 (2019) (arguing that WTO members “should collaborate more generally” to resolve mounting security challenges to the trading system).

9. For a recent use of this term focused on Chinese security policy, see Congyan Cai, *Enforcing a New National Security? China’s National Security Law and International Law*, 10 J. E. ASIA & INT’L L. 65, 66 (2017).

At the international level, many major trade and investment agreements contain a general exception for security measures, reflecting the line between ordinary economic activity and security.<sup>10</sup> Many of these exceptions, including those in the foundational multilateral trade agreements, are often argued to be “self-judging”: each state has discretion to determine for itself whether the exception applies.<sup>11</sup> This relatively ungoverned zone of discretion contrasts starkly with ordinary trade and investment adjudication, where international tribunals have for years asserted their authority to review the decision-making processes of national administrative bodies and to issue binding and enforceable judgments.<sup>12</sup>

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10. See, e.g., General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947] (providing that “[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . [inter alia] taken in time of war or other emergency in international relations”). For the full text of Article XXI, see *infra* text accompanying note 140.
  11. E.g., CC/Devas v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, ¶¶ 219, 242 (Perm. Ct. Arb. July 25, 2016) [hereinafter CC/Devas Award on Jurisdiction and Merits], <https://www.italaw.com/sites/default/files/case-documents/italaw9750.pdf> [<https://perma.cc/R2PT-26JU>] (rejecting the argument that national security clauses are self-judging); El Paso Energy Int’l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 593 (Oct. 31, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf> [<https://perma.cc/487S-ZP6W>] (describing a prior decision that found such a clause not self-judging); see also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 222 (June 27) [hereinafter Military and Paramilitary Activities] (finding a treaty not self-judging); Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 7.276, WTO Doc. WT/DS394/R (adopted July 5, 2011) (rejecting the claim that a clause was self-judging); Canfor Corp. & Terminal Forest Prods. Ltd. v. United States of America, NAFTA/UNCITRAL, Decision on Preliminary Question, ¶ 299 (June 6, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0122.pdf> [<https://perma.cc/3GB6-NSDP>] (rejecting the argument that the treaty in question was self-judging but noting that provisions covering essential national security interests might be self-judging). For critiques of the “self-judging” terminology, see Semptra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 384 (Sept. 28, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf> [<https://perma.cc/4JGC-HLUJ>]; MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 550 (3d ed. 2015); and Ira Ryk-Lakhman, Security Exceptions in Investment Instruments and Armed Conflicts 13 (unpublished manuscript) (on file with author).
  12. Cf. Paul Mertenskötter & Richard B. Stewart, *Remote Control: Treaty Requirements for Regulatory Procedures*, 104 CORNELL L. REV. 165 (2018) (noting that newer trade treaties have begun to prescribe specific procedures for domestic administrative decision-making). See generally Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012) (arguing that a new generation of international tribunals have the power to exercise what is effectively compulsory jurisdiction and can render enforceable decisions); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 455-60 (2003) (noting the ways in which international treaties and international adjudicators have exerted influence over national administrative processes); Richard B. Stewart & Michelle Ratton Sanchez Badin, *The*

As a result, these exceptions historically allowed national governments to escape their trade and investment commitments, provided that they were willing to accept the political and economic costs of asserting a national security justification for the offending measure.<sup>13</sup> The security exceptions also allowed national security and economic globalization to emerge as two separate spheres of activity in the postwar liberal order. But, as WTO members respond to the first-ever decision from a dispute-settlement panel on the trade regime's national security exception, these two spheres are now colliding.<sup>14</sup>

The question is how this collision will be managed. Here, existing theories fail. The prevailing approach, originally developed during the Cold War, relies on political pressure and mutual restraint to enforce the boundary between ordinary commerce and national security. As a growing number of issues become security sensitive and states' incentives to invoke national security to escape trade commitments increase, this approach appears unsustainable.<sup>15</sup> The alternative approach, developed largely in the literature and only recently in the case law, looks to international adjudicators to police the trade/security boundary for signs of abuse or envelope-pushing.<sup>16</sup> The rapid transformation of national security destabilizes this model as well, eroding the objective perch from which courts can sort abusive security claims from good-faith but novel ones.<sup>17</sup> In light of these new realities, the collision between trade and security cannot be managed either by law or politics alone.

What is missing is an account of the full range of institutional options for channeling and controlling national security claims that impact the global economy. Trade law's focus on the role of tribunals reflects parallel debates in the scholarship on constitutional emergency powers about the role of courts and judicial oversight.<sup>18</sup> But in the emergency-powers literature, an equally relevant

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*World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 569-74 (2011) (explaining that the WTO imposes requirements of "transparency, participation, reason-giving, and review on decision-making by members' domestic administrative bodies").

13. See *infra* Part II.

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

15. See *infra* Part II.

16. See *supra* note 6 for a list of the available literature.

17. See *infra* Part III.

18. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 19-21 (2007); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2566 (2003); Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 829-30

strand of thought concerns the role of other institutional mechanisms, beyond judicial review, for managing and controlling the national security state.<sup>19</sup> By contrast, the debate on security measures in trade and investment law has not yet taken on this wider focus. This has led to a brute clash between two relatively impoverished theoretical models – one that depends on politics and self-restraint and another that relies on international adjudication to control security measures.<sup>20</sup> As this Article demonstrates, the rise of the new national security poses a potentially fatal challenge to these two models and demands that we consider solutions that fall between adjudication and politics.<sup>21</sup>

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(2013); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5-6 (2004); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1920-21 (2012); Geoffrey R. Stone, *Civil Liberties v. National Security in Law's Open Areas*, 86 B.U. L. REV. 1315, 1315-16 (2006); Cass Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2664 (2005); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 274; John Yoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1144 (2006).

19. See generally BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 3-9 (2006) (proposing an “emergency constitution” as a framework for authorizing and controlling emergency power in response to terrorism and other contemporary threats); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* at xi (2012) (describing the emergence of new political and legal constraints on executive power after 9/11); NOMI CLAIRE LAZAR, *STATES OF EMERGENCY IN LIBERAL DEMOCRACIES* 137 (2009) (setting out a “topographical model” of emergency power that focuses on the institutions through which power is operationalized); MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* 5-8 (2013) (arguing that each branch of government brings to bear distinct institutional capacities in constructing and controlling war powers); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029-32 (2004) (describing the emergency constitution); Andrew Arato, *The Bush Tribunals and the Specter of Dictatorship*, 9 CONSTELLATIONS 457, 468-71 (2002) (stressing the role of constitutional procedures in constraining emergency power); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 210-11 (2004) (describing modern emergency powers); William E. Scheuerman, *Emergency Powers*, 2 ANN. REV. L. & SOC. SCI. 257, 270-73 (2006) (describing a model of “emergency legal formalism” that relies on constitutional procedures); William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61, 75-77 (2006) (similar); Mark V. Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2673-75 (2005) (steering the debate toward questions of institutional design). For defenses of this style of thinking about institutional arrangements, even while admitting the weaknesses of some of their specific normative proposals, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2375 (2006); and William E. Scheuerman, *Presidentialism and Emergency Government*, in EMERGENCIES AND THE LIMITS OF LEGALITY 258, 282-86 (Victor V. Ramraj ed., 2008).
20. See *infra* Parts II & III.
21. For similar approaches in other areas of international security governance, see J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT’L L.J. 1, 1-5 (2016), which

This analysis brings national security to the center of ongoing debates on the reform of international trade and investment institutions.<sup>22</sup> Despite the threat that expanding security measures poses to the economic system, national security has up to this point occupied a relatively peripheral place in ongoing efforts to imagine institutional alternatives to the current system. Nevertheless, these efforts to reform both investment and trade law provide fertile ground for institutional-design options that, if modified and extended, could offer a promising framework for managing the increasing overlap between national security and the global economy. These include structured political fora for the resolution of disputes, complementarity between emerging domestic administrative mechanisms and international adjudication, dejudicialized measures that force states to internalize some costs of security actions, and the centralization of international tribunals.<sup>23</sup> Each of these approaches poses its own set of challenges. Together, though, they supply understudied options that could provide a more workable balance between flexibility and enforcement of international economic rules in the face of good-faith but novel national security claims.

The approach outlined in this Article has descriptive and normative benefits. First, it offers an account of the growing overlap between national security and the global economy. In this respect, it supplements and amplifies the emerging

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discusses global health security; and Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 8-9 (2016), discussing terrorism sanctions.

22. Efforts are ongoing to rethink trade and investment law in response to a range of concerns, including the fairness of dispute settlement proceedings, the ability of the existing rules to respond to new challenges like climate change and electronic commerce, the concern that trade and investment agreements enhance economic inequality within countries, and the ability of the trade system to cope with great-power rivalries, particularly between the United States and China. See, e.g., PAUL BLUSTEIN, SCHISM: CHINA, AMERICA, AND THE FRACTURING OF THE GLOBAL TRADING SYSTEM (2019); DANI RODRIK, STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY (2018); Charles N. Brower, Lisa Sachs & Natalie Y. Morris-Sharma, *ISDS at a Crossroads: How the Settlement of Investor-State Disputes is Being Transformed*, 112 AM. SOC'Y INT'L L. PROC. 191 (2018); Harlan Grant Cohen, Editorial Comment, *What Is International Trade Law For?*, 113 AM. J. INT'L L. 326 (2019); Nicolas Lamp, *How Should We Think About the Winners and Losers From Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, 30 EUR. J. INT'L L. (forthcoming 2020); Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985 (2017); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018); Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410 (2018); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1.
23. See *infra* Part IV.

literature focusing on the increasing role of “economic security” in states’ national security policies and the use of economic measures for political means.<sup>24</sup> While this literature identifies important challenges for trade and investment law, it understates those challenges insofar as it leaves aside transformations in national security policy, such as responses to climate change, that cannot be easily reduced to economic security or interstate conflicts.<sup>25</sup> The expansion of the national security state has become a major cause for concern in the literature on crime, terrorism, and armed conflict, but there has been little consideration of its effect on trade and investment beyond discrete issues like economic sanctions.<sup>26</sup> By bringing these strands together, this Article identifies how state responses to terrorism, climate change, cyberthreats, and economic insecurity have interacted to challenge the global economic order.

As a normative matter, these challenges will require changes to the trade and investment system’s design that go beyond current reform proposals. By recognizing the national security challenge, we can prevent new reforms from lapsing into old and unworkable dichotomies between trade and security. For example, in trade law, some have suggested salvaging and depoliticizing the faltering

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24. See, e.g., ROBERT D. BLACKWILL & JENNIFER M. HARRIS, *WAR BY OTHER MEANS: GEOECONOMICS AND STATECRAFT* (2016); Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT’L SEC. 42, 42 (2019); David Singh Grewal, *A Research Agenda for Trade Policy Under the Trump Administration*, 44 YALE J. INT’L L. ONLINE 69, 74-76 (2019); Tom C.W. Lin, *Financial Weapons of War*, 100 MINN. L. REV. 1377 (2016); Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Geoeconomics: The Variable Relationship Between Economics and Security*, LAWFARE (NOV. 27, 2018, 7:00 AM), <https://www.lawfareblog.com/geoeconomics-variable-relationship-between-economics-and-security> [<https://perma.cc/WJ69-73ZB>].
25. See *infra* Section I.E.
26. See ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING* (2016) (describing the spread of problems handled through a national security framework in the United States); BARRY BUZAN, OLE WAEVER & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* (1998) (making the case for a broader focus in security studies); Perry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1, 2 (2018) (arguing that sanctions “warrant more rigorous consideration in [international economic law] scholarship”); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573 (2011); Kanishka Jayasuriya, *Struggle Over Legality in the Midnight Hour: Governing the International State of Emergency*, in EMERGENCIES AND THE LIMITS OF LEGALITY 360, 364-73 (Victor V. Ramraj ed., 2008); Keith Krause & Michael C. Williams, *Security and “Security Studies”: Conceptual Evolution and Historical Transformation*, in OXFORD HANDBOOK OF INTERNATIONAL SECURITY 14 (Alexandra Gheciu & William C. Wohlforth eds., 2018); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989); Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417 (2012).

WTO dispute-settlement system by preventing trade panels from adjudicating national security measures.<sup>27</sup> But, as argued here, the changing shape of national security itself means that this approach is unlikely to provide the intended balance between stability and flexibility. If national security cannot simply be excised from ongoing reforms to the trade and investment system, reform proposals must instead find ways to effectively manage the challenge that the “new” national security poses to the economic order. This Article does not advocate for particular reforms but rather suggests a framework for developing alternatives to the all-or-nothing clash between national security exceptionalism and judicial oversight.

This Article proceeds in four parts. Part I advances the Article’s descriptive and analytical claim by mapping and theorizing the challenge that the new national security poses to the economic order.<sup>28</sup> Parts II and III turn to twin critical claims: that these transformations in national security fundamentally challenge the ability of interstate politics and international courts to police states’ attempts to evade economic rules. Part IV outlines a normative response to this critique, arguing that the increasing overlap between national security and the global economy requires us to consider the benefits of emerging strategies that mix politics and law in the management of economic disputes.

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27. See, e.g., Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 J. WORLD TRADE 867, 888-89 (2018) (suggesting mechanisms for diverting security and other sensitive issues away from adjudication); Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT’L L. ONLINE 37, 49-50 (noting a Canadian proposal to this effect). This Article was substantially completed prior to the collapse of the WTO Appellate Body in mid-December 2019. For an early assessment of those developments in relation to the argument presented here, see J. Benton Heath, *Trade and Security Among the Ruins*, DUKE J. INT’L & COMP. L. (forthcoming 2020).

28. Note that in referring to the “economic order,” this Article addresses security in relation to international trade and foreign investment. See Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT’L L. 169, 172-82 (2018). This focus necessarily leaves out other fields that are encompassed by the term “international economic law.” See Steve Charnovitz, *What Is International Economic Law?*, 14 J. INT’L ECON. L. 3 (2011). Many of the historical and jurisprudential examples in Parts II and III will be drawn from trade law, as opposed to investment law, because that is where self-judging security exceptions were first developed, and there is a comparatively robust public record of disputes under those provisions. International investment law only more recently began to adopt these broad self-judging exceptions, and there have been no public disputes under such clauses. But in framing the coming national security challenges, Part I draws equally from examples in trade and investment. Part IV is also framed in general terms, while still capturing significant differences between the trade and investment regimes.

## I. NEW NATIONAL SECURITY AND THE CHALLENGE TO INTERNATIONAL ECONOMIC LAW

The post-World War II international economic order has long depended on a relatively stable separation of national security policy from “ordinary” economic matters. This has been reflected in the legal rules of trade and investment treaties, which frequently use broad and flexible exceptions to exempt national security measures from ordinary economic rules.<sup>29</sup> The assumption embedded in these treaties is that the substantive provisions of these agreements can address most state measures that affect trade and investment with national security exceptions operating at the margins.<sup>30</sup> Thus, even though the underlying rationale for these treaties might be to foster international peace or solidify strategic alliances, the operational logic of trade treaties is national security exceptionalism.<sup>31</sup>

This logic obscures the fact that national security pervades even relatively mundane decisions regarding trade and investment.<sup>32</sup> For instance, states might adopt discriminatory boycotts or sanctions to redress what they see as lawless or unethical behavior by other countries or nonstate actors.<sup>33</sup> They may also selectively restrict the export or import of weapons or sensitive products.<sup>34</sup> National governments may restrict imports to protect strategic or vital industries<sup>35</sup> or restrict exports to ensure that their militaries have access to certain goods.<sup>36</sup> Many

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29. See *infra* notes 140, 186-190 and accompanying text.

30. See generally Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception*, 41 MICH. J. INT’L L. (forthcoming 2020) (noting that the U.S. State Department framers of the GATT had this view, while the military lawyers took an alternative view that “free trade *was* the exception, and national security was the rule”).

31. This was also the case in U.S. law. See Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3439705> [<https://perma.cc/DW5C-NKLT>].

32. E.g., MICHAEL TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 13 (4th ed. 2013).

33. See, e.g., International Emergency Economic Powers Act, Pub. L. No. 95-223, §§ 201-208, 91 Stat. 1625, 1626-29 (1977) (codified as amended in scattered sections of 50 U.S.C. (2018)); Trading with the Enemy Act, Pub. L. No. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (2018)); Antonios Tzanakopoulos, *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union’s International Responsibility*, in *ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW* 145, 148-52 (Ali Z. Marossi & Marisa R. Bassett eds., 2015).

34. See, e.g., Export Administration Regulations, 15 C.F.R. § 730 (2019).

35. See, e.g., 19 U.S.C. § 1862(d) (2018).

36. See KENNETH J. VANDEVELDE, *THE FIRST BILATERAL INVESTMENT TREATIES* 145 (2017).

governments also maintain mechanisms that limit or prohibit foreign investment on national security grounds.<sup>37</sup> Moreover, they may invoke national security to justify bypassing administrative processes or upending the regulatory framework, and, in so doing, disrupt trade or undermine the expectations of foreign investors.<sup>38</sup> And national security may even support an outright seizure or expropriation of foreign investment.<sup>39</sup>

What makes current circumstances different is the growing overlap between national security policy and the ordinary trade and investment rules since the end of the Cold War. International economic law underwent a period of ambitious expansion beginning in the 1990s, imposing rules that reached deeper into the state and were backed by stronger forms of dispute settlement. Trade law shifted its focus from reducing tariff barriers and quotas to disciplining “behind-the-border” impediments to trade, such as domestic regulations.<sup>40</sup> At the same time, the founding of the WTO brought about a robust dispute-settlement system capable of issuing enforceable judgments.<sup>41</sup> International investment law also became increasingly relevant to domestic politics, as investors began to use arbitration clauses in investment treaties to win enforceable judgments against national governments for the expropriation or mistreatment of investments.<sup>42</sup> The decisions of arbitral tribunals transformed vague treaty terms – such as the requirement to give investors “fair and equitable treatment” – into a globalized form of administrative law.<sup>43</sup>

At the same time, an increasing share of domestic policy-making across all sectors can now be described in terms of national security. The Cold War laid

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37. See Frédéric Wehrlé & Joachim Pohl, *Investment Policies Related to National Security: A Survey of Country Practices* 10 (OECD Working Papers on Int'l Inv., 2016).
  38. See, e.g., Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507, 507-08 (2009).
  39. See, e.g., Patrick Mitchell v. Dem. Rep. Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 57 (Nov. 1, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0537.pdf> [<https://perma.cc/C2K2-2Z24>].
  40. E.g., DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 37 (1997); TREBILCOCK ET AL., *supra* note 32, at 288-90.
  41. E.g., Shaffer, *supra* note 27.
  42. See, e.g., Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.—FOREIGN INV. L.J. 232 (1995).
  43. See, e.g., Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMÉRICA LATINA 221 (2009); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006); Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43 (2010).

the groundwork for this expansion.<sup>44</sup> The period from 1945 to 1989 saw the rise of perpetual states of emergency and a concomitant expansion of executive power,<sup>45</sup> the increasing use of discretionary economic tools such as sanctions and embargoes as a means of foreign policy,<sup>46</sup> the use of economic tools such as foreign aid and trade to influence interstate conflicts,<sup>47</sup> and the emergence of national security as a predominant theme in domestic discourse on areas from the military to education and civil rights.<sup>48</sup> During the Cold War, however, even the most expansive conceptions of national security tended to be filtered through an adversarial lens. In the United States, the conflict with the Soviet Union became the overriding security consideration that informed all other issues.<sup>49</sup> Other states also tended to mimic that adversarial interstate paradigm, whether in the context of decolonization or regional conflicts.<sup>50</sup>

The end of the Cold War transformed national security from that adversarial interstate paradigm into a multifaceted concept intertwined with law enforcement, human rights policy, environmental protection, public health, and eco-

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44. See, e.g., Lobel, *supra* note 26, at 1399-1412.

45. See, e.g., Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 731-36 (1992); Lobel, *supra* note 26, at 1399-1412.

46. See, e.g., Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1163-65 (1987).

47. See, e.g., DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY 498, 518-19 (2017) (noting broad acceptance in the United States during the 1950s that free trade and foreign aid were essential to the fight against communism). See generally ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 14-23 (2001) (noting, from a realist perspective, the foundational role of power-based and security concerns underpinning international economic institutions).

48. See, e.g., OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 214-20 (2006); HAROLD D. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 50-75 (1950); Donohue, *supra* note 26, at 1657-1705; Arnold Wolfers, "National Security" as an Ambiguous Symbol, 67 POL. SCI. Q. 481 (1952); Note, *The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972). What is notable about the past twenty years is thus not the existence of debates about the meaning of terms like "security" and "emergency" but the accretion and legitimation of new security claims. In this respect, Joseph Weiler's metaphor of geology is apt. See J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZAÖRV 547 (2004).

49. See Donohue, *supra* note 26, at 1576-77, 1657-58; cf. MARK MAZOWER, GOVERNING THE WORLD: THE HISTORY OF AN IDEA 240-41, 265-66 (2012) (noting significant shifts in the U.S. approach to security policy during this era, with the adversarial U.S.-Soviet contest as a constant background factor). On the direct relationship between the U.S.-Soviet conflict and the texts of trade agreements, see *infra* Section II.A.

50. See *infra* text accompanying notes 163-165.

economic globalization. The following discussion maps the collision between economic rules and the new national security along five axes: (1) the transformation of security threats, (2) changing ideas about which actors can threaten national security, (3) an expanding list of economic sectors and products that are considered to be security sensitive, (4) a temporal shift from indefinite to permanent security emergencies, and (5) a reordering of the relationship between geopolitics and economic globalization. Each of these transformations has already complicated economic relations and emerged as a significant issue in trade and investment disputes. And each is likely to continue to do so in ways that challenge the ordinary operation of trade and investment rules.

### A. *New Security Threats*

The end of the Cold War brought about a profound transformation in the nature of security threats faced by states. Whereas security was once largely framed in terms of interstate rivalries, after 1989 states increasingly focused on diffuse threats such as terrorism, transnational crime, corruption, infectious disease, environmental degradation, and climate change. Some threats, like terrorism, could be more readily analogized to interstate rivals. But the most transformative developments concerned “actorless” risks, such as climate change or pandemic disease, which threaten security even without manifesting any ill intent toward the state or its population.<sup>51</sup>

The causes for this shift were both material and cultural, and they involved a range of actors inside and outside government.<sup>52</sup> Within government, self-interest and self-preservation drove defense agencies to embrace open-ended notions of security to preserve their authority and large budgets despite the removal of the Soviet threat.<sup>53</sup> At the same time, advocacy groups seized on the

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51. See Donohue, *supra* note 26, at 1709.

