TRADE MULTILATERALISM AND U.S. NATIONAL SECURITY: THE MAKING OF THE GATT SECURITY EXCEPTIONS

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I. INTRODUCTION

> *The General Agreement [on Tariffs and Trade] has been in effect for a period of over 10 years, including such crises as the Berlin airlift, the Korean War, and the Closing of the Suez Canal, but there has never been an invocation of this exception based on the existence of an emergency in international relations.*[1]

> *[I]f the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole.*[2]

In a time of complex economic interdependence and rapid technological innovation, the global trading system is confronted by the entanglement of "trade multilateralism"[3] and "national security."[45] Most problematic from a

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1. Walter Hollis, Confidential Memorandum, International Legal Problems Involved in Certain Proposed Modifications of Voluntary Petroleum Restrictions, U.S. Dep't of State (Nov. 3, 1958) (on file with General Records of the Dep't of State, National Archives at College Park, MD ("NACP"), record group 59, box 11, A1-5393, file 'National Security Amendment').

2. Request for the Establishment of a Panel by the European Union, *United States—Certain Measures on Steel and Aluminium Products*, 34, WTO Doc. WT/DS548/14 (Oct. 29 2018).

3. The term "trade multilateralism" refers to coordinated procedures and substantive principles in trade, such as liberalization and non-discrimination. It draws from John Ruggie's

legal perspective is how to address the concept of national security within the institutional structure of the World Trade Organization ("WTO").

World trade law enables governments to address exigent security circumstances and temporarily suspend or deviate from their international trade commitments.[6] Yet, at the same time that trade disputes are escalating, there is fear that the WTO cannot serve as an outlet for dealing with disputes involving national security.[7]

Members implementing security measures suggest that they have sole authority to determine when to take "any action which [they] consider[] necessary for the protection of [their] essential security interests," under Article XXI of the General Agreement on Tariffs and Trade (the "GATT"), entitled "Security Exceptions."[8] However, interpreting the language this

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definition of multilateralism: "Multilateralism is an institutional form that coordinates relations among three or more states on the basis of generalized principles of conduct: that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence." John G. Ruggie, *Multilateralism: The Anatomy of an Institution*, *in* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 3, 11 (John G. Ruggie ed., 1993); *see also* James N. Miller, *Wartime Origins of Multilateralism, 1939–1945: The Impact of Anglo-American Trade Policy Negotiations* 3, 9–10 (Aug. 1, 2003) (unpublished Ph.D. Thesis, Cambridge University, Emmanuel College) (on file with author) (describing several "incentives to cooperate"); RICHARD N. GARDNER, STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE 13 (3rd ed. 1980); *c.f.* Harlan G. Cohen, *Multilateralism Life Cycle*, 112 AM. J. INT'L L. 47, 50 (2018) (offering another perspective on trade multilateralism: "a preference— a belief that, all things being equal, broader more inclusive regimes would best solve the problems at hand, whether functionally or normatively.").

4. This article focuses on the traditional definition of "national security," which primarily refers to a state's "defensive posture and self-protecting response" to external threats. ROBERT JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 186 (2003); *see also* Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.130, WTO Doc. WT/DS512/R (adopted April 26, 2019) [hereinafter Panel Report, *Russia—Traffic in Transit*] (providing the WTO's definition of "essential security interests"—those interests "relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.").

5. *See* Henry Farrell & Abraham Newman, *The New Interdependence Approach: Theoretical Development and Empirical Demonstration,* 23 REV. INT'L POL. ECON. 713, 714 (2016); Anthea Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment* (Sept. 16, 2019), https://ssrn.com/abstract=3389163.

6. Caroline Henckels, *Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict*, *in International Investment Law and the Law of Armed Conflict*, EURO. Y.B. INT'L ECON. L. 319, 328 (K. Fach Gómez et al. eds., 2019) (observing that the security exceptions are an "affirmative defense"). For an assessment of which treaties provide states with the opportunity to invoke national security considerations, see Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO*, 43 VA. J. INT'L L. 365, 366–70 (2003).

7. WORLD TRADE ORG., *Panels Established to Review India, Swiss Complaints Against US Tariffs* (Dec. 4, 2018), https://www.wto.org/english/news_e/news18_e/dsb_04dec18_e.htm.

8. General Agreement on Tariffs and Trade art. XXI(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; *see* Marrakesh Agreement Establishing the World Trade

way removes the WTO's oversight over the invocation of these security exceptions and risks a "loophole" for governments to act opportunistically and without legal consequence under international law.[9] It further unhinges the multilateral rules, norms, and dispute settlement procedures that create the framework through which governments can ward off narrow sectoral pressures on trade policy-making, focus on rules and renegotiate them, and "thrash out their differences on trade issues."[10]

For decades, article XXI GATT was rarely invoked;[11] it lay like a dormant dragon beneath the mountain, still dangerous but fallen out of memory.[12] Until now. Today, there are an unprecedented number of disputes at the WTO involving national security. After Russia blocked Ukrainian ex-

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Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 187 [hereinafter Marrakesh Agreement]. Article XXI of the GATT provides:

> Nothing in this Agreement shall be construed
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> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests;
>
> (b) to prevent any contacting 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.

9. *See, e.g.*, Simon Lester & Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST., Policy Analysis No. 874 (June 25, 2019), https://www.cato.org/publications/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale.

10. WORLD TRADE ORG., *10 Things the WTO Can Do*, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi00_e.htm (last visited Dec. 17, 2019); Frieder Roessler, *Democracy, Redistribution and the WTO: A Comment on Quinn Slobodian's Book Globalists: The End of Empire and the Birth of Neoliberalism,* 18 WORLD TRADE REV. 353 (2019) (book review).

11. Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶ 7.81 ("Members have generally exercised restraint in their invocations of Article XXI(b)(iii)."); *see also* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011).

12. The reference to the dragon is a nod to J.R.R. Tolkien's Middle-earth legend of Smaug, the Dragon of Erebor. *See* J.R.R. TOLKIEN, THE HOBBIT OR THERE AND BACK AGAIN (1937).

ports to key markets in Central Asia and the Caucasus through road and rail transport restrictions, Ukraine launched WTO proceedings, and Russia defended its actions under article XXI. This resulted in the first formal WTO panel report on the interpretation of article XXI, *Russia—Measures Concerning Traffic in Transit* (*Russia—Traffic in Transit*), in 2019.[13]

Aside from the international crisis involving Russia and Ukraine, there are other conflicts currently involving national security at the WTO. At the time of this writing, Japan has restricted the export of certain chemicals crucial to South Korea's electronics industry, citing national security risks.[14] India has announced it will withdraw trade preferences to Pakistan due to national security reasons.[15] Qatar has launched several WTO proceedings against Saudi Arabia, Bahrain, and the United Arab Emirates due to alleged violations of international trade rules.[16] Qatar's conflicts stem from 2017 when it was subjected to an economic embargo by Saudi Arabia and its Gulf Cooperation Council partners due to allegations that the Qatari government funded terrorism.[17] Recent tensions over global control of fifth generation cellular technology by Chinese firm Huawei Technologies Co., Ltd. have led several states to take action on the grounds of national security, raising speculation of future WTO disputes in response.[18] Separately, seven WTO

13. Panel Report, *Russia—Traffic in Transit*, *supra* note 4.

14. *See* Henry Farrell & Abraham Newman, *Japan and South Korea Are Being Pulled into a Low Level Economic War*, WASH. POST (Aug. 1, 2019); *see also* Lindsay Maizland, *The Japan-South Korea Trade Dispute: What to Know*, COUNCIL ON FOREIGN REL. (Aug. 5, 2019), https://www.cfr.org/in-brief/japan-south-korea-trade-dispute-what-know (outlining the historical grievances and regional policy tensions between the two states).

15. Bryce Baschuk, *India Withdraws Trade Preferences to Pakistan; Cites WTO Clause*, BLOOMBERG LAW (Feb. 15, 2019), https://news.bloomberglaw.com/international-trade/india-withdraws-trade-preferences-to-pakistan-cites-wto-clause.

16. *See* WORLD TRADE ORG., *DS526: United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (2017), https://www.wto.org/english/news_e/archive_e/dscases_arc_e.htm?dscase=526 (last visited Dec. 17, 2019); *see* Request for Consultations by Qatar, *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS526/1 (Feb. 28, 2018); Request for Consultations by Qatar, *Bahrain—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Right*s, WTO Doc. WT/DS527/1 (July 31, 2017); Request for Consultations by Qatar, *Saudi Arabia—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS528/1 (July 31, 2017).

17. Bryce Baschuk, *WTO to Probe Qatar's TV Piracy Claim Against Saudi Arabia*, BLOOMBERG LAW (Dec. 18, 2018), https://www.bloomberg.com/news/articles/2018-12-18/wto-to-investigate-qatar-s-tv-piracy-claim-against-saudi-arabia.

18. *See* Adam Satariano et al., *U.S. Tech Suppliers, Including Google, Restrict Dealings with Huawei After Trump Order*, N.Y. TIMES (May 20, 2019), https://www.nytimes.com/2019/05/20/technology/google-android-huawei.html; *see* Cassell Bryan-Low & Colin Packham, *How Australia Led the US in Its Global War Against Huawei*, THE SYDNEY MORNING HERALD (May 22, 2019), https://www.smh.com.au/world/asia/how-australia-led-the-us-in-its-global-war-against-huawei-20190522-p51pv8.html.

Members have challenged the legality of extra-schedule tariffs imposed by the United States[19] on imports of steel and aluminum deemed to threaten U.S. national security,[20] pursuant to section 232 of the Trade Expansion Act of 1962.[21]

The historicization of article XXI GATT was crucial to the *Russia—Traffic in Transit* panel's interpretation of the article.[22] The report delivers a powerful signal to WTO Members relying on national security claims: Despite the political facets of the *Russia—Traffic in Transit* dispute, the panel concluded that the dispute involved a legal question that was suitable for legal assessment.[23] Moreover, the panel found that the Member invoking article XXI does not have the sole authority to interpret the security exception provision—that article XXI is not purely "self-judging."[24] Against the text of article XXI and the "general object and purpose" of the WTO agreements, the panel found that the existence of the circumstances enumerated in the subparagraphs of article XXI(b) was subject to objective determination.[25] In doing so, the panel found that while the invoking Member has discretion to decide on the necessity of measures, the circumstances when it can do so are eminently justiciable.[26] Still, the *Russia—Traffic in Transit* panel report is not the final word on the matter.[27] The dramatic rise in trade disputes in-

19. *See, e.g.*, WORLD TRADE ORG., *Panels Established to Review US Steel and Aluminium Tariffs, Countermeasures on US Imports* (Nov. 21, 2018) https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm. At the time of publication, the first U.S. submission in *United States—Certain Measures on Steel and Aluminum Products* was posted publicly. OFFICE OF U.S. TRADE REPRESENTATIVE, *Certain Measures on Steel and Aluminum* (June 12, 2019), https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-dispute-50.

20. The GATT actually allows some tariffs; WTO Members negotiate over the maximum or "ceiling" tariff rates that they will offer each other on various kinds of goods. As long as members set their tariffs below these "bound" rates, the imposition of a tariff alone is not a violation of the GATT. *See* PETROS C. MAVROIDIS, TRADE IN GOODS 87–88 (2d ed. 2012).

21. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, §232, 76 Stat. 877 (1962).

22. Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶ 7.83 (noting that "[the panel's] textual and contextual interpretation of Article XXI(b)(iii), in the light of the object and purpose of the GATT 1994 and WTO Agreement, is confirmed by the negotiating history of Article XXI of the GATT 1947."). *See also* Jean d'Aspremont, *Critical Histories of International Law and the Repression of Disciplinary Imagination*, 7 LONDON REV. INT'L L. 89 (2019) (defining historicization as when international lawyers engage "in the creation of discourses about the past to give the latter a form and a meaning intelligible in the present").

23. *See* Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶ 7.103, n.183. *See also infra* Part VIII. For this first formal reading of article XXI, the panel was led by well-known international lawyer and former Appellate Body member Georges Abi Saab.

24. *Id.* ¶¶ 7.102–7.103. *But see* Third-Party Oral Statement by the United States, *Russia—Measures Concerning Traffic in Transit*, ¶ 35, WTO Doc. WT/DS512 (Jan. 25, 2018).

25. Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶¶ 7.66, 7.69–7.77.

26. *See Id.* ¶¶ 7.100–7.103 (adding "there is no basis for treating the invocation of Article XXI(b)(iii) . . . as an incantation that shields a challenged measure from all scrutiny").

27. Even if adopted, panel reports are not binding precedent for other disputes, even on the same questions of WTO law. *See* Appellate Body Report, *United States—Final Anti-*

volving national security has resuscitated debate over the degree of discretion afforded to WTO Members as to when and how a Member may invoke the security exceptions with binding effect.[28]

The language of article XXI does not precisely define what elements of the article are self-judging. Nor does it confirm how WTO adjudicative bodies may review trade disputes involving highly sensitive security concerns. Article XXI begins, "Nothing in this Agreement shall be construed," and article XXI(b)'s chapeau continues, "to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests," in relation to certain enumerated circumstances (*e.g.*, those actions relating to fissionable materials; those relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials for the purpose of supplying a military establishment; or those taken in time of war or other "emergency in international relations").

Some scholars maintain that the adjectival clause "which it considers" renders the security exceptions wholly self-judging.[29] Emphasis is placed on the words "it" and "considers" as allocating total (or very high) discretion to the state in determining both what constitutes its essential security interests and the means it "considers" necessary to protect those essential security interests.[30] This implies that no other Member or WTO body has "any right to determine whether a measure taken by a sanctioning member satisfies the requirements" of article XXI.[31] With total, unfettered discretion, a WTO Member could make a direct jurisdictional defense that a WTO adjudicative body lacks jurisdiction to review an invocation of article XXI, as Russia argued in the *Russia—Traffic in Transit* dispute.[32]

WTO Members may also argue that the dispute is nonjusticiable because WTO adjudicating bodies must defer total interpretation of article XXI to the discretion of the invoking WTO Member, as the U.S. had argued

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Dumping Measures on Stainless Steel from Mexico, ¶¶ 158, 160–162, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008) (elaborating on the value in following WTO panel and Appellate Body reports, despite the absence of formal binding precedent). *See also* Joost Pauwelyn, *Minority Rules: Precedent and Participation Before the WTO Appellate Body*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW 141, 141–172 (Joanna Jemielniak et al. eds., 2016) (evaluating the importance of precedent in the WTO).

28. *See* Akande & Williams, *supra* note 6, at 384, n.81 (observing the issue is "whether there is a right of unilateral determination of the obligation by one party which the other party is bound to accept").

29. *See* Raj Bhala, *National Security and International Trade Law: What the GATT Says and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 268–69 (1998); *see also* V.A. SEYID MUHAMMAD, THE LEGAL FRAMEWORK OF WORLD TRADE 176–78 (1958).

30. *See* Holger P. Hestermeyer, *Article XXI Security Exceptions*; Peter-Tobias Stoll, *Article XXIII Nullification or Impairment*, *in* WTO—TRADE IN GOODS 578–79 (Rüdiger Wolfrum et al. eds., 2010).

31. Bhala, *supra* note 29, at 269.

32. Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶ 7.103; *see* 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, 438 (1999).

in its Third Party submissions in the *Russia—Traffic in Transit* dispute.[33] Justiciability relates to the "nature" of the dispute, and requires consideration of whether or not the dispute is "capable of being disposed of judicially."[34]

The challenge with either claim is that under either approach the WTO lacks recourse to regulate the invocation of a security exception; the invoking Member would solely determine the political and economic costs for deviating from their trade commitments.[35] The danger of this is the potential for a cascade of unilateral "self-help" actions.[36]

Some commentators have sought nuance within the self-judging nature of the chapeau in an effort to allow competent dispute settlement bodies to control for abuse.[37] For example, there remains diverse commentary as to whether the adjectival clause "which it considers" refers to the determination of the "necessity" of the measures taken, or whether it qualifies only the determination of a Member's "essential security interests."[38] Another observation is that WTO adjudicative bodies can control opportunistic use of the exceptions by incorporating an obligation of good faith into the interpretation of article XXI.[39] Such an obligation would set limits to several seemingly open-ended terms included in article XXI, particularly "security inter-

33. Responses of the United States to Questions from the Panel and Russia to Third Parties, *Russia—Measures Concerning Traffic in Transit*, ¶¶ 18–19, WTO Doc. WT/DS512 (Feb. 20, 2019); *see* Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶ 7.103. The WTO adjudicating bodies referred to here are the Dispute Settlement Body panels, the Appellate Body (a permanent body of seven members entrusted to review the legal aspects of the reports issued by panels), and article 25 arbitrators. *See* Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

34. Responses of the United States to Questions from the Panel and Russia to Third Parties, *supra* note 33, ¶¶ 18–19.

35. *See* Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296, 303 (2015); Benton J. Heath, *The New National Security Challenge to the Economic Order*, YALE L.J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361107.

36. *See* ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 282 (2013).

37. *See* Heath, *supra* note 35, at 45; *see, e.g.*, Akande & Williams, *supra* note 6, at 386–402 (drawing attention to the nature of the term "considers" in the chapeau and evaluating a good faith review of the security exceptions).

38. *Compare* Schloemann & Ohloff, *supra* note 32, at 450, *with* Akande & Williams, *supra* note 6 at 386, 397, 399, Alford, *supra* note 11, at 704, *and* Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 589–90 (1991). For a comparison of state practice, see Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶¶ 7.62–7.101, ¶ 7.36 (main arguments of Australia), ¶ 7.43 (the European Union), ¶ 7.37 (Brazil).

39. *See* Akande & Williams, *supra* note 6, at 390–96; *see* Schloemann & Ohlhoff, *supra* note 32, at 444; Alford, *supra* note 11, at 708.

ests" and "emergency in international relations."[40] Despite the open-ended nature of the article, commentators have tethered the language to "bona fide" military and defense paradigms, further noting that "Article XXI does *not* encompass exigencies such as a member government's financial distress or domestic economic crises that are unrelated to war and international emergencies."[41]

As this article shows, detailed archival investigation into U.S. practice during the construction of the security exceptions within the framework of the International Trade Organization ("ITO") Charter[42]—the original multilateral trade bargain—complicates current debates about the plausible legal interpretive steps involved in invoking article XXI GATT. The United States was the main architect in the design and placement of the security exceptions within the ITO. Due to the overwhelming influence the United States had in designing and constructing the exceptions, U.S. practice offers a revealing lens by which to study the history of article XXI.[43] Moreover, in the *Russia—Traffic in Transit* decision, the U.S. observed that "the U.S. understanding of the security exemption in article XXI has been consistent" with the article's negotiating history, the statements of the GATT contracting parties, and the statements of other WTO Members, that article XXI is totally self-judging.[44]

This article argues that analyzing internal U.S. practice during the making of article XXI is relevant for current and future efforts to interpret the exceptions, thereby contributing to existing literature on article XXI GATT. Moreover, to the extent that article XXI is meant to clarify the bounds between trade multilateralism and national security, this article explores the multifaceted considerations that shaped U.S. national security policy and foreign economic policy at the time article XXI was drafted, which, in turn, created the language, phrasing, and placement of the security exceptions in the ITO Charter.

Out of the complex debate among U.S. officials during the construction of the security exceptions, this article reveals several legal choices made by U.S. officials that are relevant to understanding the construction of article XXI GATT. First, it reveals the competing perspectives of U.S. agencies as to how to balance U.S. national security against the creation of an interde-

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40. Heath, *supra* note 35, at 48–49.

41. Sykes, *supra* note 35, at 303 (emphasis in original); *see also* Hahn, *supra* note 38, at 580; Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶ 7.130.

42. The negotiation of the International Trade Organization ["ITO"] Charter began in 1946 and concluded in March 1948 in the United Nations Conference on Trade and Employment held in Havana. Meanwhile, negotiation of the GATT occurred in Geneva in 1947, during the second preparatory meeting of delegates for ITO Charter negotiations. *See infra* Part II for background on the ITO.

43. To understand how the ITO Charter is relevant to the interpretation of the GATT, see JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 46–49 (1969).

