

TRADE AND SECURITY AMONG THE RUINS

J. BENTON HEATH*

The collision of trade and security interests is taking place today in an increasingly fragmented landscape. Governments' conceptions of their own vital interests are undergoing a rapid transformation as the concept of "national security" expands to encompass issues such as national industrial policy, cybersecurity, and responses to climate change and pandemic disease. At the same time, the system for settling trade disputes is being pulled apart by competing tendencies toward legalism and deformalization. Last year, a landmark decision suggested that international adjudicators could oversee this clash between security and trade, deciding which security interests can override trade rules and which ones cannot. Then the collapse of the WTO Appellate Body threw into doubt the future of a legalized trade regime, suggesting a partial return to a system driven by politics.

I argue that this fragmented landscape provides an opportunity to experiment with different ways of resolving the clash between trade and security. After introducing the expansion of state security interests with reference to recent policy developments, I identify three emerging models for reconciling expanded security interests with trade obligations: structured politics, trade legalism, and judicial managerialism. Each of these models brings tradeoffs in terms of oversight and flexibility, and each is associated with an ideal institutional setting. Rather than attempting to vindicate one model for all settings and all purposes, we should embrace plurality, especially at a moment where the relationship between trade and security appears to be undergoing a historic transformation.

I. INTRODUCTION	224
II. THE EVOLVING NATIONAL SECURITY CHALLENGE.....	226
A. The Return of the Past: Industrial Policy as National Security	229
B. The Untenable Present: Cybersecurity, National Security, and the Future	

Copyright © 2020 J. Benton Heath

* Acting Assistant Professor of Lawyering, New York University School of Law. Thanks to Barry Appleton, Julian Arato, Edith Beersden, Rachel Brewster, Harlan Cohen, James Gathii, Maryam Jamshidi, Simon Lester, Ruti Teitel, Elizabeth Trujillo, participants at the *Duke Journal of Comparative & International Law* Symposium on National Security and Trade Law, and students in colloquia at Brooklyn New York Law School and Loyola University Chicago School of Law. My sincere thanks also to the *Journal* editors for careful and conscientious editing.

of Commerce.....	234
C. The Looming Future: Climate Change and Security	239
III. STRUCTURED POLITICS AT THE WTO.....	245
IV. NATIONAL SECURITY LEGALISM.....	250
A. Channeling Security.....	252
B. Normalizing Security.....	255
C. The Place of National Security Legalism in a Fragmenting System ...	258
V. JUDICIAL MANAGERIALISM IN SECURITY DISPUTES.....	261
VI. CONCLUSION.....	266

I. INTRODUCTION

The clash between economic and security interests today is taking place in an increasingly fragmented institutional landscape. In April 2019, a World Trade Organization (WTO) dispute-settlement panel in *Russia—Measures Concerning Traffic in Transit (Russia—Transit)* declared that it could review and second-guess a state’s invocation of the WTO’s security exception, marking what many considered a “constitutional moment” for the WTO.¹ Months later, the WTO Appellate Body collapsed after years of obstruction by the United States, heralding a much broader turn away from trade legalism and a return to diplomacy- and power-based modes of dispute settlement.² This push-and-pull between adjudication and politics can be seen in different configurations in other fora, as regional trade dispute settlement mechanisms come online³ and states consider reforms to investment law that would arguably make the system more responsive to state interests.⁴

This fragmented landscape challenges the ability of international economic law to respond to evolving state interests—particularly to those interests considered most vital, such as national security. It is by now widely

1. E.g., Sungjoon Cho, *A WTO’s ‘Kompetenz-Kompetenz’ Moment*, INT’L ECON. L. & POL’Y BLOG (Apr. 5, 2019), <https://ielp.worldtradelaw.net/2019/04/a-wtos-kompetenz-kompetenz-moment.html>.

2. See generally THE APPELLATE BODY OF THE WTO AND ITS REFORM (Chang-fa Lo, Junji Nakagawa & Tsai-fang Chen eds., 2020); Gregory Shaffer, *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 (2019).

3. See, e.g., Simon Lester & Inu Manak, *The NAFTA/USMCA Panel Blocking Issue Looks Like It Has Been Fixed (Probably)*, INT’L ECON. L. & POL’Y BLOG (Dec. 11, 2019), <https://ielp.worldtradelaw.net/2019/12/the-naftausmca-panel-blocking-issue-looks-like-it-has-been-fixed.html>; *EU Asks for Panel with Ukraine on Wood Export Ban*, EUROPEAN COMM’N (June 21, 2019), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2034>.

4. See, e.g., Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reform: Visualising a Flexible Framework*, EJIL TALK (Oct. 24, 2019), <https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/>.

recognized that the relationship between economic liberalization and national security is undergoing a profound reconfiguration.⁵ In the United States, this shift is driven in part by a changing perception about the relationship between free trade and the national interest.⁶ At the same time, a number of other threats—including terrorism, transnational crime, corruption, human rights violations, migration, pandemic disease, and climate change—increasingly claim the mantle of “security” and are ever more likely to overlap with economic rules.⁷ All of these new security concerns can drive demands for exceptions to domestic and international trade rules, and many have already done so.⁸ It remains to be seen how the increasingly fragmented trade landscape will respond to the proliferation of security interests.

In this contribution to the *Duke Journal of Comparative & International Law* Symposium on National Security, I argue that there is some silver lining among the ruins of the Appellate Body. In the wake of the Appellate Body’s collapse, we can see different institutional forms emerging that offer diverging approaches to reconciling emerging security interests with the demands of a relatively globalized economy. The outlines of these emerging forms can be found in the practice of dispute settlement panels, in treaty language, and in policy proposals put forward at the WTO and in other fora. This Article maps each of these emerging forms and identifies the tradeoffs associated with them. Rather than attempting to vindicate one proposed solution over the others, we should embrace the fact that we seem to be entering a period of institutional experimentation and attempt to understand the stakes. Given today’s uncertainty in political debates about trade’s importance vis-à-vis other values, such experimentation is not an altogether bad thing.

In advancing this argument, this paper is meant to serve as an Afterword for my prior work on this subject.⁹ In an earlier piece, I argued that evolving security interests pose a fundamental challenge to both political and legalist models for managing the trade-security clash. I contended that “the increasing overlap between national security and the global economy

5. See, e.g., J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 924 (2020); Kathleen Claussen, *Old Wine in New Bottles? The Trade Rule of Law*, 44 YALE J. INT’L L. ONLINE 61, 63–64 (2019); Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT’L ECON. L. 655 (2019).

6. See generally Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. 583 (2019).

7. J. Benton Heath, *National Security and Economic Globalization: Toward Collision or Reconciliation?*, 42 FORDHAM INT’L L.J. 1431, 1433–39 (2019).

8. See *infra* Part I.

9. See generally Heath, *supra* note 5.

requires us to consider the benefits of emerging strategies that mix politics and law.”¹⁰ Since that article was finalized, the collapse of the Appellate Body has focused attention on exactly these kinds of blended institutional forms. In this fast-moving environment, it is not too soon to pause and take stock of recent developments in national security policy and trade law.

The following discussion identifies three distinct modes of reconciliation between trade and security measures. The WTO itself is shifting to a version of “structured politics” rather than adjudication, privileging diplomacy and power politics over legalism, though with a more highly articulated institutional structure than what existed during the General Agreement on Tariffs and Trade (GATT) era.¹¹ A second mode, which can be identified in approaches that rely on *ad hoc* arbitration, would continue to emphasize legalism and hard limits on national security carve-outs, privileging trade governance over flexibility. A third mode, which is reflected in some language found in the recent *Russia—Transit* case, appears to steer a middle path between oversight and flexibility, stressing the role of dispute settlement bodies in fostering adaptation and mutual learning. This “judicial managerialist” approach to trade and security has yet to find an institutional home, but it may be compatible with a range of contemplated reforms to the WTO dispute settlement process, regional trade fora, and investment law.

This paper proceeds in four parts. Part II describes three novel conceptions of security that, in my view, are likely to pose significant challenges for economic law in the near term, focusing on developments taking place over the past two years. Parts III through V discuss each of the three emerging modes of engagement, identifying the tradeoffs for evolving security interests in terms of oversight, flexibility, and mutual learning. A brief conclusion follows.

II. THE EVOLVING NATIONAL SECURITY CHALLENGE

The period since the end of the Cold War has witnessed a dramatic proliferation of national security interests.¹² This is not to say that national security was ever a tight or easily defined concept—contestation about its meaning is at least as old as the national security state itself.¹³ But, at least with respect to the security-trade nexus, the Cold War provided a notable

10. *Id.* at 1030.

11. This is particularly relevant to security concerns because there are signs that this mode is likely to persist for “sensitive” issues even if the WTO Appellate Body is revived. *See infra* text accompanying notes 137–140.

12. This and the next paragraph condense and restate an argument made in Heath, *supra* note 5.

13. *See, e.g.*, OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS* 214–20 (2006).

degree of conceptual and practical stability. In general, governments tended to argue that security concerns should override trade commitments only with respect to interstate conflicts (such as wars or embargoes) or for import and export controls relating to military readiness.¹⁴ This period of stability outlasted the Cold War itself, but it now seems to be reaching its end.¹⁵

The transformation of national security has multiple sources.¹⁶ The advent of human rights and terrorism as national security concerns has led to the identification of new interstate adversaries, as well as non-state rivals.¹⁷ More recently, the United States has deployed anti-corruption norms for the same purpose, asserting that corruption abroad is a threat to U.S. national security and a national emergency.¹⁸ But the most expansive visions of national security tend to involve what Laura Donohue has called “actor-less” risks: phenomena that are caused not by a single governmental or non-state adversary, but by diffuse interactions between humans and non-human phenomena.¹⁹ These include climate change and environmental damage, pandemic disease, and cyber vulnerabilities.

It is helpful, given this state of flux, not to be preoccupied with asking which of these constitute “real” security interests.²⁰ Security itself is

14. Heath, *supra* note 5, at 1054–55.

15. *Id.* at 1057–59.

16. See 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>.

17. See Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Inquiry*, 2 CHI. J. INT’L L. 101 (2001); Philip Zelikow, *The Transformation of National Security*, THE NAT’L INTEREST, Mar. 1, 2003.

18. See, e.g., E.O. 13692, Mar. 8, 2015, 80 Fed. Reg. 12747 (Mar. 11, 2015) (finding that “the situation in Venezuela, including the Government of Venezuela’s erosion of human rights guarantees, . . . as well as the exacerbating presence of significant public corruption, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States,” and declaring a national emergency). *But see* Gregory Korte, *White House: States of Emergency Are Just Formalities*, USA TODAY (Apr. 9, 2015), <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”). These sanctions are currently the subject of a WTO dispute. See Request for the Establishment of a Panel by Venezuela, *United States—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS574/2 (Mar. 15, 2019).

19. Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1709 (2011).

20. This is not to say that “security,” as used in a particular legal text, cannot be interpreted to have hard legal boundaries; it certainly can. See, e.g., *CC/Devas v. India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, ¶¶ 355, 371 (July 25, 2016) (interpreting “essential security interests” in a bilateral investment treaty to be limited to military and quasi-military matters, thus avoiding overlap with the “public purpose” prong of the treaty’s expropriation provision). But, by incorporating “security” as an exception to trade agreements, states do appear to be reserving to themselves a wider range of

helpfully viewed as an intersubjective and socially constructed concept, wherein any matter can plausibly be “securitized” if an actor successfully claims that extraordinary measures are necessary to address an existential threat.²¹ Security, in domestic and international trade law, tends to follow this exceptionalist logic, allowing governments to deviate from ordinary trade rules whenever doing so serves a proclaimed security interest.²² An investigation into the changing political demands around “security,” however defined, thus reveals the kinds of pressures that security politics are likely to place on trade and investment law.

This section identifies three trends that challenge traditional, military-focused notions of security from a variety of perspectives. First, domestic industrial policy—meaning the protection of emerging or declining industries—is increasingly taking on a national security cast, particularly in the United States under President Trump. Second, the challenges of technological interconnectedness have elevated “cybersecurity” to a national security issue, with broad ramifications for all international commerce that has a digital component (which is, increasingly, nearly all of it). Third, climate change today is cast as the existential threat to end all others—a security issue *par excellence*.

In addition to these threats, the Covid-19 outbreak of 2020 underscored the ways in which pandemic disease challenges existing narratives of trade, security, and globalization.²³ Infectious diseases are a paradigmatic non-military security threat, having been the object of a widely successful transnational effort in the early 1990s and 2000s to establish new legal and policy frameworks for “global health security.”²⁴ The international response to Covid-19 includes a range of extraordinary actions, including travel restrictions, quarantine measures, lockdowns and enforced closure of businesses, and export restrictions on critical protective equipment.²⁵ The

discretion than for other, more subject-specific terms like “environment” or “labor.” And, even if “security” in trade agreements is interpreted narrowly, understanding the malleability of this term in wider political discourse reveals important tensions between international trade law and domestic politics.

21. BARRY BUZAN, OLE WAEVER & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 23–31 (1998).

22. Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 *STAN. L. REV.* (forthcoming 2020).

23. See, e.g., Anthea Roberts & Nicolas Lamp, *Is the Virus Killing Globalization?: There Is No One Answer*, *BARRON’S* (Mar. 15, 2020).

24. See generally SARA E. DAVIES, ADAM KAMRADT-SCOTT & SIMON RUSHTON, *DISEASE DIPLOMACY: INTERNATIONAL NORMS AND GLOBAL HEALTH SECURITY* (2015).

25. There are already suggestions that some of these measures could generate claims under investment or trade treaties. See, e.g., Joost Pauwelyn, *Export Resitricition in Times of Pandemic* (unpublished paper 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579965; Mona Pinchis Paulsen, *Thinking Creatively and Learning from Covid-19: How the WTO Can Maintain Open Trade on Critical Supplies*, *OPINIO JURIS* (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium->

crisis also may herald a longer-term shift in trade, as countries invoke national security to justify policies aimed at unwinding global supply chains and ensuring that essential supplies, including medicines and medical devices, are manufactured domestically.²⁶ Although it remains to be seen how fundamentally the pandemic will affect the existing global order, state responses to the outbreak are already reinforcing and accelerating the trends identified in this section.