52. See generally THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996) (arguing that norms and identity play important roles in global politics, and particularly in constructing concepts of security); David A. Baldwin, *The Concept of Security*, 23 REV. INT'L STUD. 5, 22-23 (1997) (arguing that developments in security policy and security studies after 1990 do not challenge the basic “concept of security,” whatever their merits “as an aid to coping with the post-Cold War world”); Stephen M. Walt, *The Renaissance of Security Studies*, 35 INT'L STUD. Q. 211, 213 (1991) (contending that recent efforts to expand the discipline of “security studies” to include matters like environmental degradation, HIV/AIDS, and poverty “would destroy its intellectual coherence”).

53. See RITA FLOYD, SECURITY AND THE ENVIRONMENT: SECURITISATION THEORY AND US ENVIRONMENTAL SECURITY POLICY 116-20 (2010).

sudden openness of the “security” concept to advance their own causes.<sup>54</sup> Efforts to redefine security eventually penetrated domestic electoral politics, with both right- and left-leaning coalitions contributing to the term’s expansion.<sup>55</sup> For example, the Clinton Administration sought to sell disease control, climate change mitigation, and even China’s accession to the WTO through a security framework.<sup>56</sup> Three years later, this broad approach was cited as a precedent for the aggressive antiterrorism policies of the Bush Administration.<sup>57</sup> In the United States especially, mainstream political contests over national security were less about whether the concept should be expanded than which direction that expansion should take.<sup>58</sup>

Today, this new security agenda is reflected in the domestic policies of countries worldwide.<sup>59</sup> Both the Obama and Trump Administrations’ national secu-

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54. *E.g.*, SARA E. DAVIES, ADAM KAMRADT-SCOTT & SIMON RUSHTON, *DISEASE DIPLOMACY: INTERNATIONAL NORMS AND GLOBAL HEALTH SECURITY* 17-42 (2015) (describing the efforts of actors within the secretariat of the World Health Organization to sell member states on “global health security”); Jessica Tuchman Mathews, *Redefining Security*, 68 *FOREIGN AFF.* 162 (1989); *Human Development Report 1994*, U.N. DEV. PROGRAMME 22-46 (1994), [http://hdr.undp.org/sites/default/files/reports/255/hdr\\_1994\\_en\\_complete\\_nostats.pdf](http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf) [<https://perma.cc/97RA-HAEM>] (announcing a new “human security” approach to development).
55. *See, e.g.*, David E. Sanger, *The World; Sometimes, National Security Says It All*, *N.Y. TIMES* (May 7, 2000) (analyzing these tactics in the Clinton Administration and responses from Republican challengers).
56. *See, e.g.*, U.N. SCOR, 55th Sess., 4087th mtg. at 3, U.N. Doc S/PV.4087 (Jan. 10, 2000) (President of the Security Council announcing a “new security agenda,” encompassing climate change, terrorism, proliferation, and pandemics, in contrast to the “classic security agenda” of resisting aggression and stopping armed conflict); Sanger, *supra* note 55 (concerning China’s accession to the WTO).
57. *See* Philip Zelikow, *The Transformation of National Security*, *NAT’L INT.* 17, 19-20 (Mar. 1, 2003), <https://nationalinterest.org/article/the-transformation-of-national-security-491> [<https://perma.cc/FP8P-FWAL>].
58. The Trump Administration’s emergency declarations recently reignited these debates. *See, e.g.*, Jackie Flynn Mogensen, *Five Things a Democratic President Could Do by Declaring a National Emergency Over Climate Change*, *MOTHER JONES* (Mar. 8, 2019), <https://www.motherjones.com/politics/2019/03/what-democratic-president-could-do-climate-national-emergency> [<https://perma.cc/CC8Y-YRJU>].
59. It is not only domestic policy. The same shifts can be seen at the international level. Historically, the United Nations Security Council has exercised its power regarding the preservation and restoration of “international peace and security.” *See* U.N. Charter, arts. 25, 39-41 (regarding traditional security threats, such as armed conflict). *See generally* Gregory H. Fox, Kristen E. Boon & Isaac Jenkins, *The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law*, 67 *AM. U. L. REV.* 649 (2018) (describing the way the Security Council has influenced these types of conflicts). But the Security Council also recently declared the 2014 Ebola outbreak a threat to

urity policies have been wide-ranging, broadly defining security to include economic issues, infectious disease, cyberthreats, transnational crime, and, in Obama's case, climate change, along with more traditional national security issues.<sup>60</sup> U.S. sanctions practice also reflects this new breadth, with the United States having declared national emergencies and imposed sanctions to deal with security threats stemming from terrorism, international drug trafficking, human rights violations, corruption, transnational crime, and "malicious cyber-enabled" activities, among other matters.<sup>61</sup> A 2009 study of states' national security policies found that states now treat a wide range of risks as security matters, and that the meaning of national security as a concept is stable only at an extremely high level of generality.<sup>62</sup> In 2015, China adopted a national security law that defines security as having political, military, economic, cultural, and technological dimensions.<sup>63</sup>

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international peace and security, thereby suggesting that nonhuman threats may also qualify. See S.C. Res. 2177, pmb. (Sept. 18, 2014); Gian Luca Burci, *Ebola, the Security Council and the Securitization of Public Health*, 10 QUESTIONS IN INT'L L. 27 (2014); J. Benton Heath, *Pandemics and other Health Emergencies*, in OXFORD HANDBOOK ON THE INTERNATIONAL LAW OF GLOBAL SECURITY (Robin Geiss & Nils Melzer eds., forthcoming 2020).

60. See 2017 NSS, *supra* note 1; *National Security Strategy*, WHITE HOUSE (Feb. 2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf) [<https://perma.cc/THX4-HTF8>].
61. See, e.g., Exec. Order No. 13,873, 84 Fed. Reg. 22,689 (May 15, 2019) (malicious cyber activities); Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 20, 2017) (human rights violations); Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015) (malicious cyber activities); Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (July 27, 2011) (transnational crime); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) (terrorism); Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 21, 1995) (narcotics trafficking).
62. Inv. Div., Directorate for Fin. & Enter. Affairs, *Security-Related Terms in International Investment Law and in National Security Strategies*, OECD 11, 13 (May 2009), [hereinafter *Security-Related Terms*], <https://www.oecd.org/daf/inv/investment-policy/42701587.pdf> [<https://perma.cc/7FSZ-NLRC>] (finding that "national security . . . refers to protecting nations and citizens," and that states "aspire to a broad and integrated management of risks, often including all threats to public safety that require coordinated, nation-wide responses," and noting that policies refer to a range of risks, including terrorism, armed conflict, pandemics, disasters, energy security, failed states, organized crime, cyber threats, human trafficking, drug trafficking, migration, and climate change).
63. *National Security Law of the People's Republic of China (2015)*, MINISTRY NAT'L DEF: CHINA (Mar. 3, 2017), [http://eng.mod.gov.cn/publications/2017-03/03/content\\_4774229.htm](http://eng.mod.gov.cn/publications/2017-03/03/content_4774229.htm) [<https://perma.cc/AN6U-5LX4>] (defining dimensions of Chinese national security policies in articles 15-24); see also Cai, *supra* note 9, at 66 (discussing this development).

Climate change provides a provocative example of how this emerging vision of security policy could conflict with economic rules. There is increasing agreement that climate change presents a national or international security issue.<sup>64</sup> Indeed, in 2019, several jurisdictions declared a “climate emergency.”<sup>65</sup> Although these declarations do not necessarily translate into concrete policy, many of the measures they imply would implicate international trade and investment commitments. For example, advocates suggest that countries, including the United States, could use a climate-emergency declaration to suspend oil drilling, restrict trucking or other fossil-fuel-intensive activities, or impose sanctions on traffic in fossil fuels.<sup>66</sup> Depending on how such policies are implemented, they could implicate treaty rules against nationality-based discrimination; limits on quantitative restrictions; takings rules; or requirements of consistency, transparency, and due process in the treatment of investments.<sup>67</sup> In these circumstances, treaty-based exceptions for security measures may provide a readymade and flexible justification for measures taken to address the climate “emergency.”

A series of investment cases involving Argentina in the 2000s raised the possibility that such nonmilitary threats could implicate security interests under economic agreements. In 2001 and 2002, Argentina took a series of emergency economic measures in response to a severe financial crisis that investors later

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64. See, e.g., John R. Allen & David G. Victor, Opinion, *Despite What Trump Says, Climate Change Threatens Our National Security*, N.Y. TIMES (Mar. 7, 2019), <https://www.nytimes.com/2019/03/07/opinion/climate-change-national-security.html> [<https://perma.cc/5AXL-UZ7M>]; Andreas Motzfeldt Kravik, *The Security Council and Climate Change – Too Hot to Handle?*, EJIL: TALK! (Apr. 26, 2018), <https://www.ejiltalk.org/the-security-council-and-climate-change-too-hot-to-handle> [<https://perma.cc/H5FA-2ACH>]. But see Maryam Jamshidi, *Climate Change Is a Human Security, Not a National Security Issue*, 93 S. CAL. L. REV. POSTSCRIPT 36 (2019).
65. See, e.g., Anne Barnard, *A ‘Climate Emergency’ Was Declared in New York City. Will That Change Anything?*, N.Y. TIMES (July 5, 2019), <https://www.nytimes.com/2019/07/05/nyregion/climate-emergency-nyc.html> [<https://perma.cc/J8TZ-PPJR>]; Mark Tutton, *UK Parliament Declares ‘Climate Emergency,’* CNN (May 1, 2019, 5:46 PM ET), <https://www.cnn.com/2019/05/01/europe/uk-climate-emergency-scn-intl/index.html> [<https://perma.cc/UE7D-M79R>].
66. See, e.g., Daniel A. Farber, *Using Emergency Powers to Fight Climate Change*, LEGAL PLANET (Jan. 14, 2019), <https://legal-planet.org/2019/01/14/using-emergency-powers-to-fight-climate-change> [<https://perma.cc/25B7-7D6X>]; Mark P. Nevitt, *Climate Change: Our Greatest National Security Threat?*, JUST SECURITY (Apr. 17, 2019), <https://www.justsecurity.org/63673/climate-change-our-greatest-national-security-threat> [<https://perma.cc/P2J9-Q3B2>].
67. Subsidies for green energy can also violate treaty-based rules on nondiscrimination if they favor domestic producers. See, e.g., Panel Report, *United States – Certain Measures Relating to the Renewable Energy Sector*, WTO Doc. WT/DS510/R (June 27, 2019).

challenged before arbitral tribunals under bilateral investment treaties (BITs).<sup>68</sup> In several cases, Argentina contended that even if its measures would otherwise violate its commitments related to the treatment of foreign investment, they fell within a treaty exception for measures “necessary for . . . the protection of its own essential security interests,” and hence there was no breach and no compensation was owed.<sup>69</sup> Although only two of six tribunals accepted Argentina’s defense, nearly all of them agreed that an economic crisis can implicate a state’s “essential security interests” even if there is no military dimension to the threat.<sup>70</sup> Using broad language, these decisions generally make clear that economic, social, and political threats can constitute a separate basis for security measures, apart from any link to conflict or use of force.<sup>71</sup>

These decisions, along with the developments in state policy described above, open the door to an even greater intertwining of national security and

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68. These included abrogating a prior measure that had pegged the Argentine peso to the U.S. dollar, requiring that debts and contracts be paid in pesos, and restricting bank withdrawals and transfers of currency. See JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 247-54 (2011); William W. Burke-White, *The Argentine Financial Crisis: State Liability Under Bits and the Legitimacy of the ICSID System*, 3 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 199, 202-04 (2008); Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 *INT’L & COMP. L.Q.* 325, 330-33 (2010).

69. *El Paso Energy Int’l Corp. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶¶ 563-73 (Oct. 31, 2011), <https://www.italaw.com/sites/default/files/case-documents/itao270.pdf> [<https://perma.cc/487S-ZP6W>]; *Cont’l Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 84-89 (Sept. 5, 2008), <https://www.italaw.com/sites/default/files/case-documents/itao228.pdf> [<https://perma.cc/7DHJ-954R>]; *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 367 (Sept. 28, 2007), <https://www.italaw.com/sites/default/files/case-documents/itao770.pdf> [<https://perma.cc/4JGC-HLUJ>]; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 324-26 (May 22, 2007), <https://www.italaw.com/sites/default/files/case-documents/itao293.pdf> [<https://perma.cc/BZY8-Y2CD>]; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 217-19 (Oct. 3, 2006), <https://www.italaw.com/sites/default/files/case-documents/itao460.pdf> [<https://perma.cc/CL2K-E2K7>]; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 344-52 (May 12, 2005), <https://www.italaw.com/sites/default/files/case-documents/itao184.pdf> [<https://perma.cc/N66W-C4TZ>]. Argentina also invoked a related exception for “public order” in these treaties and, in cases under other treaties, attempted to invoke potentially analogous exceptions in those agreements or in customary international law. Kurtz, *supra* note 68, at 333-41.

70. One tribunal did not reach the question and suggested that “essential security interests” can relate only to “external” threats. See *El Paso Energy Int’l Corp.*, Award, ¶ 588.

71. See, e.g., *Cont’l Casualty Co.*, Award, ¶ 181; *Sempra Energy Int’l*, Award, ¶ 374; *Enron Corp.*, Award, ¶ 332; *LG&E Energy Corp.*, Decision on Liability, ¶ 238; *CMS Gas Transmission Co.*, Award, ¶¶ 359-60.

international economic law.<sup>72</sup> The reasoning of certain Argentina tribunals could potentially apply to a range of other nonmilitary matters recently designated as security threats, including infectious diseases, environmental damage, and cybersecurity.<sup>73</sup> In particular, the *Continental Casualty* tribunal emphasized the range of security challenges faced by Argentina, although some elements of its decision may counsel against a boundless interpretation of “essential security.”<sup>74</sup> Nevertheless, the broadening of essential security beyond military threats was a critical development.<sup>75</sup> It is overlooked in much of the debate about the Argentina cases, which has focused on other doctrinal questions.<sup>76</sup>

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72. For a critique of the Argentinan cases focusing on this issue, see William J. Moon, *Essential Security Interests in International Investment Agreements*, 15 J. INT’L ECON. L. 481 (2012).
73. For an argument that the tribunals’ reasoning of these arbitral decisions could be extended to environmental protection, see JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 384–89 (2012). For discussion of the environment as an “essential interest” of the state, see *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 260 (July 30, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf> [<https://perma.cc/7NYG-37BC>]; *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, ¶ 53 (Sept. 25). Notably, some scholars and practitioners have proposed investment-treaty drafts that actually codify the relationship between climate change and national security. See Daniel Magraw et al., *Model Green Investment Treaty: International Investment and Climate Change*, 36 J. INT’L ARB. 95, 104 (2019).
74. *Cont’l Casualty Co.*, Award, ¶ 180 (noting that the crisis created “the real risk of insurrection and extreme political disturbances”).
75. See *id.* ¶ 181 (framing this as a matter of fairness to both parties).
76. The literature on the Argentinan cases is vast and addresses a range of questions, including the conceptual nature of the security exception, the relationship with customary international law, and the structure of the “necessity” test that it implies. See, e.g., José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011, at 319 (Karl P. Sauvant ed., 2011); José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008–2009, at 379 (Karl P. Sauvant ed., 2009); Burke-White & von Staden, *supra* note 6; Kathleen Claussen, Comment, *The Casualty of Investor Protection in Times of Economic Crisis*, 118 YALE L.J. 1545 (2009); Caroline Henckels, *Scope Limitation or Affirmative Defense? The Purpose and Role of Investment Treaty Exception Clauses*, in EXCEPTIONS AND DEFENCES IN INTERNATIONAL LAW (Federica Paddeu & Lorand Bartels eds., forthcoming 2020); Kurtz, *supra* note 68; August Reinisch, *Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases?*, 8 J. WORLD INV. & TRADE 191 (2007); Stephan W. Schill, *International Investment Law and the Host State’s Power to Handle Economic Crises: Comment on the ICSID Decision in LG&E v. Argentina*, 24 J. INT’L ARB. 265 (2007). Some of these issues, in particular the necessity test, are addressed *infra* Section III.B.

*B. New Actors*

The new national security also implicates a broader range of actors who might be deemed security threats. The emergence of terrorism as a primary focus of security efforts during the 1990s effectively transformed national and international security from a state-centered to an individual- or network-centered paradigm.<sup>77</sup> Beginning in the late 1990s, the U.N. Security Council began to target individual suspected terrorists, terrorist financiers, and proliferators of chemical, biological, and nuclear weapons, relying on its power to preserve and restore international peace and security.<sup>78</sup> Today, perceived security threats also come from networks of human or drug traffickers, transnational criminal organizations, individuals involved in corruption, and hackers and other cybercriminals.<sup>79</sup> Corresponding shifts in the definition of nonhuman hazards, such as natural disasters and climate change, could further widen the circle of actors.

These shifts have the potential to alter the relationship between economic law and security measures. The emergence of transnational networks as adversaries has triggered a shift in sanctions practice from state-based sanctions to “targeted” sanctions centered on individuals.<sup>80</sup> At the same time, the distributed nature of nonstate threats has shifted strategies from simply defeating the enemy to structuring and controlling the entire environment in which an adversary operates.<sup>81</sup> For example, John Arquilla and David Ronfeldt argue that responding to nonstate actors requires a range of strategies that increasingly incorporate “soft power” efforts alongside military measures and economic sanctions,<sup>82</sup>

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77. See, e.g., JOHN ARQUILLA & DAVID RONFELDT, NETWORKS AND NETWORKS: THE FUTURE OF TERROR, CRIME, AND MILITANCY 6-14 (2001); MICHAEL HARDT & ANTONIO NEGRI, MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE 54-55 (2004); Fiona B. Adamson, *The Changing Geography of Global Security*, in OXFORD HANDBOOK OF INTERNATIONAL SECURITY, *supra* note 26, at 319, 321-23.

78. See, e.g., S.C. Res. 1540 (Apr. 28, 2004) (establishing the obligations under Chapter VII of the United Nations Charter for all Member States to develop and enforce appropriate legal and regulatory measures against the proliferation of chemical, biological, radiological, and nuclear weapons and their means of delivery, in particular, to prevent the spread of weapons of mass destruction to nonstate actors); S.C. Res. 1373 (Sept. 28, 2001) (resolution adopted after September 11 attacks); S.C. Res. 1267 (Oct. 15, 1999) (designating Osama bin Laden and associates as terrorists and establishing a sanctions regime to cover individuals and entities associated with Osama bin Laden and the Taliban wherever located).

79. See, e.g., *Security-Related Terms*, *supra* note 62, at 11, 13.

80. Bechky, *supra* note 26, at 4-6.

81. HARDT & NEGRI, *supra* note 77, at 58.

82. ARQUILLA & RONFELDT, *supra* note 77, at 350-54.

which could potentially multiply the types of measures considered necessary for national security.

The rise of nonstate actors also interacts with more traditional state-centered security paradigms, as illustrated in a recent dispute between the United States and Iran. In 2018, Iran instituted its third case at the International Court of Justice (ICJ) against the United States under a 1955 treaty on commercial and consular relations<sup>83</sup> and challenged certain measures imposing or reimposing sanctions against Iran and Iranian entities.<sup>84</sup> Later that year, the ICJ rejected many of Iran's requests for preliminary measures, noting the plausibility of the U.S. argument that sanctions did not violate the treaty because they were necessary for essential security interests.<sup>85</sup> In particular, the United States argued that Iran's continued effort to develop ballistic missiles for its own military use, as well as its continued support for terrorist and militant groups, threatened its security interests, reflecting the intersection between state and nonstate security paradigms.<sup>86</sup> The claim based on Iran's documented support for militant and terrorist organizations speaks to the contemporary security environment, where nonstate actors represent security threats in their own right while also operating with state support.<sup>87</sup>

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83. Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899. The United States has announced its withdrawal from the treaty. See Edward Wong & David E. Sanger, *U.S. Withdraws From 1955 Treaty Normalizing Relations With Iran*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/world/middleeast/us-withdraws-treaty-iran.html> [<https://perma.cc/TK6H-ZXVL>].

84. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Application Instituting Proceedings, 2018 I.C.J. 175 (July 16).

85. See Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Order, 2018 I.C.J. 175, ¶¶ 68-70, 87 (Oct. 3); Elena Chachko, *What to Make of the ICJ's Provisional Measures in Iran v. U.S. (Nuclear Sanctions Case)*, LAWFARE (Oct. 4, 2018, 7:23 AM), <https://www.lawfareblog.com/what-make-icjs-provisional-measures-iran-v-us-nuclear-sanctions-case> [<https://perma.cc/8T9F-4SUC>] (“[T]he court strongly implied that a significant portion of the recently re-imposed nuclear sanctions would be covered by the national security exception . . .” (citation omitted)).

86. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Verbatim Record, 2018 I.C.J. 175, ¶ 31 (Aug. 28). The author served as counsel to the United States in the parallel *Certain Iranian Assets* case from 2016 to mid-2018, but not in this case. The opinions expressed here are solely the author's own.

87. See, e.g., Finding that the Islamic Republic of Iran Is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72,756 (Nov. 25, 2011).

### C. *New Vulnerabilities*

As the range of security threats expands, so does the range of products and industries that may be considered security sensitive, as indicated by the proliferation and expansion of “investment-screening” mechanisms. In the United States, this function has been performed since 1989 by the Committee on Foreign Investment in the United States (CFIUS), which reviews mergers, acquisitions, and takeovers of U.S. businesses for their effect on national security.<sup>88</sup> Other countries maintain similar mechanisms, many of which have been recently adopted or expanded.<sup>89</sup> These laws frequently do not define “national security,”<sup>90</sup> and security review can encompass a range of sectors, including not only military and defense industries but also the protection of telecommunications, transportation, energy, water and food supply, education, health services, and the media.<sup>91</sup> The procedural framework for such reviews may vary, but these mechanisms often involve classified information, flexible decision-making criteria, and limited opportunities for external review.<sup>92</sup>

This flexibility causes perennial anxiety about the effect of security screening on foreign investment.<sup>93</sup> In the 2000s, there was a series of high-profile controversies in which national security concerns were applied broadly to do everything

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88. See generally Mark A. Clodfelter & Francesca M.S. Guerrero, *National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level*, in *SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS* 173 (Karl P. Sauvant, Lisa E. Sachs & Wouter P.F. Schmit Jongbloed eds., 2012) (discussing changes and approaches to national security review of foreign direct investment (FDI)).