44. *See* Third-Party Oral Statement by the United States, *Russia—Measures Concerning Traffic in Transit*, *supra* note 24, ¶ 33.

pendent global economy and a multilateral trade institution meant to aid governments in resolving trade disputes peacefully. It is important to note that the U.S. debate over the exceptions occurred against a backdrop of the "birth" of the Cold War between the U.S. and the Soviet Union.[45] Economic issues were inlayed into U.S. foreign policy, and internal conflicts developed as competing agencies prescribed different approaches to the post-war international economy. Internal U.S. debates reveal that challenges to constructing the security exceptions ran deeper than an exercise in linguistics. There were fundamental disagreements about U.S. engagement with the multilateral trade system, as it remained unclear whether the ITO (and then the GATT) would benefit or hinder U.S. security interests at home and abroad.

Officials at the U.S. Department of State (the "DOS" or "State") who advocated for the U.S. to take leadership in the construction of the post-World War II international economic order saw the exceptions differently than officials from the Army, Navy, and War Departments ("Services" or "Services Departments"), who were charged with post-war U.S. military and defense planning. This article captures the policy considerations that emerged during these internal debates to explain how and why the U.S. negotiators compromised on the language of the ITO Charter's security exceptions, which together ultimately constituted article XXI GATT. While DOS and Services both sought to prioritize U.S. national security in drafting the security exceptions, this article reveals that DOS officials were consistently concerned with the use and abuse of these exceptions by other ITO Members and with the exceptions' effects on the broader ITO project. By contrast, Services officials prioritized states' total power of unilateral interpretation that would confirm maximum U.S. powers, regardless of the impact on the broader multilateral trade project.

Second, exploring the internal U.S. materials adds plausibility to the notion that the U.S. negotiators did not believe the security exceptions were purely self-judging in nature and non-justiciable. Internal U.S. debates show how divided the U.S. negotiators were about purely self-judging security exceptions. Moreover, this article details how DOS officials considered the construction of the exceptions while they contemporaneously considered the functioning of the nullification or impairment procedure, the legal basis of dispute settlement.[46] The history of internal U.S. debates also highlights stances *not* taken by the United States in the delegates' meetings, such as a firm position that a Member with security concerns shall have sole, open-ended authority to determine when to suspend or extinguish its commitment to the international trade legal framework.

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45. BENN STEIL, THE MARSHALL PLAN: DAWN OF THE COLD WAR 135–36 (2018) (placing the "birth" of the Cold War as July 7, 1947—right in the middle of when the United States was constructing the security exceptions).

46. *See generally* Stoll, *supra* note 30, at 598–615.

Evidence that the U.S. negotiators did not plan for purely self-judging security exceptions is further revealed in the materials they prepared for the U.S. Congress after the conclusion of the ITO Charter in 1948. U.S. negotiators outlined the legal steps required to interpret the security exceptions. They presented a two-step approach. First, an invoking ITO member would determine both its "essential security interests" and the "necessity" of its measure for the protection of its essential security interests.[47] Second, the ITO bodies would answer the factual question of whether the invoking ITO Member's security-related actions were within one of the enumerated set of circumstances qualifying for security exception. Because a crucial goal for the ITO was to *limit* unilateral government actions, U.S. negotiators did not seek to make exceptions that would create an open-ended, unchecked power for the ITO Members.

Third, this article shows that the interaction between the U.S. delegation and other national delegations failed to explore the full depth of the concerns that the U.S. DOS had with Members' potential abuse of the security exceptions.[48] For example, within the Geneva preparatory meetings, the national delegations did not elaborate on the legal interpretive questions that sparked heated debate within the U.S. delegation between the U.S. DOS and the Services officials.[49]

Instead, the national delegates considered the scope of the exceptions with respect to political interests and access to the nullification or impairment procedure.[50] Under this procedure, Members could seek relief when the benefits they received from the Charter were nullified or impaired by another Member's security measures, regardless of whether the measure actually breached the Charter's rules. By the time the delegates met in Havana months later to finalize the Charter and shortly after the signing of the GATT, they appeared in agreement that the procedure applied to excepted security actions. This finding is echoed in materials the DOS prepared for U.S. Congressional hearings on the ITO, whereby it was revealed that if Members were to withhold information mandated by the Charter on grounds of national security, the complainant Member retained the opportunity to file a "non-violation complaint" via the nullification or impairment procedure.[51]

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47. It appears that these two interpretive questions were placed together.

48. For the implications of this observation upon treaty interpretation, see *infra* note 61.

49. These questions included the proper placement of the phrase "relating to" within the exception provision and the most appropriate body to review disputes involving security measures. *See infra* Part V.

50. *See also* Mona Pinchis-Paulsen, *The Historical References in the U.S. First Submission in United States—Certain Measures on Steel and Aluminum Products*, INT'L ECON. L. & POL'Y BLOG (Oct. 6, 2019) (offering an expansion and comment on the context of the historical references made by the United States as related to the ITO Charter delegations' drafting meetings), https://ielp.worldtradelaw.net/2019/10/the-historical-references-in-the-us-first-submission-in-united-states-certain-measures-on-steel-and-.html.

51. *See infra* text accompanying note 529.

Still, the absence of a detailed delegates' discussion does not signal ambivalence to the kinds of issues that triggered heated exchanges between the DOS and Services officials. Just as the article demonstrates compromise within the U.S. agencies, it also demonstrates that the U.S. sought compromise among the heterogenous delegations. For example, when delegations raised potential dangers with the exceptions in Geneva, the U.S. delegation remained fairly neutral, explaining how the language and phrasing of the enumerated exceptions chosen reflected the "balance" the U.S. sought when creating latitude for measures concerning "real security interests."[52] One reading of this history is that detailed interpretive assessments of the open-ended language used to make the exceptions, like other interpretive issues, would be addressed following completion of the Charter.

The WTO will soon evaluate the merits of some of these U.S. security claims.[53] Until then, the WTO is in peril in light of the Trump administration's recurrent invocation of U.S. national security to support unilateral trade actions and its distrust of multilateralism generally.[54] Moreover, there is a growing "technological Cold War" between China and the United States, which is playing out in tit-for-tat defensive trade measures that further tangle economic and security initiatives.[55]

Considering its role in founding the post-war international economy, it is remarkable how the United States now invokes security in the pursuit of trade actions. The Trump administration has broadly used security concerns to defend the U.S. trade agenda, arguing that "national security is economic security."[56] It justifies its decisions to impose tariffs, government blacklists, and other defensive measures using this rationale.[57] The repeated U.S. invo-

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52. *See infra* text accompanying note 423.

53. *See supra* text accompanying note 22.

54. *See generally* Jacob Lew, Op-Ed., *America is Surrendering the Moral High Ground Over Huawei*, FIN. TIMES (June 6, 2019); Quinn Slobodian, *You Live in Robert Lighthizer's World Now*, FOREIGN POL'Y (Aug. 6, 2018); James Bacchus, *Might Unmakes Right: The American Assault on the Rule of Law in World Trade* (Ctr. For Int'l Governance Innovation Papers, No. 173, May 2018), https://www.cigionline.org/publications/might-unmakes-right; 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* (Nov. 26, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290590; Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises?*, 18 WORLD TRADE REV. 1–23 (May 24, 2019).

55. *See* Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115, 179 (2018); Shawn Donnan & Jenny Leonard, *Trump's Latest Tariffs Threat Betrays Impatience for a China Deal,* BLOOMBERG (Aug. 1, 2019); Li Yuan, *Huawei Feud Is Latest Brick in a Tech Wall*, N.Y. TIMES, at A1 (May 20, 2019); Raymond Zhong & Paul Mozur, *For the U.S. and China, a Technology Cold War That's Freezing Over*, N.Y. TIMES, at A1 (Mar. 23, 2018)*; see also supra* note 5.

56. Peter Navarro, *Why Economic Security Is National Security*, THE WHITE HOUSE (Dec. 10, 2018), https://www.whitehouse.gov/articles/economic-security-national-security.

57. Ana Swanson & Paul Mozur, *In Name of Security, Trump Sets Off Economic Wars on Multiple Fronts*, N.Y. TIMES, at A8 (June 8, 2019). In addition to the tariffs on aluminium

cation of national security to justify its trade restrictive measures is more worrisome against the background of an ongoing U.S. challenge to the WTO Appellate Body's legal interpretations and judicial practices, culminating in its efforts to block Appellate Body member appointments.[58] As a result, WTO Members are left hoping to avoid a situation where "the strongest party to a dispute says [what] the rules are."[59]

It is likely that future WTO panel reports will continue to build on the *Russia—Traffic in Transit* dispute and will therefore emphasize the preparatory materials related to article XXI of the GATT. But, while the historical facts contained herein capture insights into the making of article XXI, the concern of this article is to offer perspective to current debates, not to make a formal interpretive claim about the GATT.[60] Collectively, the insights captured in this article offer a historical lens by which to explore the reviewability of national security claims, but this article does not seek to resolve the interpretive legal questions presented or to confirm the standards by which the WTO's adjudicative bodies should review claims under article XXI.[61] In

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and steel, the Trump administration cited concerns with Japanese and European Union automobiles and automobile parts imports in 2018, raising the possibility of tariffs to protect U.S. competitiveness under section 232. Proclamation No. 9888, 84 Fed. Reg. 23,433 (May 17, 2019); *see also* Jenny Leonard & Shawn Donnan, *Trump Delays EU, Japan Auto Tariffs for 180 Days for Talks*, BLOOMBERG (May 17, 2019). *But see* David Lawder, *Trump Can No Longer Impose 'Section 232' Auto Tariffs After Missing Deadline: Experts*, Reuters (Nov. 18, 2019), https://www.reuters.com/article/us-usa-trade-autos/trump-can-no-longer-impose-section-232-auto-tariffs-after-missing-deadline-experts-idUSKBN1XT0TK (explaining that the Trump administration failed to act by November 14, 2019 and has consequently missed the deadline to impose tariffs on certain automobile and automobile part imports). Similarly, the Trump administration threatened an emergency declaration to impose tariffs on the United States' top trading partner, Mexico, in an effort to reduce illegal immigration into the U.S. *See* Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019), https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico (outlining the dramatic use of the International Emergency Economic Powers Act); Fred Barbash, *Use of Emergency Declaration to Impose Tariffs on Mexico is Legally Questionable, Scholars Say*, WASH. POST (June 4, 2019), https://www.washingtonpost.com/world/national-security/use-of-emergency-declaration-to-impose-tariffs-on-mexico-is-legally-questionable-scholars-say/2019/06/04/f9b60004-86ed-11e9-a870-b9c411dc4312_story.html.

58. *See* Robert E. Lighthizer*, The President's 2018 Trade Policy Agenda*, OFFICE OF U.S. TRADE REPRESENTATIVE 22–28 (Mar. 2018), https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf. *See generally* Petersmann, *supra* note 54.

59. Peter Van den Bossche, *Farewell Speech of Appellate Body Member Peter Van den Bossche*, (May 28, 2019), https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

60. While the subsequent evolution of U.S. thinking on the security exceptions is occasionally touched upon, the U.S. stance in early GATT disputes is a separate story, told elsewhere. *See*, *e.g.*, Alford, *supra* note 11; Hahn, *supra* note 38; Schloemann & Ohlhoff, *supra* note 32.

61. This article does not consider how U.S. practice comes under the Vienna Convention on the Law of Treaties. In particular, the article does not argue that internal U.S. materials

fact, this article suggests that U.S. negotiators anticipated clarification of the standard of review based on the interpretation of a competent dispute settlement body.[62]

II. Establishing a Timeline for a Historical, Descriptive Account

The negotiation of the ITO began with a small group of states—the United States, the United Kingdom (the "UK"), and the Commonwealth states—during World War II. The United States presented its Suggested Charter for the ITO in September 1946, based on an outline of principles devised with the UK from 1941 to 1945.[63] The subsequent work of the Preparatory Committee of the United Nations (the "UN") Conference on Trade and Employment was divided into three phases. There were two Preparatory Committee sessions, in London (1946) and in Geneva (1947), and a meeting of the Drafting Committee in New York (1947). Each meeting produced its own draft ITO Charter. The UN Conference on Trade and Employment was then held in Havana, Cuba in 1948. Annexed to the Final Act of the UN Conference was the final version of the Havana Charter, signed on March 24, 1948.[64]

Within each of these sessions, participating delegations broke up into smaller committees and commissions that simultaneously addressed a range of topics based on the Suggested Charter, including non-discrimination and fairness, commodities, restrictive business practices, direct and indirect trade barriers, the response of the Soviet Union to the ITO, rules for relations with communist and state-trading economies, positive approaches to full employment, the role of occupied territories in the trading system, balance of payments difficulties and economic development, the interaction between the Bretton Woods institutions, and the role of dispute settlement in the ITO in relation to the World Court and the UN.

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connote a collective effort of all participating governments or that they constitute a supplementary means of interpreting article XXI under article 32 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331. *See* Isabelle Van Damme, Treaty interpretation by the WTO Appellate Body 309, 313 (2009) (noting that "the proposition that preparatory work reflects the common intention of all contracting parties is troubling.").

62. *See* Schloemann & Ohlhoff, *supra* note 32, at 448; *see also* John H. Jackson, *Helms-Burton, The U.S., and the WTO*, ASIL Insights (Mar. 3, 1997), https://www.asil.org/insights/volume/2/issue/1/helms-burton-us-and-wto.

63. U.S. Dep't. of State, pub. 2598, *Suggested Charter for an International Trade Organization of the United Nations* (Sept. 1946) [hereinafter 1946 U.S. Suggested Charter].

64. U.N. Conference on Trade and Employment, Havana Charter for the International Trade Organization, U.N. Doc. E/Conf.2/78 (Apr. 1948) [hereinafter 1948 Havana Charter].

Meanwhile, the negotiation of the GATT was completed on schedule, and twenty-three governments signed its Final Act on October 30, 1947.[65] With the GATT concluded prior to the Havana Conference, certain elements from the finalized Havana Charter's security exceptions article were not included in the GATT. For example, the Havana Charter provision respecting inter-governmental agreements "made by or for a military establishment" was not included in the final GATT text, nor was the provision regarding the "special" circumstances of India and Pakistan as newly independent states.[66] There were also minor textual changes to the security exceptions between the Havana Charter and the GATT. For example, the second enumerated subparagraph of the Havana Charter's security exceptions article was simplified in article XXI GATT to allow "traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment."[67]

A. *Identifying the Actors in the U.S. Government*

As previewed above, not all U.S. postwar planners desired freer trade for global economic recovery and peace. The construction of the security exceptions captures a tense battle between the U.S. DOS and Services as to how to define post-war U.S. foreign economic policy. Services' personnel, drawn from the War, Army, and Navy Departments were tasked with post-war U.S. military and defense planning.[68] Though both prioritized U.S. security, they did so in different ways. While the U.S. DOS championed multilateral approaches to trade liberalization and the norm of non-discrimination, Services prioritized the U.S. expansion of power to counter rising concerns with Soviet actions in eastern Europe.[69] While the DOS un-

65. ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 30–35, 50 (2d ed. 1990). *See generally* DOUGLAS IRWIN ET AL., THE GENESIS OF THE GATT 96 (2008).

66. 1948 Havana Charter, *supra* note 64, at 92–93*; see also infra* note 541.

67. GATT, *supra* note 8, at 39. In the Havana Charter, the text was "traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment *of the Member or of any other country*." 1948 Havana Charter, *supra* note 64, at 93 (emphasis added).

68. These departments were unified under the National Military Establishment on July 26, 1947 when President Truman signed the National Security Act of 1947.

69. *Cf.* Miller, *Wartime Origins of Multilateralism, 1939–1945*, *supra* note 3, at 286 (observing that just *prior* to the negotiation of the ITO, and therefore prior to negotiation of the GATT, U.S. negotiators were divided into factions with two distinct aims: "to open the world economy to suit their own expansionist commercial goals and liberal trade ideals (a predominantly selfish aim)" and "to pay the necessary price to accommodate war town economies and stabilise the international system (a more selfless aim that required economic sacrifices)."). Nevertheless, both factions believed their aims could be accomplished through the same means: liberalizing the world economy. *Id.*

derstood national security as an exception to free trade rules, Services saw *free trade* as the exception, and national security was the rule.[70]

In fact, the crucial advocates for freer trade were the DOS officials that supported former Secretary of State Cordell Hull's promotion of non-discriminatory, open trade; these were led by William Clayton, Assistant Under Secretary of State for Economic Affairs.[71] They "simply believed that freer trade would lead to global economic recovery and international harmony" and sought to "democratise . . . international capitalism."[72] Consequently, DOS officials defended the ITO and trade liberalization as crucial ingredients to future U.S. security.[73]

That the DOS was responsible for managing the negotiation of the ITO Charter and the GATT helps to explain why the United States was ultimately willing to sacrifice (some) sovereignty for the benefits generated in a multilateral result.[74] As Francine McKenzie observed, during that era "[t]rade was not just an instrument of foreign policy; it was also its expression."[75] Thus, the DOS was likely successful at tethering U.S. interests to trade multilateralism in large part because its negotiating lens fit the times: U.S. trade policy was seen as integrated into the country's broader diplomatic efforts and long-term objectives for maintaining global peace, a pathway for governments to identify common interests and to manage complex domestic and international pressures.

B. *The Influence of the Cold War on Trade Negotiations*

Several commentators have remarked that the ITO was "a product of the Cold War."[76] At the least, it is inescapable that the broader context of

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70. *See generally infra* parts III and V.

71. DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY 464 (2017); *see* Miller, *Wartime Origins of Multilateralism, 1939–1945*, *supra* note 3, at 12. Not every official in the State Department aligned with Hull's goal of freer trade. Leroy Stinebower, an economist at the State Department reflected on how certain U.S. officials did not adhere to "[William] Clayton internationalism," understood as a free trade approach. He further observed that "[Will Clayton] constantly came up against the less convinced, in Dean Acheson and Adloph Berle." Oral History Interview by Richard D. McKinzie with Leroy Stinebower, Columbus, North Carolina, ¶¶ 12–13 (June 9, 1974), https://www.trumanlibrary.org/oralhist/stinebow.htm.

72. Miller, *Wartime Origins of Multilateralism, 1939–1945*, *supra* note 3, at 285–86.

73. Francine McKenzie, *GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947–1959*, 10 J. COLD WAR STUD. 78, 107 (2008) (finding the State Department was "pervaded by economics" and "formulated with Cold War aims in mind") (citations omitted).

74. *See generally* Miller, *Wartime Origins of Multilateralism, 1939–1945*, *supra* note 3, at 14, 15–17 (arguing that U.S. officials pursued multilateralism in trade from 1941 to 1945 as a result of "their own ideals, and British influence").

75. *Id.* at 107.

76. *Compare* THOMAS W. ZEILER, FREE TRADE, FREE WORLD: THE ADVENT OF GATT 138 (1999) *with* McKenzie, *supra* note 73, at 79 (interviewing former GATT negotia-

ITO Charter negotiation occurred against the "birth" of the Cold War between the United States and the Soviet Union.[77] The majority of the discussion of the language and phrasing of the security exceptions occurred at a time when the United States and the Soviet Union seemed "irrevocably committed to securing their respective spheres of influence—politically, economically, and militarily—without mutual consultation."[78]

Nonetheless, despite the U.S. perception that the Soviet Union represented an ideological, political, and economic threat, the DOS's support for trade multilateralism in the late 1940s was not so easily compartmentalized. Traditional reasons, including the U.S. goal of strengthening the West against "the threat of communism"[79] and the effort "to prevent a revival of the closed autarkic systems that had contributed to world depression,"[80] fed into each other. The U.S.'s "ideological" conflict against "the totalitarian-communist identity of the Soviet Union"[81] was supported by American "political and business elites" who were active in "promoting liberal capitalism and democracy as the international model."[82] However, revisionist historians also expose the complexity of U.S. post-war planning, observing a U.S. "strategic-economic" quest for "expanding empire in the 1940s not simply as a reaction to Soviet machinations but as another and more accelerated step in a long imperial journey from continental to global power."[83] In sum, the reasoning of the United States should be understood as a composite of accounts from different actors that considers their behaviors, philosophies, actions, and ambitions within international economic law at the dawn of the Cold War.[84]

The Cold War did play a role in the formation of the Charter and the security exceptions, of course, but its impact started out slowly. Early U.S.