A. The Return of the Past: Industrial Policy as National Security

The return of industrial policy is among today's most prominent challenges to international trade and investment law.²⁷ Today, governments are frequently using the rhetoric of national security to explain and justify policies designed to protect emerging or declining industries and to enable international competitiveness. This raises the possibility that a wide range of state intervention into the economy could be justified on security grounds, or that trade itself could come to be seen as a threat to national security. The tension between free trade and industrial policy thus poses an acute problem for international institutions, particularly given skepticism of free trade from leaders on both ends of the political spectrum.

Industrial policy, as used here, refers to a wide range of government interventions designed to reallocate resources horizontally among sectors of the economy.²⁸ Such interventions can include subsidies, tariffs, product standards, bans or quotas, bailouts, and nationalizations—all of which have the potential to impact trade and to implicate trade rules.²⁹ The fallout from the 2008 global financial crisis triggered a renewed interest in industrial policy among both academic observers and policymakers,³⁰ and it was argued that some form of horizontal reallocation across sectors had proven

thinking-creatively-and-learning-from-covid-19-how-the-wto-can-maintain-open-trade-on-critical-supplies/; Michael Ostrove, Kate Brown de Bejar & Ben Sanderson, *Covid-19: A Legitimate Basis for Investor Claims?*, DLA PIPER (Apr. 16, 2020), <https://www.dlapiper.com/en/spain/insights/publications/2020/04/covid-19-a-legitimate-basis-for-investment-claims/>.

26. See, e.g., Samuel Esreicher & Jonathan F. Harris, *Bring Home the Supply Chain*, VERDICT (Apr. 15 2020) (“Once the COVID-19 pandemic subsides, U.S. policymakers . . . should mandate that a minimum percentage of essential supplies be manufactured domestically. This is a national security issue.”).

27. See, e.g., MARK FELDMAN, *INTERNATIONAL INVESTMENT OBLIGATIONS AND INDUSTRIAL POLICY: EVOLUTION IN TREATY PRACTICE* (2018); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 ILL. L. REV. 1, 39–41; Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. U. L. REV. 401 (2014).

28. TODD N. TUCKER, *INDUSTRIAL POLICY AND PLANNING: WHAT IT IS AND HOW TO DO IT BETTER* 6 (2019).

29. See *id.* at 9.

30. See generally *THE INDUSTRIAL POLICY REVOLUTION* (Joseph E. Stiglitz & Justin Yifu Lin eds., 2013).

successful in emerging economies.³¹ Some authors began to tell revisionist stories about industrial policy in the United States and other free-market countries, contending that such policies were neither as rare nor as ideologically anathema as often thought.³² As one prominent economist wrote in 2010, “industrial policy is back.”³³

The return of industrial policy is reconfiguring the established relationship in market economies between national security and economic liberalization. Of course, some subset of industrial policy is always concerned with national security. For example, governments historically used procurement, subsidies, and other means to support industries considered essential for national defense, space exploration, and critical infrastructure.³⁴ The national-security justifications for these policies could sometimes be specious, such as quotas imposed by the United States on petroleum imports³⁵ or Sweden’s claim that import restrictions on footwear were necessary “to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.”³⁶ But, in general, state support for domestic industries needed to be phrased in terms of military procurement or military readiness if it was

31. Dani Rodrik, *Industrial Policy: Don’t Ask Why, Ask How*, 1 M.E. DEV. J. 1 (2009).

32. E.g., Robert H. Wade, *Return of Industrial Policy?*, 26 INT’L REV. APP. ECON. 223, 229–32 (2012); Dan Ciuriak & John M. Curtis, *The Resurgence of Industrial Policy and What It Means for Canada*, IRPP INSIGHT, June 2013, <https://irpp.org/research-studies/the-resurgence-of-industrial-policy-and-what-it-means-for-canada/>.

33. Dani Rodrik, *The Return of Industrial Policy*, PROJECT SYNDICATE (Apr. 12, 2010), <https://www.project-syndicate.org/commentary/the-return-of-industrial-policy>.

34. The tendency of such interventions to occupy ever-greater sections of the economy was noted in 1963 by Lon Fuller, who thought that these developments raised “problems of institutional design unprecedented in scope and importance,” in a passage that resonates today:

The problem of finding the most apt institutional design for governmental control over the economy has been acute for a long time. In the future this problem is, I think, bound to become more pressing and pervasive. Indispensable facilities, like certain of our railways, will have to be rescued from their economic plight Almost by inadvertence—a multibillion dollar inadvertence—we have developed a new form of mixed economy in that huge segment of industry dependent upon contracts with the armed services. Because this new form of enterprise is classified as “private,” it escapes the scrutiny to which direct governmental operation would be subjected. At the same time it is foolish to think of it as being significantly subject to the discipline of the market. When and if our expenditures for armaments are seriously reduced, a great unmeshing of gears will have to take place. Finally, there are the as yet largely unfaced dislocations that will be brought about by increasing automation.

LON L. FULLER, *THE MORALITY OF LAW* 175–176 (rev. ed. 1969).

35. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 752 (1969) (“United States oil quotas . . . carry the label ‘security measure,’ but are widely considered to be protectionist.”).

36. *Sweden—Import Restrictions on Certain Footwear*, ¶ 4, GATT Doc. L/4250 (Nov. 17, 1975); see also GATT Council, *Minutes of Meeting*, at 8–9, GATT Doc. C/M/109 (Nov. 10, 1975) (“Many representatives . . . expressed doubts as to the justification of these measures under the General Agreement.”).

going to be considered a “security” policy.³⁷ Autarky, on this view, is not itself a security interest; free trade is not itself a security threat.³⁸

This is consistent with broader views of trade that prevailed among Western states during the postwar era. For the U.S. diplomats who drafted the GATT, liberalized trade had long been associated with greater international harmony, peace, and national security.³⁹ This view proved relatively persistent in U.S. policy circles. The 1987 Reagan White House’s National Security Strategy explains that “encouraging regional and global free-trade agreements” are a critical element of U.S. national security and contribute to the containment of the Soviet Union.⁴⁰ The Clinton White House argued in 2000 that Chinese accession to the WTO was critical to national security.⁴¹ And the Obama administration repeatedly argued that entering the Trans-Pacific Partnership would enhance U.S. national security.⁴² While this discussion has focused on the United States, supporters of trade liberalization and the WTO worldwide frequently advance the argument that trade agreements contribute to peace and security.⁴³

This policy orientation was turned on its head with the election of Donald Trump in 2016. The Trump administration promptly declared that “economic security is national security,” adding:

For decades, the United States has allowed unfair trading practices to grow. Other countries have used dumping, discriminatory non-tariff barriers, forced technology transfers, non-economic capacity, industrial subsidies, and other support from governments and state-owned enterprises to gain economic advantages.

Today we must meet the challenge. We will address persistent trade

37. Heath, *supra* note 5, at 1054.

38. For an uncompromising argument to this effect in international trade law, see Michael Hahn, *Vital Interests and the Law of GATT: An Analysis of the GATT’s Security Exception*, 12 MICH. J. INT’L L. 558, 580 (1991) (“[I]t would be wrong to read article XXI as coping with dire socioeconomic consequences ensuing from the operation of GATT principles and policies.”).

39. See generally Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception*, MICH. J. INT’L L. (forthcoming 2020) (arguing that the GATT security exception reflected a qualified victory for members of the U.S. delegation who successfully argued—against the perspective of their own armed services—that U.S. leadership on liberalized international trade would further U.S. security interests).

40. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 3 (1987) [hereinafter 1987 NSS].

41. David E. Sanger, *Sometimes, National Security Says It All*, N.Y. TIMES, May 7, 2000. Notably, the Reagan administration was not willing to support Soviet admission to the GATT in the 1980s, despite the existence of similar arguments at the time. See 1987 NSS, *supra* note 40, at 10.

42. Raj Bhala, *TPP, American National Security and Chinese SOEs*, 16 WORLD TRADE REV. 655, 659–60 (2017) (quoting then-current and former U.S. officials).

43. See, e.g., Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355, 369 (Jean-Marc Coicaud & Veijo Heiskanen eds. 2001) (describing, but not adhering to, the “conflict management” approach to the WTO’s legitimacy).

imbalances, break down trade barriers, and provide Americans new opportunities to increase their exports. The United States will expand trade that is fairer so that U.S. workers and industries have more opportunities to compete for business.⁴⁴

This language signals a shift in U.S. policy, whereby ever freer trade is no longer presumed to result in security gains and U.S. national security is instead preserved through trade policies that support and protect domestic industry.⁴⁵ Responding to these developments in the United States and abroad, commentators have raised concerns that “[t]reating economic security as national security may . . . create a permanent state of exception justifying broad protection/protectionist measures across time and space.”⁴⁶

In the United States, the most salient example of this new approach to industrial-policy-as-national-security is the Trump administration’s decision to impose tariffs on steel and aluminum imports.⁴⁷ These tariffs expressly relied on a strong form of “security exceptionalism,” both under domestic law and international law, to avoid the domestic and international legal constraints that would otherwise apply to such trade restrictions.⁴⁸ Domestically, the tariffs rely on Section 232 of the Trade Expansion Act of 1962, which enables the President to take action to “adjust” imports of a certain product “so that such imports will not threaten to impair the national security.”⁴⁹ To defend these tariffs at the WTO, the United States has also invoked Article XXI of the GATT, which recognizes a state’s right to take “any action which it considers necessary for the protection of its essential security interests” under certain enumerated circumstances.⁵⁰ By invoking these exceptions, the United States has edged toward a version of national security that goes beyond military readiness, to embrace a conception that equates security with economic self-sufficiency and competitiveness.⁵¹ This

44. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 17, 19 (2017).

45. See, e.g., Roberts, Moraes & Ferguson, *supra* note 5, at 664–65.

46. *Id.* at 665.

47. E.g., TUCKER, *supra* note 28, at 7 (citing Trump’s support for the steel industry as an example of industrial policy).

48. Claussen, *supra* note 22, at 24–25 (describing these measures as a form of “hard” security exceptionalism).

49. 19 U.S.C. § 1862(c)(1)(A). “National security” is not defined in the statute, and the text mandates a range of considerations that blend economic and security concerns, including the capacity of domestic industries, their growth requirements, the national economic welfare, the impact of foreign competition on “individual” domestic industries, and the effect of imports on the workforce, government revenue, job skills, and investment. *Id.* § 1862(d).

50. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

51. See Presidential Proclamation on Adjusting Imports of Steel into the United States, ¶ 8, Mar. 8, 2018 (“This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will

approach connects national security to far older conceptions of industrial policy, often with the same racist and gendered views about which jobs and economic sectors merit government support.⁵²

All this is not to say that industrial policy is the exclusive province of the populist-nationalist right. There appears to be growing enthusiasm among progressives in the United States for some form of industrial policy to address inequality, invest in disadvantaged communities, catalyze innovation, and restart domestic manufacturing.⁵³ It is frequently argued that “green industrial policy”—consisting in large measure of subsidies for the development of green technology—is necessary to facilitate investment in risky ventures and counteract the market’s mispricing of carbon emissions.⁵⁴ For example, certain types of subsidies and local content requirements may be the most politically effective ways to build support for green energy programs, particularly in places like the United States where publics are wary of top-down governance by international institutions.⁵⁵ Separately, domestic industrial policy is shaping cybersecurity and digital commerce, as states intervene to support domestic industries and identify national champions,

reduce our Nation’s need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense. Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security.”); U.S. DEP’T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY 55–57 (Jan. 11, 2018) (referring to the effect of a declining steel industry on U.S. “surge capability” in time of “extended conflict or national emergency,” while also stressing that global excess capacity in steel are “weakening our internal economy”).

52. Compare TUCKER, *supra* note 28, at 25 (noting the “racially exclusionary” nature of New Deal-era industrial policies), with 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*, at 10–12 Queen’s Univ. Faculty of Law Res. Paper Ser., No. 2018-102 (Aug. 2019) (“The deeply gendered nature of Trump’s narrative becomes even more evident in a crucial omission: Trump consistently fails to mention the textile industry, even though textile workers have been affected by import competition in much greater numbers than those in the coal and steel industry. A key difference between the coal and steel industry, on the one hand, and the textile industry, on the other hand, is that the textile industry predominantly employs women.”).

53. E.g., GANESH SITARAMAN, THE GREAT DEMOCRACY 166 (2019) (“The United States . . . should also engage in an industrial policy that invests in communities across the country. This industrial policy would jump-start areas with investments in research and development and infrastructure and require that manufacturing take place in the United States when products are built on breakthroughs from public investments in R&D.”); TUCKER, *supra* note 28, at 30–39 (outlining considerations for an industrial policy focused on federalized planning, sustainable development, and support for women and communities of color).

54. DANI RODRIK, STRAIGHT TALK ON TRADE 257–60 (2017); *see also* Salzman & Wu, *supra* note 27, at 416–42; Dani Rodrik, *Green Industrial Policy*, 30 OXFORD REV. ECON. POL’Y 469 (2014).

55. *See* Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 BOSTON UNIV. L. REV. 1937 (2015); Todd Tucker, *There’s a Big New Headache for the Green New Deal*, WASH. POST, June 28, 2019.

sometimes touching off economic and geopolitical conflict.⁵⁶ Most recently, the Covid-19 pandemic has produced calls on the American right and left for “a serious industrial policy to reclaim and rebuild domestic supply chains.”⁵⁷

Unlike the Trump administration’s steel and aluminum tariffs, progressive industrial policy has yet to be justified by reference to “essential security” concerns before an international tribunal, though that could change. Industrial policies can implicate a range of applicable domestic and international laws, only some of which are subject to the kind of broad security exceptions that the United States is invoking with respect to the steel tariffs.⁵⁸ The more fundamental point, however, is that an increasing range of regulatory techniques designed to support domestic industry are being tied to national security, and not just in the United States.⁵⁹ The securitization of industrial policy is thus poised to precipitate further clashes with trade rules.