89. See, e.g., *Current Trends in Investment Policies Related to National Security and Public Order*, OECD (Nov. 2018), <http://www.oecd.org/daf/inv/investment-policy/Current-trends-in-OECD-NatSec-policies.pdf> [<https://perma.cc/9FZT-2RGN>]; Joachim Pohl, *Is International Investment Threatening or Under Threat?*, COLUM. FDI PERSP. (Feb. 25, 2019), <http://ccsi.columbia.edu/files/2018/10/No-246-Pohl-FINAL.pdf> [<https://perma.cc/U93U-MFDM>]. In the United States and the European Union, see, most recently, Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, §§ 1701-1728, 132 Stat. 2173 (2018); and Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79) 1.

90. 50 U.S.C. § 4565(f) (2018) (setting out a nonexhaustive list of factors).

91. Wehrlé & Pohl, *supra* note 37, at 22.

92. See *id.* at 28-33. On judicial review in national courts, see, for example, *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 319-20 (D.C. Cir. 2014) (finding that CFIUS review failed to afford due process but registering skepticism that better process would yield a different result); and Wehrlé & Pohl, *supra* note 37, at 41-42 & nn.86-88.

93. Compare José E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 104 (1989) (observing that

from unwinding foreign ownership of Russian natural gas to blocking an acquisition that would have brought six U.S. ports under the management of UAE company Dubai Ports World.<sup>94</sup> These controversies led to ongoing efforts to reconsider how screening mechanisms are designed and how investment agreements could discipline their use, though few hard limits were imposed.<sup>95</sup>

Rising concerns about cybersecurity have only amplified these risks, leading to even greater potential for trade and investment disputes. Recent efforts by the United States and Australia, among others, to restrict investment by and trade with the Chinese telecommunications company Huawei have triggered debates in the WTO about the measures' legality.<sup>96</sup> Separately, the United States surprised many longtime observers when it invoked national security concerns to pressure a Chinese company to divest its ownership stake in the LGBTQ dating app Grindr, on the grounds that the company's aggregation of personal data created a blackmail risk.<sup>97</sup> More broadly, recent reforms have expanded the jurisdiction of CFIUS national security reviews to include transactions involving

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the law “may be used by a wide variety of interests . . . to address virtually all sociopolitical concerns raised by foreign investment”), with Alan P. Larson et al., *Lessons from CFIUS for National Security Reviews of Foreign Investment*, in *SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS*, *supra* note 88, at 422, 424 (contending that the law “provides the President with extraordinary powers, but limits their application only to the most extraordinary of circumstances”).

94. See, e.g., U.N. Conference on Trade & Development, *The Protection of National Security in IIAs*, 11-13, UNCTAD/DIAE/IA/2008/5 (2009).
95. See, e.g., Inv. Div., *Guidelines for Recipient Country Investment Policies Relating to National Security: Recommendation Adopted by the OECD Council on 25 May 2009*, OECD (May 25, 2009), <https://www.oecd.org/daf/inv/investment-policy/43384486.pdf> [<https://perma.cc/9X79-4QFN>] (on investment screening).
96. See Tom Miles, *China Warns Australia at WTO About 5G Restriction*, REUTERS (Apr. 12, 2019, 12:09 PM), <https://www.reuters.com/article/us-huawei-australia-china-wto/china-warns-australia-at-wto-about-5g-restriction-idUSKCN1RO2oH> [<https://perma.cc/3Q7Y-SWAQ>]; James Politi, *China Hits Out at US over Huawei Blacklisting at WTO Meeting*, FIN. TIMES (May 28, 2019), <https://www.ft.com/content/978f169a-8175-11e9-b592-5fe435b57a3b> [<https://perma.cc/N388-3NQM>]; Tania Voon & Andrew Mitchell, *Australia's Huawei Ban Raises Difficult Questions for the WTO*, E. ASIA FORUM (Apr. 22, 2019), <https://www.eastasiaforum.org/2019/04/22/australias-huawei-ban-raises-difficult-questions-for-the-wto> [<https://perma.cc/3ZN8-4KZM>].
97. See Georgia Wells & Kate O'Keefe, *U.S. Orders Chinese Firm to Sell Dating App Grindr over Blackmail Risk*, WALL ST. J. (Mar. 27, 2019, 6:43 PM), <https://www.wsj.com/articles/u-s-orders-chinese-company-to-sell-grindr-app-11553717942> [<https://perma.cc/VV74-AGWV>]. The new national security could thus revive old prejudices. See Julian Gewirtz & Moira Weigel, *Grindr and the 'New Cold War': Why US Concerns over the App Are Dangerous*, GUARDIAN (May 18, 2019, 6:00 A.M. EDT), <https://www.theguardian.com/commentisfree/2019/may/18/grindr-us-security-china-new-cold-war> [<https://perma.cc/6MFW-Q3E8>].

“critical technologies,” “critical infrastructure,” or sensitive personal data.<sup>98</sup> These developments raise legitimate concerns that nearly every online business, data transfer, or emerging technology has potential security implications.<sup>99</sup>

Investment screening has yet to be tested in an international dispute, but a pair of recent arbitral proceedings involving satellite technology illustrates the difficulty of expanding the list of security-sensitive sectors.<sup>100</sup> In these cases, which arose from the same dispute, a pair of investors claimed that India’s annulment of a contract for a satellite telecommunications spectrum on national security grounds violated their treaty rights.<sup>101</sup> In annulling the contract, the Indian government stated that the spectrum was required “for national needs, including the needs of defense, para-military forces and other public utility services as well as for societal needs.”<sup>102</sup> The tribunals agreed that India’s annulment of the contract could be justified as a measure to protect its “essential security interests”<sup>103</sup> only insofar as the satellite spectrum was being appropriated for military or paramilitary use.<sup>104</sup> The other purposes for which the spectrum was to be used—such as railways, “public utility services,” emergency communication and disaster warnings, crop forecasting, rural communications, telemedicine, tele-education, and other “societal needs”—did not qualify.<sup>105</sup>

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(warning that “special scrutiny paid to the supposed liabilities of gay men reflects lingering conservative ideas that homosexuality must always be a source of shame and danger”).

98. 50 U.S.C. §§ 4565(a)(4)(B)(iii)(III), (a)(5), (a)(6) (2018).

99. See Robert D. Williams, *In the Balance: The Future of America’s National Security and Innovation Ecosystem*, LAWFARE (Nov. 30, 2018, 3:01 PM), <https://www.lawfareblog.com/balance-future-americas-national-security-and-innovation-ecosystem> [https://perma.cc/Y5QM-7UC8].

100. Disclosure: The author was affiliated with Curtis, Mallet-Prevost, which represents India in these cases, during a period that overlapped with their pendency. The author did not provide counsel on those cases, and the opinions expressed here are the author’s own.

101. See CC/Devas Award on Jurisdiction and Merits, *supra* note 11, ¶¶ 211-374; Deutsche Telekom AG v. India, PCA Case No. 2014-10, Interim Award, ¶¶ 183-291 (Perm. Ct. Arb. Dec. 13, 2017) [hereinafter *Deutsche Interim Award*].

102. CC/Devas Award on Jurisdiction and Merits, *supra* note 11, ¶ 332; *accord* *Deutsche Interim Award*, *supra* note 101, ¶ 265.

103. Agreement for the Promotion and Protection of Investments, Mauritius-India, art. 11(3), Sept. 4, 1998, <https://dea.gov.in/sites/default/files/Mauritius.pdf> [https://perma.cc/KSW4-UYBJ]; Treaty for the Promotion and Protection of Investments, Ger.-India, art. 12, July 10, 1995, 2071 U.N.T.S 121.

104. CC/Devas Award on Jurisdiction and Merits, *supra* note 11, ¶¶ 354-56; *accord* *Deutsche Interim Award*, *supra* note 101, ¶ 281. The *Deutsche Telekom* tribunal ultimately rejected even this narrowed justification on the facts of that particular case.

105. CC/Devas Award on Jurisdiction and Merits, *supra* note 11, ¶¶ 354-56, 360; *accord* *Deutsche Interim Award*, *supra* note 101, ¶ 281.

In parsing India's purported essential security interests, each tribunal focused on the policies investment treaties serve. A key protection of investment treaties is that states must pay prompt, adequate, and effective compensation when they expropriate or nationalize investments for a public purpose.<sup>106</sup> These treaties were thus designed specifically to deal with cases in which a state nationalizes a vital industry without compensation to foreign investors. If the security exception allowed states to nationalize investments for purposes such as "public utilities" without having to pay compensation, it would undermine precisely the protection afforded by the treaties' expropriation provisions.<sup>107</sup>

This result, while sensible, illustrates the tension between international economic law and emerging security practices. The tribunal's reasoning had to exclude from the scope of India's "essential security interests" several areas that, while perhaps novel compared with those considered during the Cold War, are increasingly accepted as security-related. These include disaster response, telecommunications, public utilities, and critical infrastructure.<sup>108</sup> That the tribunals could have drawn the line differently—for example, to include disaster response but exclude public utilities—only underscores the unanswered questions raised by the collision between state practice and the principles of international economic law.

#### *D. New Temporalities*

The emergence of new types of security threats has also transformed the temporal nature of these threats, resulting in the creation of indefinite emergencies. Even if it has long been the case that emergencies are not just relatively short periods of extreme exigency,<sup>109</sup> there once was greater consensus that emergencies would someday end. As long as the Cold War-era adversarial paradigm held,

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106. *E.g.*, Agreement for the Promotion and Protection of Investments, India-Mauritius, art. 6, Sept. 4, 1998.

107. *See* CC/Devas Award on Jurisdiction and Merits, *supra* note 11, ¶¶ 355, 371; *accord* Deutsche Interim Award, *supra* note 101, ¶ 281.

108. This is particularly notable given that these are the same sectors that are receiving increasing scrutiny from states' national security policies and investment-screening mechanisms. *See, e.g.*, U.N. Conference on Trade & Development, *supra* note 94, at 15-17; *Security-Related Terms*, *supra* note 62, at 14 tbl.2 (reviewing state security policies and EU policy, noting concerns relating to natural disasters and critical infrastructure); Wehrle & Pohl, *supra* note 37, at 22.

109. *See* MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 8-9 (2012); GROSS & NÍ AOLÁIN, *supra* note 48, at 174-80 (2006); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 771-72 (2002).

it was possible to imagine an endpoint to interstate conflicts when the threat was eliminated or the enemy vanquished.<sup>110</sup>

The same cannot be said for many of the new security threats that now pre-occupy states. Many of these threats are diffuse and likely to become permanent features of contemporary life, barring massive social or technological change.<sup>111</sup> For example, it is nearly impossible to imagine a future in which the United States and other countries must no longer confront prevalent and severe “malicious cyber-enabled activities” originating abroad.<sup>112</sup>

These types of threats have not yet been systematically addressed by economic tribunals. If and when they are, they will likely pose significant difficulties.<sup>113</sup> In their critique of human rights emergency jurisprudence, Oren Gross and Fionnuala Ní Aoláin argue that the European Court of Human Rights displays a “structural inability to deal credibly with permanent emergencies” and simply defers to national determinations that an emergency continues to exist.<sup>114</sup>

International economic tribunals could be nudged into a similar position.<sup>115</sup> A leading trade-law treatise, coauthored by a former member of the WTO Appellate Body, states that dispute settlement panels should not “seek to overrule a member’s judgment on what is an emergency in international relations except in the most obvious circumstances.”<sup>116</sup> In this view, the continued U.S. embargo against Cuba can be justified under this deferential standard, despite the shifting

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110. See, e.g., 22 U.S.C. §§ 6064–6066 (2018) (setting out a detailed and ambitious set of criteria for ending the U.S. embargo of Cuba). This detailed list of criteria may be more of a political signal than a set of realistic requirements, but it still signifies the idea that there will be a rapprochement one day when circumstances favor reconciliation. Cf. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT’L L. 419, 425 (1996) (suggesting that reconciliation between the United States and Cuba would likely result in this Act being “amended, repealed, or replaced,” rather than having all of its conditions fully satisfied).

111. Cf. Arjen Boin, *The New World of Crises and Crisis Management: Implications for Policymaking and Research*, 26 REV. POL’Y RES. 367, 367–68 (2009) (observing that crises are more likely today to transcend national boundaries, to jump across industrial sectors, and to spread across time).

112. Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 2, 2015) (blocking the property of certain persons engaging in significant malicious cyber-enabled activities).

113. For one example of a possible test in the near future, see Cai, *supra* note 9, at 86, suggesting that China would invoke a national security exception in the GATT with respect to domestic encryption standards relating to cybersecurity.

114. GROSS & NÍ AOLÁIN, *supra* note 48, at 282–83.

115. *But see* LG&E Energy Corp. v. Argentine Republic, Decision on Liability, ICSID Case No. ARB/02/1, ¶¶ 228–237 (Oct. 3, 2006), <https://www.italaw.com/sites/default/files/case-documents/itao460.pdf> [<https://perma.cc/CL2K-E2K7>] (taking care to define the exact boundaries of the economic crisis that excused Argentina from its treaty obligations).

116. MATSUSHITA ET AL., *supra* note 11, at 553.

rationales for the U.S. measures and the authors' own doubts about their appropriateness.<sup>117</sup> But despite the long-lasting nature of the U.S.-Cuba contest, it is surely not a permanent emergency. It is unclear whether trade or investment tribunals would take a harder line toward permanent emergencies of the kind described here.

#### *E. New Politics*

The above transformations also interact with wider shifts in the nature of politics. Writing after the terrorist attacks on September 11, 2001, some critics noted that concepts of national and international security were deployed as a means of “jurisdictional politics,” as states and other actors sought to create, shape, and contest the boundaries of legal fora and authorities in response to terrorism.<sup>118</sup> At the international level, this meant the formation of new legal categories and methods of administration, which effectively displaced traditional guarantees in the laws of war, human rights, or public law.<sup>119</sup> The system of international economic law now appears to be experiencing a similar transformation, as the exceptionalist framework grapples with new challenges such as cybersecurity and nonhuman threats.<sup>120</sup>

These developments challenge the relationship between trade and security in ways that transform politics within the trading system. Historically, national and international security was itself an organizing principle of the global economic order.<sup>121</sup> The multilateral trading system and the U.S. program of bilateral commercial and investment treaties were founded in part on the conviction that deeper economic integration would mitigate conflicts and prevent world

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117. *Id.* at 551-53. On the shifting justification, see Klinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States Under the GATT National Security Exception*, 11 FLA. J. INT'L L. 559, 570-74 (1997).

118. Jayasuriya, *supra* note 26, at 367 (quoting LAUREN BENTON, LAW AND COLONIAL CULTURES 10 (2002)); see also Martti Koskenniemi, *Introduction* to HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, at xxix, xlvi-xlviii (Oxford Univ. Press 2011) (1933) (discussing the “jurisdictional tug of war” that different institutions and bodies enter into when deciding difficult political questions).

119. See, e.g., Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 40-48 (2010); Jayasuriya, *supra* note 26, at 364-73.

120. See Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. INT'L ECON. L. 449 (2015); Roberts, Moraes & Ferguson, *supra* note 24.

121. See Roberts, Moraes & Ferguson, *supra* note 24 (noting the aspirations of peace and security underpinning similar postwar developments).

wars.<sup>122</sup> As such, the continued existence of the economic system itself was treated as a security matter.<sup>123</sup> This allowed states to characterize as security imperatives actions such as deeper commitments to remove tariffs and the accession of new players like China and Russia to the WTO as security imperatives.<sup>124</sup> At the same time, unilateral protectionist measures and other acts that subverted the liberalizing aims of the economic order could be characterized as “existential threat[s].”<sup>125</sup> In this way, although the trading system allowed states to defect in specific instances to ensure their national security, the overriding security imperative was to preserve the system as such. With respect to national security, this meant that there needed to be a stable and predictable boundary between security measures and economic integration, which the paradigm of interstate conflict provided.

In the contemporary security environment, however, these boundaries have become contested. Some writers have focused on the emergence of a “Geoeconomic World Order,” in which economic competitors are seen as security threats, and economic interdependence is seen as a security risk rather than a benefit.<sup>126</sup> On this view, geopolitical security threats can no longer be separated from economic issues, in part because of the successes of economic globalization: geopolitical rivals such as the United States, Russia, and China are now members of the same economic institutions, purporting to play by the same economic

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122. See VANDELDE, *supra* note 36, at 31-37 (noting the emergence of these views in U.S. foreign policy in the 1930s and 1940s); Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism – A Reply to Simon Batifort & J. Benton Heath*, 111 AM. J. INT’L L. 914, 935 (2017) (updating the argument in the particular context of most-favored-nation clauses). *But see* Barry Buzan, *Economic Structure and International Security: The Limits of the Liberal Case*, 38 INT’L ORG. 597 (1984) (critiquing this view).

123. BUZAN, WAEVER & DE WILDE, *supra* note 26, at 106 (noting that, in contrast to the international military and political systems, the liberal international economic order itself was “routinely invoked” as an object of security).

124. See, e.g., President William J. Clinton, Statement on Permanent Normal Trade Relations with China (Apr. 11, 2000), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 676 (2001). *But see* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 613-16 (2019) (arguing that, by the early 1990s, these justifications for trade liberalization had begun to break down).

125. BUZAN, WAEVER & DE WILDE, *supra* note 26, at 106.

126. Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *The Geoeconomic World Order*, LAWFARE (Nov. 19, 2018, 11:17 AM), <https://www.lawfareblog.com/geoeconomic-world-order> [<https://perma.cc/J6CQ-L3ZN>].

rules.<sup>127</sup> In this new world order, states are increasingly tempted to deploy economic instruments to achieve foreign-policy goals.<sup>128</sup>

In this context, measures perceived to be necessary for state security can implicate the rules of the economic order. The Trump Administration's steel tariffs may be one example, though many observers doubt whether even the Administration seriously believes its own security rationale.<sup>129</sup> A less politically salient, but potentially far-reaching, example may be the U.S. Congress's finding in 2019 that "long-term strategic competition with China" is a national security priority that must be addressed through a combination of military, political, and economic means.<sup>130</sup>

Yet geoeconomics alone does not capture the full effect that transformations in national security have on the economic order. Recent discussions of geoeconomics have tended to focus on great-power contests between the United States and China, with third states either choosing sides or attempting to mediate the conflict.<sup>131</sup> The theory itself is not limited to U.S.-China politics, and some observers have noted the adoption of geoeconomic tactics by other states for reasons wholly unconnected to this emerging great-power rivalry.<sup>132</sup> Yet the focus on economic instruments as a means of "statecraft" still echoes the terms of adversarial interstate contests along the lines of a Cold War model. If this were the only transformation taking place, then it could conceivably provide some stability, as newly emerging interstate rivalries begin to provide a relatively predictable context for the deployment of future geoeconomic measures.

The conceptual transformation of national security itself, however, makes any return to stability unlikely. As detailed above, national security has become a multifaceted, risk-based concept that embraces nonstate actors and nonhuman threats. This exponentially multiplies the potential points of contact between perceived "security" measures and economic rules, including by identifying new

127. See Roberts, Moraes & Ferguson, *supra* note 24.

128. *E.g.*, BLACKWILL & HARRIS, *supra* note 24, at 20.

129. See, *e.g.*, John Brinkley, *Trump's National Security Tariffs Have Nothing to Do with National Security*, FORBES (Mar. 12, 2018, 11:41 AM), <https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security> [<https://perma.cc/6UFQ-6SDJ>] (suggesting "that Trump would not have let Canada and Mexico off the hook if he were really worried about national security" and noting the President's own suggestions that he imposed the tariffs to gain an upper hand in international negotiations).

130. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1261(a), 132 Stat. 1636, 2060 (2018); see also Roberts, Moraes & Ferguson, *supra* note 24 (noting this as a significant development).

131. See, *e.g.*, Roberts, Moraes & Ferguson, *supra* note 126.

132. See BLACKWILL & HARRIS, *supra* note 24, at 49-92 (describing the geopolitical application of seven economic tools in situations outside the U.S.-China rivalry).

vulnerable sectors that must be protected from foreign influence; subjecting an increasingly wide array of emerging technologies to security-based review; broadening the range of economic tools needed to target networks of nonstate adversaries; and even justifying general regulations aimed toward redressing massive problems, such as emerging infectious diseases, economic crisis, or climate change. As the following Parts will discuss, these developments affect both the established practice of managing disputes politically and the emerging trend toward judicial review of security measures.

## II. THE FATE OF NATIONAL SECURITY EXCEPTIONALISM

The transformations wrought by the new national security threaten to undermine established practices for controlling the effect of security measures on the global economy. In the multilateral trading system especially, security measures historically were not subject to any form of judicial oversight and instead were managed through diplomatic negotiations and mutual restraint. This set of informal dispute-settlement practices, referred to here as the “Cold War Settlement” on national security, emerged early in the life of the multilateral trading system and continued into the twenty-first century.<sup>133</sup> As recently as 2011, one author described the Cold War Settlement as a success story, noting that an “unaccountable sovereign domain prevails in one small corner of the trade regime, and yet the WTO continues to thrive.”<sup>134</sup>

The new national security, this Part argues, calls into doubt the sustainability of the Cold War Settlement and the exceptionalist model that it inscribes. The transformations discussed above dramatically increase the proportion of state measures affecting the global economy that could be justified on national security grounds. At the same time, these transformations increase the incentives for states to invoke national security and to test one another’s invocations by resorting to compulsory dispute settlement.<sup>135</sup> These changes also undermine the promise that nonjudicial dispute settlement practices will provide stability and predictability as to the boundary between trade and security.

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133. See *infra* Section II.A. The relationship with security in the investment treaty regime is more complex, owing to differences in treaty language. But even in that regime, most disagreements over security measures were historically handled through diplomacy and only recently became the subject of arbitral proceedings.

134. Alford, *supra* note 6, at 699.

135. See *infra* Section II.B.

### A. *The Cold War Settlement*

The Cold War Settlement emerged as an exceptionalist, nonjudicial model for policing the boundary between “trade” and “security” concerns in the postwar multilateral trading system.<sup>136</sup> At the postwar conferences leading to the failed charter for an International Trade Organization (ITO), the United States insisted on a reservation for security matters,<sup>137</sup> already anticipating that its next major conflict would be with the Soviet Union. Although the ITO Charter was never adopted, its security exception was included, with few changes, in the 1947 General Agreement on Tariffs and Trade (GATT).<sup>138</sup> The GATT subsequently became the sole multilateral instrument governing trade in goods for much of the remainder of the century. The exception, wrote one U.S. negotiator, reflected the fact that the new multilateral trading system was forged “at a time when it [wa]s necessary for the western world to keep itself well prepared to deal with the assault by the Soviet Union.”<sup>139</sup>

In full, the GATT exception for security matters provides:

#### Article XXI: Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which *it considers* contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which *it considers* necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on

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136. For antecedents in early twentieth-century arbitration and economic treaties, see LAUTERPACHT, *supra* note 118, at 147-52; MAZOWER, *supra* note 49, at 121; and Hahn, *supra* note 6, at 563. See also Declaration by the President of the United States of America August 14, 1946 Respecting Recognition by the United States of America of the Compulsory Jurisdiction of the International Court of Justice, 61 Stat. 1218 (describing the types of cases in the ICJ’s jurisdiction); R.Y. Jennings, *Recent Cases on “Automatic” Reservations to the Optional Clause*, 7 INT’L & COMP. L.Q. 349, 362 (1958) (explaining that “national security . . . is not a category capable of any kind of juridical assessment”).