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tors and revealing that "Cold War politics" did not affect trade liberalization efforts). *See generally* ROBERT A. POLLARD, ECONOMIC SECURITY AND THE ORIGINS OF THE COLD WAR, 1945–1950, at 201 (1985); Michael Mastanduno, *Trade as a Strategic Weapon: American and Alliance Export Control Policy in the Early Postwar Period* 42 INT'L ORG. 121, 125 (1988); Jacob Viner, *Conflicts of Principle in Drafting a Trade Charter*, 25 FOREIGN AFF. 612 (1947).

77. STEIL, *supra* note 45, at 135.

78. *Id.*

79. *See* I. MAC DESTLER, AMERICAN TRADE POLITICS (4th ed. 2005) at 7; *see also* IRWIN, *supra,* note 71, at 495.

80. POLLARD, *supra* note 76, at 244; *see* Thomas G. Paterson & Les K. Adler, *Red Fascism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930's–1950's*, 75 AM. HIST. REV. 1046–64 (1970) (exploring U.S. perceptions of totalitarianism and how it impacted U.S. foreign policy towards the Soviet Union).

81. ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 21 (2001).

82. Sandrine Kott, *Cold War Internationalism*, *in* 15 INTERNATIONALISMS: A TWENTIETH-CENTURY HISTORY 340, 346 (Glenda Sluga & Patricia Clavin eds., 2016).

83. Thomas G. Paterson, *Cold War Revisionism: A Practitioner's Perspective*, 31(3) DIP. HIST. 387, 391 (2007).

84. *See e.g.,* STEIL, *supra* note 45.

and UK efforts sought to include the Soviet Union, a state-trading economy, into the multilateral trade system.[85] The severity of the Cold War does not appear to have crystallized in U.S. officials' minds prior to the "shock" of the North Korean invasion of South Korea.[86] Before that time, Services officials were primarily concerned with the Soviet Union's exploitation of the "dramatic unraveling of the geopolitical foundations" in Europe and in Asia.[87]

Nevertheless, despite not completely expecting Soviet "military conquest" in the late 1940s, U.S. Services officials shaped an expansive conception of U.S. national security in estimation of Soviet capabilities.[88] Professor Melvyn Leffler, an expert in U.S. foreign relations history, described U.S. military officials as broadening the conception of U.S. national security to include "a strategic sphere of influence within the Western Hemisphere," a system of bases and transit rights, "access to the resources and markets of most of Eurasia," nuclear "superiority," and denial of strategic materials and resources to "prospective" enemies.[89]

As elaborated below, tensions mounted and, as historian Thomas Zeiler observed, the United States ultimately sought to combine its foreign and economic policy to "contain the expansion of Soviet-directed international communism."[90] Yet, as this article will explain, growing U.S.-Soviet tensions did not lead to an expansion of the security exceptions as commentators might expect. Instead, the emerging Cold War placed an urgency on the U.S. negotiators' plans to sell trade multilateralism—both to other delegations and back home in Washington. To champion trade liberalization and procedural multilateralism—seen as the creation of "a talking shop" for developing shared policy[91]—the U.S. negotiators sought to circumscribe the exceptions. The DOS officials that served as U.S. negotiators sought to convince other U.S. officials that gaining the fullest benefits from ITO membership required closing the opportunity for unbridled government regulation and protectionism, even in the name of national security. To achieve this end, compromises were made between the various U.S. agencies, particularly the DOS and Services. These compromises were a considerable challenge at the time of negotiation, with "lingering isolationism" within the

85. James N. Miller, *Origins of the GATT—British Resistance to American Multilateralism* 18, n.30 (Jerome Levy Econ. Inst. Working Paper, No. 318, 2000).

86. THOMAS OATLEY, A POLITICAL ECONOMY OF AMERICAN HEGEMONY: BUILDUPS, BOOMS, AND BUSTS 48–49 (2015).

87. Melvyn P. Leffler, *America's National Security Policy: A Source of Cold War Tensions*, *in* THE ORIGINS OF THE COLD WAR 83 (Thomas G. Paterson & Robert J. McMahon eds., 3d ed. 1991).

88. *Id.* at 85–86.

89. *Id.* at 90.

90. ZEILER, *supra* note 76, at 76.

91. *See* Miller, *Origins of the GATT—British Resistance to American Multilateralism*, *supra* note 85, at 9.

U.S. government,[92] and several U.S. officials skeptical of "liberal ideals and capitalist institutions."[93]

III. Preparing for Trade Multilateralism: The Suggested Charter and the Initial U.S. Construction of the National Security Exception

Within the United States, post-war foreign economic policy was managed by an inter-departmental committee, the Executive Committee on Economic Foreign Policy ("ECEFP"), which itself was subdivided into smaller committees that considered economic, territorial, and security problems through coordination between the Departments of State, War, Navy, and others.[94] As a general matter, the ECEFP sought international cooperation to "maximize the production and exchange of goods," to "prevent future wars," and to avoid "measures of economic warfare."[95]

During World War II, before the United States shared its Suggested Charter on the world stage, the ECEFP considered solutions for a multilateral economic approach to post-war recovery internally. A multilateral approach was meant to aid all governments transitioning from wartime controls.[96] The ECEFP believed that international trade rules would facilitate the "expansion of world trade" needed by Member States to address the political realities of unemployment, balance-of-payments, or other economic problems.[97] Consequently, though it recognized the need for states to take defensive action, any security exceptions still had to fit within a larger constellation of political and economic goals for trade multilateralism in post-war planning.

The ECEFP drew from past U.S. trade agreements and discussions with British and Canadian officials to form the earliest proposals for a multilat-

92. ZEILER, *supra* note 76, at 78.

93. Leffler, *supra* note 87, at 87.

94. *See Executive Committee on Economic Foreign Policy*, 10 Dep't St. Bull. 507, 511 (1944); *see also* ROBERT W. OLIVER, INTERNATIONAL ECONOMIC CO-OPERATION AND THE WORLD BANK 102–03 (1975); HARLEY A. NOTTER, POSTWAR FOREIGN POLICY PREPARATION, 1939-1945, at 222–23, 357–58 (1949).

95. *See* U.S. Dep't of State, Executive Committee on Economic Foreign Policy ["ECEFP"], Letter from Comm. On Trade Barriers ["CTB"] on Proposed Multilateral Convention on Commercial Policy, ECEFP D-62/44, at 1–2. (Oct. 4, 1944) [hereinafter Letter from CTB to ECEFP on Proposed Multilateral Convention, 1944] (on file with NACP, record group 59, box 46, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9').

96. *See* U.S. Dep't of State, ECEFP, Committee on Wartime Trade Controls, Rep. on Basic Foreign Commercial Policy and Wartime Trade Controls, ECEFP D-61/44, at 4 (Sept. 28, 1944) (on file with NACP, record group 59, box 46, A1 353, file 'ECEFP: Meetings, Documents 61/44/9').

97. Letter from CTB to ECEFP on Proposed Multilateral Convention, 1944, *supra* note 95, at 2–3.

eral convention on commercial policy.[98] The security exceptions in particular, appear to be inspired by both the U.S.-Argentina reciprocal trade agreement and the U.S.-Mexico reciprocal trade agreement.

The reciprocal trade agreement between the United States and Argentina incorporated a general exception that divided national concerns into two groups. First, explicitly without prejudice to states' commitments to engage in consultation or third-party adjudication (by a committee of technical experts), actions "relative to public security" and "public health and morals," among others, were excepted.[99] This first group of excepted concerns was qualified by a commitment against "arbitrary discrimination."[100] The second group of national security actions permitted by the exceptions included "control of the export or sale for export of arms, ammunition, or implements of war, and, in exceptional circumstances, all other military supplies" and those "relating to neutrality."[101] Unlike the language of the first group of exceptions, the language of this group did not directly reference consultation or third-party adjudication. Moreover, these security actions were permitted without qualification (meaning they were not controlled by a prefatory clause restricting "arbitrary discrimination"), and were introduced as follows: "Nothing in this Agreement shall be construed to prevent the adoption or enforcement of such measures as the Government of either country may see fit."[102]

By comparison, article XVII of the Agreement between the United States of America and Mexico Respecting Reciprocal Trade, which entered into force on January 30, 1943, stated: "Nothing in this Agreement shall be construed to prevent the adoption or enforcement of measures . . . relating to public security, or imposed for the protection of the country's essential interests in time of war or other national emergency."[103] There was no separation between different types of national concerns, and it was unclear whether article XVII was subject to article XIV, which outlined a procedure for either government to seek adjustment of measures believed to nullify or im-

98. Letter from CTB to ECEFP on Proposed Multilateral Convention, 1944, *supra* note 95, at 1.

99. Agreement and Supplemental Exchange of Notes Between the United States of America and Argentina Respecting Reciprocal Trade, arts. XV(1), XVI(1), U.S.-Arg., Oct. 14, 1941, E.A.S, 277, 56 Stat. 1685, 1698–1701 [hereinafter U.S.-Arg. Agreement, Oct. 14, 1941].

100. *Id.* The chapeau of art. XV(1) reads: "Subject to the requirement that, under like circumstances and conditions, there shall be no arbitrary discrimination by either country against the other country in favour of any third country . . . the provisions of this Agreement shall not extend to prohibitions or restrictions."

101. *Id.*

102. *Id.* art. XV(2). The language of "qualified" and "unqualified" emerged from elaboration on the kinds of exceptions present in past trade agreements during later ECEFP meetings. *See infra* notes 266, 285.

103. Agreement between the United States of America and Mexico Respecting Reciprocal Trade, U.S.-Mex., art. XVII(h) Dec. 23, 1942, 57 Stat. 833, 850 (1942).

pair objects of the agreement. Just as under the U.S.-Argentina agreement, excepted national security actions were not limited by a prefatory clause, but the U.S.-Mexico agreement provision included open-ended language related to "other national emergency" not present in the U.S.-Argentina agreement.

By 1944, the ECEFP had drafted its initial proposal for a multilateral convention. Security-related exceptions were contained in draft article XXVIII (General Exceptions). They were unqualified, with a few key changes.[104] Article XXVII provided, *inter alia*:

> Nothing in this Convention shall be construed to prevent the adoption or enforcement of measures:
>
> . . .
>
> (c) relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies;
>
> . . .
>
> (h) [measures] undertaken in pursuance of obligations for the maintenance of international peace or security; . . . .[105]

Subparagraph (c) resembled language found in past U.S. trade agreements,[106] while the ECEFP explained that subparagraph (h) was original to its proposal and meant to "replace" language in inter-war trade agreements "relating to (unilateral) 'neutrality' and 'public security' measures *and* measures imposed 'in time of war or other emergency.'"[107] The proposal targeted the open-ended language contained in prior agreements that permitted exception for measures unrelated to war actions and purposefully rejected expanding the scope of the security exceptions to permit "action under emergency situations."[108] Further, the ECEFP confirmed its position that "the scope of the exception should properly be restricted to situations in-

104. U.S. Dep't of State, ECEFP, Analysis of the Draft Text of the Proposed Multilateral Convention on Commercial Policy, ECEFP D-64/44, at 63 (Oct. 1944), [hereinafter Analysis of the Proposed Multilateral Convention] (on file with NACP, record group 59, box 46, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9') (analyzing key changes between the initial ECEFP proposal and earlier U.S. trade agreements).

105. U.S. Dep't of State, ECEFP, Draft Text of the Proposed Multilateral Convention on Commercial Policy, ECEFP D-63/44, at 44 (Oct. 1944) (on file with NACP, record group 59, box 46, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9') (the bracketed text signaled a drafting suggestion).

106. Analysis of the Proposed Multilateral Convention, *supra* note 104, at 63 (identification of which past U.S. trade agreements were consulted was not provided).

107. *Id.* at 63–64.

108. *Id.* at 64.

volving war or the threat of war, which would be covered by (h)."[109] For clarity, the security exceptions would "not extend to national emergencies of any other kind, such as those produced by depressions."[110]

A. *The Suggested Charter's Security Exceptions*

By 1945, the ECEFP was working towards a draft convention for a United Nations organ to construct "agreed principles" and "an equitable basis for dealing with the problems of governmental measures affecting international trade."[111] This organ, the ITO, would establish machinery for collaboration, but it was not described as an international body meant to police protectionism.[112]

In 1946, following the 1944 ECEFP proposal, an ECEFP subcommittee, the Trade Agreements Committee ("TAC"), was tasked with constructing the initial charter for the ITO for the Secretary of State's use when negotiating with other governments.

The TAC was divided over its final proposal to the ECEFP. A majority of the TAC, largely DOS officials, offered security exceptions maintaining the ITO's trade liberalization goals.[113] The Services Departments offered a dissenting, minority report that was attached to the majority TAC statement.[114]

The security exceptions recommended by the TAC read, *inter alia*:

> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures . . .
>
> b. relating to the traffic in arms, ammunition, implements of war and fissionable materials;

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109. *Id.*

110. *Id.*

111. U.S. Dep't of State, ECEFP, Proposal to Establish an International Trade Organization, marked Secret, ECEFP D-108/45, at 13 (July 21, 1945) (on file with NACP, record group 59, box 48, A1 353, file '5.19B ECEFP Meetings, Documents 101/45 – 110.45') (containing security exceptions similar to those in the ECEFP's 1944 Draft Text of the Proposed Multilateral Convention on Commercial Policy).

112. *Id.* at 5.

113. *See* U.S. Dep't of State, ECEFP, Trade Agreement Comm. ("TAC") on Exceptions for Security Measures, ECEFP D-42/46 (May 27, 1946) [hereinafter TAC Statement on Exceptions for Security Measures] (on file with NACP, record group 59, box 33, A1 497, file 'Executive Committee on Economic Foreign Policy').

114. *See* Harold H. Neff and H.L. Challenger, Memorandum, Attachment to TAC Statement on Exceptions for Security Measures, ECEFP D-42/46, at 2 (June 10, 1946) [hereinafter Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures] (on file with NACP, record group 43, box 13, A1 698, file 'Charter: Security').

> c. in time of war or imminent threat of war, relating to the protection of the essential security interests of a Member;
>
> . . .
>
> j. undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace or security.[115]

B. *The Services Departments' Dissent: Requesting a Broader Security Exception*

Harold Hopkins Neff (a lawyer with international law and business experience, and Special Assistant to the Under Secretary of War, serving as representative of the War Department) and Captain H.L. Challenger (of the U.S. Navy) presented the Services' dissent to the TAC majority's security exceptions proposal.[116] The Services Departments sought wide discretion for all security measures, with a broad understanding of what constitutes U.S. national security.[117] The Services Departments' overarching thesis was that the proposed security exceptions were "much too narrow" and failed to preserve the United States' necessary powers.[118] According to Neff, it was crucial that the United States address the "depleted" raw materials required for U.S. security with the power "to control trade"—both to conserve these resources domestically and to develop such resources "nearby" or in "friendly countries."[119]

Yet, Services' concerns stretched beyond the scope of the security exceptions. It became clear that the Services Departments viewed the exceptions as the chief tool for escaping the ITO's legal and "moral" obligations to enable access to materials "on equal terms" as "needed [by Members] for

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115. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 1–2.

116. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114; *see also* U.S. Dep't of State, ECEFP, Meeting Minutes, ECEFP M-16/46, at 6 (June 14, 1946) [hereinafter ECEFP Meeting Minutes, June 14, 1946] (on file with NACP, record group 59, box 57, A1 353, file 'ECEFP Minutes 16/46 – 33/46'). For a biography of Neff, see generally U.S. Dep't of State, Harold Hopkins Neff Biographic Data, *attached to* Office Memorandum from L.D. Heck to Mr. Swayzee (May 5, 1947) (on file with NACP, record group 43, box 132, A1 704, file 'Biographies part 1'); *see also* Harold H. Neff, *Memorandum on the study of the London Stock Exchange*, S.E.C. ARCHIVES (June 27, 1941), http://www.sechistorical.org/collection/papers/1940/1941_0627_NeffCommission.pdf.

117. *See* Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 1.

118. ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 1.

119. *Id.* at 1–2. Neff did not clarify his comment about the depletion of resources, though against the context of the memorandum, it appears he was speaking to those war materials essential for U.S. defense and military interests. *See* Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114.

their economic prosperity."[120] Additionally, as elaborated below, Services desired sole discretion to draw on trade powers in peacetime to control imports and exports, to make strategic Government purchases abroad, and to impose economic sanctions on ITO members.[121]

1. Accounting for New Technology and New Weapons

Services wanted the Suggested Charter to contain language similar to that in past U.S. commercial treaties and trade agreements that offered arguably broad national security protections.[122] According to Neff, those treaties used open-ended legal phrases, including exceptions for measures relating to "public security," and those relating to "all other military supplies" in "exceptional circumstances."[123]

Instead, the TAC replaced the language "and in exceptional circumstances, all other military supplies" from past trade agreements with new language (covering a narrower subset of military supplies: "fissionable materials") in the security exception provision.[124] In dissent, Neff argued that reserving the exception "to munitions of war and fissionable raw materials does not appear realistic."[125] He argued that the narrowness of the proposed language ignored the possibility of discovering "some new technology" or material for new weapons of war.[126] Moreover, the history of U.S. neutrality legislation, Neff countered, demonstrated that security interests "cannot be realistically limited to munitions of war."[127] Petroleum and metals, for example, were equally important.[128]

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120. *Id.*

121. *Id.* at 2–3; *see* TAC Statement on Exceptions for Security Measures, *supra* note 113, at 3; Clair Wilcox, Memorandum to Dean Acheson and Will Clayton on National Security Exceptions to Draft ITO Charter, at 2 (July 8, 1946) [hereinafter Wilcox Memorandum to Acheson and Clayton] (on file with NACP, record group 43, box 13, A1 698, file 'Charter: Security'). Clair Wilcox, a U.S. economist from the faculty of Swarthmore College, both served as head negotiator for the ITO Charter and chaired the International Trade Conference that resulted in the GATT 1947. *See* Joshua Hausman, *One Hundred Years of Economics at Swarthmore*, SWARTHMORE COLLEGE (2005), http://www.swarthmore.edu/sites/default/files/assets/documents/economics/econ_history.pdf.

122. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 1, 7–8.

123. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 2; Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 7–8.

124. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 2-3.

125. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 2.

126. *Id.* at 3; *see* ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 2.

127. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 2.

128. *Id.* at 2–3.

Neff and the TAC majority also disagreed on whether the language of "public security," as included in prior U.S. trade agreements (but excluded in the TAC statement), referred solely to "domestic police measures" and "police powers" alone.[129] Neff argued that the terms "public security" should be included and read broadly, to permit all "necessary powers to control trade."[130] The TAC majority rejected this expansive understanding of the terms "public security."[131] The DOS observed the phrase "public security" ought to be interpreted "very narrowly to cover only matters affecting public safety or order."[132] John Leddy (Trade Agreements Division, State Department)[133] added that prior trade agreements only authorized measures "required in the face of a clear and present danger to the national security."[134] The TAC also referred to the United States' narrow interpretation of the phrase in the past, with specific attention to the United States' position during the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions.[135]

2. Export Restrictions

The Services Departments argued that export restrictions, such as those "designed to conserve domestic supplies of scarce materials necessary in war or designed to prevent supplies from reaching a possible U.S. enemy,"

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129. ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 1–2; Wilcox Memorandum to Acheson and Clayton, *supra* note 121, at 2.

130. ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 1–2.

131. *See* TAC Statement on Exceptions for Security Measures, *supra* note 113, at 6.

132. Winthrop G. Brown, U.S. Dep't of State, Letter to William Clayton on behalf of Clair Wilcox, National Security Exceptions in the ITO Charter, at 6 (June 13, 1946) [hereinafter Wilcox Letter to Clayton] (on file with NACP, record group 43, box 13, A1 698, file 'Charter: Security').