B. The Untenable Present: Cybersecurity, National Security, and the Future of Commerce

Cybersecurity, today, is widely understood to be essential to national security,⁶⁰ even if the concept itself remains somewhat slippery.⁶¹ The notion that cybersecurity demands extraordinary measures appears to enjoy broad support from lawmakers across the political spectrum, not to mention intuitive appeal among the lay public. This is also a policy area in which state governments have been particularly active, intervening to restrict cross-border data flows; unwind transactions involving sensitive personal data; impose technical and regulatory standards; restrict certain foreign companies from entering sensitive sectors; and even negotiate new trade rules in

56. *E.g.*, Vinod K. Aggarwal & Andrew W. Reddie, *Comparative Industrial Policy and Cybersecurity: A Framework for Analysis*, 3 J. CYBER POL’Y 291 (2018).

57. Robert Kuttner, *Trump’s Economy Goes Viral*, AM. PROSPECT (Mar. 4, 2020); accord Marco Rubio, *We Need a More Resilient American Economy*, N.Y. TIMES (Apr. 20, 2020).

58. Compare Salzman & Wu, *supra* note 27, at 451–54 (arguing that many green industrial policies implicate the WTO Subsidies and Countervailing Measures agreement, which, on its face, lacks an exception for either security or environmental measures), with Meyer, *supra* note 55, at 1993–2001 (analyzing local content requirements largely under the GATT).

59. *See, e.g.*, Aggarwal & Reddie, *supra* note 56, at 296 (noting that U.S., Chinese, Finnish, and French policies emphasize that national security considerations drive standard setting, procurement, and public investment in the cybersecurity market); Salzman & Wu, *supra* note 28, at 415 (finding that governments are emphasizing the national security benefits of green industrial policies).

60. *See, e.g.*, Jim Garamone, *Cyber Tops List of Threats to U.S.*, *Director of National Intelligence Says*, DOD NEWS (Feb. 13, 2018), <https://www.defense.gov/Explore/News/Article/Article/1440838/cyber-tops-list-of-threats-to-us-director-of-national-intelligence-says/>.

61. For critical reviews of the cybersecurity discourse, noting shifts among frames and referent objects, see Helen Nissenbaum, *Where Computer Security Meets National Security*, 7 ETHICS & INFO. TECH. 61 (2005); Lene Hansen & Helen Nissenbaum, *Digital Disaster, Cyber Security, and the Copenhagen School*, 53 INT’L STUDS. Q. 1155 (2009).

bilateral, regional, and multilateral fora specifically relating to data transfers.⁶² Despite these efforts to innovate new rules and policies, the existing frameworks governing the intersection of electronic commerce and security imperatives are woefully undertheorized, and they all essentially punt on the question of whether and when cybersecurity concerns should override the demands of trade liberalization (or *vice versa*). The result is an untenable present—an unstable and tense state of affairs that must give way to some future, yet-to-be-understood equilibrium.

Cybersecurity, as it relates to international trade and investment, in fact refers to a bundle of different threats, each suggesting a different set of policy responses. These threats have been said to include intrusions into systems belonging to militaries, defense or intelligence agencies, or their suppliers; cyberattacks on critical infrastructure, such as power networks, hospitals, or telecommunications; “economic cyber-espionage” operations aimed at stealing intellectual property and trade secrets or disrupting competitors; or the manipulation of digital information to create distrust.⁶³ Today, this list of potential security threats must also include the collection of sensitive personal data by private or state-owned firms, which governments are increasingly viewing as a national security concern in itself, without necessarily demanding any further connection to espionage, sabotage, or warfare.⁶⁴

In response to these threats, states are imposing measures in the name of national security that significantly impact cross-border trade and investment. The most prominent examples of such measures tend to involve Chinese firms, particularly the global telecommunications giant Huawei.⁶⁵

62. On the various regulatory paradigms for digital commerce, see Thomas Streinz, *Digital Megaregulation Uncontested?: TPP's Model for the Global Digital Economy*, in MEGAREGULATION CONTESTED: GLOBAL ECONOMIC ORDERING AFTER TPP 312 (Benedict Kingsbury et al. eds., 2019).

63. Joshua Meltzer, *Cybersecurity and Digital Trade: What Role for International Trade Rules?* (Brookings Glob. Econ. & Dev. Working Paper No. 132, 2019).

64. E.g., Carl O'Donnell, Liana B. Baker & Echo Wang, *Exclusive: Told U.S. Security At Risk, Chinese Firm Seeks to Sell Grindr Dating App*, REUTERS, Mar. 27, 2019; Samm Sacks et al., *China's Cybersecurity Reviews for 'Critical' Systems Add Focus on Supply Chain, Foreign Control*, DIGICHINA, May 24, 2019.

65. Huawei was identified last year by some outlets as “the world’s largest telecom equipment company,” and is a recognized global leader in the development of 5G telecommunications technology. Keith Johnson & Elias Groll, *The Improbable Rise of Huawei*, FOREIGN POL’Y, Apr. 3, 2019. It is not technically owned by the Chinese government, instead referring to itself as “employee-owned,” but the reality appears to be more complicated. See Christopher Balding & Donald Clarke, *Who Owns Huawei?* (unpublished manuscript, Apr. 17, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372669; cf. Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 688 (2015) (arguing that, in China, “[t]he state has only attenuated control over state-owned enterprises, yet it exerts significant control rights over private firms in which it holds no ownership interests”).

In August 2018, Australia banned Huawei and the Chinese company ZTE from providing 5G equipment on its territory, citing concerns about the security of critical infrastructure.⁶⁶ The following year, the United States declared a national emergency with respect to exploitation by “foreign adversaries” of telecommunications networks and invoked statutory emergency powers to review and prohibit technology transactions that pose an “unacceptable risk to the national security of the United States.”⁶⁷ This order was widely understood to be meant “to ban Huawei equipment in 5G networks, but it could end up having a much broader use than that.”⁶⁸ Elsewhere, other countries are wrestling with whether to ban Huawei equipment,⁶⁹ admit Huawei,⁷⁰ or attempt a middle road between openness and an outright ban.⁷¹ China has decried the Australian and U.S. measures as violations of WTO rules that prohibit discrimination and forbid quantitative restrictions.⁷²

States are also beginning to use national-security authority to regulate the collection, aggregation, and transfer of personal data. This is particularly pronounced in the United States, where the interagency Committee on Foreign Investment in the United States (CFIUS) has opened high-profile investigations into the online video app TikTok and the LGBTQ dating app Grindr, forcing Grindr’s Chinese owner to divest its holdings by later this year.⁷³ The reported rationale for the Grindr action was that users’ personal data “could be exploited by Beijing to blackmail individuals with security

66. E.g., Jamie Smyth, *Australia Banned Huawei over Risks to Key Infrastructure*, FIN. TIMES, Mar. 27, 2019.

67. E.O. 13873, May 15, 2019, 84 Fed. Reg. 22689 (May 15, 2019). Proposed regulations issued in late 2019 do not provide any further definition of the “national security” concerns at issue. See *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 65316, 65320–22 (Nov. 27, 2019).

68. Samm Sacks & Graham Webster, *The Trump Administration’s Approach to Huawei Risks Repeating China’s Mistakes*, SLATE (May 21, 2019), <https://slate.com/technology/2019/05/u-s-china-huawei-executive-order-foreign-adversary-national-security.html>.

69. Katrin Bennhold & Jack Ewing, *In Huawei Battle, China Threatens Germany ‘Where It Hurts’: Automakers*, N.Y. TIMES, Jan. 17, 2020, at A1.

70. *Huawei: Which Countries Are Blocking Its 5G Technology?*, BBC NEWS (May 18, 2019), <https://www.bbc.com/news/world-48309132>.

71. See, e.g., Joel P. Trachtman, *The Internet of Things Cybersecurity Challenge to Trade and Investment: Trust and Verify?* (Apr. 18, 2019) (unpublished manuscript) (on file with author) (describing the approach taken by the U.K.).

72. 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>; *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-idUSKCN1RO20H>.

73. Louise Matsakis, *TikTok Is Having a Tough Time in Washington*, WIRED (Nov. 5, 2019), <https://www.wired.com/story/tiktok-rough-time-washington/>; O’Donnell, Baker & Wang, *supra* note 64

clearances.”⁷⁴ The view that personal data poses a national-security risk also appears to enjoy broad political support. In 2018, Congress expanded CFIUS’s mandate to, among other things, review any foreign investment in any U.S. business that “maintains or collects sensitive personal data” of U.S. citizens.⁷⁵ The actions of investment-screening mechanisms like CFIUS, if not justified by security exceptions, could implicate obligations in the GATT and the General Agreement on Trade in Services, as well as investment-treaty guarantees of non-discrimination, expropriation, and fair treatment, where applicable.⁷⁶

Existing trade agreements are, at best, ill-suited to dealing with the challenge of cybersecurity measures. The 1947 GATT, which provides the template for the security exception in many trade agreements, was designed in a time long before contemporary cyber-threats, referring instead to “fissionable materials,” “implements of war,” military supplies, and “war or other emergency in international relations.”⁷⁷ Lawyers could argue endlessly about whether cybersecurity measures such as those described above are “taken in time of . . . emergency in international relations,” or relate to the supply of a “military establishment,” but the fit is obviously less than ideal.⁷⁸

74. Georgia Wells & Kate O’Keeffe, *U.S. Orders Chinese Firm to Sell Dating App Grindr Over Blackmail Risk*, WALL ST. J., Mar. 27, 2019.

75. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1703(a)(4)(B)(iii)(III), 132 Stat. 2178 (2018). Subsequent regulations explained that this provision covers, among other things, any business that maintains or collects certain types of data, including financial, health, email and chat data, on more than one million persons, or plans to do so. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3112, 3132 (Jan. 17, 2020) (to be codified at 31 C.F.R. pt. 800). The drive to protect personal data, potentially on national security grounds, is not unique to the United States. In 2019, China released draft rules for the “security assessment” of outbound data transfers involving personal data. Qiheng Chen et al., *Translation: Personal Information Outbound Transfer Security Assessment Measures (Draft for Comment)*, DIGICHINA (June 13, 2019), <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-new-draft-rules-cross-border-transfer-personal-information-out-china/>. And even the European Commission, which has been especially critical of expansive national security claims, has anchored its policies relating to data privacy “ultimately on the Commission’s many concerns about EU Members’ regional, national, and economic security.” Desierto, *supra* note 16.

76. James Mendenhall, *The Evolution of the Essential Security Exception in U.S. Trade and Investment Agreements*, in SOVEREIGN INVESTMENT 311, 347 (Karl P. Sauvant, Lisa E. Sachs & Wouter P.F. Schmit Jongbloed eds., 2012).

77. See GATT 1947, *supra* note 50, art. XXI(b); Comprehensive Economic and Trade Agreement [CETA], art. 28.6, Can.-E.U., Oct. 2016, Official Journal of the E.U., L 11 (Jan. 14, 2017); General Agreement on Trade in Services [GATS], art. XIV bis, Apr. 15, 1994, 1869 U.N.T.S. 196; Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS], art. 73, Apr. 15, 1994, 1869 U.N.T.S. 299, 331; North American Free Trade Agreement [NAFTA], art. 2102, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605 (1993).

78. See Neha Mishra, *The Trade-(Cyber)security Dilemma and Its Impact on Global Cybersecurity Governance*, J. WORLD TRADE (forthcoming 2020) (arguing that the GATS security exception does not cover most cybersecurity measures, placing panels in a politically difficult position); Meltzer, *supra* note

Some treaty drafters—including the United States, India, and parties to the Trans-Pacific Partnership—have responded to this ill fit by allowing a state to invoke the security exception for any measure “it considers necessary for the . . . protection of its own essential security interests,” without regard to war, emergency, or military supplies.⁷⁹ This streamlined formulation, as Josh Meltzer notes, “would seem to provide scope for justifying most, if not all, cybersecurity measures.”⁸⁰

This doctrinal confusion poses a particular problem for the development of new international commerce. From the perspective of cybersecurity, some security exceptions—such as the GATT formulation—appear outmoded or ill-suited to address contemporary realities. Meanwhile, more recent exceptions, such as the formulation now preferred by the United States, would appear to provide *carte blanche* for cybersecurity measures to override trade rules. Notably, these more flexible and open-ended security exceptions appear in the same agreements, such as the CPTPP and the recent U.S.-Mexico-Canada agreement, that are also meant to supply state-of-the-art rules for digital trade.⁸¹ In other words, states are writing new trade rules for the digital economy, but, given the breadth of today’s cybersecurity concerns, it’s not clear when those rules will apply.

The recent U.S.-Japan digital trade agreement is a case in point.⁸² This treaty collects all of the United States’ newest innovations with respect to electronic commerce and the free flow of data. It provides for non-discrimination against each parties’ digital products, prohibits measures requiring the localization of servers, and provides that cross-border data transfers can be limited only “to achieve a legitimate public policy objective” in a non-discriminatory and narrowly tailored manner.⁸³ It also contains an innovative provision on cryptography, which essentially prohibits either

63, at 21 (arguing that “the absence of an emergency in international relations between the U.S. and China as outlined by the Panel in Russia-Transit, would seem to foreclose genuine cybersecurity measures being justified under the GATS or GATT security exception”); Trachtman, *supra* note 71 (arguing that “high-risk” measures, but not “low risk ones,” are probably justifiable under both prongs of GATT Article XXI).

79. United States-Mexico-Canada Agreement [USMCA], Can.-Mex.-U.S., art. 32.2, Nov. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>; Comprehensive and Progressive Agreement for Trans-Pacific Partnership [CPTPP], art. 29.2(b), Mar. 8, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

80. Meltzer, *supra* note 63, at 26.

81. See generally Streinz, *supra* note 62 (referencing the CPTPP and USMCA as examples of where the “U.S. digital trade agenda” was featured).