137. Clair Wilcox, *The Promise of the World Trade Charter*, 27 FOREIGN AFF. 486, 492-93 (1949).

138. See U.N. Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, U.N. Doc. E/CONF.2/78, art. 99, ¶ 1 (Mar. 24, 1948) (not in force); GATT 1947, *supra* note 10, art. XXI.

139. Herbert Feis, *The Geneva Proposals for an International Trade Charter*, 2 INT’L ORG. 39, 45 (1948).

- directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.<sup>140</sup>

The critical language in this provision is the phrase “it considers.” This was often understood to render Article XXI(a) and (b) “self-judging,” meaning that the member invoking the security exception—not another state or an international tribunal—must decide whether the exception applies.<sup>141</sup> This interpretation, however, has long been contested, with authors giving textual and historical reasons for doubting that the provision excludes dispute settlement entirely.<sup>142</sup> But the discretion afforded by the phrase “it considers,” combined with the indeterminacy of other undefined terms, suggests that states retain wide discretion in security matters.<sup>143</sup>

The public negotiating record of the ITO Charter also suggests that the parties recognized that politics, rather than law, would play a leading role in disciplining use of the exception. In one of the few exchanges on this subject, the Dutch representative noted the ambiguity and potential breadth in the terms “essential security interests” and “emergency in international relations,” which he said were “difficult to understand” and could create “a very big loophole in the whole Charter.”<sup>144</sup> The U.S. representative, in response, emphasized the need for flexibility, while not wanting to make the clause so broad that it could “permit anything under the sun.”<sup>145</sup> The Dutch delegation did not propose any changes or narrowing language,<sup>146</sup> and the Norwegian delegate, sitting as chairman, added that “the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands delegate has drawn

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140. GATT 1947, *supra* note 10, art. XXI (emphasis added).

141. See *supra* note 11 for examples of such exclusions.

142. See *supra* note 6. For archival work investigating the drafting of this security exception, see VANDEVELDE, *supra* note 36, at 145-54; and Pinchis-Paulsen, *supra* note 30.

143. Note that terms such as “essential security interests,” “emergency in international relations,” “military establishment,” and “directly or indirectly” are undefined in the treaty.

144. U.N. ESCOR, 2d Sess., 33d mtg., at 19, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947).

145. *Id.* at 20-21, as modified by Corrigendum, U.N. ESCOR, 2d Sess., 33d mtg., U.N. Doc. E/PC/T/A/PV/33.Corr.3 (July 30, 1947).

146. *Id.* at 21.

our attention.”<sup>147</sup> This does not necessarily mean the exception is without limits: the text is not totally open-ended,<sup>148</sup> and it was suggested in negotiations that it preserved at least some role for dispute settlement under the Charter’s “nullification or impairment” provisions.<sup>149</sup> Nevertheless, the public position staked out was that the best constraint on trade-related security measures would be diplomacy and the members’ good faith.<sup>150</sup>

Indeed, whatever the parties’ original intent, a practice of national security exceptionalism prevailed within the world trading system for several decades.<sup>151</sup> Shortly after the GATT was adopted, the United States and its allies quickly staked out the position that each state would be the sole judge of what measures are necessary to protect its essential security interests. The issue arose for the first time in response to a complaint by Czechoslovakia that the selective application of U.S. export controls to Eastern European countries violated trade rules on nondiscrimination.<sup>152</sup> The United States defended its policy on national security grounds.<sup>153</sup> Other GATT parties agreed that each state must be the sole judge of its security interests and that the dispute would have to be dealt with diplomatically rather than through any mechanism under the GATT.<sup>154</sup> Czechoslovakia’s

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147. *Id.* at 1, 21.

148. *See id.* at 21 (statement of the U.S. delegate) (explaining that the exception was drafted to foreclose “measures which really have a commercial purpose”).

149. *Id.* at 28-29 (considering the interactions among Charter articles 34, 35, and 94). On the “non-violation” remedy, see *infra* Section IV.C.

150. *Id.* at 21 (statement of the Chairman) (arguing that “the atmosphere inside the ITO will be the only efficient guarantee against abuses” that the Netherlands delegate had discussed).

151. *See generally* Alford, *supra* note 6, at 708-25 (analyzing state practice regarding invocation of the security exception). Alford attempts to leverage this practice for a legal argument, contending that it confirms the self-judging interpretation of Article XXI. *See id.* at 707-08 (citing Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331; Marrakesh Agreement Establishing the World Trade Organization art. XVI(1), Apr. 15, 1994, 1867 U.N.T.S. 154). *But see* *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.80 (describing “the absence of a common understanding regarding the meaning of Article XXI”). The argument presented here is simply that, *in practice*, the trading system for decades reflected an exceptionalist approach to security, and that this bears important lessons for institutional design.

152. GATT Council, 3d Sess., *Summary Record of the Twenty-Second Meeting*, at 5-6, GATT Doc. GATT/CP.3/SR.22 (June 8, 1949) (statement of Czechoslovakia); *see also* MATSUSHITA ET AL., *supra* note 11, at 549 (describing the complaint as bringing about “[t]he first invocation of Article XXI”).

153. GATT Council, 3d Sess., *Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation Under Item 14 on the Agenda*, at 9, GATT Doc. GATT/CP.3/38 (June 2, 1949).

154. *See, e.g.*, GATT Council, 3d Sess., *Corrigendum to the Summary Record of the Twenty-Second Meeting*, at 1, GATT Doc. GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (statement of the United

request to commence an investigation into the U.S. measures was overwhelmingly voted down.<sup>155</sup>

This dispute characterized the trade/security debate for years to come<sup>156</sup> in at least two ways. First, the U.S.-Czechoslovakia dispute reflected a paradigm case of “traditional” national security: it concerned items of purportedly military application and took place against the backdrop of the broader U.S.-Soviet rivalry. States would later push the boundaries of what constituted “military” goods by taking measures relating to oil,<sup>157</sup> shipping,<sup>158</sup> and—most infamously—footwear,<sup>159</sup> but an asserted connection with military readiness often remained. Later uses of the security exception also turned on various interstate conflicts such as Arab countries’ embargo of firms doing business with Israel,<sup>160</sup>

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Kingdom); GATT Council, 3d Sess., *Summary Record of the Twenty-Second Meeting*, *supra* note 152, at 5 (statement of Cuba); *id.* at 7 (statement of Pakistan).

155. GATT Council, 3d Sess., *Summary Record of the Twenty-Second Meeting*, *supra* note 152, at 9.
156. See MATSUSHITA ET AL., *supra* note 11, at 549.
157. See, e.g., *Russia-Transit Panel Report*, *supra* note 14, app. ¶¶ 1.15-1.17; Donald N. Zillman, *Energy Trade and the National Security Exception to the GATT*, 12 J. ENERGY & NAT. RESOURCES L. 117, 122 (1994).
158. See 46 U.S.C. § 55305(b)-(c) (2018); Memorandum from the Italian Embassy (May 7, 1954), reprinted in XXXI DEP’T OF STATE BULL. 68 (July 5, 1954) (stating only that the measure “possibly” violated U.S. treaty commitments); Thomas F. Olson, *Cargo Preference and the American Merchant Marine*, 25 L. & CONTEMP. PROBS. 82, 103 (1960) (noting that the measure was likely inconsistent with commercial treaty obligations unless justified by the security exception).
159. See GATT Addendum, *Sweden—Import Restrictions on Certain Footwear*, GATT Doc. L/4250/Add.1 (Mar. 15, 1977); Swedish Delegation, *Sweden—Import Restrictions on Certain Footwear*, ¶ 4, GATT Doc. L/4250 (Nov. 17, 1975); GATT Council, *Minutes of Meeting*, at 8-9, GATT Doc. C/M/109 (Nov. 10, 1975).
160. See, e.g., Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 69 AM. J. INT’L L. 861, 873-74 (1975) (quoting Letter from Robert J. McCloskey, Assistant Secretary of State for Congressional Relations, U.S. Dep’t of State, to J. Glenn Beall, Senator, U.S. Senate (Apr. 16, 1975)) (implying without stating that Arab states could justify the oil embargo under GATT Article XXI); Jordan J. Paust & Albert P. Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT’L L. 410, 423-26 (1974) (arguing that the boycott was unlawful notwithstanding GATT Article XXI); Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT’L L. 591, 622-23 (1974) (contesting that view).

the U.S. embargo of Cuba,<sup>161</sup> or tensions between Ghana and Portugal.<sup>162</sup> These disputes thus mimicked the structure, if not necessarily the exact substance, of the conflict that provoked the Czechoslovakia dispute.

Second, the U.S.-Czechoslovakia dispute heralded the beginning of an equilibrium during which the exceptionalist approach to dealing with security disputes operated relatively smoothly. Security-related economic measures were often dealt with entirely outside of the GATT.<sup>163</sup> And even when such measures were discussed inside the trading system, they were largely handled through diplomatic discussions rather than formal dispute settlement.<sup>164</sup> Even a controversial Swedish import restriction on boots and other footwear – although now widely thought to be an instance of clear abuse – at the time triggered no formal request for an investigation or dispute settlement at the GATT before being repealed by the Swedish government.<sup>165</sup>

This diplomatic mode of dispute settlement was first seriously tested during the twilight of the GATT in the 1980s. By that time, the process of decolonization and regime change worldwide had fostered a much greater degree of political heterogeneity within the GATT. A 1982 dispute over trade sanctions – connected with the Falkland Islands/Malvinas conflict – saw the emergence of a relatively unified bloc of Latin American, African, and Middle Eastern states arguing that the security exception must be subject to some objective and potentially justiciable limits. Western states, on the other hand, were largely unified in their insistence on the discretionary invocation of the exception.<sup>166</sup> Again, no

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161. See, e.g., GATT Secretariat, *Multilateral Trade Negotiations, Part 4 of the Inventory of Non-Tariff Measures: Specific Limitations, Cuba-U.S.*, at 559-60, GATT Doc. MTN/3B/4 (Feb. 15, 1974) (noting that the United States invoked the security exception as justification for the embargo with Cuba).

162. See GATT Council, *Summary Record of the Twelfth Session*, at 196, GATT Doc. SR.19/12 (Dec. 21, 1961) (statement of Ghana) (asserting that a ban on Portuguese goods was justified because the “situation in Angola was a constant threat to the peace of the African continent”).

163. See Alford, *supra* note 6, at 710 (noting that “[i]t would be over thirty years before the GATT Council debated the security exception again”).

164. See *Russia-Transit Panel Report*, *supra* note 14, app. ¶¶ 1.9-1.21 (noting only four instances between 1950 and 1982 involving interpretation or practice with respect to the GATT security exception).

165. See *supra* note 159.

166. See, e.g., GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, at 5-9, GATT Doc. C/M/157 (May 7, 1982) (recording the opinions of some Latin American, African, and Middle Eastern states that there must be some oversight over security claims); *id.* at 10 (recording the statement of the European Economic Communities that the security exception “constituted a general exception, and required neither notification, justification, nor approval”).

dispute settlement panel was instituted.<sup>167</sup> The same fault lines broke open three years later in a dispute over the U.S. embargo of Nicaragua.<sup>168</sup> This time, a dispute settlement panel was established, but its terms of reference excluded the panel from examining the United States's invocation of the security exception.<sup>169</sup> Still, by the end of the old GATT regime in the early 1990s, no dispute over the security exception had been subject to third-party adjudication.<sup>170</sup>

Beginning in the late 1980s, developments elsewhere started to challenge the Cold War Settlement. At the same time that Nicaragua challenged the U.S. embargo under the GATT, it also brought an ICJ suit alleging that the trade and investment restrictions violated a bilateral treaty of "friendship, commerce, and navigation" (FCN) with the United States.<sup>171</sup> Although the FCT Treaty contained a security exception for measures "necessary" to protect a state's essential security interests, it lacked the critical "it considers" language.<sup>172</sup> The ICJ found both that it had jurisdiction to decide whether the embargo was indeed "necessary" to U.S. national security and determined that the embargo failed that

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167. The GATT parties did produce a general decision on the use of the security exception, but this document was a political compromise that did not place any hard limitations or provide much guidance on its use. See Contracting Parties, *Decision Concerning Article XXI of the General Agreement*, GATT Doc. L/5426 (Dec. 2, 1982).

168. See GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29 May 1985*, at 2-17, GATT Doc. C/M/188 (June 28, 1985); see also *Minutes of Meeting Held in the Centre William Rappard on 17-19 July 1985*, at 41-42, GATT Doc. C/M/191 (Sept. 11, 1985) (recording the United States expressly invoking Article XXI(b)(iii) of the GATT, which applies in time of "war or other emergency in international relations," in trade measures affecting Nicaragua). But see Panel Report, *United States—Imports of Sugar from Nicaragua*, ¶ 3.10, GATT Doc. L/5607 (Mar. 2, 1984), (recording the United States saying it would neither invoke Article XXI nor defend its actions "in GATT terms" with respect to an earlier U.S. measure sharply reducing sugar imports from Nicaragua).

169. Alford, *supra* note 6, at 715. The panel was thus unable to decide whether the United States had violated the GATT. GATT Panel, *United States—Trade Measures Affecting Nicaragua*, ¶¶ 5.1-5.18, GATT Doc. L/6053 (Oct. 13, 1986).

170. After the Nicaragua dispute, there was one more case involving national security measures under the GATT, in which Yugoslavia challenged European economic sanctions, but this did not proceed to a panel decision. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 18 March 1992*, at 14-18, GATT Doc. C/M/255 (Apr. 10, 1992).

171. Treaty of Friendship, Commerce and Navigation, U.S.-Nicar., Jan. 21, 1956, 367 U.N.T.S. 3. See generally Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603 (1987) (discussing the history of and procedural issues in the case).

172. Treaty of Friendship, Commerce and Navigation, *supra* note 171, art XXI(1).

test.<sup>173</sup> In reaching this result, the ICJ was careful to contrast the treaty at issue from the self-judging language of the GATT.<sup>174</sup> But the result provided an alternative model for settling security-related trade and investment disputes based in international law rather than politics.

Indeed, the growth in the 1990s of compulsory dispute settlement in international economic law initially held out a promise of greater judicial governance of security measures. Starting in 1990, arbitral tribunals began to review state actions under BITs, and some of the earliest disputes concerned security-related issues.<sup>175</sup> In the early 2000s, the Argentina investment cases discussed in Part I unanimously reaffirmed the *Nicaragua* court's finding that security exceptions lacking the self-judging "it considers" language were justiciable in principle.<sup>176</sup> The ICJ reiterated the same point in a case involving the United States and Iran.<sup>177</sup> For its part, the newly established WTO adopted binding rules for compulsory and enforceable dispute settlement that prevented any state from unilaterally blocking the establishment of a panel or the adoption of its report.<sup>178</sup>

Ultimately, however, the Cold War Settlement reasserted itself in the post-Cold War trading system and even seemed to expand into the investment-treaty

173. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 116-17, 141 (June 27). For contemporary critiques, see *id.* at 557 (Jennings, J., dissenting); *id.* at 472 (Oda, J., dissenting); *id.* at 560-61 (Schwebel, J., dissenting); and W. Michael Riesman, *Has the International Court Exceeded Its Jurisdiction?*, 80 AM. J. INT'L L. 128, 130-31 (1986).

174. See *Military and Paramilitary Activities*, 1986 I.C.J. at 116.

175. See, e.g., *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 246 (1997).

176. See *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 610 (Oct. 31, 2011), <https://www.italaw.com/sites/default/files/case-documents/itao270.pdf> [<https://perma.cc/487S-ZP6W>]; *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 187 (Sept. 5, 2008), <https://www.italaw.com/sites/default/files/case-documents/itao228.pdf> [<https://perma.cc/A5FD-8ZX9>]; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 374 (Sept. 18, 2007), <https://www.italaw.com/sites/default/files/case-documents/itao770.pdf> [<https://perma.cc/4JGC-HLUJ>]; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 332 (May 22, 2007), <https://www.italaw.com/sites/default/files/case-documents/itao293.pdf> [<https://perma.cc/BZY8-Y2CD>]; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 212 (Oct. 3, 2006), <https://www.italaw.com/sites/default/files/case-documents/itao460.pdf> [<https://perma.cc/CL2K-E2K7>]; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 370-71 (May 12, 2005), <https://www.italaw.com/sites/default/files/case-documents/itao184.pdf> [<https://perma.cc/N66W-C4TZ>].

177. See *Oil Platforms (Iran v. United States)*, 2003 I.C.J. 161, 182-83 (Nov. 6).

178. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, arts. 6-7, 16(4), 17, 21-22, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

regime. In trade, the major component agreements of the WTO system largely reproduced the security exception of the 1947 GATT, including the “it considers” language.<sup>179</sup> However, in 1996, Europe brought a claim against the United States that tested the boundaries of this exception when Europe challenged the WTO legality of certain U.S. measures adopted in connection with the continuing embargo of Cuba.<sup>180</sup> The United States asserted that the measures were taken pursuant to essential security interests and warned WTO members that Europe’s actions could destabilize and undermine the fledgling organization.<sup>181</sup> A dispute-settlement panel was established, but the parties settled prior to any ruling, and the United States refrained from implementing some measures.<sup>182</sup> Because the underlying jurisdictional issue was never resolved, this incident darkened the shadow of dispute settlement over the WTO security exception. But the successful diplomatic settlement of the claim set a pattern as well, and no claims involving security measures were adjudicated for more than twenty years.<sup>183</sup> When security measures were addressed from time to time, it was only within the WTO’s political bodies.<sup>184</sup>

During this period, states also began to reassert control over security measures in the law governing foreign investment, as well as in foreign trade.

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179. The GATT 1947 was incorporated wholesale into the 1994 General Agreement on Tariffs and Trade, which is one of the foundational treaties of the World Trade Organization. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 190. For other agreements, see General Agreement on Trade in Services, art. XIV bis, Apr. 15, 1994, 1869 U.N.T.S. 196 [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 73, April 15, 1994, 1869 U.N.T.S. 299, 331. *But see, e.g.*, Agreement on Technical Barriers to Trade, art. 2.2, Apr. 15, 1994, 1868 U.N.T.S. 120 (providing a limited exception for national security that does not use the self-judging language of the GATT).

180. Request for the Establishment of a Panel by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/2 (Oct. 8, 1996).

181. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 October 1996*, WTO Doc. WT/DSB/M/24, at 7 (Nov. 26, 1996); Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 November 1996*, WTO Doc. WT/DSB/M/26, at 2 (Jan. 15, 1997); *WTO – Dispute Settlement Body: Hearing Before the Subcomm. on Int’l Econ. Policy and Trade of the H. Comm. on Int’l Relations*, 105th Cong. 15 (1998) (statement of Susan G. Esserman, General Counsel, U.S. Trade Rep.).

182. Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, E.U.-U.S., Apr. 11, 1997, 36 I.L.M. 529, 530 (1997).

183. In 2000, Colombia sought to initiate a dispute regarding Nicaraguan trade sanctions in connection with a maritime boundary dispute. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 7 April 2000*, WTO Doc. WT/DSB/M/78, ¶¶ 48-62 (May 12, 2000). A panel was never constituted.

184. See, e.g., Alford, *supra* note 6, at 721-25 (discussing security measures addressed as part of Saudi Arabia’s accession to the organization).

After a series of controversial decisions finding Argentina liable for measures taken in response to its economic crisis,<sup>185</sup> states have increasingly incorporated the self-judging “it considers” language into their investment treaties.<sup>186</sup> The United States, for its part, revised its model BIT in 2004 to make clear that its security exception was entirely self-judging and retained this formulation in its 2012 model.<sup>187</sup> Many states also adopted similar wording in regional and bilateral trade agreements, which often govern both trade and foreign investment.<sup>188</sup> Most of these agreements do not speak directly to the role of a tribunal in reviewing trade measures beyond the “it considers” language, although some expressly forbid any tribunal review;<sup>189</sup> others expressly allow for a deferential form of review.<sup>190</sup> In short, while by no means all international economic arrangements are subject to self-judging security carve-outs, at least for a time there appeared to be a consolidation of a bifurcated system whereby ordinary trade and investment issues would be subject to an increasingly regularized process of adjudication, while security measures would be relegated mostly to political and diplomatic controls.

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185. For a discussion of these cases, see *supra* text accompanying notes 68-76.

186. Karl P. Sauvant et al., *The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements*, COLUM. FDI PERSP. (Dec. 5, 2016), <https://academiccommons.columbia.edu/doi/10.7916/D8862R47/download> [<https://perma.cc/7J3D-8YHZ>]. Sauvant and Ong’s data is current through 2015. It thus, necessarily, does not capture developments in the period following the U.S. steel tariffs and the Russia-Transit Panel Report.

187. U.S. MODEL BILATERAL INVESTMENT TREATY art. 18 (U.S. DEP’T OF STATE 2012); U.S. MODEL BILATERAL INVESTMENT TREATY art. 18 (U.S. DEP’T OF STATE 2004).

188. *E.g.*, United States-Mexico-Canada Agreement, art. 32.2, Can.-Mex.-U.S., Nov. 30, 2018 [hereinafter USMCA], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/2NHJ-65LR>] (not yet in force); Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 29.2(b), Mar. 8, 2018 [hereinafter CPTPP], <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng> [<https://perma.cc/FFC9-5WTX>]; Comprehensive Economic and Trade Agreement, Can.-E.U., art. 28.6, Oct. 2016, Official Journal of the E.U., L 11 (January 14, 2017); Dominican Republic-Central America Free Trade Agreement, C.A.F.T.A.-D.R., art. 21.2, Aug. 5, 2004, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [<https://perma.cc/U9VQ-MV4D>]; North American Free Trade Agreement, Can.-Mex.-U.S., art. 2102, Dec. 17, 1992 [hereinafter NAFTA], 32 I.L.M. 605 (1993).

189. *E.g.*, Trade Promotion Agreement, U.S.-Peru, art. 22.2 & n.2, Apr. 12, 2006, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> [<https://perma.cc/52KY-YVU3>].

190. *See, e.g.*, Free Trade Agreement, China-Peru, art. 194 & n.19, Dec. 6, 2009, <http://fta.mofcom.gov.cn/topic/enperu.shtml> [<https://perma.cc/AM8J-JFBD>].