133. In London, Leddy served as an advisor to the U.S. delegation for the commercial policy chapter of the ITO Charter, which later formed the GATT 1947. *See* Oral History Interview by Richard D. McKinzie with John M. Leddy, Washington, D.C., HARRY S. TRUMAN PRES. LIBR. & MUSEUM, ¶¶ 44–45 (June 15, 1973) [hereinafter Leddy Oral History]; *see also* Oral History Interview by Richard D. McKinzie with Honore Marc Catudal, Washington, D.C., HARRY S. TRUMAN PRES. LIBR. & MUSEUM, ¶ 59 (May 23, 1973); *John Marshall Leddy Dies, Obituary*, WASH. POST (Sep. 3, 1997), https://www.washingtonpost.com/archive/local/1997/09/03/john-marshall-leddy-dies/53943cdd-9046-41a0-8085-6e1ce9cd634e/?utm_term=.53d57e88c2d1. Leddy's views mattered; he was deeply respected by other State Department officials for his skills as a drafter and negotiator. *See* Oral History Interview by Richard D. McKinzie with Joseph D. Coppock, Washington, D.C., HARRY S. TRUMAN PRES. LIBR. & MUSEUM, ¶¶ 46–47 (July 29, 1974), ("John Leddy was one of the greatest, one of the really greatest, most knowledgeable people in State for many years."); Oral History Interview by Richard D. McKinzie with Winthrop G. Brown, Washington D.C., HARRY S TRUMAN PRES. LIBR. & MUSEUM, ¶¶ 43–44 (May 25, 1973) [hereinafter Brown Oral History].

134. John Leddy, U.S. Dep't of State, Draft Letter to William Clayton on behalf of Clair Wilcox, at 1 (June 13, 1946) [hereinafter Wilcox Draft Letter to Clayton] (on file with NACP, record group 43, box 13, A1 698, file 'Charter: Security').

135. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 6.

were essential to U.S. security interests and appeared prohibited by the proposed Charter.[136] The TAC had argued that its proposed security exceptions permitted the United States to take certain export restrictions "to conserve supplies of exhaustible natural resources," rather than a blanket permit to take any export restriction as this would "clearly open the door to discriminatory or protectionist measures."[137] Services disagreed. According to Services, the Charter only permitted the levying of export duties.[138] Without an expansive set of security exceptions, the ITO asymmetrically weakened the United States,[139] as other ITO members lacked the United States' constitutional prohibitions on levying export duties.[140] From Services' perspective, such "renunciation" of powers was problematic because it would require the nullification of U.S. statutes (*e.g.*, statutes relating to the export of tinplate scrap and helium gas) that were designed to "guard [U.S.] war potential" and "to keep from increasing the war potential of a possible enemy," and it limited action in the name of these goals in the future.[141] Neff "discounted" DOS's arguments that export restrictions imposed for national security reasons, could lead to retaliation and, consequently, a denial of strategic materials.[142] Neff observed that other countries would still trade with the United States to obtain currency.[143]

3. Import Restrictions

Under the majority's proposal, the U.S. government could not rely on broad forms of quantitative import restrictions to protect certain industries, with, for example, "specification controls" like mixing regulations for the protection of the synthetic rubber industry.[144] Industries necessary in war should not, the TAC majority observed, "be maintained through the use of . . . direct barriers to trade."[145] In contrast, the Services Departments wanted the freedom to impose mixing regulations or other quantitative import restrictions "to assure the maintenance of a domestic industry . . . necessary in war."[146]

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136. *Id.* at 3.

137. *Id.* at 5.

138. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 3.

139. *Id.* at 3.

140. U.S. CONST. art. I, § 9, cl. 2 ("No Tax or Duty shall be laid on Articles exported from any State.")

141. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 4.

142. ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 2.

143. *Id.* at 2.

144. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 3; ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 3.

145. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 5.

146. *Id.* at 3.

Services also rejected the TAC majority's assessment that the U.S. government could achieve its security goals through subsidies and government operation instead. Neff argued that these choices were unacceptable due to the uncertainty created by the dependence on government appropriations.[147] The Services Departments also complained that the ITO would require reporting the use of internal subsidy programs to other governments, as well as consultations to limit any subsidy program that caused any "serious effects on international trade," even if for national security reasons.[148] Thus, according to the Services Departments it was "dangerous" to "make such [an] undertaking in regard to a subsidy program based on national security reasons."[149]

4. Strategic Purchasing

The Services Departments also sought total discretion for the U.S. government to apply strategic considerations in effecting foreign purchases.[150] Counter to the Charter's rules of non-discrimination and Member States' commitment that "all nations shall be treated fairly and equitably," Services believed that trade discrimination was necessary for U.S. security.[151] Specifically, the U.S. might need to make discriminatory purchases for strategic reasons, citing the examples of petroleum and the tropical products of natural rubber, abaca, and cinchona.[152] According to the TAC majority, Services desired the power to make discriminatory purchasing by state trading (*e.g.*, of government stockpiles) to either allow the United States to minimize its use of "near-by foreign sources of scarce materials needed in war" or "to help maintain in neighboring or near-by countries a possibly noneconomic industry producing materials or goods necessary in war."[153] To give an example of the wide-ranging powers sought, where "normal civilian consumption" required consumption of products from abroad (such as petroleum), Services believed the U.S. government should seek to fulfill this demand with "Government purchases abroad" in an effort to maintain supply closer

147. *Id.*; Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 4–5.

148. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114*,* at 5.

149. *Id.* An unnamed State Department official reviewing the Neff and Challenger memo had handwritten "Nuts!" next to this comment, underlining the word "dangerous."

150. *Id.*

151. *Id.* An unnamed State Department official handwrote, "Good!" next to this comment.

152. *Id.* at 5–6. For a further investigation as to how the U.S. government resolved its demand for rubber by creating a synthetic rubber industry, see generally DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES, 262–77 (2019).

153. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 3.

to the U.S., such as in Latin America.[154] However, Services saw this strategic consideration as restricted by the Charter's non-discrimination rules, the obligation it imposed on states to treat all nations "fairly" when making Government purchases, and its requirement that such purchases be "based on commercial considerations alone."[155] An unnamed DOS official argued that this failed to achieve Services' desired effect: "Purchase of oil in the Middle East rather than in Venezuela would not keep Venezuelan oil in the ground."[156] Likewise, Services argued that any attempt to link subsidies or loans to those governments that produce tropical materials with "an obligation to deliver the products" to the United States would violate the Charter's commitment to "fair and equitable treatment" to all ITO Members.[157]

Another vocal concern raised by Services was how responsive the United States could be to Russia. For free-market economies, the Charter imposed strict commitments to prohibit trade controls. However, states with direct government control over trade could make all of their export and import decisions based on strategic considerations, such that "prohibitions against trade controls would be meaningless."[158] The "vague" obligations of state monopolies to provide "equal and fair treatment" to the trade of other ITO Members would be difficult to enforce. To the TAC majority, however, this concern "did not seem particularly significant" because Russia and its satellite states accounted for only five percent of world trade at that time.[159]

5. The Jurisdiction of the UN Security Council over Economic Disarmament

Services believed that "renunciation" of those trade powers necessary for security reasons constituted economic disarmament that was indistinguishable from general disarmament, and therefore fell under the jurisdiction of the United Nations' Security Council, where the U.S. held great power with weighted representation and a veto right.[160] In support of this claim, Neff argued that "the failure by the Allied nations to destroy the German economic potential for war as well as German armaments following World War I was a convincing demonstration of the fallacy of separating economic disarmament from general disarmament."[161]

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154. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 5.

155. *Id.*

156. ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 3.

157. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 6.

158. ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 3.

159. *Id.* at 5.

160. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 7; ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 3.

161. ECEFP Meeting Minutes, June 14, 1946, *supra* note 116, at 3.

Services also argued it was in U.S. security interests that U.S. allies not renounce their powers affecting national security. For example, Neff and Challenger observed that it was in U.S. interests that "Great Britain have complete power to support her domestic agriculture by the measures which at the time she deems most appropriate."[162]

A related argument put forward by Services was the desire to

"unilaterally" impose economic sanctions, regardless of whether "there should be war or imminent threat of war."[163] Proposals relating to unilateral economic sanctions were concerning for the DOS. An undated memorandum provided the DOS position that Services' response to the TAC proposal, "assumes that any aspect of military security, no matter how remote or indirect, must override all consideration of economic and social well-being," an assumption that "is wholly at variance with our established foreign policy."[164]

C. *The TAC Majority's Defense of the ITO*

After "lengthy discussion" in the ECEFP, the TAC majority observed that the Services Departments' understanding of national security constituted "the maximum which could be included without seriously jeopardizing the expansion of world trade which the Charter seeks to bring about."[165] However, these exceptions were "firmly" rejected by the TAC majority.[166] Instead, the TAC majority repeatedly defended the ITO and the trading world they sought to establish—one that would *not* include states' open-ended power "to make economic preparations for war in the indefinite future."[167]

Clair Wilcox of the DOS reported that for the TAC majority, the Services Departments' desired national security exceptions sought to amplify the United States' powers *and* to "curb the military potential of other powers."[168] DOS officials viewed such measures as undermining, possibly destroying, the international legal framework for peaceful economic and political relations.[169]

The TAC majority argued that a successful ITO would better protect U.S. security interests than a broad security exception provision. They re-

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162. *Id.*

163. Neff and Challenger Memo attached to TAC Statement on Exceptions for Security Measures, *supra* note 114, at 3. Specific mention is made to past proposals for export embargoes to Argentina and Spain, but no further details are included in the memorandum.

164. U.S. Dep't of State, ECEFP, Undated Memorandum Commenting on the ITO Charter [hereinafter Unauthored and Undated ECEFP Memorandum] (on file with NACP, record group 43, box 13, A1 698, file 'Charter: Security').

165. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 4.

166. *Id.*

167. *Id.*

168. Wilcox Memorandum to Acheson and Clayton, *supra* note 121.

169. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 4.

marked that a "Charter for world trade with real teeth in it" would "contribute far more to the security of the United States than the reservation of broad freedom of action by all signatories."[170] To this end, Winthrop Brown argued that the proposed security exceptions protected "legitimate security interests" and the United States "against arbitrary actions by others to our detriment for political or economic warfare reasons."[171] In addition, such a Charter would strengthen "all the nations outside the Soviet orbit . . . and [help] to keep a free enterprise system."[172] Thus, as Clair Wilcox (who led the Office of International Trade Policy at the State Department and resided in the TAC majority) explained, the United States' strength "depends on the integration of the non-collectivist world into a great trading system. It is to our interest to preclude exceptions under the Charter which might result in its breaking up into exclusive trading blocs."[173]

Nevertheless, the TAC majority did not discount the vital character of states' security interests.[174] They knew that states would undertake necessary security measures, regardless of possible infringement of the Charter.[175] However, they strived to meet the need for security exceptions while still avoiding the promotion of unilateral actions, which ran counter to the goals of trade multilateralism. Thus, the TAC majority's proposed security exceptions permitted several measures necessary for U.S. security interests, provided that certain "safeguards" against opportunistic and protectionist uses were met. For example, subsidies remained an option for maintaining necessary war industries, provided Services could make "the case for action on security grounds" to Congress.[176] Moreover, the DOS argued that provisions encouraging multilateral dialogue and transparency, such as requirements for reporting or consulting on subsidy programs, "commit[] no member in advance to take limiting action as a result."[177] Additionally, ITO members could take trade actions for security reasons under the auspices of the United Nations Security Council, finding "agreement among the principal powers on the Security Council for the retention of key industries in key areas."[178] Finally, controls over trade in fissionable materials, as well as arms, ammunition, and implements of war were "specifically excepted" from the Charter.[179]

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170. *Id.* at 7.
171. ECEFP Meeting Minutes, June 14, 1946, *supra* note 115, at 1.
172. Wilcox Letter to Clayton, *supra* note 132, at 6.
173. ECEFP Meeting Minutes, June 14, 1946, *supra* note 115.
174. *See* TAC Statement on Exceptions for Security Measures, *supra* note 113, at 4.
175. *Id.*
176. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 4–5.
177. Wilcox Letter to Clayton, *supra* note 132, at 4 (emphasis removed).
178. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 5.
179. *Id.* at 6.

A significant DOS concern with the Services' dissent was that other states might use the security exceptions for "every form of discriminatory and restrictive practice"[180]—not just military measures. For example, Wilcox raised the possibility that less-developed states would claim economic development and industrialization as "essential to their ultimate national security" to justify the use of quantitative restrictions.[181] A broadened exception provision could "give general sanction to the kind of measures envisaged by the service members [and] could be held to justify, for example, the high-cost industrialization of India behind tariff barriers, or the maintenance of high-cost British agriculture by means of quotas."[182] In this way, "every special interest in every other country would clothe itself in the mantle of national defense."[183] Thus, strategically, the TAC majority observed that it was in the United States' best interest to "prevent[] other countries from imposing harmful trade measures against the United States," and this "far outweigh[ed] the risk involved in committing [the U.S.] along with other countries to the relaxation of trade controls."[184]

Another issue the DOS raised was the fear that a blanket exception for national security would "open the door to economic warfare and to the use of economic power for purely political reasons."[185] DOS officials and U.S. businesses separately referenced concerns over "economic war" between the United States and the Soviet Union.[186] Echoing this concern, Wilcox later recounted, there were "two roads leading to industrial power," and it was imperative that other trading nations follow the United States road, rather than the Soviet one.[187] In light of all of these reasons, it was no surprise that the TAC majority argued that the Services Departments' proposal for widening the scope of the security exceptions was "unnecessary, unwise, and possibly dangerous, to carry forward in a multilateral code of commercial behavior."[188]

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180. Wilcox Letter to Clayton, *supra* note 132, at 6.

181. *Id.* at 6 (India, Brazil, and Australia are specifically named); *see* ECEFP Meeting Minutes, June 14, 1946, *supra* note 115 at 5.

182. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 6.

183. Wilcox Letter to Clayton, *supra* note 132, at 6.

184. ECEFP Meeting Minutes, June 14, 1946, *supra* note , at 6.

185. Wilcox Letter to Clayton*, supra* note 132, at 6.

186. *See, e.g.*, Clair Wilcox, *Statement on Quantitative Restrictions by Vice Chairman of U.S. Delegation*, 18 DEP'T ST. BULL. 37, 40 (1948); John Abbink, *The Issues at Havana and What the Charter Came to Look Lik*e, *in* ECONOMIC INSTITUTE ON AMERICA AND THE INTERNATIONAL TRADE ORGANIZATION 16 (1948).

187. CLAIR WILCOX, A CHARTER FOR WORLD TRADE 141 (1972).

188. TAC Statement on Exceptions for Security Measures, *supra* note 113, at 7.

D. *Finding Compromise: Adding Open-Ended Language to the ITO Security Exceptions*

In a June 14, 1946 ECEFP meeting, the TAC majority challenged Services to reconsider the expansion of the security exceptions. The contention that the United States would be "less secure by advocating commitments by all countries of the world completely overlooks what other countries give up and bind themselves to do," the majority observed, "and the fact that they are more apt to try to use loopholes in discriminatory ways than we."[189] It also pointed out that the ITO would make the United States "economically stronger by freeing our access to other people's products."[190] Moreover, it noted that the United States' economic power "is dependent not only on access to raw material but also on technological development, progressive management and an active and expanding industrial plant, to which export markets are essential."[191] The head U.S. negotiator, William Clayton (Assistant Under Secretary of State for Economic Affairs) put it simply: The Services Departments "supported the very proposition which they were intended to oppose."[192]

A day before the meeting, John Leddy composed a sharp defense of the ITO and of trade multilateralism to William Clayton on behalf of Clair Wilcox, meant to summarize earlier discussion with the Services officials.[193] Calling the Services Departments' approach "shortsighted," Leddy noted that there was "no clear distinction between 'security' industries and other industries, and any basic industry might be defended as essential from the security standpoint."[194] From a strategic perspective, the Services Departments' approach made no sense to State—permitting discrimination on security grounds would allow for *any* kind of discrimination on that basis, including British imperial preferences and the "system of 'integration'" pursued by the Soviet Union in eastern Europe.[195] Leddy concluded that the Services Departments' exception language "would tear the heart out of the Charter."[196]

In a June 17, 1946 meeting with the Services Departments, Wilcox and Clayton spoke to Services' questions about the TAC proposal "at some length" and emphasized the potential of the ITO to improve living stand-

189. ECEFP Meeting Minutes, June 14, 1946, *supra* note 115, at 5; *see supra* text accompanying note 180.

190. ECEFP Meeting Minutes, June 14, 1946, *supra* note 115, at 5.

191. *Id.* at 4–5.

192. *Id.* at 6.

193. *See* Wilcox Draft Letter to Clayton, *supra* note 134.

194. *Id.* at 3.

195. *Id.* at 4.

196. *Id.* at 3.

ards, advance technology, and bring peace and national security.[197] They placed the ITO as part of a bigger picture of economic recovery and integration, alongside loans to Britain and France, and the operation of the Bretton Woods institutions, created in 1944.[198] The DOS believed that "the Charter as written, with the safeguards it contains against action by other nations inimical to United States interests, is a better protection for our security than the reservations proposed by the Services."[199] For the DOS, the outcome of unity and interdependence superseded the exclusion of certain security concerns in the architecture of the ITO.[200]

Though the Services Departments acknowledged the DOS's arguments, they reportedly continued "to plead for a free hand in controlling international transactions for military purposes."[201] They demanded freedom "to stop any shipment of any raw material, scrap, manufactured product, plant equipment, or technology to Russia at any time without regard to whether or not there was imminent threat of war."[202] Although the Services Departments mentioned their intention to escalate their concerns to the Joint Chief of Staffs, Wilcox stood firm. Though the DOS sought to make "necessary" provisions for security, "he insisted that this must be done in a way that would not give a carte blanche to other countries to violate their commitments with respect to commercial policy under the cloak of a sweeping security exception."[203] At the conclusion of the meeting it was agreed that Neff and Wilcox would work together to develop wording for the Charter exceptions.[204]

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197. U.S. Dep't of State, Memorandum of Conversation, Security Exceptions to Proposed ITO Charter, at 2 (June 17, 1946) [hereinafter Memorandum of Conversation, Security Exceptions, June 17, 1946] (on file with NACP, record group 43, box 13, A1 698, file 'Charter: Security').

198. *Id.*

199. Wilcox Letter to Clayton, *supra* note 132, at 2.

200. Unauthored and Undated ECEFP Memorandum, *supra* note 164, at 3 (giving the State Department's response to the Services Departments' reliance on the Anglo-American Petroleum Agreement as a past practice justifying broad security exceptions). The memorandum reported that the U.S. position at the time of that agreement "was that such pre-emptive rights [to oil in time of war or emergency] should be exercised only in the light of the broad (commercial) objectives of the Agreement and that any new agreements regarding such rights should be subject to international review." *Id.* Nevertheless, the memorandum urged that the text of the agreement was "subject always to considerations of military security and to the provisions of such arrangements for the preservation of peace and prevention of aggression as may be in force." *Id.* (emphasis in original).

201. Memorandum of Conversation, Security Exceptions, June 17, 1946, *supra* note 197, at 2.

202. *Id.* at 1–2. The language "imminent threat of war" was seen by the Army-Navy Munitions Board representative, Mr. Deupree, as having "serious diplomatic repercussions," and he "urged a change in the wording." *Id.*

203. *Id.* at 2 (emphasis in original).