82. Agreement Concerning Digital Trade, U.S.-Japan, Oct. 7, 2019, <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text> [hereinafter U.S.-Japan Digital Trade Agreement].

83. *Id.* arts. 8, 11, 12.

government demand that a company hand over the keys to its encrypted systems as a condition of doing business and includes a handful of narrowly drawn exceptions.⁸⁴ None of these provisions, however, precludes a party from “applying measures that it considers necessary for . . . the protection of its own essential security interests.”⁸⁵ Given the broad scope of the security exception and the range of cybersecurity measures that could be justified in this way, it is unclear to what extent the two countries have agreed to anything of substance in the rest of the treaty.

This is the untenable present of cybersecurity and trade. For advocates of free trade and free data flows, the growing cybersecurity challenge threatens to wipe out all of the gains achieved through the adoption of rules that limit server localization measures and ensure the cross-border transit of data. But, for those seeking assurance that trade agreements will not interfere with cybersecurity measures, this state of affairs is not much better. The relationship between trade norms and security exceptions is too underdeveloped to provide that degree of certainty.

C. The Looming Future: Climate Change and Security

The next challenge to the trade/security balance may come from an entirely different vector. Despite the persistence—for now—of climate denialism on the American political right, governments and populations are increasingly recognizing the catastrophic risks posed by global climate change.⁸⁶ To date, there is no known case where a government has sought to escape trade and investment rules by invoking its security interests relating to climate change. But the incentives to do so exist, and as the salience of this issue increases, states may perceive economic, legal, or political benefit in doing so.

There appears to be growing consensus among governments that climate change poses a security risk, though the precise nature of this risk remains contested.⁸⁷ By 2009, the Canadian, U.K., and U.S. national security strategies all identified climate change as a threat.⁸⁸ President Obama’s second term placed a sharp emphasis on the dangers of climate change, with

84. *Id.* art. 21.

85. *Id.* art. 4.

86. 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>.

87. Matt McDonald, *Climate Change and Security: Towards Ecological Security?*, 10 INT’L THEORY 153, 153 (2018).

88. Inv. Div., Directorate for Fin. & Enter. Affairs, OECD, SECURITY-RELATED TERMS IN INTERNATIONAL INVESTMENT LAW AND IN NATIONAL SECURITY STRATEGIES, 14 (May 2009) (referring to Canada and UK policies); *National Security Strategy*, WHITE HOUSE (Feb. 2015).

the president asserting that “climate change constitutes a serious threat to global security, an immediate risk to our national security”⁸⁹ and Secretary of State John Kerry announcing steps to “integrate climate and security analysis into overall foreign policy planning.”⁹⁰ Though the policies did not always match the rhetoric, Obama at times seemed intent on subverting the traditional security mindset, stating that the terrorist group “ISIS is not an existential threat to the United States Climate change is a potential existential threat to the entire world if we don’t do something about it.”⁹¹ As the Trump administration has sought to de-prioritize climate change in favor of vilifying migrants and using emergency powers to build a border wall,⁹² the climate-security narrative has become even more salient among the center-left.⁹³

These developments dovetail with changes at the international level, where there is an increasing push to declare climate change a threat to “international peace and security” under the U.N. Charter, potentially triggering emergency powers on the international stage.⁹⁴ The U.N. Security Council opened this door somewhat in 2014, when it declared that an Ebola outbreak constituted a threat to international peace and security, thus suggesting that other non-human threats may qualify.⁹⁵ Some countries have encouraged the Security Council to take a more active role in threats like

89. President Barack Obama, Remarks at the U.S. Coast Guard Academy (May 20, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/05/20/remarks-president-united-states-coast-guard-academy-commencement>.

90. Secretary of State John Kerry, Remarks on Climate Change and National Security, Old Dominion Univ., Norfolk, Va. (Nov. 10, 2015), <https://2009-2017.state.gov/secretary/remarks/2015/11/249393.htm>.

91. Jeffrey Goldberg, *The Obama Doctrine*, THE ATLANTIC, (Apr. 2016), <https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>.

92. See, e.g., Juliet Eilperin & Missy Ryan, *White House Prepares to Scrutinize Intelligence Agencies’ Finding that Climate Change Threatens National Security*, WASH. POST, Feb. 20, 2019. For a discussion of who feared at the time that border emergency declaration would encourage Democrats to later declare climate emergency, see Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019).

93. See, e.g., Janet Napolitano & Karen Breslau, *The Real National Emergencies Trump is Ignoring*, POLITICO (Feb. 19, 2019), <https://www.politico.com/magazine/story/2019/02/19/trump-national-emergency-225163>.

94. Shirley V. Scott, *Implications of Climate Change for the UN Security Council*, 91 INT’L AFF. 1317, 1333 (2015); Andreas Motzfeldt Kravik, *The Security Council and Climate Change – Too Hot to Handle?*, ELIJ: TALK (Apr. 26, 2018), <https://www.ejiltalk.org/the-security-council-and-climate-change-too-hot-to-handle/>.

95. See S.C. Res. 2177, prmb., U.N. Doc. S/RES/2177 (Sept. 18, 2014); Gian Luca Burci, *Ebola, the Security Council and the Securitization of Public Health*, 10 QUESTIONS IN INT’L L. 27, 27 (2014); J. Benton Heath, *Pandemics and other Health Emergencies*, in OXFORD HANDBOOK OF INTERNATIONAL LAW OF GLOBAL SECURITY (Robin Geiss & Nils Melzer ed.) (forthcoming 2020).

climate change,⁹⁶ though consensus at the Council has so far been limited to deeming climate change a “threat multiplier.”⁹⁷ All of these high-level developments are matched by the rhetoric of transnational social movements, which have increasingly used “emergency” language to define the climate threat.⁹⁸ Given these moves to redefine “international peace and security” under the U.N. Charter, it is notable that some regional trade treaties have begun to provide states with more flexibility to act in accordance with their own understandings of their Charter obligations.⁹⁹

It is still unclear where all this rhetoric leads, but commentators have identified a range of climate policies that might interfere with trade or investment and be justified on national security grounds. Despite the European Union’s recent skepticism of expansive security claims, one EU trade lawyer has suggested that “climate change and environmental issues . . . may under certain circumstance become a matter related to the very existence of a nation,” as in the case of island states affected by sea-level rise.¹⁰⁰ Other commentators allow a wider scope, suggesting countries could use a climate-emergency declaration to suspend oil drilling, restrict trucking or other fossil fuel-intensive activities, or impose sanctions or other restrictions on traffic in fossil fuels.¹⁰¹

There is also the possibility that future governments will seek the broad

96. See, e.g., Michelle Müntefering, Minister of State, Permanent Mission of the Federal Republic of Germany to the United Nations, Statement in the UNSC Open Debate: Upholding the United Nations Charter (Jan. 9, 2020), <https://new-york-un.diplo.de/un-en/news-corner/200109-un-charter/2291676>.

97. *Climate Change Recognized as ‘Threat Multiplier,’ UN Security Council Debates Its Impact on Peace*, U.N. NEWS (Jan. 25, 2019), <https://www.un.org/peacebuilding/news/climate-change-recognized-%E2%80%98threat-multiplier%E2%80%99-un-security-council-debates-its-impact-peace>.

98. 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>; Mark Tutton, *UK Parliament Declares ‘Climate Emergency’*, CNN (May 1, 2019, 5:46 PM), <https://www.cnn.com/2019/05/01/europe/uk-climate-emergency-scn-intl/index.html>.

99. Historically, trade treaties contained “essential security” exceptions for actions taken pursuant to U.N. Charter obligations, but these were not self-judging, meaning that in principle it would be for a trade panel or tribunal to decide whether an action was truly necessary to comply with a given Charter obligation. GATT 1947, *supra* note 46, art. XXI(c). This has changed, particularly in treaties involving the United States, where the security exceptions permit any action that either state “considers” necessary for its Charter obligations. See U.S. MODEL BILATERAL INVESTMENT TREATY, art. 18 (U.S. DEP’T OF STATE 2012); CPTPP, *supra* note 79, art. 29.2(b).

100. George-Dian Balan, *On Fissionable Cows and the Limits to the WTO Security Exceptions*, 14 GLOBAL TRADE & CUSTOMS J. 1, 6 & n.36 (2019).

101. The arguments of which I am aware have been deployed largely in the context of U.S. statutes like the International Emergency Economic Powers Act. See Daniel A. Farber, *Using Emergency Powers to Fight Climate Change*, LEGAL PLANET (Jan. 14, 2019), <https://bit.ly/2GkdfYs>; Mark Nevitt, *Climate Change: Our Greatest National Security Threat?*, JUST SECURITY (Apr. 17, 2019), <https://bit.ly/2UvCvPq>. The same arguments used to invoke emergency power domestically would likely have to be deployed at the international level to justify departures from trade rules.

protection of security exceptions for “ordinary” environmental measures relating to climate change. Generally, such regulations, insofar as they interfere with trade, are justified under public-policy exceptions such as GATT Article XX, which require that measures be “necessary” for a particular purpose and not arbitrarily or unjustifiably discriminatory.¹⁰² These exceptions are in principle available for environmental or conservation measures, though such measures often fail to pass the test, at least initially.¹⁰³ There is thus concern that some legitimate environmental measures—such as Border Carbon Adjustments designed to ensure that domestic environmental regulations are not undermined by foreign imports—could struggle to actually pass the test under these exceptions.¹⁰⁴ Security exceptions, if available and supported by a widening consensus on the threat of climate change, may provide an alternative that is not subject to the same close, administrative-law-like scrutiny.

To this point, this discussion of climate and security has largely adopted the perspective of the Western developed world, but the next challenge could just as easily come from the Global South. For example, the trade policy community has long understood that “[t]he ability to feed one’s own nation is sometimes considered to be an important national goal for security purposes.”¹⁰⁵ Climate change is likely to put increasing pressure on global food security in the coming years, with the hardest changes being felt by some of the poorest countries.¹⁰⁶ While protectionist measures can often exacerbate food insecurity, trade restrictions may sometimes be justified in order to insulate localized regions from the double shock of exposure to both

102. See GATT 1947, *supra* note 50, art. XX.

103. Compare DANI RODRIK, THE GLOBALIZATION PARADOX 71 (2011) (noting that WTO Appellate Body rulings against environmental and other regulations “raised the ire of anti-globalization advocates and made the WTO a dirty word in many circles,” demonstrated the “absence of a clear bright line between where domestic prerogatives end and external obligations begin,” and contributed to “the trade regime’s growing legitimacy crisis”), with Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9, 51 (2016) (arguing that WTO Appellate Body jurisprudence on environmental and other public policy measures has balanced the need to “make assurances of policy space to establish and enhance its legitimacy in an era when neo-liberal globalization is highly contested” with the concomitant need to place “constraints on protectionist abuse of public policies that undermined the value or integrity of the basic GATT-like commitments”).

104. See Michael A. Mehling et al., *Designing Border Carbon Adjustments for Enhanced Climate Action*, 113 AM. J. INT’L L. 433, 464–70 (2019) (explaining that BCAs would have to be carefully designed to pass muster under the GATT Article XX exceptions); ECONOMIST ECONOMIC INTELLIGENCE UNIT, CLIMATE CHANGE AND TRADE AGREEMENTS: FRIENDS OR FOES? 18 (2019) (noting a “lack of clarity about how the WTO’s dispute settlement mechanism would treat future trade-related disputes arising from climate policies”).

105. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 752 (1969).

106. UN INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE AND LAND (2019).

climate instability and international markets.¹⁰⁷ The possibility that developing states would invoke GATT security exceptions in the name of food security has particularly worried some U.S. agricultural interests, whose representatives have argued that Trump's steel tariffs would open the floodgates to these types of claims.¹⁰⁸

It would also be a mistake to think the securitization of climate change would benefit only left-leaning voices. As Nils Gilman has recently argued, recognition of anthropogenic climate change could easily go hand-in-hand with a far right-wing agenda that includes deep restrictions on migration, hostility to Asian and African development, and the use of military power to control scarce natural resources.¹⁰⁹ The same emergency powers and national security authorities described above could just as easily be mobilized in the service of a right-wing program that is newly awakened to the reality of climate change. For this reason, some commentators have articulated skepticism about using a national security frame for climate change, preferring instead frames such as “ecological security,” “human security,” or no security at all.¹¹⁰ Even so, there are still benefits to employing “essential security” as a frame for climate measures, insofar as existing trade or investment rules are perceived as too onerous and in need of disruption.

* * *

These dramatic changes raise difficult and unanswered questions about how best to reconcile shifting demands of national security with the objectives of trade and investment law.¹¹¹ As a practical matter, the expansion of national security into industrial policy (by way of Trump's tariffs), e-commerce (by way of controversies over Huawei and personal data), and climate change (by way of growing emergency rhetoric) put trade and investment institutions into a difficult position. The legal regime can choose to “let in” these novel security claims, and thus risk allowing the

107. Molly E. Brown et al., *Do Markets and Trade Help or Hurt the Global Food System Adapt to Climate Change*, 68 FOOD POL'Y 154, 156 (2017).

108. David Milligan & Doug Goyings, *Eating Away at Our Trade Defenses*, THE HILL (Mar. 8, 2018), <https://thehill.com/opinion/energy-environment/377463-eating-away-at-our-trade-defenses>.

109. Nils Gilman, *Beware the Rise of Far-Right Environmentalism*, THE WORLD POST (Oct. 17, 2019), <https://www.berggruen.org/the-worldpost/articles/beware-the-rise-of-far-right-environmentalism/>.

110. See e.g., NAOMI KLEIN, *THIS CHANGES EVERYTHING* 57–58 (2014) (arguing that national-security and patriotism frames for galvanizing climate action actively reinforce the values that climate activists should be trying to attack); Maryam Jamshidi, *The Climate Crisis Is a Human Security, Not a National Security*, *Issue*, 93 SO. CAL. L. REV. POSTSCRIPT 36 (2019) (arguing that recourse to national security undermines democracy and exacerbates disparities created by climate change); McDonald, *supra* note 87, at 164–72 (proposing a shift toward an “ecological security” discourse based on the resilience of interconnected ecosystems).