*B. Corrosion of the Cold War Settlement*

Even as post-Cold War trade and investment agreements enshrined the Cold War Settlement, the model it created has come under increasing strain.<sup>191</sup> This model rests on a set of normative assumptions about the fragility of the international trading system.<sup>192</sup> Under this view, an unaccountable sovereign domain for security measures is the price for ensuring that all states adhere to an international legal regime.<sup>193</sup> If international institutions or courts were to assert authority over states' security policies, the argument goes, these states would either exit the regime or ignore the pronouncements of international courts, corroding the rules themselves.<sup>194</sup> Overreach by international institutions is thus presented as an existential threat to the global order and security exceptions as a "safety valve" that relieve this threat.<sup>195</sup> Legal oversight is unnecessary, the argument continues, because states share an interest in maintaining the overall system and do not wish to see it undermined by an escalating series of adventurous security claims.<sup>196</sup> Political controls, based on mutual interest and reciprocity, are thus preferable to legal ones.

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191. For an exploration of exceptionalism generally in political theory, see LAZAR, *supra* note 19, at 19-51.

192. This discussion of justifications focuses on the trade regime because this is where the normative arguments have been most thoroughly worked out. Despite the different policies implicated by investment law, there has been less thorough consideration in that context of whether the same rationales for security exceptions should apply. *But see* ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN* 160-61 (2009) (suggesting that exceptionalist approaches are appropriate in trade where verification costs are high and the regime deals with general security policies but that different considerations may apply in investment law cases dealing with the application of measures specific to a particular investor).

193. See, for example, similar arguments made in connection with the effort to establish mandatory adjudication (with a security carve-out) after the end of the Cold War. OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, *DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW* 1989-1990, at 207-09 (2003) (describing a proposal to expand compulsory jurisdiction of the World Court while providing a carve-out for national security); Paul Lewis, *World Court Plan Meets Difficulties*, N.Y. TIMES (June 24, 1990), <https://www.nytimes.com/1990/06/24/world/world-court-plan-meets-difficulties.html> [<https://perma.cc/6E2W-VNN6>].

194. See Holger Hestermeyer, *Article XXI*, in *WTO TRADE IN GOODS* 569, 580 (Rüdiger Wolfrum, Peter-Tobias Stoll & Holger P. Hestermeyer eds., 2010) (footnote omitted) (characterizing this view based on the realist school that because "law cannot win in a conflict with national security, it had better not meddle with it"); *cf.* van Aaken, *supra* note 38, at 518-19, 526, 533 (exploring the problems of exit and regret in international economic treaties).

195. See, e.g., Cann, *supra* note 6, at 417.

196. See Alford, *supra* note 6, at 749-57.

This normative justification rests on at least three assumptions about the politics of the international trade and investment system, all of which the new national security fundamentally challenges. First, it assumes that states share an underlying interest in maintaining these systems and that leaders are willing to expend political capital to restrain themselves and each other from taking otherwise politically advantageous actions.<sup>197</sup> But as national security policy evolves, governments are more likely to find security imperatives that override their commitment to maintaining a liberal international economic order.<sup>198</sup> In addition, because geopolitical rivalries now play out within economic institutions rather than outside them, states have greater incentives to advance their strategic aims either by pushing the boundaries of security exceptions or by triggering compulsory dispute settlement when their adversaries do so.<sup>199</sup> The emergence of the new national security can turn public opinion—and hence officials’ reputational calculations—against the stability of the economic order.<sup>200</sup> This is especially the case if the public has internalized the new national security imperatives and values them more highly than liberal trade or investment rules.<sup>201</sup> Democratic politics can also amplify the geoeconomic concerns of political leaders, pressuring them to ratchet up pressure on their trading partners in the name of national security.<sup>202</sup>

Second, the justification assumes that all relevant actors know the circumstances in which security claims are likely to be made. The Cold War allowed for clear delineation between ordinary trade measures and extraordinary security measures through a focus on military readiness and the example of the U.S.-Soviet conflict. Although this frame does not itself necessarily give rise to a readily applied *legal* limitation on the security exception, it does provide a political

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197. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY* 85-109 (1984); ROBERT O. KEOHANE, *Reciprocity in International Relations*, in *INTERNATIONAL INSTITUTIONS AND STATE POWER* 132-52 (1989).

198. Cf. BUZAN, WAEVER & DE WILDE, *supra* note 26, at 106.

199. See *supra* Section I.E. It is thus notable that the first-ever panel dispute on the WTO security exception arose amid a tug-of-war between Europe and Russia over Ukraine. See Russia-Transit Panel Report, *supra* note 14, ¶¶ 7.6-7.7; cf. Rostam J. Neuwirth & Alexandr Svetlicinii, *The Economic Sanctions over the Ukraine Conflict and the WTO: ‘Catch-XXI’ and the Revival of the Debate on Security Exceptions*, 49 *J. WORLD TRADE* 891, 893 (2015) (describing these tensions and presciently suggesting that they provide a chance to clarify Article XXI).

200. See generally Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 *HARV. INT’L L.J.* 487, 497 (1997) (explaining how reputation can be a double-edged sword).

201. Consider, for example, the growing transnational movement on the existence of a “climate emergency.” See *supra* text accompanying notes 64-67.

202. See *supra* note 130 and accompanying text (noting the sense of Congress that the rise of China should be addressed through a combination of military, political, and economic means).

narrative as to when security measures should be expected and when they are out of place.<sup>203</sup> The rise of the new national security makes it increasingly likely that states will come to the table with vastly divergent ideas about what types of issues can and should constitute a “security interest” or an international “emergency.” Without a process such as third-party dispute settlement to develop shared meanings, diplomatic controls will likely prove inadequate in containing the proliferation of security measures.

Third, it assumes that the costs of an adverse finding on security measures are large enough to validate the fear of withdrawal that lies at the heart of the justification for the Cold War Settlement. A withdrawal threat is clearly credible in some circumstances. It would not have been unreasonable, for example, to think that Cold War-era publics might have pressured U.S. officials to leave the GATT if they thought trade rules prevented the United States from exercising a free hand vis-à-vis the Soviet Union. More recently, perceptions that international economic rules are impediments to climate-change regulation have generated domestic pressures to withdraw from trade and investment treaties. If climate policy were fully “securitized,” such pressures would increase.<sup>204</sup> Finally, the United States’s current complaint that the WTO rules do not effectively constrain China, while not directly concerning Article XXI, resonates broadly with U.S. security concerns. Indeed, it has recently led the United States to entirely block the dispute-settlement system’s functioning.<sup>205</sup> But it is less clear that, in all cases, the exercise of any judicial oversight of national security measures would necessarily lead states to withdraw from the system as a whole, particularly where security has become an increasingly diffuse and multifaceted concept. In fact, as “security” begins to overlap more fully with ordinary regulatory policy, it may take some of the teeth out of the normative argument in favor of the Cold War Settlement’s diplomatic- and power-based model.

The expansive conception of national security and the changes in security politics discussed above render the Cold War Settlement model increasingly unlikely to deliver the stability and predictability it previously afforded. Instead, a

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203. Cf. *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.81 (indicating that the “[p]anel does not assign any legal significance” to the observation that “[m]embers have generally exercised restraint in their invocations of Article XXI(b)(iii), and have endeavoured to separate military and serious security-related conflicts from economic and trade disputes”).

204. There is dispute about whether trade and investment rules really do constrain legitimate environmental regulation. See *infra* notes 381-384 and accompanying text.

205. See, e.g., Markus Wagner & Weihuan Zhou, *The WTO Dispute Settlement System: Just Another Victim on the Road to Tomorrow’s GATT?*, INT’L L. ASS’N REP., <http://ilareporter.org.au/2019/07/the-wto-dispute-settlement-system-just-another-victim-on-the-road-to-tomorrows-gatt-markus-wagner-and-weihuan-zhou> [<https://perma.cc/4GDK-H5CV>].

turn away from global, multilateral economic agreements and toward regional institutions and bilateralism—a preference recently espoused by the United States<sup>206</sup>—could reproduce that stability in smaller clubs that are more ideologically homogeneous and suited to hegemonic pressure.<sup>207</sup> But the unpredictability created by the new national security will continue to challenge the existing economic rules of the road even in those smaller fora.

### III. JUDGING THE NATIONAL SECURITY STATE IN ECONOMIC TRIBUNALS

The leading alternative to the Cold War Settlement model has been a proposal to adjudicate security measures before specialized trade panels and investment tribunals. However, given the relative lack of jurisprudence on self-judging security exceptions, there is no consensus among governments or scholars on the legal basis for judicial review, its scope, or the appropriate standards to apply.<sup>208</sup> Proposals range from a light-touch review that polices for pretext and abuse to more searching substantive review and the imposition of broad procedural standards. Security measures that do not meet such stringent criteria, and that are otherwise inconsistent with a trade or investment rule, would constitute treaty violations. A panel in such a case would be empowered to recommend prospective relief or award retrospective compensation, depending on its mandate.<sup>209</sup>

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206. See William Mauldin, *Trump's Big Gamble: Luring Countries into One-on-One Trade Deals*, WALL ST. J. (Jan. 27, 2017, 5:39 PM), <https://www.wsj.com/articles/trumps-big-gamble-luring-countries-into-one-on-one-trade-deals-1485483628> [https://perma.cc/8MAM-43LZ].

207. See generally Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD 219 (Robert O. Keohane ed., 2002) (describing international institutions as forums for state-based negotiation); Nicolas Lamp, *The Club Approach to Multilateral Trade Lawmaking*, 49 VAND. J. TRANSNAT'L L. 107 (2016) (expanding on the club model to argue that international institutions allow insiders to control membership in the club based on desirable membership traits); Matthew C. Turk, *Reversing the Two Wrong Turns in the Economic Analysis of International Law: A Club Goods Theory of Treaty Membership & European Integration*, 36 BERKELEY J. INT'L L. 445 (2018) (applying the club model to European interstate cooperation).

208. See sources cited *supra* note 6.

209. In general, trade panels recommend prospective relief, while investment tribunals issue retrospective damages awards that are enforceable in domestic courts. On the difference in remedies afforded by trade and investment tribunals, see generally ALVAREZ, *supra* note 68, at 38-75.

Indeed, questions surrounding the security exception are finally beginning to be tested before tribunals after more than seventy years. The *Russia-Transit* panel rejected exceptionalism in favor of a two-stage review of trade-restrictive security measures in the first publicly known economic dispute to interpret and apply a GATT-style security exception.<sup>210</sup> Under this model, a panel first fully reviews whether the measure falls within one of the three preconditions for invoking the security exception.<sup>211</sup> It then determines more deferentially whether the state could in good faith consider its measure “necessary” to protect its “essential security interests.”<sup>212</sup> The *Russia-Transit Panel Report* will be influential on future trade and investment panels, and it therefore merits close consideration.<sup>213</sup> Nevertheless, this discussion also considers alternative approaches suggested in the literature because WTO panel reports have no formal precedential effect and because the report itself leaves many questions unanswered.

As a technical matter, judicial review can enforce either *primary* or *secondary* limitations on security and emergency measures.<sup>214</sup> Primary limitations perform a gatekeeping function, labeling certain types of purported “security interests,” or certain declared “emergencies,” as out-of-bounds and thus outside the treaty’s security exception.<sup>215</sup> Secondary limitations purport not to question the existence of a security interest or an international emergency but rather to investigate the nexus between the security interest and the particular measure adopted. This might include considering either the substantive rationality or necessity of a measure (as in a proportionality or strict-scrutiny test) or the procedure used to adopt the security measure. Many of the approaches in the literature, as well as in the *Russia-Transit* case, propose both primary and secondary limitations in their interpretations of self-judging security clauses.

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210. J. Benton Heath, *Trade, Security and Stewardship (Part IV): A Variable Framework for Security Governance*, INT’L ECON. L. & POL’Y BLOG (May 8, 2019, 6:09 PM), <https://worldtradelaw.typepad.com/ielpblog/2019/05/guest-post-trade-security-and-stewardship-part-iv-a-variable-framework-for-security-governance.html> [<https://perma.cc/DF53-8ETH>] (noting that this two-step approach is the “headline, black-letter lesson to be drawn from the panel report”).

211. See *Russia-Transit Panel Report*, *supra* note 14, ¶¶ 7.53–.101. These preconditions require that the measure relates either to nuclear materials, military supplies, war, or an “other emergency in international relations.” GATT 1947, *supra* note 10, art. XXI(b)(i)–(iii).

212. *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.4; see *id.* ¶¶ 7.53–.101, 7.127–.146.

213. See, e.g., J. Benton Heath, *Trade, Security and Stewardship (Part V): Implications for International Economic Law*, INT’L ECON. L. & POL’Y BLOG (May 9, 2019, 7:08 PM), <https://worldtradelaw.typepad.com/ielpblog/2019/05/guest-post-trade-security-and-stewardship-part-v-implications-for-international-economic-law.html> [<https://perma.cc/R53W-B6RB>].

214. This distinction is made in GROSS & NÍ AOLÁIN, *supra* note 48, at 283.

215. *Id.*

The case for judicial review at either level turns on the instrumental and principled benefits of adjudication. In terms of efficiency, some degree of judicial oversight can ensure that states retain the flexibility they sought *ex ante* while constraining opportunistic envelope-pushing *ex post*.<sup>216</sup> A more normatively charged argument grounds the case for judicial review in the rule of law, focusing on the corrosive effect that self-judging provisions would have on the legal order.<sup>217</sup> In this view, the “it considers” language signifies that states wish to retain extraordinary discretion and flexibility. But tribunals can still afford the right degree of discretion through deferential standards of review and other ordinary judicial techniques.<sup>218</sup> Advocates of the adjudicatory model accept the risk that states may flout adverse rulings or exit the regime altogether. Indeed, they may argue that this risk is all the more acceptable as trade and security become deeply entangled and exceptionalism increasingly threatens to swallow the rules. If the price of staying in the regime is undermining the rules, then even politically contentious alternatives may be preferable.

The new national security challenges the prospects for judicial review as well, raising serious questions about the ability of international adjudication to facilitate review and promote the rule of law. The case for adjudication depends on the capacity of international economic tribunals to distinguish legitimate national security claims from impermissible ones. In some cases, tribunals may be well equipped to conduct this kind of review, such as where the measure at issue is only masquerading as a security imperative to hide what is clearly outright protectionism or hostility to foreigners.<sup>219</sup> But where the measure is, at least potentially, a good-faith but novel security claim, tribunals may face a different set of problems. These types of security claims, to borrow a phrase, threaten to

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216. See, e.g., van Aaken, *supra* note 38, at 524–26 (suggesting that a good-faith test could replicate the parties’ *ex ante* expectations while preventing opportunism).

217. See, e.g., VANDEVELDE, *supra* note 36, at 154 (framing the argument for judicial review of security measures in explicit rule-of-law terms); Geraldo Vidigal, *WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed—Something Blue?*, 46 LEGAL ISSUES ECON. INTEGRATION 203, 224 (2019) (observing that the *Russia—Traffic in Transit* panel, by rejecting a purely self-judging interpretation, “not only arrived at but began from a fundamentally Lauterpachtian stance”).

218. See, e.g., European Union Third Party Written Submission, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 49–51, WT/DS512 (Nov. 8, 2017) [hereinafter EU Written Submission], [https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156602.pdf](https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf) [<https://perma.cc/VN8R-PMDZ>]; Burke-White & von Staden, *supra* note 6, at 381; Schloemann & Ohlhoff, *supra* note 6, at 447–49.

219. See *infra* Section III.A.

stretch tribunals and panels “between the poles of inert deference and overreaching defiance.”<sup>220</sup>

The following discussion considers proposed deferential standards of review, including good-faith tests, substantive tests, and procedural review. I assess how each would manage potentially legitimate but novel security policies. The argument here is not that tribunals can easily sort abusive policies from novel ones. Rather, it is that, outside of a small set of patently abusive security measures, the new national security hinders the ability of tribunals to exercise meaningful review while also maintaining a high degree of deference.

### A. *Controlling for Abuse*

Many proposals for assessing the self-judging security exception center on combatting obvious or flagrant abuses.<sup>221</sup> This approach, which can be operationalized as either a primary or secondary limitation, can leverage well-established principles of treaty law to ensure that states, at minimum, do not use a broad security exception to defy or undermine a trade or investment treaty. This approach can have high political costs for an international regime because it usually requires finding that a state’s security measure was not only unlawful but also patently abusive.<sup>222</sup> Despite these political costs, international tribunals have the doctrinal tools at their disposal to conduct a coherent and deferential good-faith review. However, such review still poses a conceptual problem for the new national security because a focus on curbing outright abuse is neither designed nor well-suited to addressing the proliferation of novel but potentially good-faith security policies.

The legal basis for good-faith review, either as a primary or secondary limitation, is said to be located in the law of treaties. States are required to perform their treaty obligations and to interpret treaty terms in good faith, according to

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220. Hovell, *supra* note 21, at 11 (discussing the judicial and legislative review of Security Council sanctions).

221. For approaches that most closely match that of controlling-for-abuse, see Third Party Oral Statement of Australia, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 12-20, WT/DS512 (Jan. 25, 2018), <https://dfat.gov.au/trade/organisations/wto/wto-disputes/Documents/ds512-australias-third-party-oral-statement-240118.pdf> [<https://perma.cc/VER6-N247>]; Akande & Williams, *supra* note 6, at 386-402; and Burke-White & von Staden, *supra* note 6, at 376-81.

222. See, e.g., *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16 & ARB/03/02, Opinion of José E. Alvarez, ¶ 78 & n.93 (Sept. 12, 2005); cf. *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 I.C.J. 9, 52-54 (July 6) (separate opinion by Lauterpacht, J.) (arguing that any good-faith/bad-faith inquiry could in fact be quite “exacting”).

their ordinary meaning and in light of their context and the treaty's purpose.<sup>223</sup> The ICJ and the *Russia-Transit* panel have reasoned that, even where a treaty uses the self-judging "it considers" language, this overarching good-faith obligation is nonetheless justiciable.<sup>224</sup> Good faith also may have a role to play even outside of expressly self-judging elements. Broad treaty terms such as "essential security" or "emergency" are so open-ended that they necessarily afford a great deal of discretion to the invoking state, which is only limited by good faith.<sup>225</sup> For example, a tribunal could decide that it was up to the invoking state, in principle, to identify an emergency in international relations,<sup>226</sup> but the state's discretion to do so is limited by a reviewable obligation of good faith.<sup>227</sup>

There is no single agreed-upon formulation of a "good-faith test," but proposals generally focus on separating genuine security policies from abuse, pretext, and subversion of the treaty. At a bare minimum, tribunals might use the good-faith requirement to demand that the invoking state articulate the nature of the security interest involved and its relationship to the measure at issue. If a state simply refuses to explain its security rationale, then the exception may not

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223. Vienna Convention on the Law of Treaties, arts. 26, 31(1), May 23, 1969, 1155 U.N.T.S. 331.

224. Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. 177, ¶ 145 (June 4); *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.132. This is not a foregone conclusion. Although states are indisputably obligated as a matter of law to perform and interpret even self-judging treaty provisions in good faith, it does not necessarily follow that a court or tribunal is empowered to review compliance with this obligation. *Cf.* *Fr. v. Nor.*, 1957 I.C.J. at 52-53 (separate opinion of Lauterpacht, J.).

225. *E.g.*, MATSUSHITA ET AL., *supra* note 11, at 550-51. On "essential security," see Military and Paramilitary Activities, *supra* note 11, ¶ 224.

226. The term "emergency in international relations" is not a term of art in international law. Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133, 183 (2002). For some antecedent uses, see Act of June 15, 1917, Pub. L. No. 65-24, tit. II, § 1, 40 Stat. 217, 220 (codified as amended at 50 U.S.C. § 191 & 46 U.S.C.A. § 70051 (West 2018)) (permitting measures with respect to maritime traffic in the event of "disturbance of the international relations of the United States"); *Extending Reciprocal Foreign Trade Agreement Act: Hearing on H.R.J. Res. 96 Before the H. Comm. on Ways and Means*, 75th Cong. 3, 6 (1937) (statement of Cordell Hull, Secretary of State) (using the phrase "emergency in the field of international relations" to refer to the collapse of international commerce during that period); and Preparatory Comm. of the United Nations Conference on Trade & Emp't., *supra* note 144, at 20 (suggesting that the United States "had in mind" the situation before its entry into World War II), *as modified by* Corrigendum, U.N. Doc. E/PC/T/A/PV/33.Corr.3 (July 30, 1947).

227. This may be one way to implement *Russia-Transit*, which suggests that existence of an "emergency" is reviewable, but defines the term broadly. *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.132; *see also* Heath, *supra* note 210.

apply.<sup>228</sup> Tribunals might find a violation where a state's articulated rationale for a security measure patently falls outside the scope of the exception.<sup>229</sup> In taking this approach, tribunals could exclude security interests that effectively subvert the entire treaty regime, such as when a state claims that economic autarky constitutes an essential security interest under a treaty meant to further trade liberalization.<sup>230</sup> Additionally, tribunals might review the public record for indications that the state does not actually "consider" the measures at issue to be in its security interests, and that the security rationale is a pretext for other motives.<sup>231</sup>

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228. See *Russia-Transit Panel Report*, *supra* note 14, ¶¶ 7.119, 7.134. But see J. Benton Heath, *Trade, Security and Stewardship (Part III): WTO Panels as Factfinders Under Article XXI*, INT'L ECON. L. & POL'Y BLOG (May 7, 2019, 1:36 PM), <https://worldtradelaw.typepad.com/ielpblog/2019/05/guest-post-trade-security-and-stewardship-part-iii-wto-panels-as-factfinders-under-article-xxi.html> [<https://perma.cc/9SWS-8DVK>] (noting that the panel appeared to be satisfied with an extremely low degree of clarity and specificity from Russia in this respect).
229. This was suggested by the ICJ, which held in the *Mutual Assistance in Criminal Matters* case that a French court's refusal to transfer a case file containing defense secrets was a good-faith application of a self-judging exception to a legal-assistance treaty. *Djib. v. Fr.*, 2008 I.C.J. ¶¶ 145-48 (limiting its inquiry to whether the reasons stated in the court decision "fell within those allowed for" in the treaty). One judge would have gone further and found a failure of good faith because the French court appeared to consider additional reasons for refusing assistance that were clearly beyond the scope of the self-judging exception and because the court did not appear to consider available and less restrictive alternatives. See *id.* ¶¶ 7-11 (declaration of Keith, J.). Using good-faith to imply these kinds of procedural requirements is considered further *infra* Section III.C.
230. See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, *supra* note 144, at 21 (noting the U.S. intention that the security exception not extend to measures "which really have a commercial purpose").
231. See, e.g., *Fr. v. Nor.*, 1957 I.C.J. at 94 (Read, J., dissenting). This approach raises difficult questions of whose statements to credit, how to address interagency or interbranch disagreement about a security measure and whether to consider statements made in a private capacity. Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (noting that the Court was being asked "to probe the sincerity of the stated [security] justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office"). These issues could be tested if pending cases on national security tariffs and economic sanctions proceed to a decision. See, e.g., Gregory Korte, *White House: States of Emergency Are Just Formalities*, USA TODAY (Apr. 9, 2015, 12:33 PM), <https://www.usatoday.com/story/news/politics/2015/04/09/pro-forma-states-of-national-emergency/25479553> [<https://perma.cc/VDP5-4AL3>] (quoting a White House deputy national security adviser as saying that, despite new emergency economic sanctions, "the United States does not believe that Venezuela poses some threat to our national security. We, frankly, just have a framework for how we formalize these executive orders"); Phil Levy, *Commerce Dept. Sees Strong Link Between Steel And National Security; Military Doesn't Seem So Sure*, FORBES (Feb. 27, 2018, 10:29 PM), <https://www.forbes.com/sites/phillevy/2018/02/27/in-the-battle-for-steel-the-military-weighs-in> [<https://perma.cc/KEY3-Y7P3>] (noting that public interagency disagreement on the rationale for steel tariffs would lead to different policy outcomes).