204. *Id.*

In early July 1946, Clair Wilcox wrote to William Clayton and Dean Acheson and argued that the Services Departments sought a Charter provision "so broad as to permit any nation, seeking individual advantage in trade under the guise of security, completely to escape from the obligations it had assumed under the ITO Charter."[205] Wilcox cautioned that the Services Departments sought "a loophole for everything except consumers' luxury goods."[206]

Taking on the voice of economic authority in his memorandum, Wilcox went on to explain that U.S. military potential needed export markets, especially to develop "large-scale, heavy manufacturing."[207] Moreover, Wilcox argued that the Services Departments had failed to consider how other governments would invoke such broad security exceptions. He raised caution that, under a broadly worded security exception provision, other countries producing the strategic raw materials required by the United States would be free to impose discriminatory trade barriers or "close those markets to us."[208] He worried that the Services Departments' exception clause sought to "build our military strength . . . not by methods that would integrate the other economies of the world more closely with our own, but by methods that would isolate them from us."[209] He closed his letter by noting that the Services Departments and "civilian departments" fundamentally disagreed on whether to include an exception provision "so broad as to leave every Member free to engage in economic warfare and, by unilateral actions, to impose economic sanctions in times of peace."[210]

The DOS presented the redrafted security exceptions (in article 32 of the draft Suggested Charter) on July 17, 1946.[211] To address the Services Departments' concern with the narrowness of permitted actions relating to "arms, ammunition, implements of war and fissionable materials," the DOS proposed appending "[and] other supplies of the use of the military establishment."[212] The DOS also proposed the phrase "international emergency" in place of the phrase "imminent threat of war." This change stemmed from Services' belief that the original wording would be "unduly restrictive be-

205. Wilcox Memorandum to Acheson and Clayton, *supra* note 121, at 3.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 4. Though he sought guidance from Acheson and Clayton, the archive file did not contain their response on this issue.

211. U.S. Dep't of State, ECEFP, Security Exceptions in the ITO Draft Charter–Memorandum from the Department of State, Memorandum, ECEFP D-64/46 (July 17, 1946) [hereinafter ECEFP, Security Exceptions Memorandum] (on file with NACP, record group 59, box 50, A1 353, file 'ECEFP Meeting Documents 61/46-70/46').

212. *Id.* at 1.

cause action taken under this exception [provision] would involve formal public admission that war threatened."[213]

Two days later, on July 19th, the ECEFP approved all of these textual changes to the general exceptions provision of the commercial policy chapter, article 32.[214] First, it agreed to the creation of a new paragraph that addressed measures "relating to fissionable materials" since this was considered a separate class of materials from the class of "arms, ammunition and implements of war."[215] Second, it broadened sub-paragraph (d) to exempt from the Charter's commercial policy commitments "such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment."[216] Wilcox observed that under this wording "only that portion (meaning specific shipments of specific goods) of such traffic conducted with the end purpose of actually supplying the military[,] whether going directly to the military or to private hands[,] could be dealt with by exceptional measures."[217] The example provided in the meeting by DOS officials was control over pre-war traffic in scrap metal destined for Japanese military use.[218] Neff required time to study Wilcox's proposal, but offered a tentative acceptance of the language.[219]

Third, the ECEFP approved the change to subparagraph (e). The phrase "international emergency" was substituted for "imminent threat of war" so as "to avoid the possibility that action under these provisions would appear to be practically an act of war."[220] The ECEFP then agreed to further amend "international emergency" to "emergency in international relations," as suggested by Lynn R. Edminster, Vice Chairman of the U.S. Tariff Commission, "to avoid the implication that Members would be free to take measures under article 32 in an economic emergency, such as a world depression."[221]

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213. *Id.*

214. The group further agreed to amend article 49, dealing with exceptions to provisions relating to intergovernmental commodity agreements, to match the changes made to article 32. U.S. Dep't of State, ECEFP, Meeting Minutes, ECEFP M-23/46, at 7 (July 19, 1946) [hereinafter ECEFP Meeting Minutes, July 19, 1946] (on file with NACP, record group 59, box 57, A1 353, file 'ECEFP Minutes 16/46-33/46').

215. *Id.* at 6.

216. The ECEFP further approved an amendment to article 32(d), subject to study by the War Department: "relating to the traffic in arms, ammunition, and implements of war [and fissionable materials] and to such traffic in other goods and material as is carried on for the purpose of applying a military establishment." *Id.* at 2 (bracketed text in original document signified alternative language, underlining signified new additions to the draft).

217. *Id.* at 6–7.

218. *Id*. at 7.

219. *Id.*

220. *Id.* at 2, 7.

221. *Id.* at 7. The ECEFP thus approved a change to article 32(e), "in time of war or [imminent threat of war] emergency in international relations, relating to the protection of the

E. *Amendments to the Suggested Charter's Provisions Respecting Interpretation and Dispute Settlement*

The Services Departments' concerns with the security exceptions also raised questions of enforcement. In particular, the Services Departments questioned whether either the ITO Executive Board or the ITO Conference (the full membership of ITO Members) could have the power to "stigmatize a country as a violator" through enforcement decisions.[222] The Services Departments objected to either body retaining full discretion to "vote upon a 'decision' in interpreting the security exceptions of the Charter [so] as to place [the United States] in violation of its commitments thereunder."[223] The Services Departments particularly objected that the parties to a dispute lacked the right of appeal to the International Court of Justice ("ICJ"), giving the ITO's Executive Board "final discretion."[224]

On June 28, 1946, before finalizing the text of the security exceptions article itself that July, the ECEFP met to discuss revision of paragraph 2 of article 76 of the Charter draft, respecting the interpretation and settlement of dispute. It particularly evaluated judicial interpretation of the national security exceptions, the issue of appeal of any ruling of the Executive Board, and the opportunity for Members to appeal a decision of the Conference to the ICJ.[225] The ECEFP debated whether the ability to refer questions of interpretation outside the ITO—to the ICJ—should be an automatic right for ITO Members.[226] Neff argued against placing "complete power" to interpret "national security exceptions" with the Board or Conference. However, he also observed that ICJ review of such exceptions raised additional questions, since the United States had not yet accepted the compulsory jurisdiction of the ICJ.[227] He suggested further study of the matter, and recommended that "questions of interpretation involving national security" would fall under the jurisdiction of the U.N. Security Council.[228]

To address the alleged potential for stigmatization, the DOS revised article 76 in meetings from late June to early July. Rather than provide a "decision," the Executive Board or Conference would provide a "ruling," with recourse to the ICJ upon consent of the Conference.[229] The DOS further

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essential security interests of a Member." (Bracketed text in original document signified alternative language, underlining signified new additions to the draft.)

222. ECEFP, Security Exceptions Memorandum, *supra* note 211, at 2.

223. *Id.*

224. *Id.*

225. U.S. Dep't of State, ECEFP, Meeting Minutes, ECEFP M-20/46, at 2 (June 28, 1946) (on file with NACP, record group 59, box 57, A1 353, file 'ECEFP Minutes 16/46-33/46').

226. *Id.* at 6.

227. *Id.*

228. *Id.*

229. *Id.* at 2–3. After this revision, article 76(2) read:

amended the text to comply with the ECEFP's position that a "ruling" of the Executive Board regarding the interpretation of the Charter should be subject to appeal to the Conference.[230] The DOS sought to assure Neff that, regarding the interpretation of the security exceptions by the Executive Board or Conference, the revised language was "intentionally inexplicit" and would "avoid the implication that a 'ruling' of the Conference would be necessarily binding on all Members."[231] Leddy also explained that "only should there be sufficient reason would Members be likely to impose, as provided elsewhere in the Charter, sanctions and penalties on a Member not abiding by a ruling of the Conference."[232]

Neff raised concern that in the case of a dispute involving the security exceptions, the Conference could "refuse[] to allow a Member to carry a case to the [ICJ]" under the existing draft.[233] Requiring consent had established "in effect . . . a screening mechanism for such appeals."[234] In response, Leddy confirmed new language providing that when a Member brings a dispute to the ICJ (with Conference consent) it "will in effect set up the compulsory jurisdiction of the Court over the other party to the dispute."[235] Neff desired more time to consider the security implications of the dispute resolution procedure presented by DOS. At this preliminary juncture, Neff argued it was "unnecessary and undesirable" to require Conference consent for appeals.[236] He believed the U.S. Government should have "full power" to present a case to the ICJ whenever it so chose.[237] Leddy challenged Neff's assessment. He argued that "many cases involving interpretation of the Charter might place an unnecessary burden on the Court and

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Any question or difference concerning the interpretation of this Charter shall be [decided by] referred to the Executive Board for a ruling thereon. [which] The Executive Board may require a preliminary report from any of the Commissions in such cases as it deems appropriate. Any ruling of the Executive Board shall, upon the request of any Member directly affected or, if the ruling is of general application, upon the request of any Member, be referred to the Conference. [A decision of the Executive Board] Any justifiable issue arising out of a ruling of the Conference [shall, in the discretion of the Board] may, with the consent of the Conference, be [referred] submitted by [the] any Party[ies] to the dispute to the International Court of Justice [for review]. The Members accept the jurisdiction of the Court in respect of any dispute submitted to the Court under this Article. (Bracketed text in original document signified alternative language, underlining signified new additions to the draft.)

230. U.S. Dep't of State, ECEFP, Meeting Minutes, ECEFP M-22/46, at 3 (July 12, 1946) (on file with NACP, record group 59, box 57, A1 353, file 'ECEFP Minutes 16/46-33/46').

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 3–4.

237. *Id.* at 4.

should be kept within the Organization, as far as possible."[238] Leddy added that other DOS officials found the screening mechanism for referrals to the ICJ to be "necessary."[239]

By July 19th, the ECEFP approved changes proposed by the DOS following its consultation with Services. New language was added to article 76(2) of the Charter, respecting the interpretation of the security exceptions and the settlement of disputes: "Any justiciable issue arising out of a ruling of the Conference with respect to the interpretation of subparagraphs (c), (d), (e) or (k) of article 32 or of Paragraph 2 of article 49 may be submitted by any Party to the dispute to the International Court of Justice . . . ."[240] Other justiciable issues arising out of a Conference ruling could be submitted by the disputing parties to the ICJ only with Conference consent.[241] Wilcox confirmed that the goal was to address the Services Departments' concerns with "the authority given to the Conference in previous drafts" by offering appeal to the World Court.[242] Leroy Stinebower (an economist with the DOS, and special assistant to the Assistant Secretary of State for Economic and Business Affairs, Willard Thorp) believed the redraft would be "acceptable" to the ECEFP Committee on Specialized International Economic Organizations (another relevant ECEFP sub-committee, the "IO subcommittee"), though the subcommittee had not thus far given "special consideration to security questions."[243]

Neff also argued that the U.S. negotiators should treat the conservation exception (found in subparagraph (j) of article 32)[244] like other "purely" security exceptions, thereby removing its interpretation from the "absolute competence of the Conference."[245] A new discussion then arose as to whether or not consent of the Conference was required to appeal a justiciable issue concerning the conservation exception to the ICJ, though the analysis offers insights into the treatment of the "purely security exceptions," too.[246]

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238. *Id.*

239. *Id.*

240. ECEFP Meeting Minutes, July 19, 1946, *supra* note 214, at 1–2 (bracketed text in original document signified alternative language, underlining signified new additions to the draft).

241. *Id.*

242. *Id.* at 3.

243. *Id.*

244. Article 32(j) of the Suggested Charter draft provided an exception to Members' trade commitments "[r]elating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption." 1946 U.S. Suggested Charter, *supra* note 63. See also the July 17, 1946 ECEFP, Security Exceptions Memorandum, *supra* note 211, for the recommended DOS text prior to ECEFP agreement, which was identical to the final article 32(j).

245. ECEFP Meeting Minutes, July 19, 1946, *supra* note 214, at 3.

246. *Id.*

Stinebower stated that the IO subcommittee sought to have the ITO Charter interpretation provisions "parallel" those in the Monetary Fund Agreement.[247] Permitting appeals without Conference consent for an exception "which has many security aspects but which is not specifically a security exception" would weaken the Charter when other governments began "to add to these exemptions on grounds of national security."[248] He did not recommend "remov[ing] [it] from the interpretative power of the Organization."[249] Stinebower, Oscar Ryder (Chairman of the Tariff Commission), and others within the ECEFP meeting argued that the conservation exemption was "essentially economic and political in character rather than legal" and required a "political interpretation and not a legal opinion."[250] As such, the Conference "as the representative body of the Organization" seemed to be "the proper authority to interpret such questions."[251] Leddy interjected that the ECEFP should determine the proper authority for resolving such questions after determining whether voting in the Conference was weighted or not.[252]

The discussion offered an opportunity for Neff to further clarify the Services Departments' position on the jurisdiction of the ICJ to interpret security matters. Neff dismissed Stinebower's desire to match the Charter's interpretation provisions with those of the Monetary Fund because the Conference was at that time designed with "one Member—one vote" representation (as compared to the Fund, where Members had weighted votes).[253] Moreover, with its "wider field of operations" the ITO also placed "greater limitations on national power than the Fund."[254] Neff proposed striking Conference screening on "all justiciable questions to the Court."[255] Wilcox believed the conservation exception was "limited" in importance, "but he felt that exemptions regarding appeals should be limited to strictly security matters."[256] Therefore, Wilcox saw merit in including screening by the Organization of trade matters relating to the Charter.[257]

The finalized article 32 of the Suggested Charter, published in September 1946, provided general exceptions to the commercial policy chapter, with several sub-paragraphs devoted to security concerns (sub-paragraphs (c), (d), (e) and (k)):

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247. *Id.*
248. *Id.* at 3–4.
249. *Id.* at 3.
250. *Id.* at 4.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 4–5.
256. *Id.* at 6.
257. *Id.* at 6.

> Nothing in Chapter IV shall be construed to prevent the adoption or enforcement by any Member of measures . . . (c) relating to fissionable materials; (d) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; . . . (k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security . . . .[258]

The Suggested Charter also contained security exceptions to the intergovernmental commodity arrangements chapter in article 49(2).[259]

There were other relevant provisions for understanding the function of the security exceptions within the Suggested Charter. In line with past U.S. trade agreements, the Suggested Charter provided for consultation among ITO Members on all matters affecting the operation of its commercial policy chapter.[260] Article 30 set out that any Member could initiate consultations with another Member regarding representations on the operation of internal regulation and laws, and "generally all matters affecting the operation of this Charter."[261] Further, Members could work towards a "mutually satisfactory" solution in the event one Member believed another's measures "ha[d] the effect of nullifying or impairing any object of this Chapter," regardless of whether or not the measure generally conflicted with the Chapter's commitments (the nullification or impairment procedure).[262] Members could re-

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258. *See* 1946 U.S. Suggested Charter, *supra* note 63, art. 32. A brief note on the changing sub-articles. The security exceptions first appear in the U.S. Suggested Charter's article 32, with relevant provisions including sub-articles (c), (d), (e), and (k). Parallel provisions were present in article 49(2) of the U.S. Suggested Charter. The exceptions were moved to article 37 of the London and New York drafts of the ITO Charter, article 94 in the Geneva draft, and finally article 99 of the Havana draft, which is almost identical to article XXI in the General Agreement on Tariffs and Trade (GATT). *See generally* GATT Secretariat, *Article XXI Note by the Secretariat, Negotiating Group on GATT Articles*, GATT Doc. MTN.GNG/NG7/W/16 (Aug. 18, 1987) [hereinafter GATT Secretariat Note, Aug. 18, 1987].

259. Article 49's provisions were similarly worded to article 32's, though article 49(2) lacked reference to article 32(k) of the Suggested Charter. 1946 U.S. Suggested Charter, *supra* note 63, art. 32.

260. 1946 U.S. Suggested Charter*, supra* note 63, art. 30. Article XII of the 1941 U.S.-Argentina reciprocal trade agreement required consultations and provided the nullification or impairment procedure, "with a view to effecting a mutually satisfactory adjustment" of any disputes arising from measures imposed by other government that have the "effect of nullifying or impairing any object of the Agreement or of prejudicing an industry or the commerce of that country, ..." U.S.-Arg. Agreement, Oct. 14, 1941, *supra* note 99.

261. 1946 U.S. Suggested Charter, *supra* note 63, art. 30.

262. *Id.* In "non-violation" complaints, the emphasis is not on compliance with the Charter but on whether a Member frustrated one of its objectives. Non-violation complaints seek to redress an imbalance created when one Member frustrates another Member's benefit by taking a measure otherwise consistent with the Charter. This issue is addressed in Part VIII and in the

fer disputes to the Organization, and it would investigate, "make appropriate recommendations," and where "serious enough," would "determine" when a complainant Member could suspend obligations or concessions to the other Member.[263]

In sum, the United States' internal preparation of the security exceptions revealed a number of insights. First, intense debate among DOS and Services displayed the Services Departments' desire to weaken the authority of the ITO to preserve U.S. industrial post-war powers. While the DOS sought to curb unilateralism, the Services Departments wanted to preserve open-ended powers for the United States. Second, compromise was found by introducing (or, in some cases, restoring) indeterminate and open-ended language, such as the reference to an "emergency" as an enumerated circumstance within the security exception provision. Third, the nullification or impairment procedure was considered to be a check on abuse of the exceptions. Fourth, the exceptions were seen as justiciable, but there remained debate as to which body would undertake review of trade matters involving national security concerns—an organ of the ITO or the ICJ.

IV. London and New York: Prohibiting Arbitrary Discrimination and Generalizing the Security Exceptions

A few months after the DOS published the Suggested Charter, national delegations met in London for the first preparatory meetings.[264] In London in November 1946, the United Kingdom's delegation raised concern with the potential for Member "abuse" of article 32 of the Suggested Charter (the general exceptions to the commercial policy chapter) to mask economic protection.[265] The solution proposed by the United Kingdom was to add introductory language to the exception provision: Measures relating to import and export restrictions could not be prevented "provided they are not applied in such a manner as to constitute a means of arbitrary discrimination

conclusion of this article. For information regarding the origins of the non-violation complaint, see Mona Pinchis, *The Ancestry of 'Equitable Treatment' in Trade: Lessons from the League of Nations During the Inter-War Period*, 15 J World Inv. & Trade 13–72 (2014) and the citations therein.

263. 1946 U.S. Suggested Charter, *supra* note 63, art. 30.

264. The Preparatory Committee of the United Nations Conference on Trade and Employment was formed to complete the ITO's Charter. Its work was divided into three phases. There were two preparatory committee sessions, in London (1946) and in Geneva (1947), and a meeting of the Drafting Committee in New York (1947). The United Nations Conference on Trade and Employment was then held in Havana, Cuba in 1948.

265. *See* U.N. Econ. and Soc. Council Comm'n II, Ninth Meeting, U.N. Doc. E/PC/T/C.II/50, at 7 (Nov. 13, 1946) [hereinafter U.N. Econ. and Soc. Council Comm'n II, Technical Sub-Committee, Ninth Meeting Notes, Nov. 13 1946].

between countries where the same conditions prevail, or a disguised restriction on international trade."[266]

Leddy defended the existing text, observing that any added language to the general exceptions article was unnecessary. He explained that article 30 was already designed to prevent "evasion of the provisions" of the commercial policy chapter.[267] (As written, article 30 required that all disputing ITO members engage in consultations regarding the "nullification and impairment of any object of the Charter."[268]) If an ITO member opportunistically used an exception "as a means of [trade] protection" then the nullification or impairment procedure "provided that another Member might make representations to the ITO and so obtain satisfaction."[269]

Leddy added that it was "impossible to draft exceptions which could not be abused, if good faith was lacking."[270] He observed that the League of Nations committees had constructed the basis of the text that became article 30 "precisely because they had been unable to formulate exceptions which would exclude all possibility of abuse."[271] Nevertheless, there was wide support for the proposal, with Leddy ultimately suggesting acceptance "in principle" pending "further study of the wording."[272]

After London, the New York Drafting Committee included the UK's proposal in its revised general exceptions provision (now article 37 instead of article 32).[273] To prevent the language from blocking justifiably discriminatory measures, the chapeau of the exceptions was modified to cover "arbitrary *or unjustifiable* discrimination."[274]

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266. *Id.*; *see also* U.S. Dep't of State, ECEFP, Article 37–General Exceptions to Chapter V, ECEFP D-55/47, at 3 (Mar. 31, 1947) [hereinafter ECEFP, Article 37–General Exceptions to Chapter V, 1947] (on file with NACP, record group 59, box 51, A1 353, file 'ECEFP Meeting Documents 46/47-60/47').