111. This was the central argument of Heath, *supra* note 5.

exception to swallow the rule. Or trade panels and investment tribunals can draw a boundary, limiting security exceptions to military and military-adjacent measures, thus risking the regimes' legitimacy insofar as the securitization of these issues enjoys wide popular support. This dilemma is likely to reappear even if judicial review focuses on the proportionality or rationality of security measures, rather than on the nature of security itself.¹¹²

The problem is especially acute because it exacerbates uncertainty precisely where reforms in trade and investment law are most urgently needed. Among the most important discussions in trade and investment law today are reforming trade law to permit a wider range of experimentation in industrial policy,¹¹³ defining the terms of engagement between trade rules and transnational data flows,¹¹⁴ and ensuring that trade and investment agreements do not "chill" legitimate environmental and health regulation.¹¹⁵ As these issues become securitized, any settlement that is reached in any new trade agreement could be disrupted by a novel national security claim. One does not need to be a free-trade partisan to think that greater clarity here is important. So long as you accept that *some* global governance of trade is inevitable, it is important to consider the terms of engagement between trade and these other fields and to ask how evolving conceptions of national security will affect those terms. The following sections will identify these emerging terms of engagement and discuss the tradeoffs between alternative

112. On the tendency of means-ends proportionality review to collapse into more fundamental assumptions about the relative importance of public policy objectives, see J.H.H. Weiler, *Comment, Brazil—Measures Affecting Imports of Retreaded Tyres (DS322)*, 8 *WORLD TRADE REV.* 137, 140 (2009).

113. See, e.g., SHERZOD SHADIKODJAEV, *INDUSTRIAL POLICY AND THE WORLD TRADE ORGANIZATION* 271 (2018) ("The general tendency in setting trade rules has been to squeeze a government's sovereignty over trade-related aspects of industrial policy, on the one hand, and to recognize its autonomy in addressing public interests, on the other. Overall, members have their hands tied by WTO strictures and may utilize the available policy space only under limited conditions. Such legal constraints and flexibilities discussed in this book may not necessarily constitute an ideal balance."); Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization*, 52 *VA. J. INT'L L.* 551 (2012) (arguing that developing states can act strategically to create flexibility in the WTO regime for industrial policy space); Wu & Salzman, *supra* note 27, 454–73 (arguing that domestic trade remedies laws, rather than WTO law, pose the greatest threat to so-called green industrial policy, and suggesting "narrowly tailored" reforms).

114. Streinzi, *supra* note 62, at 313 (identifying competing models for the regulation of digital trade); Susan Ariel Aaronson & Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO*, 21 *J. INT'L ECON. L.* 245 (2018) (arguing that U.S., E.U., and Chinese regulations have "created three distinct data realms with different approaches to data governance," creating a challenge for the WTO); Neha Mishra, *Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows*, 52 *VAND. J. TRANSNAT'L L.* 463 (2018) (offering an account that integrates cybersecurity with the free flow of data).

115. See, e.g., ECONOMIC INTELLIGENCE UNIT, *supra* note 104, at 14–18 (assessing the positive and negative effects of WTO law on climate policy); Kyla Tienhaara, *Regulatory Chill in a Warming World*, 7 *TRANSNAT'L ENVTL. L.* 229 (2017) (arguing that corporations could use investor-state dispute settlement to forestall action on climate change, and suggesting reforms).

approaches.

III. STRUCTURED POLITICS AT THE WTO

Today, due to an ongoing crisis at the WTO, the default mode for addressing novel security matters in the trading system is likely to be one of political bargaining, rather than adjudication. Since December 2019, the WTO Appellate Body has lacked the members necessary to staff new cases, paralyzing the appellate system. The Appellate Body's collapse sets off a chain of legal events that allows any party to a WTO dispute to block the adoption of a panel report.¹¹⁶ This development represents a shift away from legalism in international trade and instead toward a more power-based system, signaling what Gregory Shaffer has called “the end of an era—potentially the close of at least the semblance of the rule of law in international trade relations.”¹¹⁷ For the time being, this development concerns a much broader swath of trade than just security matters—a state need not invoke essential security, or really any particular justification at all, for blocking a panel report. But there is reason to believe that this power-based mode of dispute settlement may persist for security measures in particular, even if the Appellate Body is revived. It is therefore important to understand the ways in which law will continue to structure these political interactions, even in the absence of appellate review, in addition to the particular kinds of flexibility that this new structure affords.

The WTO's peculiar legal structure has enabled this sudden turn to politics. For years, the United States has refused to consent to appoint any new members to the WTO Appellate Body, thus allowing that body's membership to dwindle as terms expire.¹¹⁸ As of December 10, 2019, the Appellate Body's membership had dwindled to just two members, rendering the body incapable of establishing a three-member panel necessary to hear

116. See generally Rachel Brewster, *Analyzing the Trump Administration's International Trade Strategy*, 42 *FORDHAM INT'L L.J.* 1419, 1425–27 (2019); Chang-fa Lo, Junji Nakagawa & Tsai-fang Chen, *Introduction: Let the Jewel in the Crown Shine Again*, in *THE APPELLATE BODY*, *supra* note 2, at 3, 4.

117. Shaffer, *supra* note 2, at 53.

118. See e.g., Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crisis?*, 18 *WORLD TRADE REV.* 503, 506–07 (2019). Appointments to the Appellate Body have always been made by consensus, consistent with the governing law. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2(4) & n.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter WTO DSU], though there is dispute about whether appointment by majority vote would be permissible. See, e.g., JENNIFER HILLMAN, *THREE APPROACHES TO FIXING THE WORLD TRADE ORGANIZATION'S APPELLATE BODY: THE GOOD, THE BAD, AND THE UGLY?* 11–12 (2019) (arguing that appointment of AB members is an “appointment,” rather than a decision, and so not subject to the consensus rule, and is required by the requirement that “vacancies shall be filled as they arise”).

any new cases.¹¹⁹ This undermines the ability of the Appellate Body to perform its supervisory and error-correcting functions, but there impact is even broader than that. Pursuant to the governing agreements, a first-instance panel report cannot be “adopted” by the membership if an appeal is pending.¹²⁰ A party to a trade dispute can thus prevent the adoption of any panel report by filing an appeal “into the void” left by the Appellate Body, where it will languish indefinitely until the United States lifts its blockade of new Appellate Body members.¹²¹ If a panel report cannot be adopted, then it never becomes binding, and neither party can make use of the critical provisions in WTO law for overseeing compliance with the report and for managing retaliation.¹²² The Appellate Body’s collapse, in short, effectively grants any state the right to unilaterally veto a decision by trade adjudicators.

This shift renders the WTO dispute system comparable to the earlier GATT regime, though the match is not identical, and the differences matter. For much of the life of the 1947 GATT, any member could block an adjudicatory proceeding in either of two ways: it could refuse to consent to the establishment of a panel, or it could refuse to consent to the adoption of a panel report.¹²³ This led to some panels never being formed, and to many reports not being adopted, particularly on controversial issues such as trade remedies.¹²⁴ Beginning in 1989, new rules entitled any complaining GATT member to establish a dispute panel as of right, but the losing party could still unilaterally block adoption of the report.¹²⁵ The WTO system today thus looks more like the post-1989 GATT—any member can establish a panel to adjudicate any violation of any WTO agreement, but the panel’s resulting report could be unilaterally blocked by an appeal into the void.

This turns out to be an important qualification. Prior to the 1989 rules change, a GATT member could unilaterally prevent trade adjudicators from even addressing a sensitive legal or factual issue. This was evident in the mid-1980s disputes over the U.S. trade embargo of Nicaragua, where the United States assented to the establishment of a panel only after narrowly

119. See e.g., Jonathan Josephs, *WTO Chief: ‘Months’ Needed to Fix Disputes Body*, BBC NEWS (Dec. 10, 2019), <https://www.bbc.com/news/business-50736344>.

120. WTO DSU, *supra* note 118, art. 16(4) (“If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.”).

121. Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect*, 22 J. INT’L ECON. L. 297, 303–04 (2019).

122. See WTO DSU, *supra* note 118, art. 21.

123. See e.g., Amelia Porges, *The New Dispute Settlement: From the GATT to the WTO*, 8 LEIDEN J. INT’L L. 115, 117 (1995).

124. Pauwelyn, *supra* note 121, at 306.

125. Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of Apr. 12, 1989, at 3–4, 7, GATT Doc. L/6489 (Apr. 13, 1989).

tailoring the panel's terms of reference to avoid any decision on the GATT security exception.¹²⁶ For security issues, this meant that it was impossible to get a third-party legal interpretation of terms like “essential security interests” or “emergency” within the GATT framework, so long as a powerful state was in opposition. The legal structure of the WTO, along with the precedent set by the 2019 *Russia—Transit* panel report, changes things. Even today, any state that brings a trade dispute relating to another government's security measure is entitled to a panel, and that panel is likely to make at least some ruling on the applicability of the WTO security exceptions.¹²⁷ The difference is that the resulting report stands a good chance of never being adopted.¹²⁸

An unadopted panel report, while lacking legal force, can still have important effects on state behavior. During the GATT period, unadopted reports were frequently used as the basis for negotiating the resolution of trade disputes, and there is some reason to think that this practice would resume.¹²⁹ More generally, unadopted reports still contain a record of

126. Panel Report, *United States—Trade Measures Affecting Nicaragua*, ¶¶ 1.2–1.5, 5.3, GATT Doc. L/6053 (Oct. 13, 1986).

127. In this way, the situation is even more legalized than under the post-1989 GATT, when the ability to have a third-party adjudicator rule on the security exception was still in doubt. See Minutes of Meeting Held in the Centre William Rappard on 18 March 1992, 15, GATT Doc. C/M/255 (Apr. 10, 1992) (“The [European] Community recognized that . . . a panel had to be established at the second Council meeting at which it was requested Clearly, however, the rules were silent on the question of whether, in situations where measures taken for non-economic reasons were involved, a different course could be taken such as, for example, agreeing to establish a panel in principle but delaying its activation subject to further clarity in the situation. Whatever the course of action taken at the present meeting, the Community reserved its rights as to what constituted standard terms of reference for a panel which dealt with measures taken for non-economic reasons.”).

128. Not in all cases, however. The *Russia—Transit* report, issued in April 2019, was not appealed by either side and was swiftly adopted, with both Ukraine and Russia claiming a kind of victory. See Minutes of Meeting Held in the Centre William Rappard on 26 April 2019, 19–20, WTO Doc. WT/DSB/M/428 (June 25, 2019) (statement of the Russian representative) (welcoming the panel's decision that Russia's measures did not violate its WTO commitments, and, in remarks that may reference the U.S. steel and aluminum tariffs, stating that the panel's decision “excluded the possibility of abusing provisions of Article XXI to justify measures introduced for the purposes of mere economic protectionism”); *id.* at 20 (statement of the Ukrainian representative) (endorsing portions of the panel report that referred to earlier U.N. statements condemning the “temporary occupation” of Ukrainian territory).

129. Marc Benitah, *Does the Present Paralysis of the AB Mean that the WTO Is Dead?: No, and This Is Why*, INT'L ECON. L. & POL'Y BLOG (Dec. 22, 2019), <https://ielp.worldtradelaw.net/2019/12/does-the-present-paralysis-of-the-ab-means-that-a-wto-panel-report-is-now-worthless.html>. Notably, in the first case appealed into the void—*United States—Countervailing Measures on Hot Rolled Steel*, appealed by the United States—the parties recently stated that they were working toward a negotiated solution. Joint Communication from India and the United States, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India: Recourse to Article 21.5 of the DSU by India*, WTO Doc. WT/DS436/22 (Jan. 16, 2020); cf. Robert Lighthizer, U.S. Trade Representative, Address to the Center for Strategic & Int'l Studs.: U.S. Trade Policy Priorities (Sept. 18, 2017) (on file with the Ctr.

reasoning about trade-law principles, and as such can influence cases before regional trade fora, in investor-state arbitration, or under commercial treaties in domestic courts or at the International Court of Justice.

The second major difference between the current state of play and the GATT years is the WTO's highly articulated committee structure. The WTO agreements provide for a structure of specialized counsels and committees, which do much of the "day to day work of the WTO."¹³⁰ These committees have been described as a "hidden world" of trade governance, which facilitate shared understandings and regulatory learning, elaborate open-ended norms, and resolve disputes before they reach adjudication.¹³¹ Although most of these issues involve relatively low-salience technocratic issues, there are isolated instances of high-profile concerns being raised and resolved in the WTO committees.¹³² Furthermore, although committee work is sometimes said to take place "in the shadow" of the dispute settlement system,¹³³ it is not clear that formal adjudication is necessary for the committees to do their work. It is just as likely that the threat of retaliation—whether inside or outside the WTO dispute settlement system—is what drives norm-elaboration and informal dispute settlement in the committees. If that is correct, then WTO committee work will remain an important, if understudied, component of the international trading system even if the Appellate Body remains inoperable.

The upshot is that this new structure does provide for greater flexibility and a much more prominent role for power politics, but all still within a legal framework. A state's decision to appeal a case "into the void" will be premised on calculations about reputation, relative power, and reciprocity; it matters how the decision will be received by trading partners, whether the state has sufficient economic or political muscle to "go it alone," and whether

for Strategic & Int'l Studs.) ("[B]efore the WTO, under the GATT, and there was a system where you would bring panels and then you would have a negotiation. And, you know, trade grew and we resolved issues eventually. And, you know, it's a system that, you know, was successful for a long period of time."). See generally Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 3–15 (1999) (discussing the impact of adopted and unadopted panel reports).

130. MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 12 (3d ed. 2015).

131. Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT'L L. 575, 577–601 (2009); see also 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 579 (2013) (describing these committees as exercising a form of informal dispute settlement).

132. Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance: A Rejoinder to Richard Steinberg*, 20 EUR. J. INT'L L. 1073, 1076 (2009).