Finally, some have suggested that the principle of good faith is a sufficient legal basis on which to impose something like a rational-basis or plausibility test on security measures, requiring that “the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests.”<sup>232</sup> This latter approach could shade into deeper, substantive review. For example, as Shin-yi Peng argues, restrictions on the Chinese telecommunications company Huawei might plausibly be justified on cybersecurity grounds.<sup>233</sup> However, such measures would have to contend with the reality that restrictions on “one or two companies” might make only a minimal contribution to national security in a world of integrated supply chains.<sup>234</sup>

These approaches hold some promise for constraining abuses of the security exception, but they are not designed to confront the new national security. Although in many cases military and strategic interests still form the core of what states consider to be their national security interests, it is no longer clear that only military-related issues can be deemed “essential” security issues. Indeed, when a sitting U.S. President declares that climate change, and not ISIS, is an “existential threat” to the United States, the military-centered vision of security appears turned on its head.<sup>235</sup> In these circumstances, states can more easily argue that a wide range of measures both implicate a state’s essential security interests and can “plausibly” contribute to protecting those interests. Beyond this threshold, however, the control of new national security measures falls once again to politics and self-restraint, with the attendant problems discussed above.<sup>236</sup>

This does not mean that good-faith review would be wholly without bite. The forms of review described above could impose some discipline on opportunism and pretext. The mere possibility of good-faith review, moreover, would lengthen the shadow of the law to exert more *ex ante* pressure on states to discipline their behavior. Good-faith review also provides tribunals with a toehold to assert jurisdiction over security matters, which might be gradually expanded

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232. *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.138; see Akande & Williams, *supra* note 6, at 392 & n.111; Burke-White & von Staden, *supra* note 6, at 380.

233. Peng, *supra* note 120, at 473-74.

234. *Id.*

235. Jeffrey Goldberg, *The Obama Doctrine*, ATLANTIC (Apr. 2016), <https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525> [https://perma.cc/BFD3-XFNF]. It is another question whether this shift in rhetoric is matched with a shift in institutional priorities. For a critical examination, see FLOYD, *supra* note 53.

236. See *supra* Part II.B.

over successive cases.<sup>237</sup> In this respect, good-faith review, though initially deferential, could become a Trojan horse to introduce the more intrusive styles of review discussed below.

### B. Substantive Review of Security Measures

Some advocates of judicial review go further and argue that even under putatively self-judging clauses, international tribunals can and should impose significant substantive limits on state security measures. This can be done at either stage of the analysis. As a primary limitation, tribunals can impose objective limits on certain terms—like “essential security,” “war,” or “emergency”—that narrow the scope of discretion afforded to states. Second, courts and tribunals can apply strict scrutiny, proportionality review, or some other substantive standard to review the nexus between the stated security interest and the measure at issue. Whatever the merits of these approaches, the new national security poses a significant challenge: substantive review greatly increases the risk that international tribunals will override states’ evolving national security priorities and reimpose narrower, military-focused notions of security.

Advocates of a more substantive approach to the gatekeeping function ground their views in a mixture of textual and principled arguments. As a textual matter, it has long been asserted that the subelements of GATT Article XXI(b)—which refer to fissionable materials, arms traffic, military supplies, war, and international emergency<sup>238</sup>—are not subject to the self-judging language and have objective content that is fully justiciable by a tribunal.<sup>239</sup> Some argue that in reviewing terms like “essential security” and “national security,” courts should limit the scope of the terms at the very least to the purpose and context of the agreements in which they appear. Accordingly, many contend that “essential security interests” in trade agreements cannot extend to the state’s interest in promoting economic autarky<sup>240</sup> and that the same term in investment treaties

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237. Cf. Robert Howse, *Moving the WTO Forward—One Case at a Time*, 42 CORNELL INT’L L.J. 223, 223 (2009) (discussing the incremental evolution of legal systems in the WTO context).

238. See *supra* treaty text accompanying note 140.

239. E.g., *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.82; MATSUSHITA ET AL., *supra* note 11, at 550; VANDELDE, *supra* note 36, at 151-53; Hahn, *supra* note 6, at 584; Schloemann & Ohlhoff, *supra* note 6, at 446.

240. See, e.g., EU Written Submission, *supra* note 218, ¶ 50 (discounting “[p]urely protectionist interests”); Hahn, *supra* note 6, at 580-82.

should not be interpreted so broadly as to excuse any taking for any public purpose.<sup>241</sup> Some regional human rights court decisions at least implicitly adopt the same approach to interpretation.<sup>242</sup>

This purposive approach suggests that there must be *some* limits: if truly anything can be a matter of national security – or an international emergency – then states could impose trade barriers, adopt arbitrary or discriminatory measures vis-à-vis foreign investment, or expropriate investments without compensation under any circumstances. But this approach does not specify where those limits should be, which could bring international economic tribunals directly in tension with the new national security. In the absence of guidance, tribunals are likely to render inconsistent decisions or even fall back on traditional understandings of national security. The recent cases involving India provide an example of what may occur. Each tribunal, seeking some way to limit India’s security claims and give effect to the treaties’ expropriation provisions, adopted a traditional understanding and decided that “essential security” covered only military and “para-military” activities, and not other matters, such as natural-disaster response.<sup>243</sup> Whatever their merits, these decisions reflect an approach that, if generalized, could set potentially intrusive and unpredictable limits on states’ abilities to redefine their security policies in the twenty-first century.

Perhaps for this reason, some economic tribunals and commentators have avoided focusing extensively on the gatekeeping question of what constitutes national security. Instead, they have reviewed the legitimacy of the actual security measure at issue.<sup>244</sup> Most tribunals to review security measures under non-self-judging clauses have adopted this approach and focused on whether the

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241. See *supra* text accompanying notes 100–108 (discussing the CC/Devas Award on Jurisdiction and Merits and the Deutsche Interim Award).

242. See, e.g., *C.G. & Others v. Bulgaria*, App. No. 1365/07, ¶ 43 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/eng?i=001-86093> [<https://perma.cc/69DD-FTF3>] (finding that the state’s interest in preventing illegal drug trafficking is not a matter of “national security” because that term is used in an exception relating to the rights of aliens in expulsion proceedings).

243. See *supra* text accompanying notes 100–108. The outcome in these cases may have been influenced by the difficulty that both tribunals had in sorting out both the true security interests at stake and the true purpose for which India had expropriated the investor’s rights. See Deutsche Interim Award, *supra* note 101, ¶¶ 284–91; CC/Devas Award on Jurisdiction and Merits, *supra* note 11, ¶¶ 82–109 (Haigh, dissenting).

244. Other authors have noted and critiqued a similar tendency in international human rights jurisprudence. See Oren Gross & Finnouala Ní Aoláin, *From Discretion to Scrutiny*, 23 HUM. RTS. Q. 625, 626–27 (2001).

measures were truly “necessary” to the state’s essential security interests.<sup>245</sup> Several commentators have suggested that tribunals might take a similar approach to reviewing security measures under self-judging clauses—though perhaps with a lighter touch—by amplifying states’ obligations to perform and interpret treaties in good faith.<sup>246</sup> On this view, good-faith review would encompass not only the efforts to control for abuse discussed above but also an objective component, allowing tribunals to inquire into the objective reasonableness or proportionality of the measure.

Given the expansion and destabilization of national security over recent decades, it is unclear whether a standard of review alone can effectively strike this balance, even if consensus could be reached on the precise standard. Once objective considerations of reasonableness or proportionality enter into the review, it will be difficult for tribunals to avoid second-guessing a state’s judgment as to what constitutes its national security interest. For example, in determining whether a measure is “necessary” to secure compliance with other laws and regulations, the WTO Appellate Body considers “the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect.”<sup>247</sup> This approach expressly incorporates political value judgments as to which risks are more important and thus justify greater interference with trade or investment. It then transports those value judgments from domestic politics to supranational adjudication.

This approach would thus likely have the effect of imposing the same kind of gatekeeping judgments discussed above but would do so implicitly and with

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245. *E.g.*, *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 183-99 (Nov. 6); *Military and Paramilitary Activities*, *supra* note 10, at 140-42; *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 196-236 (Sept. 5, 2008) <https://www.italaw.com/sites/default/files/case-documents/itao228.pdf> [<https://perma.cc/4CLP-UURP>]; *Deutsche Interim Award*, *supra* note 101, ¶¶ 284-91; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 226-61 (Oct. 3, 2006).

246. *See, e.g.*, EU Written Submission, *supra* note 218, ¶ 55; Akande & Williams, *supra* note 6, at 389-92; Burke-White & von Staden, *supra* note 6, at 376-81; Kenneth J. Vandeveld, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT’L TAX & BUS. LAW. 159, 176-81 (1993).

247. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 162, WTO Doc. WT/DS161/AB/R (adopted Dec. 11, 2000). The same considerations are applied by the WTO Appellate Body with respect to environmental and public health measures and by at least one investment tribunal in the context of non-self-judging security provisions. *See Cont’l Cas. Co. v. Argentine Republic*, Award, ¶ 194; Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 142, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter Appellate Body Report, *Asbestos*]. For critiques of *Cont’l Cas. Co. v. Argentine Republic*, see Alvarez & Brink, *supra* note 76, at 331-61; and Claussen, *supra* note 76.

even greater opacity and unpredictability. WTO jurisprudence on other provisions has created similar tensions, for example when the Appellate Body has implicitly established that public policies addressing some risks (such as to life and limb) are more important than others (such as consumer fraud) and hence more likely to receive deference.<sup>248</sup> Transporting this logic to the national security realm would likely mean once again falling back on traditional understandings of security and giving greater deference to measures taken in the context of military activity or interstate conflict, rather than measures taken pursuant to new security interests. For example, terrorism sanctions or embargoes in the context of interstate conflicts may be upheld as a matter of course, while measures to address climate security might pass a proportionality test only where environmental threats become “a matter related to the very existence of a nation,” as in the case of sinking island states.<sup>249</sup>

Recent arguments advanced in the context of the WTO demonstrate this tendency. The *Russia-Transit Panel Report* appears to expressly use military security as an anchor against which to assess claims of “emergencies”:

[T]he less characteristic is the “emergency in international relations” invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict.<sup>250</sup>

This differential treatment may seem necessary to contain the expansion of “national security,” but it is difficult to justify as a textual or principled matter.<sup>251</sup>

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248. E.g., J.H.H. Weiler, *Brazil—Measures Affecting Imports of Retreaded Tyres (DS322)*, 8 WORLD TRADE REV. 137, 140 (2009).

249. See George-Dian Balan, *On Fissionable Cows and the Limits to the WTO Security Exceptions*, 14 GLOBAL TRADE & CUSTOMS J. 2, 5-6 & n.36 (2019).

250. *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.135.

251. One attempt to offer a principled justification is suggested in a recent filing by the European Union. There, the EU suggested that there is a kind of lexical priority between the public-policy exceptions elsewhere in economic treaties (such as GATT Article XX and GATS Article XIV) and the security exceptions. The idea is that many of the emerging nontraditional security interests are “covered by the general exceptions in Article XX,” and “Article XXI cannot be used to circumvent the requirements of Article XX,” such as the requirement to submit to full judicial review whether the measure is necessary or applied in a discriminatory manner.

This is especially true given that the terms “essential security interests” and “emergency” were likely meant to be flexible and to evolve over time.<sup>252</sup> Even if this balancing approach could be legally justified, it is less deferential to states’ security policies and the evolution of new security interests than is often claimed.

C. *Procedural Review and the National Security State*

In response to these problems, some suggest turning to a process-oriented review of security measures, similar to that conducted in domestic administrative law.<sup>253</sup> On this view, the principle that treaties must be performed in good faith can be elaborated to impose norms such as reason-giving, public participation, and transparency in the decision-making process. Such an approach might allow states the space to define their security interests by imposing requirements only on *how* states decide to protect them, not *what* those interests are.<sup>254</sup> The “procedural turn” thus seeks to leverage domestic political and administrative processes to counteract the instability caused by changing ideas about national security. This approach, although a potentially promising response to the challenges of substantive review, asks specialized tribunals to step into a potentially powerful lawmaking role vis-à-vis an unfamiliar and changing national security state.

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Third Party Oral Statement of the European Union, *Russia—Measures Concerning Traffic in Transit*, ¶ 27, WT/DS512 (Jan. 25, 2018), [https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156603.pdf](https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156603.pdf) [<https://perma.cc/P22K-93MG>]. The trouble is that there are obvious overlaps between even “classic” security interests and some of the types of public policies addressed in Articles XX and XIV, such as public morals, public order, measures necessary to secure compliance with the law, and measures necessary to protect human health. See GATT 1947, *supra* note 10, art. XX; GATS, *supra* note 179, art. XIV. *But cf.* El Paso Energy Int’l Corp. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 588 (Oct. 31, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf> [<https://perma.cc/99FA-27X3>] (suggesting a sharp distinction between “essential security” and “public order”). The problem of the new national security returns: Panels would either have to exclude some traditional security interests from the self-judging clause because they are also covered by the public-policy exceptions (which is unlikely), or they would have to prioritize old national security over the new national security.

252. See, e.g., *Russia-Transit Panel Report*, *supra* note 14, ¶ 7.131.

253. See Schill & Briese, *supra* note 6, at 120–38.

254. *Id.* at 136.

Security exceptions in economic treaties generally do not impose procedural preconditions on their use.<sup>255</sup> To effect a procedural review under a self-judging clause, tribunals would instead have to divine the nature and scope of procedural requirements from the implied principle of good faith.<sup>256</sup> Stephan Schill and Robyn Briese, for example, have argued that the principles of good faith, abuse of right, and *détournement de pouvoir* (misuse of power) could be developed to encompass a wide range of ordinary administrative-law principles, including “whether the factual basis of [a] decision was adequate and properly investigated, whether the appreciation of the governing legal framework was correct, whether the state abided by proper procedure” and whether the proper values guided the state’s exercise of discretion.<sup>257</sup>

But the principle of good faith is a tenuous legal hook for such an expansive lawmaking enterprise, especially for economic tribunals that have already been accused of overly expansive interpretations.<sup>258</sup> For this reason, tribunals and trade panels may as a doctrinal and practical matter be reluctant to innovate broad procedural principles out of whole cloth, aside from finding basic requirements of candor and honesty that are closely tied to the good-faith principle.<sup>259</sup> Despite these limitations, procedural review should be considered on its own terms, given that this approach – unlike substantive review – purports to provide the appropriate level of deference to states’ emerging national security concerns.

The path-breaking *Russia-Transit Panel Report* also left the door open to procedural review, even though it did not itself cross the threshold into conducting such review. The panel established a duty on the invoking member to “articulate” its security interests “sufficiently enough to demonstrate their veracity” and to support its measures with a minimum degree of plausibility.<sup>260</sup> Although the panel required very little of Russia, it suggested that where the relevant emergency is more novel, the invoking state would need to articulate its interests

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255. Though not quite a precondition, see GATS, *supra* note 179, art. XIV bis (2), which provides that the parties “shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.”

256. See *supra* text accompanying note 224 on the principle of good faith.

257. Schill & Briese, *supra* note 6, at 137 (emphasis added).

258. For examples in the context of investment arbitration, see DAVID SCHNEIDERMAN, RESISTING ECONOMIC GLOBALIZATION 6-7 (2013); M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 246-99 (2015); and GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 89 (2006). For an example in the context of trade, see McDougall, *supra* note 27, at 875-78.

259. See *supra* Section III.A.

260. *Russia-Transit Panel Report*, *supra* note 14, ¶¶ 7.134-7.135, 7.138.

“with greater specificity,” implying the potential for more robust procedural obligations.<sup>261</sup> The panel also did not expressly resolve an emerging dispute over GATT Article XXI(a), which permits states to withhold information they consider to be security sensitive.<sup>262</sup> On one reading, this provision exempts states from having to submit sensitive or classified information to justify their security measures in dispute-settlement proceedings.<sup>263</sup> But the European Union has recently argued that a litigant invokes this provision at its peril.<sup>264</sup> Procedural issues of this sort are ripe to emerge in a later case where national security decision-making has produced a minimal administrative record or where information supporting a security measure is largely classified (for instance, cybersecurity restrictions).<sup>265</sup>

If adopted in future cases, a robust approach to procedural review would effectively normalize security measures, subjecting them to many of the same standards that international economic tribunals apply to other public-policy regulations.<sup>266</sup> In trade law, trade-restrictive public-policy measures are evaluated under GATT Article XX and General Agreement on Trade in Services (GATS) Article XIV, which allow states to take measures protecting the environment, human health, or other interests, provided the measures do not constitute arbitrary or unjustified discrimination.<sup>267</sup> Under these provisions, the WTO Appellate Body has conducted a kind of strict scrutiny of state regulations and the process by which they were adopted, carefully reviewing their “fine print” for any hint

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261. *Id.* ¶ 7.135.

262. GATT 1947, *supra* note 10, art. XXI(a); *see also* Akande & Williams, *supra* note 6, at 394 (discussing provisions of GATT that permit member states to refuse to disclose information amid trade disputes when the disclosure of such information jeopardizes a state’s security interests).

263. This appears to be the historical position of the United States. *See* Pinchis-Paulsen, *supra* note 30 (manuscript at 24-27); Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation Under Item 14 on the Agenda, GATT Doc. GATT/CP.3/38, at 9 (June 2, 1949) (discussing how the United States is not required to name the export-controlled “commodities that it considers to be most strategic” on the ground that it would be contrary to its security interests to do so).

264. EU Written Submission, *supra* note 218, ¶¶ 28-30; *see also* Hahn, *supra* note 6, at 616 (discussing the burden of proof and of production for evaluating Article XXI(b) claims).

265. *See, e.g., U.S. Envoy to EU: Customers Should Avoid Huawei Due to Security Concerns*, REUTERS (Jan. 31, 2019), <https://www.reuters.com/article/usa-china-huawei-tech-eu/us-envoy-to-eu-customers-should-avoid-huawei-due-to-security-concerns-idUSB5N1U7o3R> [<https://perma.cc/8SEZ-SJ7Z>].

266. *Cf.* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1958-74 (2015) (observing and arguing for the further “normalization” of U.S. foreign affairs law through the application of ordinary U.S. administrative law principles of delegation and deference).

267. *See* GATT 1947, *supra* note 10, art. XX; GATS, *supra* note 180, art. XIV.

of discrimination.<sup>268</sup> Investment treaty arbitrators, meanwhile, frequently interpret broad treaty provisions to impose administrative-law-like procedural requirements of transparency, reason-giving, consistency, and due process.<sup>269</sup> But this trend in investment arbitration has provoked a significant backlash, even in the context of ordinary public-policy measures, with critics arguing that developing countries have been judged against impossibly demanding, idealized conceptions of the administrative process.<sup>270</sup> These difficulties may counsel against adopting the same kind of administrative review of security measures, where the due-process questions are deeply contested and the line between policy and mere politics is even messier.

Further complicating matters, the structure and design of the national security state is itself in flux. In the United States, the modern administrative state and the national security establishment grew up largely independently, as creatures of two separate postwar laws adopted around the same time as the GATT.<sup>271</sup> National security actions can often be insulated from judicial review, either by formal limitations on judicial review, justiciability doctrines, or informal practices whereby courts routinely defer to the executive on national security matters.<sup>272</sup> As concerns about terrorism grew after the 9/11 attacks, bureaucratic

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268. See Robert Howse, *The World Trade Organization 20 Years on: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 51-53 (2016); see also, e.g., Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.316-39, WTO Doc. WT/DS400/AB/R (May 22, 2014) (demonstrating an application of chapeau requirements); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 161-76, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) (finding “unjustifiable discrimination between countries where the same conditions prevail”).

269. See, e.g., *Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003), <https://www.italaw.com/sites/default/files/case-documents/itao854.pdf> [<https://perma.cc/QSL8-YY7K>] (offering one of the more ambitious articulations of administrative-law-like procedural requirements); see also *supra* note 43 and accompanying text (elaborating on these administrative-law-like principles).

270. See SCHNEIDERMAN, *supra* note 258, at 6-7; SORNARAJAH, *supra* note 258, at 246-99; VAN HARTEN, *supra* note 258, at 89.

271. See, e.g., Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 919-31 (2014) (discussing the intertwined histories of the Administrative Procedure Act and the National Security Act); Rana, *supra* note 26, at 1451-69 (tracing the origins of the national security state).

272. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1103-06 (2009); Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035 (2016). But see Aziz Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 267-73.

agencies were newly tasked with protecting national security.<sup>273</sup> These agencies have claimed the same kind of deference previously afforded to “traditional” national security agencies and made similar arguments about comparative institutional competence, expertise, speed, flexibility, and legitimacy.<sup>274</sup> At the same time, the expansion of national security activities into previously run-of-the-mill regulatory policy domains has challenged traditional arguments that the executive is entitled to extraordinary deference on such activities.<sup>275</sup>

Where judicial review is available, accommodating the competing demands of national security and legality requires courts to prompt the political branches to engage in creative lawmaking—what David Dyzenhaus refers to as “experiments in institutional design.”<sup>276</sup> Applying a flexible and context-sensitive conception of due process,<sup>277</sup> U.S. courts have prodded the national security state to strengthen procedures for imposing economic sanctions,<sup>278</sup> making investment-screening decisions,<sup>279</sup> placing individuals on the No-Fly List,<sup>280</sup> affording administrative remedies to detainees,<sup>281</sup> and safeguarding classified information while allowing litigation to proceed.<sup>282</sup> Elena Chachko has argued that a similar process has taken place in Europe, where judicial review of EU Council eco-

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273. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1361-62 (2007).