267. U.N. Econ. and Soc. Council Comm'n II, Technical Sub-Committee, Ninth Meeting Notes, Nov. 13, 1946, at 6.

268. 1946 U.S. Suggested Charter, *supra* note 63, art. 30.

269. U.N. Econ. and Soc. Council Comm'n II, Technical Sub-Committee, Ninth Meeting Notes, Nov. 13, 1946, *supra* note 265, at 6.

270. *Id.*

271. *Id.* Leddy is referring to interwar multilateral conferences convened by the League of Nations, where national delegations had first attempted to address these trade issues. *See generally* Pinchis, *supra* note 262, at 13–72.

272. U.N. Econ. and Soc. Council Comm'n II, Technical Sub-Committee, Ninth Meeting Notes, Nov. 13, 1946, at 9. At the time, Leddy was the Rapporteur of the Procedures Sub-Committee.

273. ECEFP, Article 37–General Exceptions to Chapter V, 1947, *supra* note 266, at 3.

274. *Id.* at 4 (emphasis added). The full chapeau of article 37 read:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures: . . . .

While the scope of the ICJ's review was broadened in the first preparatory meeting in London with amendments to sub-articles 86(2) and (3) (previously article 76), Seymour Rubin, a lawyer on the U.S. negotiators' team, later explained in scholarship that the absolute right to appeal interpretation of the security articles remained unchanged.[275] Moreover, the London draft "eliminated as a Charter requirement the necessity for Conference approval before an appeal could be lodged with the Court."[276]

In Washington, reviewing the work of the drafting committee, the ECEFP now faced two issues in its recommendations for the U.S. negotiators moving forward. First, was the issue of generalizing the "essential" security-related exceptions in article 37 to apply to the entire Charter.[277] At the DOS's recommendation, the ECEFP agreed to this.[278] Interestingly, several chapters already contained their own chapter-specific exceptions, but specific notice was placed on the demand for security exceptions that would cover the investment commitments (then article 12 of the draft).[279] To prevent significant abuse of a single, generalized Charter exceptions provision, DOS recommended "circumscribing the exceptions to fit the particular matters" where needed.[280]

Second, there was the issue of whether the newly-approved chapeau of the commercial policy chapter's general exceptions provision (article 37) would apply to the proposed replacement provision, containing the Charter's consolidated, generalized security-related exceptions.[281] The ECEFP was cognizant that any dramatic changes would be difficult, considering other delegations' insistence on the chapeau.[282] Nonetheless, the ECEFP

See U.N. Econ. and Soc. Council Comm'n, Report of the Drafting Committee of the Preparatory Committee of the U.N. Conference on Trade and Employment (20 January to 25 February 1947), GATT Doc. E/PC/T/34, at 32 (Mar. 5, 1947) [hereinafter Report of the Drafting Committee—New York Draft Charter and Draft GATT].

275. Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARV. L. REV. 78, 81, 82 (1949).

276. *Id.*

277. Accepted security exceptions in article 37 are those: (c) relating to fissionable materials; (d) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) undertaken in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; and (k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security. Report of the Drafting Committee—New York Draft Charter and Draft GATT, *supra* note 274.

278. ECEFP, Article 37–General Exceptions to Chapter V, 1947, *supra* note 266, at 7; *see also* ECEFP Meeting Minutes, Apr. 3, 1947, *supra* note 285, at 3.

279. *Id.* at 7–8. The commercial policy, restrictive business practice, and intergovernmental commodity arrangements (Chapters V, VI, and VII of the New York Draft, respectively) were adequately covered by exceptions.

280. *Id.*

281. *Id.* at 1.

282. *Id.* at 2, 7.

found the New York Draft Charter's chapeau to the general exceptions to be ineffective as the language was "vague and diffuse, making it difficult, if not impossible, to assign specific content to it."[283] Moreover, the broadness of the language could "preclude the possible application of the exceptions to meet the legitimate circumstances for which the exceptions were designed."[284] Security exceptions, ECEFP officials particularly noted, were often "specifically intended to be discriminatory in character" and thus in conflict with the chapeau.[285]

For the text of the Charter's generalized security-related exceptions, the ECEFP considered three DOS options for the U.S. negotiators. According to the ECEFP, its first and "best" option was to revert back to the introductory language of article 32 of the Suggested Charter, and to include "express reference to possible recourse, in the event of abuse of the exceptions, to the nullification or impairment procedure of article 35 of the Charter."[286] Explicit reference to article 35 would offer members assurances against abuse by "advis[ing] Members contemplating abuse of the exceptions of the possible consequences."[287] The nullification or impairment procedure would "prevent any object of the Charter [from] being frustrated," and explicit reference to it would "avoid[] any possible unintended limitation that the [security exceptions] clause might now convey."[288]

The second option was for the U.S. negotiators to seek modification of the phrase "or a disguised restriction on international trade" within the chapeau of the New York Draft Charter's security exceptions provision, to more clearly explain "that the exceptions should not be used to disguise protectionist measures or to maintain other restrictive measures contrary to the objectives of the Charter."[289]

A third option was to bifurcate the security-related exceptions into qualified and un-qualified categories, as in article XV of the 1941 reciprocal trade agreement between the United States and Argentina.[290] The DOS considered this proposal to be "unnecessary and inadvisable" if the other delegations accepted the first two options.[291] ECEFP officials agreed with the

283. *Id.* at 1.

284. *Id.*

285. *Id.* at 1; U.S. Dep't of State, ECEFP, Meeting Minutes, ECEFP Doc. M-11/47, at 1–2 (April 3, 1947) [hereinafter ECEFP Meeting Minutes, Apr. 3, 1947] (on file with NACP, record group 59, box 57, A1 353, file 'ECEFP Minutes 1/47-20.47').

286. *Id.* at 2, 6. The chapeau of article 32 of the U.S. Suggested Charter read: "Nothing in Chapter V of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures." 1946 U.S. Suggested Charter, *supra* note 63.

287. *Id.* at 6.

288. *Id.*

289. ECEFP, Article 37–General Exceptions to Chapter V, 1947, *supra* note 266, at 6.

290. ECEFP Meeting Minutes, Apr. 3, 1947, *supra* note 285, at 2; *see supra* text accompanying notes 98–102.

291. ECEFP, Article 37–General Exceptions to Chapter V, 1947, *supra* note 266, at 6.

DOS assessment that it would be "difficult[]" to determine which group each exception fell into.[292] The bifurcation was not taken up in New York as it implied "a greater restriction on the possible application of the exceptions in the qualified group than if these exceptions were all placed together under a single uniform qualification."[293]

V. GENEVA: THE DAWN OF THE COLD WAR AND THE CONSTRUCTION OF A GENERALIZED CHARTER SECURITY PROVISION

In Geneva, the U.S. negotiators debated the interpretation of the security exceptions while working with other delegations to construct a general article that would apply to the entire Charter. Concerns with U.S. security were rising, with Services officials (Captain Wakeman Thorp of the U.S. Navy joined Neff in representing the Services Departments) observing that "the general situation in the world has changed drastically in the last few months," seeing "Eastern European policy" as a key example.[294] Nonetheless, Wilcox championed the "careful" consideration of the ITO "over 5 years," and contested any changes that would make the security exceptions "unquestionably . . . a means of evading [trade] responsibilities."[295]

A. *Security Exceptions Applicable to the Entire Charter*

In June 1947, the U.S. delegation proposed relocating the security exceptions of article 37 into a newly composed chapter meant to apply to the entire Charter.[296] Internally, DOS lawyer Edmund Halsey Kellogg drafted the new security exceptions and authored a memorandum setting out the scope of the new "Miscellaneous" chapter, which he finished in early July.[297] The Miscellaneous chapter consolidated the following New York

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292. *Id.* at 5.

293. *Id.*

294. *See* U.S. Dep't of State, Minutes of Delegation, TAC, and Charter Working Group Meeting for the Second Meeting of the U.N. Preparatory Comm. for the Int'l Conf. on Trade and Employment, ECEFP A1-704, at 2 (May 30, 1947) (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/April–June 20, 1947').

295. *Id.*

296. U.S. Dep't of State, Minutes of General Staff Meeting, ECEFP A1-704 (June 4, 1947) (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/ April–June 20, 1947'); Preparatory Committee of the U.N. Conf. on Trade and Emp., Working Party on Technical Articles On Its Second Meeting, U.N. Doc. E/PC/T/103, at 43 (June 19, 1947) (verifying that the Working Party, a group composed of different national delegations in Geneva, had received the U.S. delegation's proposal, but had considered it "beyond its terms of reference," though it agreed to present the proposal to a higher-level committee for review). For the text of these relocated sub-paragraphs, see text accompanying note 277.

297. *Id.*; *see* U.S. Delegation to U.N. Secretariat, Second Meeting of the U.S. Preparatory Comm. for the Int'l Conf. on Trade and Employment, Meeting Minutes, at 6 (July 2, 1947). [hereinafter Delegation Minutes, July 2, 1947] (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/June 21–July 30, 1947'); U.S. Dep't of State, Edmund

Charter draft provisions: generalized security exceptions (replacing articles 37, sub-paragraphs c, d, e, and k; 59(c); and 42(2)(c)(i));[298] consultation for nullification or impairment (article 35(2)); and, dispute settlement and interpretation (article 86).[299] It also included some new provisions, including a sunset clause mandating review of the Charter after ten years.[300] Kellogg's draft security exceptions (a new article 94) read as follows:

> 1. Nothing in this Charter shall be construed to prevent the adoption or enforcement by any Member of any measure which it may deem necessary:
>
> a) relating to fissionable materials;
>
> b) relating to traffic in arms, ammunition and implements of war, and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment [and to such traffic in other goods and materials as is carried on for the direct or indirect use of a military establishment], [if such measure is adopted or enforced unilaterally];
>
> c) in time of war or other emergency in international relations [which has been officially declared by the Member concerned], relating to the protection of its essential security interests;
>
> d) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.

Halsey Kellogg Biographic Data, *attached to* Office Memorandum from L.D. Heck to Mr. Swayzee (May 5, 1947) (on file with NACP, record group 43, box 132, A1 704, file 'Biographies 2').

298. *See* Report of the Drafting Committee—New York Draft Charter and Draft GATT, *supra* note 274, at 31, 36–37, 44.

299. *See* Delegation Minutes, July 2, 1947, *supra* note 297, at 4–5 (containing an outline of Kellogg's proposed article 94); *cf.* U.N. Econ. and Soc. Council Comm'n, Preparatory Comm. of the U.N. Conference on Trade and Employment, Second Sess., Draft Charter, GATT Doc. E/PC/T/W/236, at 8, 10, 12 (July 4, 1947) (containing the U.S. proposal as submitted to other delegations); U.N. Econ. and Soc. Council Comm'n, Preparatory Comm. of the U.N. Conference on Trade and Employment, Second Sess., Corrigendum, GATT Doc. E/PC/T/W/236/Corr.1 (July 5, 1947) [hereinafter Proposals for the Amendment of Chapters I and II] (confirming the list of all articles moved to the new Miscellaneous Chapter), U.N. Econ. and Soc. Council Comm'n, Preparatory Comm. of the U.N. Conference on Trade and Employment, Second Sess., Corrigendum 2, GATT Doc. E/PC/T/W/236/Corr.2 (July 7, 1947), at 13 (correcting Corrigendum 1). Collectively, E/PC/T/W/236 and its two corrigenda are hereinafter referred to as the "U.S. Miscellaneous Chapter Proposal, July 4, 1947."

300. Delegation Minutes, July 2, 1947, *supra* note 297.

2. This article shall not be interpreted as limiting the generality of other provisions of this Charter.[301]

As you can see, Kellogg's draft differed from both the Suggested Charter and the New York Charter draft. Unlike the Suggested Charter, Kellogg's draft included the phrase "which it may deem necessary" (in article 94(1)) which sought to clarify that each ITO Member could determine whether its measures were "necessary."[302] Whether this adjectival clause served as part of the article's introductory language (disconnected from the terms "relating to" in article 94(1)(a), (b) and (c) or the "protection of its essential security interests" in article 94(1)(c)) is addressed below.[303] Kellogg did not provide a rationale for his inclusion of the word "may" preceding the adjectival clause.[304] Unlike the New York draft, Kellogg's draft lacked a prohibition against "arbitrary or unjustifiable discrimination."

B. *Services' Efforts to Expand the Scope of the Security Exceptions*

As demonstrated by internal ECEFP discussions in 1944, Neff sought to maximize the U.S. government's power to take measures in the name of national security, broadly defined. When working with DOS officials in 1947 in Geneva, Neff sought greater *specificity* in the security exceptions' language, treating this as a remedy for *vagueness.*[305] For example, Neff proposed amending Kellogg's security exceptions to add the words "directly or indirectly" after the words "carried on" in article 94, paragraph 1(b).[306] Neff's justification was that this language brought the exceptions into conformity with proposed U.S. legislation (the proposed Munitions Control

301. *Id.* annex C, article 94 (General Exceptions, attached memorandum) (brackets in original, signifying edits on the U.S. delegation side); *see also* Proposals for the Amendment of Chapters I and II, *supra* note 299.

302. Thanks to Harlan Cohen for pointing out that this was slightly different than the contemporary "it considers necessary" language in article XXI GATT. Simon Lester has highlighted the importance of the word "considers" in the phrasing of the national security exceptions. *See* Simon Lester, *The Drafting History of GATT Article XXI: The U.S. View of the Scope of the Security Exception,* INT'L ECON. L. & POL'Y BLOG (Mar. 11, 2018, 8:34 AM), https://worldtradelaw.typepad.com/ielpblog/2018/03/draft-of-gatt-security-exception-considers.html; Simon Lester, *The Drafting History of GATT Article XXI: Where Did "Considers" Come From?*, INT'L ECON. L. & POL'Y BLOG (Mar. 13, 2018, 9:36 AM) https://worldtradelaw.typepad.com/ielpblog/2018/03/drafting-history-of-gatt-article-xxi.html. For a discussion by Neff drawing attention to the word "considers," see *infra* note 378.

303. *See infra* text accompanying note 554.

304. For a possible source of the inclusion of "may," note that past U.S. trade agreements included the word "may." *See, e.g.*, *supra* text accompanying note 102. *See also infra* text accompanying notes 476–477 (further elaborating on the purpose of this term).

305. Jeremy Waldron has observed: "[I]t is a mistake to think that vagueness varies inversely with specificity: the opposite of 'specific' is 'general', and there is no assurance that a reduction in generality corresponds to a reduction in vagueness." Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 522 (1994).

306. Delegation Minutes, July 2, 1947, *supra* note 297, at 5.

Act[307]) and gave "the United States Government the widest possible latitude in dealing with national security objectives."[308] The proposed Munitions Control Act was designed to permit, in peacetime, "control over traffic in arms or other articles used to supply, directly or indirectly, a foreign military establishment, and in times of international crisis to permit control over any article the export of which would affect the security interests of the United States."[309] It came in the context of rising U.S. domestic concerns that the U.S. government must control trade to bar any adverse effects upon U.S. military power, or worse, any strengthening of Soviet military potential.[310]

In a meeting of the U.S. delegation held on July 2, 1947, Neff's proposal to add the words "directly or indirectly" to Kellogg's draft article elicited "sharp discussion" among the U.S. negotiators.[311] Leddy, John Evans (an economist with the Department of Commerce), and lawyers Seymour Rubin (Assistant Legal Advisor for Economic Affairs and legal advisor for the U.S. delegation) and George Bronz (Special Assistant to the General Counsel, Treasury) argued against Neff's proposal. Evans argued that the proposal was "unnecessary" and that the existing Kellogg draft offered the United States "ample latitude to meet any contingency that might arise."[312] Moreover, Evans remarked that Neff's proposal would "certainly provoke a great deal of argument" within the sub-committee and Commission reviewing the security exceptions, thereby "delaying final completion of the work of the Charter."[313] Leddy, Rubin, and Bronz argued "with equal fervor" that even Neff's added language failed to amplify protection for U.S. security interests against "every possible contingency which might at any time

307. *See* HARRY S. TRUMAN, U.S. PRESIDENT, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING PROPOSAL FOR LEGISLATION TO CONTROL THE EXPORTATION OF ARMS, AMMUNITION, AND IMPLEMENTS OF WAR, AND RELATED ITEMS, AND FOR OTHER PURPOSES, H.R. Doc. No. 80–195 (1947) (including draft bill) [hereinafter PROPOSED MUNITIONS CONTROL ACT].

308. Delegation Minutes, July 2, 1947, *supra* note 297, at 5. Neff referred to House document 195 of the eightieth Congress, the Proposed Munitions Control Act, which was intended to authorize controls over exports of military-related goods and technology. *See id.* (citing PROPOSED MUNITIONS CONTROL ACT); Foreign Relations of the United States, 1945–1953, vol. IV, Harry S. Truman, 1948 (Eastern Europe; The Soviet Union, Paper Prepared by the Policy Planning Staff), Doc. 325, 489, 490–92 (1974) [hereinafter Kennan Policy Planning Paper] (detailing a policy plan by George F. Kennan, Director of the Policy Planning Staff, to further restrict the trade of materials and goods with military significance out of concerns of strengthening Soviet economic-military power).

309. PROPOSED MUNITIONS CONTROL ACT, *supra* note 308, at 2 (transmitting President Truman's proposal for legislation to control the exportation and importation of arms, ammunition, and implements of war).

310. Delegation Minutes, July 2, 1947, *supra* note 297, at 5; *see* Kennan Policy Planning Paper, *supra* note 308, at 491–492.

311. Delegation Minutes, July 2, 1947, *supra* note 297, at 5.

312. *Id.*

313. *Id.*

arise."[314] Instead, Wilcox remarked, Neff's proposal was "equally destructive of the purposes of the Charter as the amendments proposed by some countries designed to eliminate the ITO control over the use of quantitative restrictions provided for in the Charter."[315] As was typical in deciding on issues that arose within their meetings, the U.S. negotiators put the proposal to a vote. The vote was "unanimous against" Neff's proposal, including Captain Thorp, who attended the meeting representing the Navy Department.[316]

That same day, after his amendment to Kellogg's draft failed, Neff submitted his own draft of article 94 to U.S. negotiators:

> 1. Without limiting the generality of any other exception or qualification, none of the obligations of this Charter shall apply to any measure or agreement:
>
> a) Relating to fissionable materials or their source materials;
>
> b) 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;
>
> c) In time of war or other emergency in international relations, relating to the protection of its [essential] security interests;
>
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.
>
> 2. Notwithstanding any provision of the Charter, no Member shall have to furnish any information in any report required by, or pursuant to, the Charter the furnishing of which will be contrary to its national security.
>
> 3. The provisions of Article 86 relating to the interpretation and settlement of disputes shall not apply to paragraphs 1 and 2 of this Article but each Member shall have independent power of interpretation.[317]

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314. *Id.*

315. *Id.*

316. *See Id.*

317. Harold H. Neff, Draft of Chapter IX, Article 94: General Exception to the Whole Charter, *attached to* Delegation Minutes, July 2, 1947, *supra* note 297 (brackets and underlin-

Neff's draft initiated "considerable discussion" among the U.S. negotiators.[318] Honore Marcel [Marc] Catudal (Legal Advisor to the DOS's commercial policy division) observed that Neff's article 94(1) was "unnecessary" and "added absolutely nothing" to Kellogg's provision, under which Catudal believed "[e]very possible contingency involving the national security of the United States is covered."[319] A group of delegates composed of Brown, Leddy, Evans, Bronz, and Rubin agreed with Catudal.[320]

Wilcox, Evans, Leddy, and Bronz further argued "with great fervor" that article 94(2), which provided a "general exemption from supplying information touching upon national security," was "unnecessary."[321] Once again, they held firm that Kellogg's version, expressing the DOS position, captured "every contingency sought."[322] Wilcox further argued that, under the Kellogg draft, "the United States may at any time it may wish refuse to furnish any country information which has a bearing on [United States] national security."[323] Neff commented that there were other Charter provisions that were "equally unnecessary and should therefore be eliminated" under this logic.[324] To this, Wilcox asked Terrill, Hawkins, and Rubin to assess similar provisions to "decide whether they can be eliminated."[325]

Due to the "legal importance" of the language and phrasing of article 94(1), Wilcox asked Rubin to closely evaluate Neff's draft and report on his assessment in a memorandum. The questions posed by Wilcox required Rubin to further consider if and how Neff's language offered the United States stronger protection of its security interests than Kellogg's. Of the four questions Wilcox posed to Rubin, none referred to the power of interpretation or to Neff's exclusion of the provision on dispute settlement (Neff's draft article 94(3)).[326] In fact, there was no recorded discussion of article 94(3) on this day.[327] Nevertheless, the jurisdiction of ITO adjudicating bodies and the question of unilateral power of interpretation formed core parts of Rubin's memorandum to Wilcox and the DOS, explored in Part V.D.