133. *Id.*; Horn, Mavroidis & Wijkstrom, *supra* note 131, at 579.

retaliation is likely.¹³⁴ This means that bigger economies will likely be more readily able to push the envelope. At the same time, the flexibility created by the Appellate Body's collapse provides an opportunity for smaller countries and emerging economies to likewise re-strike the balance between trade law and other vital interests. This could include, for example, demanding that trade law give way to demands of food security or adopting an invigorated industrial policy with respect to other economic sectors, such as cyberspace.¹³⁵ Despite this greater flexibility, the existence of the WTO committee structure ensures that such measures can at least be addressed and discussed—though perhaps not resolved—at the WTO,¹³⁶ and any state has the right to request a legal opinion from a panel on the consistency of these novel security interests with WTO law.

As the situation at the WTO continues to evolve, it will be important to consider how legal reforms affect politics outside of the adjudicatory process. For instance, one prominent proposal for restoring the Appellate Body has obliquely suggested that some issues could be diverted from the dispute settlement system altogether.¹³⁷ If this involves the “formal exclusion” of security measures from dispute settlement, then the picture might look even more like the 1947 GATT era, thus maximizing flexibility and cementing a return to politics.¹³⁸ If, by contrast, security measures are diverted from adjudication and toward an alternative mechanism—such as resolution before a WTO political body, an expert review, or a mediated conciliation process—this may preserve a more optimal balance between flexibility and governance.¹³⁹ The present moment thus calls for greater consideration of mechanisms that exist between diplomacy and self-restraint, on the one hand, and formal adjudication on the other hand.¹⁴⁰

The turn toward structured politics at the WTO also raises important questions about the horizontal and vertical boundaries of the trade regime.

134. Pauwelyn, *supra* note 121, at 306–08. This is similar to the dynamic that played out under the GATT security exception. See Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 755–57 (2011).

135. See *supra* Part II.

136. For a compelling argument that this function of the WTO could be advanced by the creation of a committee on trade and security, see Simon Lester & Huan Zhu, *A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions*, 42 FORDHAM INT’L L.J. 1451, 1472 (2019).

137. Strengthening and Modernizing the WTO: Discussion Paper, at 3, Communication from Canada, WTO Doc. JOB/GC/201 (Sept. 24, 2018).

138. See *id.* (suggesting “possibly even formal exclusion of certain types of disputes or certain issues from the jurisdiction of adjudication”). For skepticism that return to the political dynamics of the GATT era is even possible, see Heath, *supra* note 5, at 1060–63.

139. Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 J. WORLD TRADE 867, 889 (2019).

140. Heath, *supra* note 5, at 1027.

Horizontally, the collapse of the WTO's binding and effective adjudicatory mechanism—a rarity in international law—potentially undermines trade law's claim to *de facto* superiority over other, less legalized regimes. For instance, Michael Fakhri has welcomed the collapse of the Appellate Body, suggesting that it could lead to new institutional designs that better recognize the polycentrism of so-called “trade” issues: matters such as food security, access to medicine, and transnational labor.¹⁴¹ Vertically, it is an open question whether changing conceptions of security will permanently shift which interests drive domestic trade policy and how national delegations will represent those interests in the WTO and other institutions.

IV. NATIONAL SECURITY LEGALISM

Even as the WTO adjudicatory system is collapsing, some members of the trading system are advocating a renewed commitment to what might be called “national security legalism.” In April 2019, a WTO dispute settlement panel issued a historic ruling declaring that disputes under the GATT security exception were justiciable.¹⁴² For many, the panel's analysis confirmed that the security exception—which expressly delegates significant discretion to member states and had long been argued to be “self-judging”¹⁴³—could be carved up into constituent elements, some of which were subject to full, objective review by a trade panel.¹⁴⁴ The European Union, in particular, has enthusiastically embraced this ruling and argued for

141. Michael Fakhri, *Life Without the WTO - Part I: Stop All this Crisis-Talk*, EJIL: TALK! (Apr. 25, 2019), <https://www.ejiltalk.org/life-without-the-wto-part-i-stop-all-this-crisis-talk/#more-17114>.

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

143. See, e.g., Alford, *supra* note 134, at 708 (arguing that a “majority” of states in the GATT years argued that the invocations of the security exception were not subject to judicial review, including, at various times, the United States, Canada, the European Communities, the United Kingdom, and Australia).

144. The GATT security exception reads, in full:

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

GATT 1947, *supra* note 50, art. XXI(b). Similar language can be found in GATS, *supra* note 77, art. XIV bis; TRIPS, *supra* note 77, art. 73.

its expansion in disputes with the United States over Trump's steel and aluminum tariffs. The legalist approach could put a brake on the evolution of new security interests in a number of different ways. It thus maximizes governance over security measures, while reducing *de jure* flexibility, and is most likely to find root in fora where legalism is a hallmark of authority.

The *Russia—Transit* panel report of April 2019 was indeed a historic ruling for the WTO and for trade law generally. The panel, chaired by former Appellate Body member Georges Abi-Saab, rejected categorically the proposition that the GATT security exception was self-judging.¹⁴⁵ The panel's report widens the scope for judicial scrutiny of security measures through a divide-and-conquer strategy, minimizing the reach of language in this provision that purports to leave wide discretion in the hands of states. Some elements of the security exception—such as whether the measure “relat[es]” to arms traffic or was “taken in time of . . . emergency”—must be assessed fully and “objectively” by the adjudicator.¹⁴⁶ If this objective criterion is met, then a state may take measures “it considers necessary for the protection of its essential security interests,” but even this broad discretion is subject to an overarching obligation of good faith.¹⁴⁷ This approach vindicates much of the literature on the GATT security exception, wherein authors have argued for carving up the exception in similar ways.¹⁴⁸

Among the WTO members that have expressed support for the *Russia—Transit* panel's ruling, the European Union is arguably the most enthusiastic. In an ongoing dispute with the United States, the European Union has argued for extending the divide-and-conquer approach even further, contending that a panel may also objectively assess whether a particular issue is a “security interest,” whether that interest is “essential,” and whether a measure is “for the protection of” a security interest.¹⁴⁹ These moves, if accepted, could significantly limit the ability of states to innovate novel security interests, even under newer treaties that have much broader security exceptions.¹⁵⁰

145. See e.g., Panel Report, *Russia—Transit*, *supra* note 142, ¶ 7.102.

146. *Id.* ¶ 7.101.

147. *Id.* ¶¶ 7.132, 7.138.

148. 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 (2003); 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 (1999).

149. Opening Oral Statement by the European Union, *United States—Certain Measures on Steel and Aluminum Products*, ¶¶ 123–129, WTO Case No. DS548 (Nov. 4, 2019) [hereinafter EU Oral Statement (DS548)] (arguing that “objective elements are to be found in the chapeau of Article XXI(b): what are the ‘security’ interests, whether such interests are ‘essential’ and whether a measure is adopted ‘for’ the protection of such interests”).

150. For instance, the EU's arguments that “security interest,” “essential,” and “for the protection

National security legalism can operate as a check on the growth of novel security interests in at least two ways. By narrowly reading the security exceptions in the GATT and other trade treaties, tribunals and panels can shunt some novel security interests away from the exception altogether or impose procedural requirements that discourage states from opportunistically relabeling public-policy matters as security interests. While these approaches maximize trade governance over security measures, they rely on certain contestable assumptions about the trade system. It is thus worth pausing to assess both techniques before noting where security legalism is likely to take root.

A. Channeling Security

First, a legalist approach can “channel”¹⁵¹ some novel security interests away from the GATT security exception (or its analogs in other treaties) and toward provisions that provide for greater oversight over trade-restricting measures. The EU litigation strategy at the WTO provides particularly strong examples of this. In response to the U.S. steel and aluminum tariffs, which were purportedly imposed for national security reasons, Europe has contended that these tariffs are in fact disguised safeguard measures, and they are thus subject to the rules and restrictions contained in those provisions.¹⁵² And, in response to the suggestion that environmental or other public-policy measures could constitute security interests, the EU has obliquely suggested that the GATT security exception “cannot be used to circumvent the requirements” of other public-policy exceptions.¹⁵³ The suggestion appears to be that public policy measures covered by GATT

of” are also objectively assessable terms not subject to the “it considers” language appears tailor-made for many newer treaties. *See, e.g.,* CPTPP, *supra* note 74 (“Nothing in this Agreement shall be construed to: . . . (b) preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.”). The CPTPP formulation, which lacks the objective criteria of GATT Article XXI(b)(i)–(iii), is increasingly common in investment agreements and regional trade treaties. Karl P. Sauvant & Mevelyn Ong et al., *The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements*, (Columbia FDI Perspectives No. 188, 2016).

151. I am indebted to Tim Meyer for the term “channeling,” and I think my usage here bears at least a family resemblance to his. *See* Tim Meyer, Univ. of Cambridge, Lauterpacht Centre for International Law Friday Lecture: Foreign Affairs and the National Security Economy (Apr. 26, 2019) (recording on file with the Lauterpacht Centre for Int’l L.).

152. Chad P. Bown, *Europe Is Pushing Back Against Trump’s Steel and Aluminum Tariffs: Here’s How*, WASH. POST: MONKEY CAGE (Mar. 9, 2018, 5:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/09/europe-is-pushing-back-against-trumps-steel-and-aluminum-tariffs-heres-how/>. The EU has also argued that it is thus entitled to retaliate against the U.S. measures without waiting for a WTO ruling, as provided for in the special rules for safeguards.

153. European Union Third Party Oral Statement, *Russia—Measures Concerning Traffic in Transit*, ¶ 27, WTO Doc. DS512 (Jan. 25, 2018).

Article XX—which allows for measures “necessary” for human or environmental health, public morals, etc., so long as they are not arbitrarily discriminatory—cannot be re-characterized as security measures to take advantage of the broader discretion afforded by GATT Article XXI. Underlying both arguments is the idea of a division of labor in trade agreements, where different exceptions are calibrated to respond to different political-economic pressures on liberalized trade.

This vision of trade agreements is calibrated to maximize the ability of tribunals to review novel security measures, while allowing more traditional measures to continue to make use of the security exceptions. Many emerging security interests—such as those discussed in Part II above—emerge from domestic political-economy problems that are addressed by other trade rules, and that do not resemble the problems that accompany traditional security concerns. The GATT security exception was invoked most often in the context of war or other interstate rivalries, where one GATT member simply could not be expected to carry on normal trade relations with another.¹⁵⁴ As Tim Meyer notes, in this context the self-judging security exception performed a “loss-avoidance” function for the trade regime—it prevented the rules from requiring that states engage in normal trade relations when it was clear that they would not comply.¹⁵⁵ This made particular sense for broader geopolitical conflicts, whose causes were often not directly tied to trade.

The emerging security interests discussed above, and the policies and political coalitions they imply, are quite different. For example, a securitized industrial policy will be backed by a coalition of those seeking protection for domestic industry—whether steel, semiconductors, or renewable energy—along with those who believe that industry connects with their government’s vital interests and seek to advance that interest internationally.¹⁵⁶ Arguably,

154. See, e.g., Reply by the Vice-Chairman of the United States Delegation, 9, GATT Doc. GATT/CP.3/38 (June 2, 1949) (U.S. export controls on trade with Eastern Bloc countries after World War II); Meeting Held in the Centre William Rappard on 29 May 1985, GATT Doc. C/M/188, at 2–17 (June 28, 1985) (U.S.-Nicaragua embargo); Minutes of Meeting Held in the Centre William Rappard on 16 October 1996, 7, WTO Doc. WT/DSB/M/24 (Nov. 26, 1996) (U.S.-Cuba embargo); Minutes of Meeting Held in the Centre William Rappard, 10, GATT Doc. C/M/157 (May 7, 1982) (sanctions on Argentina); GATT Council, Summary Record of the 12th Session, Dec. 9, 1961, at 196, GATT Doc. SR.19/12 (Dec. 21, 1961) (Ghana-Portugal trade); Minutes of Meeting Held in the Centre William Rappard on 7 April 2000, at 12–15, WTO Doc. WT/DSB/M/78 (May 12, 2000) (Nicaragua-Colombia boundary dispute); Minutes of Meeting Held in the Centre William Rappard on 22 November 2017, *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/DSB/M/404 (Mar. 6, 2018) (UAE-Qatar dispute).

155. Meyer, *supra* note 151.

156. See *id.*

these kinds of security-protectionist coalitions are more aptly addressed by the WTO's "safeguards" provisions, which allow states to take "emergency action" to prevent "serious injury" to domestic industries as the result of imports, but only within certain procedural and substantive limits.¹⁵⁷ Similarly, trade-restrictive or trade-distorting climate regulations might be advanced by a coalition of environmentalists and domestic industries who stand to gain from the resulting protection. GATT Article XX, similar to domestic administrative law, imposes basic procedural and substantive requirements to ensure that such regulations are, among other things, not a "disguised restriction on international trade."¹⁵⁸

On this view, re-characterizing industrial policy or climate measures as security interests could have the effect of upsetting a calibrated balance and empowering protectionist coalitions domestically. Therefore, it is arguably appropriate to channel these novel security measures away from security exceptions and toward more restrictive provisions that better respond to the political economies that generate the offending measure in the first place.

The trouble with this channeling approach is that its viability depends on a shared view that trade and investment agreements actually produce this calculated balance. Insofar as states begin to invoke security exceptions for industrial policy, climate regulation, or cybersecurity, it may be precisely because they do not view the other provisions as sufficiently flexible. For example, there is substantial doubt that the WTO safeguards provisions, as interpreted by the Appellate Body, are even capable of performing their intended function of protecting declining industries subject to import shocks.¹⁵⁹ And others have suggested that the economic dislocations from trade may require broader reforms to trade agreements, such as social dumping provisions, economic development chapters, and flexibility for green industrial policy.¹⁶⁰ As for regulations concerning cybersecurity or

157. See generally ALAN O. SYKES, *THE WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY* 59–72 (2006) (offering an explanation of safeguards grounded in public-choice theory, whereby officials are able to take back trade concessions when they become too politically costly, particularly as the result of pressure from declining industries).