274. See, e.g., *id.* at 1363-64; Donohue, *supra* note 26, at 1753-56.

275. See, e.g., Sitaraman & Wuerth, *supra* note 266, at 1935-49.

276. DAVID DYZENHAUS, *THE CONSTITUTION OF LAW* 10-12, 121-73 (2006).

277. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“Due process is flexible and calls for such procedural protections as the particular situation demands.”) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

278. See, e.g., *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 227-30 (D.C. Cir. 2010) (setting due process standards for designations of foreign terrorist organizations); *Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192, 205-09 (D.C. Cir. 2001) (similar); Elena Chachko, *Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law*, 113 AJIL UNBOUND 157, 161 (2019).

279. See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 317-20 (D.C. Cir., 2014) (reviewing a CFIUS decision).

280. See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1160-62 (D. Or. 2014).

281. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 781 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-35 (2004) (plurality opinion) (setting out procedural guidelines for review of combatant-status determinations); Huq, *supra* note 272, at 262-64.

282. Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 1024 (2018) (explaining that the judge in *Latif* and related cases conducted the procedural-due-process inquiry in multiple steps, in order to allow the case to proceed without triggering battles over privilege and classified information).

nomic-sanctions decisions has spurred the adoption of more robust administrative procedures.<sup>283</sup> Where they enjoy relatively strong enforcement mechanisms, human-rights bodies can also encourage procedural innovations by striking down arbitrary deprivations of property or liberty.<sup>284</sup> Scholars observing these decisions have suggested – with appropriate caution – that such flexibility might facilitate mutual learning and experimentation among courts and the government about what types of procedures can be legitimately expected of the national security state.<sup>285</sup>

Whatever its promise at the national or regional level, it is less clear that a trade panel or investment tribunal would have the mandate, expertise, or ability to guide similar experimentation on a global scale. Absent express treaty standards, a robust procedural review would require panels to apply amorphous principles to an evolving set of new national security practices, which are carried out by a wide array of domestic institutions. This imposes a high burden on economic tribunals to either craft a one-size-fits-all solution to due process in the national security state or to appreciate the many subtle differences among domestic institutions, security interests, and procedures. It is also difficult to see how panels could conduct this due-process assessment without weighing and balancing the security interests at stake,<sup>286</sup> which would be in tension with the wide latitude afforded to states under the treaties. Finally, the remedial structure of investor-state arbitration, in particular, affords little room for these kinds of experiments. Whereas domestic courts can use injunctive relief and other tools effectively to remand decisions to administrative agencies for revised procedures,<sup>287</sup> investment arbitration is typically retrospective and limited to monetary compensation.<sup>288</sup> Thus, the trading system may be better structured to allow for experimentation than is the investor-state arbitration system.

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283. Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 *YALE J. INT'L L.* 2, 40-41 (2019).

284. On property protection in international human-rights law, see generally José E. Alvarez, *The Human Right of Property*, 72 *U. MIAMI L. REV.* 580 (2018).

285. See, e.g., Chachko, *supra* note 283, at 41; Huq, *supra* note 272, at 262-64; Sinnar, *supra* note 282, at 1036-37 (citing Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015 (2004)).

286. In fact, this is a critical part of the due-process examination in the United States. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

287. See, e.g., *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 325 (D.C. Cir. 2014); *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001).

288. See, e.g., VAN HARTEN, *supra* note 270, at 105-09 (describing how investment arbitration grafts a private-law liability framework onto the review of regulatory decision-making).

The turn to procedural review is not a cure-all for the challenges the new national security poses. But it does open some important avenues for inquiry. First, it relies on the insight that other legal, administrative, and political processes, either at the national or supranational level, can be leveraged to help balance the conflicting demands of flexibility and oversight in the trade and investment system. Second, the experience of procedural review from other jurisdictions suggests that it can facilitate mutual learning and revision of standards over time, as experiments reveal what kind of interventions successfully accommodate competing demands. The critiques above have focused on the ability of tribunals and panels, acting more or less alone, to develop appropriate procedures for reviewing activities of the national security state. A wider view, which addresses not only the role of courts but also that of other domestic and international institutions involved in governing economic and security measures may be better suited to finding solutions that facilitate institutional experimentation and mutual learning.<sup>289</sup>

#### IV. RETHINKING INSTITUTIONAL ARRANGEMENTS FOR SECURITY GOVERNANCE

The challenges posed by the new national security demand that we rethink the design of our international economic institutions. The growing intersection between national security and economic law taxes the resources of international tribunals and challenges each competing model of adjudication in different ways. Models that focus on policing abuse and pretext are defanged when it comes to governing the growth of good-faith but novel security claims in the twenty-first century.<sup>290</sup> And models that focus on more intensive review, whether substantive or procedural, will struggle to provide such review given the new reality of expanded national security activities and the deference traditionally afforded to them.<sup>291</sup> At the same time, the way back is blocked: it is unlikely that interstate politics alone can effectively manage contemporary security claims given recent transformations in both the substance and politics of national security and economic globalization.<sup>292</sup>

The failure of these models, however, also illuminates the path forward. An alternative model of economic and security governance would address four issues, each of which is underserved by the current alternatives. First, the model would require some form of *governance* over national security measures. Given

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289. See *supra* note 19 and accompanying text.

290. See *supra* Section III.A.

291. See *supra* Sections III.B & C.

292. See *supra* Section II.B.

the rapid expansion of national security policy, it is increasingly difficult today to place such measures entirely outside of a legal order, lest the exception entirely swallow the rule. Second, the rise of good-faith but novel national security claims would demand a significant degree of policy *flexibility* at the international level. Third, alternatives to the prevailing models must flexibly apportion the *costs* of security measures. Finally, as suggested by the unfulfilled promise of procedural review, emphasis should be placed on design solutions that foster information and *mutual learning* between states and tribunals about the scope of national security policy, the terms of that policy's interaction with economic rules, and what kind of structure and process should be expected from the new national security state.

The following discussion focuses on four building blocks for an alternative model, each of which roughly corresponds to the four values above: (1) leveraging domestic administrative processes as a complement to international review, (2) using law to structure the “shadow politics” that arise before and during international economic disputes, (3) using “dejudicialized” dispute settlement to internalize some costs of security measures, and (4) centralizing international judicial review. The outlines of each emerge from institutional reforms currently under debate in both trade and investment law. The Sections below identify the principles of institutional design embedded in these options and discuss their implications for security exceptionalism in the economic order. The goal is not to provide the blueprint for an alternative model but rather to identify a set of tools for developing alternatives and identifying tradeoffs.<sup>293</sup>

#### A. *Leveraging Domestic Administrative Procedure to Enhance Security Governance*

The first set of approaches involves amplifying the central insight of procedural review: the best place to contest security measures may be in the national security bureaucracy itself.<sup>294</sup> The difficulty, as noted above, is that trade panels and investment tribunals struggle to conduct this kind of review in the abstract because of the extreme institutional variation, the vagueness of procedural norms, and disputes about the legitimate structure of national security bureaucracies worldwide. Moreover, the rise of the new national security suggests that different security interests and measures will implicate the need for secrecy, dispatch, or expertise to different degrees and thus require different administrative

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293. See Puig & Shaffer, *supra* note 22; Shaffer, *supra* note 22; Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103, 105-07 (2011). On this method in general, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3-13 (1994).

294. See *supra* Section III.C.

procedures. A potentially promising response, in the medium to long term, is to engage states in developing standards for certain types of security procedures, either through binding agreements or softer standards. These can then be used to create a kind of complementarity between national and international mechanisms.

States today implement national security policy through bureaucratic and administrative procedures, but the extent to which these procedures afford a transparent and open process varies widely. For instance, the aforementioned U.S. investigation into the national security effects of steel and aluminum imports was criticized for being “extremely nontransparent” because, among other problems, the investigation did not even identify which products were being investigated—and thus which constituencies would be affected—until the results were finalized.<sup>295</sup> At the same time, the United States and others have expressed concerns that administrative “security reviews” of data transfers, contemplated in China and Vietnam, are subject to vague and undefined criteria.<sup>296</sup> Such powers, broadly speaking, are administrative in nature, even if they are not subject to the full battery of administrative law procedures.

Although it is likely impossible to develop a set of one-size-fits-all procedures for security measures, it may be feasible to develop more specific standards for particular types of security-related administrative processes. In fact, some treaties already distinguish between different types of security measures, albeit in a rudimentary way. NAFTA, for example, provided for a narrower security exception with respect to restrictions on energy imports and exports, established an especially broad form of deference with respect to investment-screening mechanisms, and left other measures to be governed by a GATT-style security

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295. E.g., Chad P. Bown, *Trump Has Announced Massive Aluminum and Steel Tariffs. Here Are 5 Things You Need to Know*, WASH. POST (Mar. 1, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/01/trump-has-announced-massive-aluminum-and-steel-tariffs-here-are-5-things-you-need-to-know> [https://perma.cc/3CLY-25A5].

296. See, e.g., Council for Trade in Services, *Report of the Meeting Held on 2 March 2018*, ¶¶ 6.1-74, WTO Doc. S/C/M/134 (Apr. 5, 2018); Rogier Creemers, Paul Triolo & Graham Webster, *Translation: Cybersecurity Law of the People's Republic of China (Effective June 1, 2017)*, NEW AM. (June 29, 2018), <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china> [https://perma.cc/85Z9-XV96]; Samm Sacks, Paul Triolo & Graham Webster, *Beyond the Worst-Case Assumptions on China's Cybersecurity Law*, NEW AM. (Oct. 13, 2017), <https://www.newamerica.org/cybersecurity-initiative/blog/beyond-worst-case-assumptions-chinas-cybersecurity-law> [https://perma.cc/G4J8-XSP2].

clause.<sup>297</sup> In contrast, the Energy Charter Treaty, a multilateral agreement that protects foreign investments in the energy sector, provides a broad and self-judging security exception but nonetheless makes clear that states cannot expropriate investments without compensation, even for security reasons.<sup>298</sup> Outside of formal treaty drafting, states and international organizations have created voluntary and nonbinding standards for other security measures, such as export controls and investment screening.<sup>299</sup> The procedural standards produced by these institutions can provide a basis for designing limitations on some types of security measures.<sup>300</sup>

Tribunals and panels could draw on procedural standards to review security measures but only after a domestic administrative process has concluded.<sup>301</sup> This is already done in other contexts under international trade treaties. For example, with respect to “antidumping” measures, the WTO agreements themselves set out procedural and substantive guidelines for domestic administrative decision-making.<sup>302</sup> Antidumping investigations are then carried out by domestic agencies, whose actions are then subject to review by international panels – often under a deferential standard.<sup>303</sup> This approach allows greater policy flexibility – delegating substantive decisions to national authorities – while setting out procedural requirements that are reviewable at the international level.<sup>304</sup>

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297. NAFTA, *supra* note 188, arts. 607, 1138, 2102; *see also* James Mendenhall, *The Evolution of the Essential Security Exception in U.S. Trade and Investment Agreements*, in SOVEREIGN INVESTMENT, *supra* note 88, at 310, 335.

298. *See* Energy Charter Treaty, arts. 13, 24(3), Dec. 17, 1994, 2080 U.N.T.S. 95.

299. *Guidelines for Recipient Country Investment Policies Relating to National Security*, OECD (May 25, 2009) (on investment screening); MATSUSHITA ET AL., *supra* note 11, at 548 (on export controls). These standards are not legally binding, and membership in these entities does not overlap entirely with membership in the WTO or other economic agreements, making their direct application in economic fora politically and legally difficult.

300. *See, e.g.*, Mendenhall, *supra* note 297, at 344, 347-48 (discussing the relevance of OECD guidelines on security-related investment policies).

301. Puig & Shaffer, *supra* note 22, at 401-08. Such review ordinarily applies international standards to the domestic proceeding, but in some cases international bodies could apply domestic administrative-law standards, effectively displacing national courts. *See* USMCA, *supra* note 188, arts. 10.8-10.18 & Annexes 10-B.1, 10-B.2; NAFTA, *supra* note 188, arts. 1901-1911 & Annex 1901.2.

302. *See* Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, 1868 U.N.T.S. 201.

303. *See id.* art. 17.6.

304. There is some debate in trade law as to whether these procedures have in fact led to the desired balance between deference and oversight intended by the drafters. *See, e.g.*, TREBILCOCK ET AL., *supra* note 32, at 344, 350.

Recently, scholars have suggested that these vertical structures could help rebalance trade commitments with other social policies. For example, Gregory Shaffer and Dani Rodrik have separately explored mechanisms to deter “social dumping” – the export of “products produced under exploitative labor conditions – that sell for less than domestically produced products, [leading] to concerns over wage suppression and reductions of labor protections” in the Global North.<sup>305</sup> Social dumping procedures could be modeled on existing antidumping rules by providing standards for investigation, evidence-gathering, public notice and participation, reason-giving, and judicial review of domestic social dumping investigations.<sup>306</sup> The initiation of an investigation, as in the antidumping regime, would trigger bilateral consultations that create a space for the negotiation of “constructive remedies.”<sup>307</sup> And these investigations would be subject to review, potentially in a manner similar to the WTO or NAFTA antidumping regimes.<sup>308</sup>

It is not a great conceptual leap from the mechanism outlined by Shaffer to a similar approach for certain types of security measures, particularly given the intertwining of security and social policy. This approach would provide some opportunity for the governance of new national security measures within the international economic order, while allowing states to shape the relevant requirements. Further, this approach could enhance flexibility insofar as it makes no judgment over which national security priorities are legitimate, and enables states to identify the substantive and procedural standards that apply to their security measures. The negotiation of such complementarity mechanisms might also have an information-forcing effect, as it would require states to specify and explain what kind of administrative procedures they believe security measures should comply with.

#### *B. Flexibility and the Return of the Political in Economic Disputes*

The recent turn toward deliberative mechanisms for resolving disputes offers a second vector for merging political and legal means of addressing security disputes. Deliberative fora, such as specialized committees or ombudspersons, offer

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305. Shaffer, *supra* note 22, at 34; see DANI RODRIK, *THE GLOBALIZATION PARADOX* 224-29 (2011); RODRIK, *supra* note 22, at 231-33.

306. See Shaffer, *supra* note 22, at 37-38.

307. *Id.*

308. *Id.*

alternatives for enhancing policy flexibility, finding prospective solutions to disputes, and reconciling trade and security concerns over the long term.<sup>309</sup> Some proposed reforms would direct sensitive issues entirely away from adjudication and toward mediated settlement or joint committees, thus trading the values of law-based adjudication for a more flexible but admittedly power-based form of negotiation. But adjudicators might also play a valuable role in catalyzing and steering negotiations about evolving national security issues. In so doing, tribunals and deliberative bodies could help structure “shadow politics”: the “mobilization, bargaining, negotiations, and responses generated by a plausible threat of adjudication.”<sup>310</sup>

International economic institutions vary in the extent to which they offer opportunities for deliberative engagement, with the WTO offering the most highly institutionalized example. In the WTO, state delegates participate in a number of specialized committees and in a Dispute Settlement Body, where WTO members can raise issues and in some cases resolve disputes before they reach adjudication.<sup>311</sup> It has been argued that the specialized committees, in particular, form a largely understudied component of trade governance, as these bodies facilitate shared understandings and regulatory learning, elaborate open-ended norms, and resolve disputes before they reach adjudication.<sup>312</sup> Although deliberation in these bodies is often technical and avoids high-level politics, there are times when sensitive issues can be debated and even resolved in these bodies. For example, Andrew Lang and Joanne Scott point to the removal of an EU import ban on foodstuffs that were thought to present a risk of cholera after committee deliberations and a presentation from the representative of the World Health Organization.<sup>313</sup> In other cases, debates in the WTO General Council, sitting as the Dispute Settlement Body, have led states to withdraw security-related claims before a panel is able to hear and decide the case.<sup>314</sup> And one pair of authors has

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309. These approaches are in a sense “managerial” in nature. See ABRAM CHAYES & ANTONIA HANGLER CHAYES, *THE NEW SOVEREIGNTY* 207-25 (1995). For a recent argument supporting a managerial approach to the “new national security,” see Cai, *supra* note 9, at 76-77.

310. Karen J. Alter et al., *Theorizing the Judicialization of International Relations*, 63 *INT’L STUD. Q.* 449, 454 (2019).

311. See e.g., Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 *EUR. J. INT’L L.* 575 (2009).

312. See Henrik Horn, Petros C. Mavroidis & Erik N. Wijkstrom, *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees*, 47 *J. WORLD TRADE* 729, 730 (2013); Lang & Scott, *supra* note 311, at 577-601.

313. Lang & Scott, *supra* note 311, at 592.

314. See *supra* text accompanying notes 116-117.

recently proposed that a WTO Committee on National Security Measures could usefully contribute to resolving disputes outside of litigation.<sup>315</sup>

In investment law, there are fewer institutionalized political bodies, though some recent treaties have sought to develop the deliberative and political dimension of investment disputes. Some recent investment treaties contain institutional mechanisms to monitor the treaties' implementation, provide a regular forum for exchange, and prevent disputes before they reach arbitration.<sup>316</sup> A notable example comes from the recent investment treaties concluded by Brazil, which eschew compulsory investor-state dispute settlement entirely in favor of a politically managed process of good offices, consultation, and state-to-state arbitration.<sup>317</sup> These approaches deliberately cut against the historical purpose of investment treaties to "depoliticize" investment disputes.<sup>318</sup> In so doing, they afford opportunities for states to manage the interpretation of open-ended provisions, develop shared norms for their application, or agree to avoid formal dispute settlement.<sup>319</sup>

A turn to these supranational deliberative institutions undoubtedly imposes a tradeoff in favor of flexibility and interest-based politics. Many of these institutions, such as the WTO councils and committees, operate on the basis of consensus, meaning that states can effectively block decisions and continue acting

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315. Simon Lester & Huan Zhu, *A Proposal for "Rebalancing" to Deal with "National Security" Trade Restrictions*, 42 FORDHAM INT'L L.J. 1451, 1472 (2019).

316. See, e.g., Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, arts. 4, 26, Dec. 3, 2016, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> [<https://perma.cc/3R2P-T97H>].

317. See Joaquim P. Muniz et al., *The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change*, 32 ICSID REV. 404, 414-17 (2017); Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19 J. WORLD INV. & TRADE 475, 491-99 (2018).

318. Vandevelde, *supra* note 246, at 162-64; Tarcisio Gazzini, *Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties*, BLOG EUR. J. INT'L L.: TALK! (May 8, 2017), <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties> [<https://perma.cc/G6C8-KR23>].

319. See generally Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 945-56 (2005) (exploring political and legal control mechanisms that constrain judicial independence); Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 459-62 (2000) (surveying different modes for controlling access to dispute settlement); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 266 (2004) (arguing that statements in these bodies place political constraints on judicial actors); Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 434-45 (2012) (discussing ex ante and ex post political controls on tribunals).

unilaterally.<sup>320</sup> State interests often drive the actions of individual delegates to these committees.<sup>321</sup> This means that the extent to which councils or committees will restrain states will depend heavily on power imbalances, as less powerful states will be more susceptible to political and diplomatic pressure.<sup>322</sup> At the same time, these fora offer flexibility in approaching security policy as open-ended deliberation and can substitute for the finality of a judicial decision. Regular interaction in these fora may also provide states with opportunities to exchange information about security-related measures, elaborate shared understandings and expectations, and develop mutually satisfactory approaches to the trade/security balance, at least in some contexts.<sup>323</sup>

Reform proposals at the WTO provide a roadmap for thinking about how to enhance the flexibility afforded by these political institutions. Many recent proposals center on empowering the WTO's legislative components by introducing some voting mechanism within the committees.<sup>324</sup> Other proposals focus on the strength of political bodies vis-à-vis dispute settlement, suggesting some means for states to more effectively block the adoption of contentious panel or Appellate Body reports.<sup>325</sup> If employed with respect to security measures, these approaches would increase the ability of political institutions to provide firm and stable guidance on the use of security exceptions, while also preserving more space for flexible, negotiated solutions than the existing system of adjudication currently affords. It is unlikely, however, that states would be willing to abandon the longstanding practice of decision-making by consensus for such weighty and sensitive issues as the scope of security exceptions.<sup>326</sup>

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320. See Agreement on the Application of Sanitary and Phytosanitary Measures art. 12, Jan. 1, 1995, 1867 U.N.T.S. 493; Marrakesh Agreement Establishing the World Trade Organization, art. IX, ¶ 1, Apr. 15, 1994, 1867 U.N.T.S. 154.

321. Richard H. Steinberg, *The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott*, 20 EUR. J. INT'L L. 1063, 1068-69 (2009).

322. See, e.g., JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT 763-68* (1969) (describing how power imbalances manifest in the context of GATT legal proceedings).

323. See Lang & Scott, *supra* note 311, at 577-601.

324. See, e.g., Jennifer Hillman, *Moving Towards an International Rule of Law?: The Role of the GATT and the WTO in Its Development*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO* 60 (Gabrielle Marceau ed., 2015) (arguing for the use of existing mechanisms in WTO agreements); Joel P. Trachtman, *Functionalism, Fragmentation, and the Future of International (Trade) Law: The 2018 Robert E. Hudec Lecture in International Economic Law*, 20 J. WORLD INV. & TRADE 15, 30 (2019) (advocating for weighted voting in the WTO).

325. See McDougall, *supra* note 27, at 888 (reviewing these proposals).

326. Cf. Hillman, *supra* note 324, at 75 (proposing instead that states consider introducing voting for "smaller rules changes").

It may be more feasible to adopt other procedural mechanisms that leverage the deliberative and information-forcing aspects of political bodies. For example, even before the founding of the WTO and the ascendance of the modern trade-dispute-settlement system, trade scholars gave some thought to nonjudicial means of supervising security measures. For instance, they considered requiring that every security measure be investigated and reviewed under the GATT by a working party composed of delegates, which would report on its views and make recommendations.<sup>327</sup> Such investigations would be inherently political, because these working groups would be staffed by trade delegates who would continue to report back to their ministries.<sup>328</sup> But such mechanisms can generate alternative pathways to creating stability, bringing to light the effects of security measures and assessing them with a combination of expert knowledge, legal reasoning, and political sensitivity.<sup>329</sup>

International adjudication can also work to steer decision-making to political fora and shape deliberation. In the past, the WTO Appellate Body has rejected arguments that some form of “institutional balance” requires deference to decisions or ongoing deliberations in the committees.<sup>330</sup> There are nevertheless some cases where trade panels have effectively steered trade policy-making back toward states and away from international adjudication.<sup>331</sup> Most notably, the Appellate Body has suggested that the public-policy exceptions contained in GATT Article XX can, in certain circumstances, require states to make “serious, good

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327. JACKSON, *supra* note 322, at 752.