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ing in original; brackets signify possible omissions and underlining new additions, all on Neff's part) [hereinafter Neff Draft].

318. Delegation Minutes, July 2, 1947, *supra* 297, at 6.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* Wilcox asked: (1) Does the clause "[w]ithout limiting . . . qualification" in article 94(1) enhance the protection of "vital [U.S.] national security interests"? (2) Is it necessary to mention the word "agreement" in article 94(1)? (3) Does specifying "directly or indirectly" in article 94(1)(b) provide interpretive value? (4) Do we need to eliminate the word "essential" from the phrase "essential security interests" to give the "fullest protection to our national security interests"? *Id.*

327. *See id.*

Discussion on the security exceptions would continue at the July 4, 1947 meeting of U.S. negotiators, but only after Wilcox announced that "he was becoming increasingly apprehensive concerning the possible attitude of the USSR with respect to the World Trade Conference and adoption of the ITO Charter."[328] In the early years of the construction of the ITO, U.S. officials appeared hopeful to work with the Soviet Union.[329] Historian Robert A. Pollard described the DOS approach as "a policy of firm, but not unfriendly, pressure on Moscow early 1946."[330] During this period, the DOS attempted a loan to Russia (though by April 1947 this effort was ceased formally) and continued trade talks, particularly regarding the Soviet Union membership in the ITO.[331] Yet, by the start of the Geneva meetings, the two powers were in "almost irrevocable deadlock."[332]

The U.S. delegation saw the ITO as vital for "expanding the area in which free enterprise [could] flourish and strengthening the hands of all nations that believe in it rather than in the Soviet system."[333] Consequently, Wilcox was concerned that the "serious rift" between the United States and less-developed states regarding the use of quantitative restrictions "plays directly into the hands of the USSR political propagandists."[334] Wilcox was particularly sensitive to impressions that the ITO was "part of the conspiracy developed by the great powers to interfere with the internal affairs of small states, to dominate them economically and thus hold them in perpetual slavery."[335] More than ever, he felt that trade multilateralism was at stake

328. U.S. Delegation to U.N. Secretariat, Second Meeting of the U.S. Preparatory Comm. for the Int'l Conf. on Trade and Employment, Meeting Minutes, at 1 (July 4, 1947) [hereinafter Delegation Minutes, July 4, 1947] (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/June 21–July 30, 1947').

329. *See* Telegram from Acting Secretary of State Dean Acheson to Ambassador of the Soviet Union Averell Harriman (Dec. 12, 1945), *reprinted in* 2 POLITICAL AND ECONOMIC MATTERS: INTEREST OF THE UNITED STATES IN THE CONVENING OF AN INTERNATIONAL CONFERENCE ON TRADE AND EMPLOYMENT 1328, 1348–49 (1967) (offering the Soviet Union most-favored-nation treatment and seeking non-discriminatory treatment against commerce of other countries). For the reference to "hope" from Clayton in 1947, see Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948*, 25 INT'L HIST. REV. 282, 293–294, 296 (2003). *But see* Foreign Relations of the United States, 1945-1953, vol. II, Harry S. Truman, 1945 (General: Political and Economic Matters, The Ambassador in the Soviet Union (Harriman) to the Secretary of State), Doc. 678, 1328, 1350 (1967) (replying to Acheson that seeking to have the Soviet Union refrain from discrimination and make purchases and sales based on commercial considerations was "unrealistic").

330. POLLARD, *supra* note 76, at 50–52. For example, a key instrument of U.S. policy at the time was the Russian loan, though with Soviet repression in Eastern Europe, the loan was refused and remained "an economic lever for bargaining purposes" until 1947.

331. *Id.* at 52; ZEILER, *supra* note 76, at 61–62.

332. POLLARD, *supra* note 76, at 53; *see supra* Part III.C.

333. Wilcox Letter to Clayton, *supra* note 132, at 6.

334. Delegation Minutes, July 4, 1947, *supra* note 328, at 1.

335. *Id.*

and that the U.S. delegation needed to "obtain the widest possible support here at Geneva."[336] By mid-July 1947, Wilcox had reportedly abandoned hope that the Soviet Union would participate in the ITO.[337]

C. *Services' Demands for Unilateral Interpretation of the Security Exceptions*

After the last heated meeting, the U.S. negotiators met again on July 4, 1947 to consider a new draft of the security exceptions article, as authored by Rubin, following further discussions as between Rubin and Neff.[338] The draft stated, as follows:

> [Without limitation of any other exception or qualification] Nothing in this Charter shall be construed to compell [sic] any Member to furnish any information the furnishing of which it considers contrary to its essential security interests, or to prevent the adoption or enforcement by any Member of any measure or agreement which it may [deem] consider to be necessary and to relate to:
>
> a) [Relating to] Fissionable materials or their source materials;
>
> b) [Relating to] The traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, [relating to] the protection of its essential security interests;
>
> d) [Undertaken] Undertakings in pursuant of obligations under the United Nations Charter for the maintenance of international peace and security.[339]

A key question about the scope of unilateral powers for interpretation of the security exceptions was whether to use the phrase "and to relate to" in the chapeau of the security exception provision, or to tether the enumerated

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336. *Id.*, at 2.

337. ZEILER, *supra* note 76, at 136.

338. Delegation Minutes, July 4, 1947, *supra* note 328, at 1–2. U.S. negotiators challenged Neff on a variety of elements of his draft security exceptions. For example, Neff proposed to limit the Charter's application with regard to "measures or agreement" rather simply referring to "measures"; Leddy, Terrill, and Rubin argued that the term "measure" was broad enough. *Id.*

339. Seymour Rubin, Chapter IX: Article General Exceptions, attached to Delegation Minutes, July 4, 1947, *supra* note 328 [hereinafter Rubin Draft] (brackets indicate possible changes and underlining refers to possible additions, as between Neff's Draft and Rubin's Draft). *See generally* Neff Draft, *supra* note 317 (presenting Neff's original proposal prior to compromises made between Rubin and Neff).

actions to the chapeau with the term "relating to."[340] Wilcox proposed a change to "relating to," however the placement of these words was left unclear in the minutes of the July 4th meeting.[341] Rubin explained to the U.S. negotiators that his draft included the phrase "and to relate to" within the chapeau due to Neff's "vigorous" demands for its inclusion.[342]

The choice of words and their placement would matter. For Neff, "and to relate to" meant that the ITO Member would have explicit authority to determine the "necessity" of the measure *and* whether such measure qualified as a circumstance enumerated in (related to) the subparagraphs of the provision. Neff argued for the retention of the phrase "in the context in which it is found because it involves a substantive matter."[343] Neff added that the wording created an "independent clause" that made it "clear" that the United States could take "unilateral action."[344] In his modern assessment of this meeting, Professor Kenneth Vandevelde concluded that under Neff's proposed language, "[a] member could avoid any Charter obligation by a mere unilateral invocation of its essential security interests."[345] Vandevelde put it bluntly: "Neff's proposal regarding the national security exception[s] was nothing less than an assault on the Charter as an instrument of the rule of law."[346]

Evans, Leddy, and Robert Terrill (an economist and Associate Chief of the International Resources Division, DOS) "objected strongly" to retaining the words "and to relate to," arguing that "such a provision destroyed the entire efficacy of the Charter."[347] They reminded the negotiators that the security exceptions were not limited to controlling "what the US may do," but instead would permit covered actions by *any* member state, thereby providing "means for unilateral action [that] w[ould] surely be abused by some countries."[348] They feared that if a Member could rely on "the pretext of national security" to "take any measure whatsoever it might wish in complete disregard of all provisions of the Charter" the ITO would be destroyed.[349] Leddy argued it would be far better to abandon the work on the Charter than allow for such a "legal escape."[350]

Yet Neff was unwavering that the United States "be given a free hand to make whatever decisions may be necessary without challenge by the

340. Delegation Minutes, July 4, 1947, *supra* note 328.

341. *Id.* at 2.

342. *Id.*

343. *Id.*

344. *Id.*

345. See KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 148 (2017).

346. *Id.* at 153.

347. Delegation Minutes, July 4, 1947, *supra* note 328, at 2.

348. *Id.*

349. *Id.* at 3.

350. *Id.*

ITO."[351] Evans challenged Neff, arguing that, because the United States "would be a sufficiently strong and important member" of the ITO, if the United States had "a bona fide national security problem, the Organization would not be able to do otherwise than make a finding in our favour."[352] Oscar Ryder stated that "as a practical matter no injury could possibly come to the US" as a result of the ITO's evaluation of whether "the measures introduced by the US were in fact taken in the interest of national security."[353] In any case, Wilcox "did not think that the ITO would ever become an international forum to discuss national security interests."[354] Before the vote, there was no further elaboration of the Charter's consultation or dispute settlement procedures or of the body to interpret the national security exceptions.[355]

Thorp, Neff, and one other delegate[356] voted for retaining Neff's "and to relate to" language; whereas Julean Arnold (Policy Division, State Department), Brown, Evans, Harry C. Hawkins (Chief of the Commercial Policy Division and Agreements),[357] Leddy, Rubin, Ryder, Robert B. Schwenger (Office of Foreign Agricultural Relations, Department of Agriculture), and Terrill voted against Neff's language and sought to instead include the phrase "relating to" at the beginning of sub-paragraphs (a) and (b).[358] Defeated, Neff asked to record his dissent, and Wilcox granted him the opportunity to author a memorandum on the subject.[359]

After the vote, Neff proposed a provision whereby any challenges relating to national security measures would be heard by the ICJ, rather than the ITO.[360] Neff justified this amendment to Rubin's draft on the basis that Sen-

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351. *Id.*

352. *Id.* (emphasis in original).

353. *Id.*

354. *Id.*

355. *See id.*

356. The identity of the delegate is unclear, but it was likely Edgar Brossard, an agricultural economist who had served on the Tariff Commission staff. *See* UNITED STATES INTERNATIONAL TRADE COMMISSION, *A Centennial History of the United States International Trade Commission*, USITC Publication 4744, at 204 (2017), https://www.usitc.gov/documents/final_centennial_history_508_compliant_v2.pdf.

357. Many in the State Department held Hawkins in the highest respect. In an oral interview, John Leddy said that Hawkins was "probably the most influential and important man second to Cordell Hull, in launching, operating and administering the Reciprocal Trade Agreements." Brown Oral History, *supra* note 133, ¶¶ 4–5. Winthrop Brown further noted it was Hawkins who was "Hull's right-hand man in trade agreements" and, in late 1945, "had a vision of a post-war world in which tariffs and trade barriers would be reduced, and there would be an international institution which would bring order into international trade and provide a forum for settlement of disputes; which would generally aid in international cooperation in trade expansion." *Id.*

358. Delegation Minutes, July 4, 1947, *supra* note 328, at 3.

359. *Id.*

360. *Id.*

ator Millikin, Chair of the Senate Finance Committee, had "vigorously objected" to having the ITO determine "whether measures adopted by the US were taken in defense of the national security."[361] Senator Millikin feared "excessive interference in domestic matters."[362] Neff reminded the negotiators that Millikin was staunchly against the general interpretive power of the ITO or even the ICJ when it came to questions of national security.[363]

The same day, following the U.S. negotiators' heated meeting, the national delegations participating in the Geneva preparatory work received the United States' "July 4" draft of a "Miscellaneous" chapter containing the revised security exceptions, based on the agreed changes to Rubin's draft exceptions article.[364] The introductory language of the security exceptions provision submitted to the delegations at that time read:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:
>
> a) Relating to fissionable materials or their source materials;
>
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
>
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.[365]

In accordance with the U.S. negotiators' July 4th vote, the draft lacked the phrase "and to relate to" within the chapeau. It also lacked Neff's draft of article 94(3)—the declaration that the Charter's procedures relating to the

361. *Id.*

362. U.S. Dep't of State, Memorandum for U.S. Delegation, Suggested Changes for Chapter VIII, art. 81–89, at 5 (June 16, 1947) [hereinafter U.S. Delegation, Suggested Changes for Chapter VIII, June 16, 1947] (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/April–June 20, 1947').

363. Delegation Minutes, July 4, 1947, *supra* note 328, at 3.

364. U.S. Miscellaneous Chapter Proposal, July 4, 1947, *supra* note 298 (providing the official U.S. proposal for a new Miscellaneous chapter for review by the other national delegations).

365. *Id.*

interpretation and settlement of disputes would not apply to the other provisions of article 94.

D. *The Neff And Rubin Memoranda on Unilateral Power to Interpret National Security*

While other U.S. negotiators came from economic or foreign service backgrounds, Neff and Rubin were both skilled lawyers, experienced in international business and international law.[366] Rubin was a young Assistant Legal Advisor for Economic Affairs who joined the DOS in 1943 and the U.S. delegation in Geneva in 1947.[367] As his legal advisor, Rubin became dear friends with Wilcox, and Rubin acknowledged that he served as one of Wilcox's "principal assistants."[368] Rubin later became a key figure in international law, a professor at Washington College of Law, and later Executive Director of the American Society of International Law from 1975 to 1982.[369]

Following the meetings of July 2 and 4, 1947, Neff, Thorp, and Rubin each provided a memorandum to Wilcox regarding the appropriate interpretation of the July 4 draft security exceptions article.[370] Of particular interest here, Rubin and Neff took opposing positions on the need for explicit unilateral authority to invoke an exception, the role of ITO bodies (the Executive Board and Conference) in interpreting the article, and the scope of the exceptions.

1. Neff's Argument (Supported by Thorp): Unilateral Power to Interpret the Security Exceptions

Among several other issues, Neff sought to make explicit that "a political body such as the ITO" should not have "full power" to interpret the security exceptions.[371] Neff's goal was to ensure that the United States would always have total, unilateral power to interpret the invocation of the excep-

366. For a background on Neff, see *supra* note 116.

367. Claudio Grossman et al., *A Festschrift in Honor of Seymour J. Rubin*, 10 AM. UN. INT'L L. REV. 1245 (1995).

368. Oral History Interview by Neenah Ellis with Seymour Rubin, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, at 11, No. RG 50.030*0449 (Jan. 6, 1997).

369. Grossman et al., *supra* note 367, at 1215.

370. These memoranda are attached to U.S. Dep't of State, U.S. Delegation Meeting Minutes (July 16, 1947) (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/June 21–July 30, 1947').

371. Harold Neff, U.S. Dep't of State, Memorandum to the Chairman of the U.S. Delegation Regarding Security Exceptions to the ITO Charter, at 1 (July 10, 1947) [hereinafter Neff Memorandum] (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/June 21–July 30, 1947'). Neff also discussed amendments to the July 4 Draft to ensure that the security exceptions aligned with U.S. policy and legislation, the omission of the words "directly or indirectly," and the inclusion of the word "essential" for "essential security interests."

tion provision. As Neff noted: "The power to interpret is the power to destroy."[372]

In early Charter drafts, Services had sought to afford "full [interpretive] power" to the ICJ, its preferred choice over a political body like the ITO.[373] But, as mentioned above, U.S. Senate Committee hearings following the New York drafting meeting confirmed that Senator Eugene Millikin, Chair of the Senate Finance Committee had raised concerns about the ICJ addressing questions involving security issues.[374] According to Neff, the DOS had guaranteed to Millikin that the security exceptions (as contained within the single provision) would "be worded so as to give to each Member freedom to apply them as it determines in the interests of its own security."[375] Neff believed that the recent July 4, 1947 draft provision instead granted the ITO "general power" to interpret the Charter.[376] Neff insisted that U.S. negotiators amend the security exceptions article to clarify that "the unilateral power of interpretation will . . . rest with the United States as to the content of the exceptions."[377] Neff's comments reflected two overlapping demands: First, no political bodies should judge U.S. security actions; and second, the U.S. should have absolute discretion in determining actions regarding U.S. security interests. Neff's comment also displayed the divide between the Services Departments and the State Department; within the U.S. negotiators' meetings, State officials frequently emphasized the powers of *other* ITO members to interpret the scope of the security exceptions, while Services focused on U.S. powers alone.

For Neff, the "power of unilateral determination" ought to stem from the word "consider" in the chapeau of the exception provision. However, Neff argued that the word "consider" was "put in the middle of a phrase in a completely unemphasized form."[378] In his view, the U.S. negotiators should be "clear and conspicuous" about reserving states' unilateral power of interpretation to determine when to use an exception to depart from Charter principles.[379] In seeking to lend support to his proposal, Neff added that in the July 4 version, "unilateral interpretation is not really reserved by the language used even if the person interpreting gave the most complete value to the word 'consider,' which is not in itself inevitable."[380]

Neff then turned to the enumerated sub-paragraphs: "a) Relating to fissionable materials or their source materials and b) Relating to the traffic in

372. *Id.*
373. *Id.*
374. *Id.*
375. *Id*. (underlining in original).
376. *Id.*
377. *Id.*
378. *Id.* at 2.
379. *Id.*
380. *Id.*

arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment . . . ."[381] He argued that "the 'relating' clauses modify the term 'action' [in the clause's chapeau]," and that they "qualify and condition that noun."[382] Neff argued that the "extent of the qualification and condition" presented a question of interpretation. However, according to Neff, the word "considers" failed to modify "the content of the condition."[383] Neff explained that the "effect of the language is to say that, *if* a measure relates, for example, to arms, ammunition and implements of war, then a Member may take such action as it deems necessary."[384] Thus, the July 4 draft failed to grant unilateral power to Members "to determine with finality what falls within the terms used."[385] Neff argued that the "content" of the exceptions improperly did "not fall within the power of any individual Member to determine."[386] This problem was amplified by the "one-member one-vote" representation then present in the ITO Charter, whereby the United States "would not have any greater vote in the ITO than Lebanon" should the ITO bodies have the power to interpret the Charter.[387]

Neff added that the approach taken in the July 4 draft contravened the approach the United States took in the United Nations Charter, where the United States had "reserved the complete power of unilateral action in regard to any matter affecting its national security."[388] Neff observed that in those negotiations, the ECEFP had compromised on a formula and "specifically stated" their intent that "the formula was such as to reserve power to the United States to prohibit, in time of peace, shipments such as would correspond to the scrap and petroleum shipments to Japan" in World War II.[389] However, since "any export control exercised in peacetime pursuant to the powers reserved by the security exceptions" would interfere with other states' domestic economies, "it would seem imperative that the power of interpretation should not rest with a political body such as the ITO."[390]

Neff was particularly troubled by the July 4, 1947 meeting, where he believed that he had failed to "make it absolutely clear that there was unilateral power to interpret," and that the other U.S. negotiators lacked "the intent to reserve full power of unilateral interpretation."[391] Neff reiterated that

381. *Id.*

382. *Id.* (underlining in original).

383. *Id.*

384. *Id.* (emphasis added).

385. *Id.*

386. *Id.*

387. *Id*. *See also* Report of the Drafting Committee—New York Draft Charter and Draft GATT *supra* note 274, art. 64 (laying out the voting representation of the Conference).

388. Neff Memorandum, *supra* note 371 (underlining in original).

389. *Id*. at 3.

390. *Id.* (underlining in original).