158. GATT 1947, *supra* note 50, art. XX; see also Howse, *supra* note 103, at 52–53 (arguing that the WTO practice of conducting "strict scrutiny" of regulations for arbitrariness and discrimination actually has the effect in some cases of strengthening regulations by forcing states to remove idiosyncratic exceptions and make the regulatory regime "tighter or stricter").

159. See, e.g., Alan O. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. INT'L ECON. L. 523, 523 (2004) ("WTO rules . . . pose nearly insurmountable hurdles to the legal use of safeguard measures by WTO members."); Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 WORLD TRADE REV. 261, 261 (2003) ("[N]ations cannot use safeguards without facing a near certainty that they will be found invalid.").

160. See e.g., Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 986 (2017); Meyer, *supra* note 55, at 2012–14 (positing that international trade law should be

climate change, there is already considerable anxiety that the existing non-security exceptions are not sufficiently flexible to allow for legitimate policymaking.¹⁶¹ More generally, the channeling approach sits uneasily with the view, articulated by at least one investment tribunal, that allowing for non-military security interests may be the price that capital-exporting nations like the United States must pay in exchange for retaining a free hand to impose embargoes, sanctions, and export controls.¹⁶² It is therefore unclear whether the channeling approach to security exceptions is politically feasible, even if it does turn out to be a legally available option.¹⁶³

B. Normalizing Security

In addition to channeling some issues away from security exceptions, national security legalism can help normalize such issues by imposing general procedural and substantive requirements that make the security exception a less attractive option. This can be accomplished by interpreting certain terms to require administrative rationality, non-arbitrariness, or proportionality, or by using general principles of good faith to impose broad procedural requirements.¹⁶⁴ All of these techniques go some way toward de-exceptionalizing national security measures by rendering them subject to the same scrutiny that is given to ordinary administrative action under other treaty provisions. The approach is thus likely to be favored by jurisdictions

reformed to allow for renewable energy policies enacted at the local level); Shaffer, *supra* note 27, at 33–39.

161. See *supra* notes 78 & 104 and accompanying text.

162. Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181 (Sept. 5, 2008) (“It may well be that in drafting the model text for Art. XI [of the U.S.-Argentina BIT], the U.S. intended to protect first of all its own security interests in the light of geopolitical, strategic and defense concerns, typical of a world power, so as to be able to reserve the right to freeze assets of foreigners in the U.S. and to resort to unilateral economic sanctions that may conflict with its BIT obligations. This intention would not exclude from the protection provided by Art. XI different measures taken by the other Contracting Party in relation to emergency situations affecting essential security interests of a different nature of such other Contracting Party. These interests such as ‘ensuring internal security in the face of a severe economic crisis with social, political and public order implications’ may well raise for such a party, notably for a developing country like Argentina, issues of public order and essential security interest objectively capable of being covered under Art. XI. An interpretation of a bilateral reciprocal treaty that accommodates the different interests and concerns of the parties in conformity with its terms accords with an effective interpretation of the treaty.”).

163. The legality of this approach is also unclear. For skepticism about the E.U.’s treatment of U.S. steel tariffs as safeguards rather than punitive security measures, see Joseph Weiler, *Black Lies, White Lies, and Some Uncomfortable Truths in and of the International Trading System*, EJIL TALK (July 25, 2018), <https://www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>; Simon Lester & Huan Zhu, *A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions*, 42 FORDHAM INT’L L.J. 1451, 1465–66 (2019). For a skeptical note on the argument that measures covered by Article XX cannot be covered by Article XXI, see Heath, *supra* note 5, at 1073–74, 1073n.251.

164. For a somewhat critical assessment, see Heath, *supra* note 7, at 1070–80.

whose governments are already to some extent bound by such restrictions, even though it remains in tension with the structure of the GATT and with trends in drafting more recent trade and investment treaties.

The normalization of national security finds support in academic writing, the *dicta* of some investment treaty cases, and in the pleadings of some WTO members. It is often argued, for example, that states' general obligation to perform treaties in good faith implies a requirement that the measure at issue be proportionate to the purported security interest at stake.¹⁶⁵ This approach would narrow the distance significantly between self-judging security provisions like GATT Article XXI and other general exceptions for public-policy measures, which have long been interpreted to require proportionality.¹⁶⁶ Indeed, one panel of arbitrators seems to have voiced support for convergence.¹⁶⁷ The filings of some WTO member states in disputes over the U.S. steel and aluminum tariffs would also provide a toehold for stricter proportionality analysis, by, for example, requiring a relatively robust analysis of whether the measures at issue are “for the protection of” security interests.¹⁶⁸

The effect of these interpretations is to make it less attractive to reclassify climate measures or industrial policy as “security” issues. The security exception, as historically understood, appears to allow a wide range of discretion for measures that are considered to be for “essential security interests,” as opposed to the more narrowly tailored discretion afforded to measures relating to health, conservation, or public morals.¹⁶⁹ This discretion becomes particularly attractive to states as the obligations in trade and investment treaties are interpreted and applied more broadly to capture a range of trade-affecting regulatory activity, not just tariffs and other border barriers.¹⁷⁰ If security measures are subject to roughly the same scrutiny as

165. See e.g., Stephan W. Schill & Robyn Briese, “*If the State Considers*”: *Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B.U.N.L. 61, 123–24 (2009) (surveying arguments).

166. For an adoption of WTO-style proportionality in the context of a non-self-judging security exception (*i.e.*, one lacking the “it considers” language), see *Continental Casualty*, Case No. ARB/03/9 at ¶¶ 194–95.

167. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 214 (Oct. 3, 2006) (“Were the Tribunal to conclude that the provision is self-judging, Argentina’s determination would be subject to a good faith review anyway, which does not significantly differ from the substantive analysis presented here.”).

168. See e.g., EU Oral Statement (DS548), *supra* note 149, ¶ 129; Norway’s Opening Statement at the First Substantive Meeting of the Panel with the Parties, *United States—Certain Measures on Steel and Aluminum Products*, ¶¶ 66–67, WTO Doc. WT/DS552 (Nov. 6, 2019).

169. For a statement of the self-judging position, see Alford, *supra* note 134, at 703–04 (presenting various interpretation of the security exception under Article XXI).

170. Heath, *supra* note 7, at 1440.

everything else, this lessens the incentive to invoke security exceptions internationally, even if doing so is still relevant under domestic law.

Despite the landmark ruling on the security exception in the *Russia—Transit* case, it remains unclear whether WTO panels will adopt a strong form of national security legalism. The *Russia—Transit* panel itself was particularly cautious in this respect. For instance, the panel avoided any suggestion that the state invoking the security exception bears the burdens of production and persuasion.¹⁷¹ This stands in stark contrast to long-established WTO jurisprudence on other public-policy exceptions, where the burden lies initially with the state invoking the exception, and makes it more difficult to reject a security defense for mere failure to satisfy an element of the exception. The panel also avoided addressing directly the question whether the “it considers” language—which gives the exception its putatively self-judging character—applies only to a measure’s necessity, or whether it also applies to the requirement that a measure be “for the protection of [a member’s] essential security interests.”¹⁷² If future panels decide that the “protection” language is not self-judging, this could open up space to significantly narrow the distance between the security exception and other public-policy provisions.

It thus remains unclear whether future decision-makers will continue to further legalize the WTO security exception. There are reasons to be cautious about doing so. It is unclear how much slicing and dicing the text of the security exception can really bear, and tribunals may not be willing to impose a wide range of substantive and procedural obligations on the basis of good faith alone.¹⁷³ And states’ continued practice of separating security from other exceptions, suggest that at least some states do not want to see a convergence of substantive or procedural standards.¹⁷⁴ When states have sought to subject security measures to judicial scrutiny, such as in human rights treaties,¹⁷⁵ investment treaties,¹⁷⁶ and E.U. law,¹⁷⁷ they have

171. See, e.g., *Russia—Transit* Panel Report, *supra* note 142, ¶¶ 7.113–7.126.

172. See *id.* ¶¶ 7.63, 7.128 (raising these two possibilities).

173. Heath, *supra* note 5, at 1075.

174. See *supra* note 150 and accompanying text.

175. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 221 (“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”).

176. Free Trade Agreement, China-Peru, art. 141, Apr. 28, 2009, CHINA FTA NETWORK (“For greater certainty, if a Party invokes Article 141 (Essential Security) in an arbitral proceeding initiated under this Chapter, the corresponding tribunal hearing the matter shall find whether the exception applies.”).

177. Treaty on European Union art. 346, Feb. 7, 1992, 1757 U.N.T.S. 3 (“[A]ny Member State may

demonstrated their ability to do so. Against this background, the deliberate choice to employ the self-judging language of the GATT suggests that there is some limit to national security legalism, at which point politics must take over.¹⁷⁸

C. The Place of National Security Legalism in a Fragmenting System

The shifting institutional landscape of international trade renders the place of legalism uncertain. Whereas the decision by the *Russia—Transit* panel in April 2019 was hailed as a bold statement about the power and autonomy of the trade judiciary,¹⁷⁹ the collapse of the Appellate Body just a few months later changes the picture. For instance, even if a WTO panel were to find against the United States in the pending disputes over Trump’s steel and aluminum tariffs, the United States would likely appeal this decision “into the void,” rendering the panel report legally ineffective.¹⁸⁰ But, at the same time, the proliferation of investment treaties and regional trade agreements ensures that there remain any number of fora where trade panelists and arbitrators might be asked to address the intersection of trade and security. In this fragmented institutional environment, national security legalism is most likely to thrive wherever acceptance by other legal professionals, rather than by member states, plays a significant role in an institution’s claim to authority.

The collapse of the WTO Appellate Body has shifted authority dynamics in the trading system, potentially permanently. Whereas the Appellate Body once exercised what Geraldo Vidigal calls “hegemonic authority” in the trading system, the transmission of legal ideas in trade now depends on “network authority,” where diplomats and adjudicators across fora rely and build on each other’s interpretations.¹⁸¹ The paradigm case of

take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.”); *id.* art. 348 (“[T]he Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347.”).

178. *Cf.* Akande & Williams, *supra* note 148, at 386–89 (discussing the limited scope for review under the “necessity” prong of the Article XXI analysis).

179. *See* Cho, *supra* note 1 (referring to the decisions as a “constitutional moment” for the WTO).

180. A ruling in the steel tariffs cases is not expected before “autumn 2020.” Communication from the Panel, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/17 (Sept. 10, 2019).

181. Geraldo Vidigal, *Living Without the Appellate Body: Hegemonic, Fragmented, and Network Authority in International Trade* 30, Amsterdam L. Sch. Lgl. Studs. Res. Paper No. 2019-15 (Mar. 4, 2019) (unpublished manuscript) (on file with Amsterdam Center for International Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343327.

network authority is the current system of investor-state arbitration, where panelists sitting *ad hoc* for individual cases nonetheless tend to rely on, or at least engage with, each other's interpretations of treaty provisions.¹⁸² Where the audience includes other adjudicators in parallel fora, there may be some benefit in formalistic approaches to the security exception, given that formalism taps into "the per se compliance pull of a dialogue conducted between courts in legalese."¹⁸³ In this context, the divide-and-conquer strategy of national security legalism may be particularly attractive.

The broader network of international trade and investment law thus provides plenty of opportunities for national security legalism to circulate. As Vidigal notes, the interpretations of WTO panels could be readily adopted by panelists in disputes under other regional trade treaties, who belong to the same interpretive community and are in some cases even obligated to consider prior WTO rulings.¹⁸⁴ Investment arbitration panels, too, are likely to be receptive to legalistic approaches. For instance, in assessing the impact of the *Russia—Transit* decision on investment law, José Alvarez suggests that aspects of the panel report that addressed WTO-specific legitimacy concerns are unlikely to have a decisive impact on investor-state decisions.¹⁸⁵ By the same token, the panel's decision not to give decisive effect to the "it considers" language, and to give full effect to other components of the security exception, is likely to prove influential in trade and investment cases under similarly worded provisions.¹⁸⁶

The recent efforts to salvage the appellate function at the WTO may also provide a foothold for national security legalism. In early 2020, the European Union announced that it had reached agreement with sixteen WTO members, including China and Brazil, to develop an interim arrangement whereby any panel report could be appealed to a panel of arbitrators.¹⁸⁷ The interim arrangement appears designed to replicate as far as possible the work of the Appellate Body, including by creating a standing "pool" of ten appellate arbitrators.¹⁸⁸ The pool is to be composed of experts in international law and trade, and the arrangement appears to express a preference for

182. *Id.* at 28.

183. J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUDS. 510, 520–21 (1994).

184. Vidigal, *supra* note 181, at 26–29.

185. See José E. Alvarez, Epilogue: 'Convergence' Is a Many-Splendored Thing 30 (July 2019) (unpublished manuscript) (forthcoming June 2020) (on file with the University of Copenhagen).

186. See *id.* (manuscript at 23–25).

187. Statements by Ministers, Davos, Switz., Jan. 24, 2020, https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf.

188. Multi-Party Interim Appeal Arbitration Arrangement, Council of the E.U. Doc. 7112/20 (Apr. 20, 2020) [hereinafter Multi-Party IAAA].

current and former Appellate Body members by exempting them from a pre-selection vetting process.¹⁸⁹ The pool members are also expected to “stay abreast” of WTO dispute settlement and to discuss among themselves matters of interpretation and procedure, reflecting a general desire to ensure consistency in the trade system.¹⁹⁰ Despite these efforts to mimic a standing Appellate Body, the interim arrangement is not envisioned as a permanent body, nor does it cover all WTO members. Its authority over time will thus depend on reports being accepted by future panels or in other trade and investment fora. The language of legalism, in this case, may provide a useful vehicle for building its network authority.