328. See TREBILCOCK ET AL., *supra* note 32, at 173.

329. Cf. ZEISBERG, *supra* note 19, at 203-21 (discussing the strengths and limitations of investigations by lawmakers in checking war powers in the United States).

330. See, e.g., Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶¶ 98-109, WTO Doc. WT/DS90/AB/R (adopted Aug. 23, 1999) (rejecting the argument “that there is a principle of institutional balance which requires panels, in determining the scope of their competence, to take into account the competence conferred upon other organs of the WTO”); Howse, *supra* note 268, at 33-36 (describing this move as a critical step in the Appellate Body’s “declaration of independence” from the insider trade-policy community, and as a response to a perceived lack of effectiveness of the political bodies).

331. See, e.g., Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, ¶¶ 7.132-139, WTO Doc. WT/DS392/R (adopted Sept. 29, 2010) (using, without expressly deferring to, a Sanitary and Phytosanitary Measures Committee decision); Simon Lester, *Institutional Balance at the WTO*, INT’L ECON. L. & POL’Y BLOG (Jan. 13, 2011, 8:25 AM), <https://worldtradelaw.typepad.com/ielpblog/2011/01/institutional-balance-at-the-wto.html> [<https://perma.cc/2B92-TSJ8>] (discussing cases).

faith efforts to negotiate” the optimal balance between free trade and other values like environmental protection.<sup>332</sup> It has been argued that such decisions suggest “an attempt to ‘re-delegate’ back to states supervised responsibility to balance trade values and environmental values.”<sup>333</sup> It is possible that trade tribunals could adopt a similar approach to values relating to national or international security, giving states the opportunity, *ex ante* or *ex post*, to negotiate the proper balance, while applying principles of good faith effectively to “supervise” the conduct of these negotiations.<sup>334</sup> This approach offers a twist on the relationship between flexibility and governance, as courts leave the substantive outcome largely to states while asserting authority to control the parameters of the negotiation.<sup>335</sup>

The resurgence of fora for institutionalized “shadow politics” thus suggests one way that law and diplomacy might work together to resolve conflicts produced by the new national security. At present, these fora are rudimentary, and even in the WTO, the relationship between the political bodies and the adjudicatory process is relatively one-sided. States’ ability to exercise political oversight over trade panels is extremely limited in practice, while the consensus-based mode of decision-making within these bodies tends to favor the status quo.<sup>336</sup> These fora nevertheless provide an opportunity to structure the “shadow politics” of trade and security, encouraging deliberation, good-faith negotiation, and nonjudicial settlement of security issues where possible. Further, where these fora lead to public deliberations, they create a public record about what practices states view as necessary to their national security, which can in turn inform tribunals about what kind of decision-making processes they can expect from states in the future.

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332. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 111-134, WTO Doc. WT/DS58/AB/RW (adopted Oct. 22, 2001).

333. Trachtman, *supra* note 324, at 14-15.

334. For a similar proposal, see McDougall, *supra* note 27, at 889.

335. See generally Harlan Grant Cohen, *International Law’s Erie Moment*, 34 MICH. J. INT’L L. 249, 300-01 (2013).

336. McDougall, *supra* note 27, at 876-77.

C. *Internalizing the Costs of Security Measures through Dejudicialized Dispute Settlement*

The hybrid legal-political mechanisms for handling security disputes, as discussed above, also suggest “dejudicialized” options for forcing states to internalize at least some of the costs of their security measures. The judicialization of international politics, which began in earnest after the end of the Cold War, led to the creation of numerous international bodies that decided disputes, applied preexisting rules, rendered authoritative determinations about violations of the law, and ordered binding relief.<sup>337</sup> But recent trends suggest that by relaxing some of these variables, dispute settlement might shift some costs of security measures while retaining policy flexibility. These include using “nonviolation” remedies, nonjudicial “rebalancing,” and excuse-but-compensate schemes in investment law.

WTO law already offers multiple avenues for dejudicialized dispute settlement. One is the “nonviolation” remedy. This is a unique procedure whereby a trade panel decides not whether the measure in question violated any trade rules but instead whether the measure is nullifying or impairing a trade benefit that was reasonably expected by another member.<sup>338</sup> After a successful nonviolation complaint, the state is not obliged to remove the measure, but it is instead expected to agree to a “mutually satisfactory adjustment,” a standard that is understood to be distinct from, and lesser than, the standard in violation cases.<sup>339</sup> Although the nonviolation remedy is dejudicialized, in the sense that it does not depend on any “authoritative determinations of violations of law,”<sup>340</sup> it can still force states to internalize the externalities that are caused by various domestic security policies.<sup>341</sup> Nicolas Lamp has recently argued that nonviolation complaints may be preferable for resolving disputes over U.S. steel and aluminum tariffs because a nonviolation complaint “doesn’t upset anyone”: the complaint is within a WTO panel’s jurisdiction, and it does not challenge the legality or good faith of the tariff.<sup>342</sup> This conclusion may be too optimistic given existing

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337. See Alter et al., *supra* note 310, at 451.

338. GATT 1947, *supra* note 10, art. XXIII(1)(b).

339. DSU, *supra* note 178, art. 26(1); see Alford, *supra* note 6, at 747.

340. Alter et al., *supra* note 310, at 451.

341. Robert W. Staiger & Alan O. Sykes, *Non-Violations*, 16 J. INT’L ECON. L. 741, 757-59 (2013).

342. 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://worldtradelaw.typepad.com/ielpblog/2018/10/guest-post-why-wto-members-should-bring-pure-non-violation-claims-against-national-security-measures.html> [https://

caselaw, which makes application of the nonviolation remedy contingent on whether a measure violates a trading partner's "legitimate expectations."<sup>343</sup> This approach could be politically costly, effectively deterring the adoption of good-faith but novel "essential security interests" on the ground that only traditional security matters were consistent with trading partners' legitimate expectations.<sup>344</sup> But the core insight – that dejudicialization offers opportunities to balance flexibility with some level of cost-shifting – remains instructive.

An alternative proposal for the WTO would be to move "rebalancing" national security measures largely outside of the dispute-settlement system altogether. Simon Lester and Huan Zhu have argued that a model of nonjudicial rebalancing similar to the WTO safeguards regime could usefully manage national security trade disputes.<sup>345</sup> On this proposal, states could unilaterally restrict trade on purportedly security-relevant goods, but they would have to offer compensatory trade liberalization in other sectors or be subject to retaliation by other members.<sup>346</sup> So if a state restricts steel for military purposes (or restricts coal for climate-security purposes),<sup>347</sup> it would either have to liberalize in another sector like agriculture or textiles, or it would have to accept retaliatory trade restrictions by other countries.<sup>348</sup> The focus of this proposal is to increase transparency and negotiate rebalancing among treaty parties through notification requirements and the establishment of a committee on security measures. A side benefit of this approach, however, could be to increase the quality of domestic deliberations by requiring certain procedural prerequisites, similar to the operation of Rodrik and Shaffer's social-dumping model.<sup>349</sup>

There is no direct analogue in international investment law for these types of remedies, but recent proposals for an excuse-but-compensate approach for

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[perma.cc/66DB-2N5X](https://perma.cc/66DB-2N5X)]; see also Alford, *supra* note 6, at 747-48 (discussing the justiciability of nonviolation complaints).

343. See Appellate Body Report, *Asbestos*, *supra* note 247, ¶¶ 182, 185-86; Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, ¶¶ 10.67-.68, 10.76, WTO Doc. WT/DS44/R (adopted Apr. 22, 1998).

344. This is suggested by Nicolas Lamp, *At the Vanishing Point of Law: Rebalancing, Non-Violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars* 19 (Queens Law Research Paper Series No. 2019-002), <https://ssrn.com/abstract=3470617> [<https://perma.cc/3W99-2MQJ>].

345. Lester & Zhu, *supra* note 315, at 1471-73.

346. *Id.*

347. See Farber, *supra* note 66.

348. Lester & Zhu, *supra* note 315, at 1471-73.

349. See *id.* at 1472; see also *supra* text accompanying notes 305-308 (discussing social dumping rules).

security measures would have a similar effect. For instance, Alan Sykes has argued that, to mitigate the moral hazard problem in cases of economic crises, exceptions clauses should be construed to excuse a treaty violation but nonetheless require some degree of compensation to the investor.<sup>350</sup> This approach, which Sykes contends is at least plausibly consistent with treaty text and with customary international law doctrines of necessity, would force the state to internalize some of the costs of its actions, inducing it to select the least expensive way of protecting its security interests.<sup>351</sup> Recent arbitral tribunals presented with this argument have refused to accept it, reasoning that treaty-based security exceptions act as hard limits on the treaty's substantive obligations.<sup>352</sup> The mechanism nonetheless shares a similar structure to the nonviolation and rebalancing remedies: it allows states legal flexibility to adopt security measures but forces some degree of cost-internalization. Like nonviolation, this approach also allows for compensation to be limited or deferred to take into account exigent circumstances.<sup>353</sup>

Although this approach could in some cases optimize incentives, it is not appropriate for all circumstances. Sykes, in particular, focused on cases of economic crisis, in which the state's own policies have almost certainly contributed to the calamity and the problem of moral hazard is especially acute.<sup>354</sup> Such concerns may not necessarily arise with respect to military issues or matters such as cybersecurity. It is also unlikely that, as a policy matter, states intended security exceptions to force them to internalize the costs of their security measures. Rather, state parties to trade or investment treaties likely thought that when they imposed sanctions on a designated person or nation<sup>355</sup> or when they forced a foreign company to divest its ownership of a technology firm on security grounds,<sup>356</sup> their trading partners and foreign investors would legitimately expect to bear the costs of such measures. Even when cost-shifting is appropriate, there may be subtle, case-specific factors to consider. For example, the rationale for forcing states to internalize the costs of emergency economic measures may vary depending on the economic sector, investor expectations, and the state's development prospects.<sup>357</sup>

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350. Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296, 320-22 (2015).

351. *Id.* at 321.

352. *E.g.*, CC/Devas Award on Jurisdiction and Merits, *supra* note 11, ¶ 293.

353. Sykes, *supra* note 350, at 320.

354. *See id.* at 310-19.

355. *See supra* Section I.B.

356. *See supra* Section I.C.

357. *See* Anne van Aaken, *On the Necessity of Necessity Measures: A Response to Alan O. Sykes*, 109 AJIL UNBOUND 181, 185-86 (2015).

*D. Security Governance and the Centralization of International Economic Law*

The foregoing mechanisms for blending politics and law in the governance of security-related disputes have implications for the centralization of dispute settlement in international economic law. All of the above mechanisms benefit significantly from a highly institutionalized setting where political and judicial bodies can regularly interact over time. Institutionally embedded tribunals have more opportunity to closely monitor political signals from member states, effectively “remand” matters to political bodies, and catalyze negotiations about proper administrative procedures. This raises the intriguing possibility that, despite the obvious agency problems that arise when delegating interpretive authority, a standing international court may actually be relatively well-positioned to balance flexibility and governance of security measures.<sup>358</sup>

Scholars have frequently shown that institutionally embedded courts are able to temper their legal output with political sensitivity. Successful tribunals establish their authority over sensitive issues through a practice of “incrementalism”: courts establish broad principles to govern state behavior, but elaborate those principles slowly and in narrow decisions that are sensitive to political signals coming from member states.<sup>359</sup> This works best when the court is a standing body, and when the member states are also organized in a political institution that can effectively send those signals back to the court.<sup>360</sup> The WTO Appellate Body has used this institutional context to its advantage, making politically savvy decisions and, in some cases, encouraging the member states to balance competing policies through negotiation.<sup>361</sup> The result is a “mediated interaction” between law and politics, where the boundaries for tribunals’ legitimate decision-making authority is defined through the give-and-take before and after controversial decisions.<sup>362</sup> By contrast, the system of investment arbitration,

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358. These themes are developed in Julian Arato & J. Benton Heath, *The Stewardship Function of International Courts* (unpublished manuscript) (on file with author).

359. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 314-16 (1997).

360. See *id.* at 315 (noting that the European Court of Justice effectively used the Commission of the Community as a “political bellwether”).

361. See, e.g., Howse, *supra* note 268, at 66-72 (referring to the WTO Appellate Body practice as “selective judicial minimalism”).

362. Helfer & Slaughter, *supra* note 359, at 315.

which is characterized largely by ad hoc tribunals that lack significant institutional context or a permanent set of judges, is not able to engage in the same kind of mediated exchange.<sup>363</sup>

The *Russia-Transit* case sets out a framework for taking advantage of the WTO's institutional embeddedness.<sup>364</sup> As noted above, the panel's approach to interpreting the GATT security exception imposes a two-step framework: (1) the existence of a "war," "emergency," or other basis for invoking the exception is reviewed objectively, and then (2) the necessity of the measure for a state's security interests is subject only to a deferential good-faith test.<sup>365</sup> In practice, however, the panel's test may have been designed to be more flexible, given its broad definition of "emergency" and the panel's express statement that it would vary its level of scrutiny depending on the novelty of the state's declared security interest.<sup>366</sup> This test could be used to demand more robust procedures where a purported security interest appears new or out of the ordinary.<sup>367</sup> Alternatively, a panel applying this test could defer where the type of security measure at issue is the subject of good-faith negotiations in another forum but exercise greater scrutiny when the state is acting unilaterally.<sup>368</sup> For example, if a state requires that certain kinds of data be stored domestically on cybersecurity grounds, the level of scrutiny applied to the measure could be relaxed if the state is simultaneously engaging its treaty partners in good-faith negotiations on global standards for data-localization measures.<sup>369</sup>

This approach, however, depends on an institutional architecture that is currently under significant threat. As of this writing, the United States has effectively paralyzed the WTO Appellate Body by refusing to reappoint members, potentially bringing about the collapse of the dispute-settlement system and a

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363. See, e.g., Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545, 571 (2014) (arguing that the margin-of-appreciation doctrine developed in European human rights law is a poor fit for investment arbitration precisely because of this lack of institutional embeddedness).

364. I have referred to this as a "variable framework for security governance." Heath, *supra* note 210.

365. See *supra* text accompanying notes 210-213.

366. Heath, *supra* note 210.

367. See *supra* text accompanying notes 260-265.

368. Cf. Evan J. Criddle & Evan Fox-Decent, *Mandatory Multilateralism*, 113 AM. J. INT'L L. 272, 307-09 (2019) (discussing the obligation to negotiate in good faith).

369. Some states have recently made soft or even binding commitments to strengthen cooperation on cybersecurity measures as part of their regional trade agreements. See, e.g., USMCA, *supra* note 188, art. 19.15 (using more binding but still largely aspirational language); CPTPP, *supra* note 188, art. 14.16 (stating a seemingly nonbinding commitment to collaborating on cybersecurity).

shift back to more power-based bargaining.<sup>370</sup> Without the Appellate Body, there would be no standing judicial institution that could effectively administer the new national security over time by steering novel security claims among the available fora.<sup>371</sup> The membership would gain political flexibility over security measures, but it would be a flexibility that more closely followed the Cold War Settlement critiqued above and that is vulnerable to the same pressures.<sup>372</sup> This analysis thus suggests another reason to be concerned about the demise of the WTO dispute-settlement system: while most critics have focused on the cost to certainty and the rule of law, the system was also relatively well-placed to balance flexibly the governance of security measures in the face of new threats. And if the WTO Appellate Body is revived, this insight also commends reforms that seek a greater “institutional balance” between judicial and political bodies.<sup>373</sup>

This analysis also suggests a qualified endorsement for current trends toward multilateralism in investment law. In this field, a growing number of states appear to take the view that a unified multilateral court system would prove more effective and more responsive to member states than the current system of investment arbitration.<sup>374</sup> One advantage of a standing court over ad hoc arbitration is the court’s ability to respond to political signals over time and to steer decision-making on novel and sensitive issues. The existing proposals for a multilateral investment court include some provisions for institutionalized dialogue among parties, and for mechanisms like conciliation, which could be used as political alternatives to the resolution of security-related disputes.<sup>375</sup> But these steps are necessarily halting and partial, given that the current proposals provide only for a multilateral procedure for existing forms of investor-state dispute settlement. The underlying substantive law would still be derived from individual, mostly bilateral treaties, and remedies would still be based on backward-looking

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370. See *supra* note 27 and sources cited therein.

371. Heath, *supra* note 213.

372. See *supra* Section II.B.

373. See generally McDougall, *supra* note 27, at 887-88 (describing challenges to the WTO and potential reforms).

374. See, e.g., Julian Arato, *A Watershed Moment for ISDS Reform*, INT’L ECON. L. & POL’Y BLOG (Nov. 4, 2018, 9:57 PM), <https://worldtradelaw.typepad.com/ielpblog/2018/11/a-watershed-moment-for-isds-reform.html> [<https://perma.cc/9NE7-7GPG>]; Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest*, EJIL: TALK! (Apr. 30, 2019), <https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest> [<https://perma.cc/JDW2-PZY8>].

375. See, e.g., *Submission of the European Union and Its Member States to UNCITRAL Working Group III: Establishing a Standing Mechanism for the Settlement of Investment Disputes* ¶¶ 12, 26-27 (Jan. 18, 2019), [https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf) [<https://perma.cc/VMK3-ZUXC>].

compensation to investors. It is therefore difficult to instill the same kind of multilateral dialogue that takes place in the WTO or within regional organizations like the EU.<sup>376</sup> The steering contemplated here would in fact require greater centralization, including potentially unified substantive obligations, institutionalized deliberative bodies like the WTO committees, and options for prospective and collaborative remedies.<sup>377</sup> These developments would be controversial, and they do not answer some of the harshest critiques of the proposed court levied by both defenders and critics of the current system of investment arbitration.<sup>378</sup>

Despite these difficulties, the new national security challenges outlined above highlight the importance of rethinking the balance between politics and adjudication in economic law. It is unlikely that the historical division between economic and security measures can hold much longer, and, for the reasons discussed above, international adjudicators today are ill-equipped to police that boundary themselves. The best option, therefore, may be to consider institutional designs that reconcile the need for policy flexibility with the importance of bringing national security within the legal order. Such designs should also foster mutual recognition and learning between economic institutions and the national security state.

## CONCLUSION

The collision between national security and the economic order is a troubling and difficult problem. Most obviously, the expanding national security state raises a host of concerns, as security imperatives are frequently deployed as a justification for departing from ordinary rules, hiding behind a veil of secrecy, and violating public law and civil liberties.<sup>379</sup> At the same time, the “security”

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376. See, e.g., *id.* ¶¶ 26–27.

377. See generally Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 64 NETH. INT'L L. REV. 43 (2017) (describing the need for and role of a potential World Investment Organization).

378. See, e.g., Charles N. Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 FORDHAM INT'L L.J. 791, 795–802 (2018) (critiquing the multilateral investment court proposal as an effort by states to “repossess” investment law); M. Sornarajah, *An International Investment Court: Panacea or Purgatory?*, COLUM. FDI PERSP. (Aug. 15, 2016), <http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf> [<https://perma.cc/62PJ-XKEF>] (opposing the proposal because it entrenches bad law that disadvantages developing countries).

379. E.g., BUZAN, WAEVER, & DE WILDE, *supra* note 26, at 29; Maryam Jamshidi, *The Travel Ban: Part of a Broad National Security Exceptionalism in U.S. Law*, JUST SECURITY (July 3, 2018), <https://www.justsecurity.org/58794/travel-ban-part-broad-national-security-exceptionalism-u-s-law> [<https://perma.cc/EY5V-DQQ2>].

label brings political attention and resources to problems that might have otherwise gone unaddressed or underserved. From this perspective, for example, the gradual inclusion of climate change in states' national security policies represents a qualified victory for environmental activists, who have long argued that a warming planet presents a far graver security threat than any particular terrorist organization.<sup>380</sup> The expansion of national and international security thus cannot be wholly condemned out of hand.

At the same time, the economic legal order itself is far from free of its own normative problems. As of this writing, there is concern in some quarters about the propensity of investment law to undermine states' regulatory autonomy and to "chill" beneficial public regulation of health, environmental, and other risks.<sup>381</sup> Trade law has undergone similar struggles.<sup>382</sup> Insofar as international economic rules threaten states' ability to effectively combat terrorism, cybercrime, natural disasters, and existential risks such as climate change, then a self-judging security exception might be an effective, efficient, and even advisable way to escape those rules, even when the exception is put to novel use. The problem, however, is that the increasing overlap between national security and the global economy also threatens to undermine any economically and socially beneficial aspects of trade and investment rules.<sup>383</sup>

The present moment thus demands creative thinking about how to manage the reintegration of the national security state with the global economic order. It

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380. See, e.g., Eric Schewe, *Why Climate Change Is a National Security Issue*, JSTOR DAILY (Oct. 25, 2018), <https://daily.jstor.org/why-climate-change-is-a-national-security-issue> [<https://perma.cc/SQ64-CDS8>].

381. See, e.g., JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS REVISITED* 35-38 (2018); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 132-35 (2003); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENVTL. L. 229 (2018). But see, e.g., Stephan W. Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?*, 24 J. INT'L ARB. 469 (2007).

382. See, e.g., ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM* 61-103 (2011); Emily Barrett Lydgate, *Biofuels, Sustainability, and Trade-Related Regulatory Chill*, 15 J. INT'L ECON. L. 157 (2012).

383. This Article has not mounted a normative defense of either the trade regime or the system of investment-treaty arbitration. To the extent it helps explain what is at stake, a persuasive partial defense of the world trading system is found in Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 355 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001). I am less convinced of the normative value of the investment-treaty system, though I am equally unconvinced that its death by descent into a series of tit-for-tat security claims would be normatively desirable.

is no longer sufficient to focus, as most observers do, on whether national security disputes should be justiciable before international tribunals or what doctrine of deference to apply. The classical approach of denying any legal review is becoming increasingly unmanageable and likely to swallow the ordinary legal rules. Meanwhile, existing theories of adjudication are undertheorized and tend to promise a more stable balance between flexibility and the rule of law than they can deliver. In order to move beyond this impasse, we must develop a more complete model of the ways in which political and legal mechanisms interact at the domestic and international levels to both authorize and constrain national security measures that affect the global economy.

As others have noted, we may be approaching a moment when major elements of the international system are up for grabs.<sup>384</sup> By developing a toolkit for reconfiguring the relationship between trade and security, we can hope to look beyond the current political crises and transform the current system.

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384. See DAVID KENNEDY, *A WORLD OF STRUGGLE* 13-20 (2016).