The arbitration solution, however, also points to the fragility of this consensus. The multi-member arrangement announced in January brings together the European Union, which has been national security legalism’s most forward-leaning proponent, with states that take significantly divergent views on the appropriate scope of review under the GATT security exception. For instance, Canada and Australia have both supported judicial review of security measures, but with a much lighter touch than what Europe has argued for.¹⁹¹ China’s position is particularly nuanced and delicate, owing to its dual position as both a frequent user and target of security measures.¹⁹² As a result, China has argued that security measures are justiciable at the WTO, but that panels must “exercise extreme caution . . . in order to maintain the delicate balance” between preventing abuse and maintaining “a Member’s ‘sole discretion’ regarding its own security interests.”¹⁹³ This suggests that there may be only limited support for a highly legalistic interpretation of the security exception, at least from some key members. It also portends that the coalition in favor of an arbitration solution may be relatively fragile and that at least some members may demand more political sensitivity than the arbitration solution—with its *ad hoc* structure—is capable of delivering.

National security legalism thus presents its own set of tradeoffs and risks. This approach maximizes third-party governance over security measures, giving tribunals a range of tools to oversee and guard against abusive, pretextual, or overbroad restrictions on trade in the name of national

189. *Id.* at ¶ 4, ann. 2.

190. *Id.* at ¶ 5, prmb1.

191. See, e.g., Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 7.36, 7.40, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019). I am indebted to Harlan Cohen for focusing me on whether and to what extent there is a shared commitment to legalism around national security issues.

192. See generally Congyan Cai, *Enforcing a New National Security?: China’s National Security Law and International Law*, 10 J. E. ASIA & INT’L L. 65 (2017).

193. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.41, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

security. With respect to novel and emerging security interests, the strictest versions of national security legalism discourage efforts by states to re-label public policy measures, however important, as security interests. But, in a moment when conceptions about security and its relation to trade are evolving rapidly, some degree of re-labeling may be warranted. If a design solution can be found that permits states to redefine their security interests and restrike the balance between those interests and trade liberalization, this may be preferable to delegating those sensitive and fundamental questions to international adjudicators.¹⁹⁴

V. JUDICIAL MANAGERIALISM IN SECURITY DISPUTES

In the wake of the *Russia—Transit* dispute, we can find a third model of trade-security governance emerging in the space between politics and adjudication. Indeed, the *Russia—Transit* panel report itself embeds a vision of the WTO dispute settlement system as a politically sensitive and flexible manager of security disputes.¹⁹⁵ On this view, trade adjudicators can closely scrutinize novel and emerging security interests, but can vary their level of scrutiny in ways that potentially facilitate information-sharing, negotiated solutions, and institutional innovation. This approach responds to the concerns of some WTO skeptics that the system of adjudication is insufficiently flexible to deal with sensitive political disputes.¹⁹⁶ But it also depends on a strong and centralized judicial body that is capable of crafting justiciability doctrines and adjusting their implementation over time.

Generally speaking, international courts and tribunals are reluctant to openly embrace what U.S. lawyers call the “passive virtues”—doctrines enabling courts to decide “whether, when, and how much to adjudicate.”¹⁹⁷ To take a particularly salient example, international courts in the post-war era have generally refused to explicitly endorse anything like the “political question” doctrine in U.S. law.¹⁹⁸ This should not be surprising in a system

194. For an extended version of this argument, see Heath, *supra* note 5, at 1063–80.

195. I have referred to this model elsewhere as a conception of “stewardship.” See 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://ielp.worldtradelaw.net/2019/05/guest-post-trade-security-and-stewardship-part-iv-a-variable-framework-for-security-governance.html>.

196. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 220–21 (1995).

197. Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961); see also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316 (1997) (arguing that the European Court of Human Rights was only then “discovering the ‘passive virtues’”).

198. See, e.g., Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.103, n.183, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) (rejecting the “political question” argument); Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 155 (July 20, 1962) (“It has been

of adjudication founded entirely on the *ex ante* consent of the parties, since any court-created justiciability doctrine could be viewed as a perverse arrogation of judicial power and a refusal to hear disputes properly before the court.¹⁹⁹ Nevertheless, the absence of political question and similar doctrines was a source of anxiety for some observers of the early WTO system, who worried that the convergence of trade and non-trade values in concrete disputes would delegitimize the trading system.²⁰⁰ Although the turn to proportionality analysis and principles of deference for host-state policymaking may have mitigated these concerns in subsequent years,²⁰¹ the turn to adjudicating trade-and-security disputes provides an occasion to revisit the passive virtues at the WTO.²⁰²

In fact, the *Russia—Transit* panel itself provides a vision for a more politically astute and flexible approach to security matters. In a passage that has not garnered too much attention, the panel states:

7.134. It is . . . incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.

7.135. What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the 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

argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.”); Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT’L J. L. CONTEXT 221 (2018) (arguing that international courts “are rarely upfront about this, and are reluctant to refrain from adjudicating because the dispute involves political, rather than legal, questions. Rather, [international court]s tend to avoid disputes in a more subtle fashion,” relying on procedural rules, deference doctrines, or other techniques). See generally HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933) (providing an extensive and influential critique of the view, then widely held, that certain international disputes are non-justiciable because of their political character).

199. Cf. Bickel, *supra* note 197, at 47 (noting that a court’s decision to “decline the exercise of jurisdiction which [validly] given” is in tension with a “strict-constructionist” view of judicial power).

200. See, in particular Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. 733, 754–57 (1999).

201. See Howse, *supra* note 103, at 45–53.

202. Cf. Dunoff, *supra* note 200, at 757–60 (arguing that Bickel’s arguments for the passive virtues are “extremely suggestive” for the WTO in “trade-and” disputes).

international relations involved, for example, armed conflict.²⁰³

This passage suggests a flexible approach to security that is particularly designed to address novel security threats. It imposes a baseline procedural obligation on any state invoking the security exception to “articulate” the security interests at stake.²⁰⁴ At the same time, the panel appears to explicitly contemplate that security interests may shift and evolve over time.²⁰⁵ Novel or unusual security interests thus demand a higher level of articulation from states. This variable level of scrutiny is presented as a justifiable response to the “channeling” problem identified above²⁰⁶—the concern that a state will “re-label” its policies as security interests in order to escape the constraints of trade agreements.²⁰⁷ Nevertheless, if a state can sufficiently articulate about the security interests at stake, then potentially any interest can pass muster under the exception, provided that its other elements are met.

It should be noted that this passage may have been included in the report less as a forward-looking vision of trade governance, and more as a response to the particular problems of this case. As I have noted elsewhere, Russia was remarkably vague throughout this dispute about the exact emergency and security interests at stake, and Ukraine understandably did nothing to clarify matters.²⁰⁸ The panel—which seemed to be at pains to apply Article XXI to the facts at hand and to avoid resolving the case on burden-of-proof grounds—thus needed to devise a basis for excusing Russia for the near absence of any articulation of the security interests at stake. The variable test in the passage noted above provides that basis, allowing the panel to find that, because the emergency at issue “is very close to the ‘hard core’ of war or armed conflict,” Russia’s mysterious litigation strategy was nonetheless sufficient to trigger the security exception.²⁰⁹ This approach also provides a legal basis for holding the United States to a higher procedural obligation in

203. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 7.134–7.135, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

204. This obligation is derived from the principle that all treaties must be performed and interpreted in good faith. *Id.* ¶ 7.133. It is consistent with the obligation in GATS art. XIV bis, *supra* note 77, to notify the WTO of security measures to the extent practicable. But neither the GATT nor most security exceptions explicitly require any prior notice or articulation.

205. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.131, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

206. *See supra* Part III.A.

207. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.133, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

208. 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://ielp.worldtradelaw.net/2019/05/guest-post-trade-security-and-stewardship-part-iii-wto-panels-as-factfinders-under-article-xxi.html>.

209. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.136, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

later cases, which appeared to be another goal of the panel.²¹⁰

That said, the panel's decision suggests a promising way forward for addressing novel security threats without prejudging them. Consider two examples of the security threats discussed above: industrial policy and cybersecurity. First, take a hypothetical domestic statute that permits increasing tariffs on imported products, but only after close scrutiny of the effects of those products on national security and a decision by the executive that contains a clear articulation of the security threat and its relationship to the tariffs adopted.²¹¹ If tariffs adopted pursuant to this statute are later challenged before a trade panel, the panel could defer to the security rationales articulated in the domestic regulatory process without substituting its own judgment. The obligation to articulate thus provides the panel with an assurance that rule-of-law values are being promoted elsewhere, even if the particular requirements of trade rules are not being followed.

Second, consider cybersecurity measures that affect trade, such as restrictions on cross-border data transfers.²¹² As noted above, it remains unclear how trade and investment rules will or should respond to the regulation of cyberspace, and particularly to cybersecurity measures.²¹³ In recognition of this issue, some recent trade agreements have included broad obligations to engage and cooperate internationally on cybersecurity matters.²¹⁴ It is possible that, where a state can show that a particular type of security measure is subject to ongoing negotiation or deliberation in some trade or non-trade forum that addresses cybersecurity, a panel could apply the "sufficient level of articulation" test to defer to those ongoing negotiations. In this way, a state could avoid scrutiny of cybersecurity measures by showing not that the measures are already regulated by other rules or standards, but that the state is engaging in good-faith negotiation with its treaty partners to develop new standards.²¹⁵

In each example, this approach to security governance relies on a

210. The United States figures prominently in the *Russia—Transit* panel decision, and many passages appear to be directed at the U.S. steel tariffs specifically. *E.g.*, Todd Tucker, *The WTO Just Blew Up Trump's Argument for Steel Tariffs*, WASH. POST (Apr. 5, 2019), <https://www.washingtonpost.com/politics/2019/04/05/wto-just-blew-up-trumps-argument-steel-tariffs/> ("[N]umerous parts of the decision seemed to constitute warning shots across Trump's bow.")

211. This is a more constrained version of the existing statute in the United States, which in reality provides authority for imposing tariffs on security grounds with an open-ended definition of security and minimal process. *See supra* note 49 and accompanying text.

212. This example is drawn from Heath, *supra* note 5, at 1094.

213. *See supra* Part II.B.

214. *E.g.*, USMCA, *supra* note 79, art. 19.15.

215. *Cf.* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 111-34, WTO Doc. WT/DS58/AB/RW (adopted Oct. 22, 2001).

broadly managerial form of “enforced self-regulation”²¹⁶ that may offer significant benefits over the more legalistic approaches discussed above. Most obviously, the approach envisioned here can remain open to the emergence of new security interests, without opening a loophole so wide that any public-policy measure could pass through. It also forces states to provide information on the kind of security interests that they consider capable of overriding trade agreements, without worrying about approaches that essentialize the notion of national security and declare some interests to be out of bounds *a priori*. This can enable mutual learning among both states and adjudicators. From the perspective of the adjudicator, this approach enables some flexibility to allow international negotiations and regulatory innovation to proceed, thus connecting with broader demands for a restored “institutional balance” in the trading system.²¹⁷ And this approach, based in the principle of good faith, could also perform the same “channeling” function as more legalistic approaches by actively policing for disguised restraints on trade.²¹⁸

That said, the managerialist approach to security governance is not a panacea for the trading system. First, the legal basis for this approach is open to question. Although the test articulated by the *Russia—Transit* panel purports to be based in the universally recognized principle of good faith, that principle is, as I have noted elsewhere, a “tenuous legal hook for . . . an expansive lawmaking enterprise.”²¹⁹ Even if this approach can be legally justified, the judicial discretion it implies is in tension with the idea of a consent-based dispute settlement system with a mandate to adjudicate legal disputes that are validly submitted to it. A managerial approach like this also raises distributional concerns because it tends to privilege wealthy countries that are more readily able to convince adjudicators that they have the capacity to regulate themselves through domestic procedures.

At present, the managerialist approach also appears to lack a suitable institutional home. As Julian Arato has discussed in his study of decisions transplanting the “margin of appreciation” from European human rights law to investment arbitration, *ad hoc* systems of dispute settlement are ill-suited to apply managerial forms of deference.²²⁰ The flexible approach envisioned

216. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 102–09 (1992).

217. See, e.g., McDougall, *supra* note 139.

218. 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://ieelp.worldtradelaw.net/2019/05/guest-post-trade-security-and-stewardship-part-v-implications-for-international-economic-law.html>.

219. Heath, *supra* note 5, at 1075.

220. Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT’L L. 545, 571 (2014).

here, like the margin of appreciation, depends on consistent management over time, and is thus best-suited to a standing judicial body with relatively consistent membership.²²¹ The *Russia—Transit* panel may have envisioned that its approach could take root in a revived Appellate Body, but as of this writing there appears to be little movement in that field. An intriguing possibility is that a standing multilateral investment court—also championed by the European Union—might in the future allow for this kind of mediated exchange between law and politics in investment law.²²² But, as of now, the managerialist model remains an idea awaiting an institution.

VI. CONCLUSION

The foregoing discussion suggest that there is some silver lining to the disruption of the WTO Appellate Body, in that it provides an opportunity to rethink the relationship between trade and other vital interests. The rapid expansion of “security” into new areas, such as economic self-sufficiency, technology, and climate change, suggest a broader reconfiguration of political values on the international stage. The collapse of the Appellate Body, for now, might forestall an existential clash between these emerging security interests and the demands of a liberalized economy. This pause allows us to experiment with alternative models for managing trade-and-security disputes, each featuring its own blend of legal and political controls.

In this respect, further research and discussion will be critical for reshaping trade governance in the twenty-first century, and many areas need further study. To take just one example, the foregoing discussion has touched only indirectly on the mechanisms in domestic and regional law for managing the clash between trade and emerging security interests. As Kathleen Claussen notes, these mechanisms—such as statutory emergency powers, trade sanctions, export controls, and investment screening—are undergoing their own reconfiguration.²²³ Future work will be important to understanding how changing understandings of trade and security at the national level reflect or conflict with the changing shape of global economic governance.

221. Heath, *supra* note 5, at 1093–96.

222. *Id.* at 1095; *cf.* Roberts & St. John, *supra* note 4 (suggesting that a key lesson of the UNCITRAL process is the utility of having a centralized forum for the discussion of systemic issues in investment law).

223. For a discussion and research agenda, see Claussen, *supra* note 22.