391. *Id.*

the political ITO bodies should not have authority to determine the "relatively imprecise content" of the security exceptions.[392] Neff's final word on the matter was to reiterate what he had said on July 4th, that the DOS had told the U.S. Senate that each ITO member "was to have freedom to apply the security exceptions 'as it determines in the interests of its own security.'"[393]

Captain Thorp's brief memorandum added to Neff's arguments. He recognized that having security exceptions subject to interpretation by the ITO bodies was "not satisfactory from a national security standpoint."[394] He signaled that such a procedure was unacceptable to the War and Navy Departments, and he had "grave doubts" Congress would find it acceptable either. Moreover, he also believed that "iron bound military exceptions would have very little, if any, effect on World Trade."[395] He further added there could be no ITO unless Members committed to the "spirit" of the Charter as much as they committed to its rules. Adherence to both was necessary in light of the fact that the Charter would never be "entirely free from legal loopholes." [396] Thorp closed his memorandum by recalling that the "Munitions Control Act" was deemed consistent with the United Nations Charter when it was presented to U.S. Congress, and asserted that it would "therefore seem that if any international body were to have the power of interpretation in such matters it should be the International Court of Justice."[397]

2. Rubin's Argument: Oversight to Ensure Bona Fide Invocation of the Exceptions

Rubin also focused on the power of interpretation, and he argued that the existing U.S. delegation draft afforded the U.S. government the leeway it needed to address its security matters. Rubin began his memorandum by observing that Neff had proposed language ("from taking any action which it may consider to relate to:") that made it "perfectly clear that any Member had the unilateral power to decide that any action which it proposed to take did relate to the matters contained in the lettered paragraphs."[398] Rubin be-

392. *Id.*

393. *Id.*

394. Captain Wakeman B. Thorp, U.S. Dep't of State, Memorandum to the Chairman of the U.S. Delegation, at 1 (July 11, 1947) [hereinafter Thorp Memorandum] (on file with NACP, record group 43, box 133, A1 704, file 'U.S. Delegation/Minutes/June 21–July 30, 1947').

395. *Id.*

396. *Id.*

397. *Id*. *See also* PROPOSED MUNITIONS CONTROL ACT, *supra* note 308.

398. Seymour Rubin, U.S. Dep't of State, Memorandum to the Chairman of the U.S. Delegation, at 1 (July 14, 1947) (on file with NACP, record group 43, box 133, A1 704, file 'U.S. Delegation/Minutes/June 21–July 30, 1947') (underlining maintained by Rubin from Neff, and, for greater clarification, this phrase was drawn from Rubin's memorandum rather than drawn from a text authored by Neff).

lieved that Neff's version would "make unchallengeable by the Organization or any other Member a justification, however far-fetched, of any action on this basis."[399] That the July 4 draft did not "permit this completely open escape from the Charter" could be seen, as Neff had argued, to "limit the scope of the unilateral interpretation" of the security exceptions.[400] The benefit of the July 4 draft was that it prevented other ITO Members from invoking Neff's "broader" exceptions, a sincere concern for Rubin.[401]

The security exceptions article was "drafted sufficiently broad[ly] to take care of any *reasonable* case."[402] This framed Rubin's explanation that his draft of the security exceptions aspired "to provide for unilateral determination by each Member, unchallenged by any other Member, as to what action it deems necessary in a field 'relating to' the listed subjects."[403] As such, Rubin wrote, no challenge could exist to a U.S. action that:

1) falls in the field of fissionable materials, etc; no challenge can be made to <u>any</u> regulation which we may enact regulating the use of "source materials" for fissionable materials, or the traffic in arms, ammunition, and implements of war, no matter how remote may be considered the relevance of the measures undertaken to the problem to be solved, if the measure falls in any of these fields; <u>or</u>

2) if the measure <u>relates to</u> any of these fields of interest—another phrase which grants broad power of unilateral determination.[404]

To further support this phrasing, Rubin corrected Neff's assessment of the Senate Finance Committee testimony. There was no "commitment to go farther than these broad and unilateral exceptions" offered by the U.S. delegation, Rubin argued.[405] Nor did the Senate Finance Committee display any interest in negating the Charter "by such a broad and unilateral security exception [provision] that any action, *no matter how little related to security, would be immune even from question*."[406] Reciting the transcript, Rubin demonstrated that Senator Millikin never suggested that "a safeguard ought to be written into the Charter so broad that actions which are not 'arrangements regarding fissionable materials' must, on the unilateral statement of a Member, be regarded as such."[407] Senator Millikin, Rubin explained, was

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399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.* at 2 (emphasis added).
403. *Id.*
404. *Id.* (emphasis in original).
405. *Id.*
406. *Id.* (emphasis added).
407. *Id.*

concerned with wording that "would have allowed any action taken under the security exception[s] to be brought before the International Court by any complainant Member."[408] However, the July 4 draft made clear that "no action in or relating to *certain* fields where national security is concerned can be questioned, whether before the Organisation or the Court."[409] Rubin explained that this amendment was in line with the DOS's commitment that the security exceptions "would be worded so as to give each Member freedom to apply them as it determines in the interest of its own security."[410]

Rubin also quashed Neff's claim that the United States needed to reserve unilateral interpretation in the ITO Charter's exceptions to correspond with the U.S. reservation of unilateral action in the United Nations Charter. Rubin equated this request with the United States' veto power and concluded that "it is not, as far as I know, present (if it was past) U.S. policy to support the veto principle in international affairs."[411] "Certainly," Rubin opined, the U.S. attitude is "not that the veto must be reserved for *all* nations which come into any international organization, ITO or any other."[412]

Rubin argued that the security exceptions retained "a great deal of leeway for unilateral interpretation" *without* rendering the Charter "an illusory document."[413] Rubin concluded that "the U.S. can justify such security measures as it may contemplate as 'relating to' one of the listed subjects; and that the present phraseology does give to the U.S. freedom to apply the exception [provision]—*provided* that it is the exception [provision] and not something else which it applies—'as it determines in the interest of its own security.'"[414] Rubin's memorandum suggested a role for the ITO bodies and the ICJ to objectively determine whether an ITO member was abusing the exception provision.

VI. A Backdrop to the Internal U.S. Deliberations: The Geneva Preparatory Meetings

These internal U.S. debates occurred while the U.S. negotiators participated in the Geneva preparatory committee meetings. At meetings with other delegations in Geneva, the U.S. delegation had to explain the newly phrased security exceptions and to clarify how the Organization would address disputes that involved national security. Over seventy years later, U.S. delegate John Leddy's remarks in these Geneva meetings were heavily cited by the WTO's *Russia—Traffic in Transit* panel as evidence that the U.S.

408. *Id.* at 3.
409. *Id.* (emphasis added).
410. *Id.*
411. *Id.*
412. *Id.* (emphasis added).
413. *Id.*
414. *Id.* (emphasis added).

delegation had long recognized that oversight of the security exceptions would be necessary due to the significant risk of its abuse for protectionist purposes.[415] The delegates' discussion was also relied upon by the United States in its third party submissions to emphasize that the delegations always recognized that there would be "no formal review" of a Member's invocation of the security exceptions.[416] This section considers the exchanges between the U.S. delegation and the other delegations, finding that there appeared to be agreement that trade disputes involving politically sensitive matters were reviewable within the nullification or impairment procedure of the ITO.

On July 24, 1947, in Geneva, Commission A of the United Nations Preparatory Committee considered two versions of the security exceptions.[417] In the sections that follow, discussion of the delegates' meeting is bifurcated based on each version. First, the delegates debated the language of article 37 of the New York Draft Charter, which maintained an introductory prohibition on arbitrary or non-justifiable discrimination. In this discussion, the delegates debated the open-ended language of "essential security interests," and of an "emergency" as each was set out in subparagraph (e). Second, the delegates debated the U.S. proposal to create a new Charter chapter that would render the security exceptions (now in article 94) applicable to the entire Charter, along with provisions respecting the nullification and impairment procedure, the interpretation of the Charter, and the settlement of disputes.

A. *Delegates' Meeting Regarding the Scope and Meaning of the New York Charter Security Exception*

On July 24, 1947, Commission A began by debating the language and phrasing of article 37 of the New York Charter draft.[418] In particular, Dr. Antonius Bernadus Speekenbrink (Director General, Foreign Economic Relations, Ministry of Economic Affairs), the delegate from the Netherlands,[419] sought clarification as to the meaning of the phrases "emergency in international relations" and "essential security interests," as both were contained

415. Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶ 7.90; U.N. Econ. and Soc. Council Comm'n, 2d Sess., 33d mtg. at 20, GATT Doc. E/PC/T/A/PV/33 (July 24, 1947).

416. Third Party Executive Summary of United States of America, *Russia—Traffic in Transit*, ¶¶ 25-26, WTO Doc. WT/DS512 (Feb. 27, 2018).

417. *See* U.N. Econ. and Soc. Council Comm'n, 2d Sess., 33d mtg., at 3–5, GATT Doc. E/PC/T/A/SR/33 (July 24, 1947); Hahn, *supra* note 38, at 613–14.

418. *Id.*

419. The State Department's private notes on Dr. Speekenbrink identified him as having a "[v]ery attractive personality" and being "[e]ffective in negotiation" based on his work in London in the preparatory committee. U.S. Dep't of State, Antonius Bernadus Speekenbrink Biographic Data, *attached to* Office Memorandum from L.D. Heck to Mr. Swayzee (May 5, 1947) (on file with NACP, record group 43, box 132, A1 704, file 'Biographies part 1').

within subparagraph (e) of article 37.[420] Dr. Speekenbrink specifically raised concern that agriculture would be captured by this wording, noting that in a time of emergency Members might claim, "it is essential for me to bring as much food to the country as possible."[421]

As the language stemmed from the original U.S. draft, Leddy explained the U.S. thinking on the language to the Commission. He elaborated that the phrase "essential security interests" was a product of the U.S. government's concern with having "too wide an exception," and the fact they could not simply say: "by any Member of measures relating to a Member's security interests," as that would "permit anything under the sun."[422] Leddy explained that the U.S. negotiators "thought it well to draft provisions which would take care of *real security interests* and, at the same time, so far as we could, to limit the exception[s] so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance."[423] It bears mention that in the first preparatory meeting in London, Speekenbrink (as Chairman of the Procedures Sub-Committee) and Leddy (as Rapporteur of the Procedures Sub-Committee) had already discussed the potential abuse of the exceptions provisions.[424] In addition, throughout the entire Charter negotiation, the Netherlands took "the lead in advocating maximum use of the International Court of Justice."[425]

As for the consideration of what might constitute an "emergency," Leddy observed the limitation of "time"—that is, "in time of war."[426] Speaking to the context of "time of war," Leddy remarked that "no one would question the need of a Member, or the *right* of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are."[427] As for the reference to emergency, Leddy remarked that the U.S. had in mind the situation that existed before it entered the Second World War at the end of 1941, where the U.S. government "required, for our own protection, to take many measures which would

420. U.N. Economic and Social Council Comm'n A, Verbatim Report on Its Thirty-Third Meeting, GATT Doc. E/PC/T/A/PV/33, at 19 (July 24, 1947) [hereinafter Verbatim Report of the Thirty-Third Meeting of Commission A]. Article 37(e) of the New York Draft Charter considered by the Commission read: "In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member."

421. *Id.* at 19.

422. *Id.* at 20.

423. U.N. Economic and Social Council Comm'n A, Corrigendum to Verbatim Report of Its Thirty-Third Meeting, GATT Doc. E/PC/T/A/PV/33.Corr.3 (July 30, 1947) [hereinafter Comm'n A, Corrigendum 3] (emphasis added).

424. U.N. Economic and Social Council Comm'n II, Technical Subcomm, U.N. Doc. E/PC/T/C.II/50, at 9 (Nov. 13, 1946).

425. WILLIAM ADAMS BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 92, n.6 (1950).

426. Verbatim Report of the Thirty-Third Meeting of Commission A, *supra* note 420, at 20.

427. *Id.*

have been prohibited by the Charter."[428] Chairman of Commission A, Erik Colban, reminded the delegates that "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention."[429]

A related observation came from Dr. H.C. Coombs, Chief of the Australian delegation, days earlier. He raised concern with separating trade and security considerations regarding fissionable materials, especially with the possibility that atomic energy could become an important source of industrial energy.[430] He further recommended consultation with an appropriate international body, though he did not name they body he had in mind.

B. *Evaluating the ITO Atmosphere as Safeguarding Invocation of the Security Exceptions*

In its *Russia—Traffic in Transit* submissions, the United States placed emphasis on Chairman Eric Colban's reference to the "atmosphere" inside the ITO as evidence that the delegations recognized the security exceptions' self-judging and non-justiciable nature.[431] Another reading, however, is that Colban was seeking to *strengthen* ITO review over the exceptions, not to dismiss it outright. Due to the complexity of designing the ITO, there had to be something "else"—an undefined element—that would confine and manage the breadth of open-ended terms found within the security exceptions.

Under this reading, Colban's belief in the atmosphere of the ITO revealed the "moral pressures" which would not serve as an alternative to the formal disputes procedure, but instead would support it, by incorporating "milder" law into the legal design.[432] This reading is supported by trade scholar Robert Hudec, who argued that the national delegations described the ITO's "atmosphere" or "spirit" as dependent upon the informal and diplomatic techniques of its Member States.[433] Hudec convincingly explained how such an "atmosphere" was akin to a "milder" form of law that allowed negotiating governments, including the U.S. negotiators, to rely on "techniques of the diplomat" to shape the ITO's legal remedies via the nullification or impairment procedure. The "normative pressures"[434] created through

428. *Id.*

429. *Id.* at 21.

430. U.N. Economic and Social Council Comm'n A, Verbatim Report on Its 30th Meeting, GATT Doc. E/PC/T/A/PV/30, at 16 (July 16, 1947).

431. *See* Third Party Executive Summary of United States of America, *Russia—Traffic in Transit*, *supra* note 416, ¶ 26.

432. *See* U.N. Economic and Social Council Comm'n B, Note Submitted by the Delegation of Belgium-Luxembourg, U.N. Doc. E/PC/T/W/257, at § 5 (July 31, 1947).

433. *See* HUDEC, *supra* note 65, at 30–36, 40–41; *see also* Joost H. B. Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 4 (2005) (observing the emergence of a law-and-politics narrative in the origins of the multilateral trade system).

434. HUDEC, *supra* note 65, at 35.

this procedure would "contain trade disputes—to rebalance expectations, and to avoid escalation."[435] The goal was to "modulate the pressures according to circumstances," avoiding the failure of the ITO "whenever full compliance was not possible."[436] Thus, in the early days of the Charter, the community would "focus the pressures at a particular time, on a particular part, and toward a particular result."[437] In addition, the nullification or impairment procedure was seen to provide "equitable remedies for trade injuries not involving a breach of legal obligations" arising from the Charter.[438] Some commentators have drawn on this feature of the early legal design as a way to illustrate the delegations' awareness that political controversies might not always be "settled" with judicial decision-making.[439]

This understanding is further supported by the fact that other U.S. negotiators referenced the need to complement the rules with an over-arching faith in the ITO and trade multilateralism. For example, the U.S. Tariff Commission had observed the need for Members to recognize the "spirit" of the multilateral trade system, rather than seek to simply obey its rules.[440] Thus, Colban's remarks do not suggest non-reviewability. Instead the reference to the organization's "atmosphere" signals how delegations recognized the need to embed diplomacy within the institution for the success of the embryonic dispute settlement mechanism.[441] In other words, "atmosphere" was not viewed as an alternative to a review via the ITO dispute settlement procedure. Rather, the "atmosphere" was an assumed aspect of the structure that supported the formal process. To be clear, there is no evidence to confirm that the ITO's "atmosphere" precluded ITO bodies (the Executive Board or Conference of Members) from reviewing the legality of a measure.

In sum, there were two elements to the idea of the ITO's "atmosphere": First, some diplomatic techniques were required to aid legal rules and procedures, enabling governments to negotiate what may have been "right" or "fair" in trade disputes; and, second, the existence of the ITO meant that "now there was an organization capable of issuing third-party decisions about what was 'right' and 'fair'," coupled with "community pressure behind those judgments."[442] In the context of the security exceptions, the reference to "atmosphere" could signal that the delegates accepted the impreci-

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435. ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 205 (2011).

436. HUDEC, *supra* note 65, at 34.

437. *Id.* at 35.

438. Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 616, 616 (1970).

439. *See* Hahn, *supra* note 38, at 613; LANG, *supra* note 435, at 202–203.

440. *See* U.S. TARIFF COMM'N, ANALYSIS OF GENEVA DRAFT CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 89–90 (1947) [hereinafter 1947 Tariff Commission Report].

441. *See generally* Pauwelyn, *supra* note 433.

442. HUDEC, *supra* note 65, at 36.

sion of the language, knowing the ITO and its procedures would facilitate consultations if and when disputes arose.[443] The early multilateral trade organization was therefore not simply made up of rules, it included "background processes," community opinion, and flexibility towards rules and remedies.[444]

C. *Delegates' Meeting Regarding the New U.S. Proposal for a Security Exceptions Article*

In the same July 24, 1947 meeting, Commission A continued the discussion on the security exceptions' proper form, turning now to the United States' July 4 proposal to incorporate the exceptions as part of a new Miscellaneous chapter. The Chairman began by questioning whether the new exceptions, moved to article 94, were now segregated from the "sanction clauses of Chapter V," including article 35.[445] The Chairman asked the delegations to "make up [their] minds [about] whether [they were] in agreement that these clauses should not provide for any possibility of redress."[446] It was a puzzling place to begin, as the U.S. proposal (matching Kellogg's initial proposal for a new Miscellaneous chapter) was quite clear that the new chapter included both nullification or impairment and dispute settlement procedures, as contained in articles 35(2) and 86 of the New York Draft Charter, respectively.[447]

1. Debate over the Relationship to the Nullification or Impairment Procedure

Leddy, speaking for the U.S. delegation, responded to the relationship between the exceptions provision and the nullification or impairment procedure in article 35:

> I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35. Article 35 is very broad in its terms, and I think probably covers any action by any Member under any provision of the Charter. It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the

443. *Id.* at 30; *see* U.S. Dep't of State, ECEFP, Interpretive Articles on the ITO Charter, ECEFP D-135/47, at 2 (Oct. 29, 1947) (on file with NACP, record group 353, box 52, E.192, file '5.19B ECEFP Meetings, Documents 116/47-135/47').

444. *See* LANG, *supra* note 435 at 202–205.

445. Verbatim Report of the Thirty-Third Meeting of Commission A, *supra* note 420, at 25–26 (speaking to articles 34 and 35 as related to emergency actions and consultations for nullification or impairment, respectively).

446. *Id.* at 26.

447. U.S. Proposal, July 4, 1947 *supra* note 299, at 12. At this time, article 35(1) remained within the commercial policy chapter of the draft Charter.

> terms of Article 94, should affect another Member, I should think that Member should have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article.[448]

Mr. Morton, the Australian delegate was "very glad to have the assurance of the United States Delegate" that a Member's rights under the nullification or impairment process (article 35(2)), were "not in any way impinged" by the movement of the security exceptions.[449] He proposed including a note in the Commission's report clarifying Leddy's statement, unless, he added flippantly, the United States only meant to give "one of those 'kerbside' opinions."[450] Leddy rejected a note specific to article 35's application to article 94, on the basis it would "raise doubts elsewhere in the Charter."[451] However, he confirmed the U.S. view that "[a]rticle 35, in its terms, covers everything in the Charter."[452]

In response to the request to place such a limit in article 94, rather than in the article 35 dispute settlement procedure itself, Leddy explained that if the delegates agreed that article 35 should not apply to article 94, then "a clear and explicit provision in Article 35 saying that no Member shall bring any complaint in respect of measures taken pursuant to Article 94" was required.[453] Leddy stated, "[I]t is perfectly clear from the text that Article 35 does apply to Article 94," and that he would "rather have it left that way."[454] The discussion on this point concluded, suggesting Leddy had satisfied Morton that the nullification or impairment process outlined in article 35 applied to the entire Charter.[455]

2. Implications for Modern Day Questions of Justiciability

Is Leddy's response to the Chairman evidence that the exceptions were non-justiciable and self-judging in nature, as claimed by the United States in its recent *Russia—Traffic in Transit* submissions?[456] It remains unclear

448. Verbatim Report of the Thirty-Third Meeting of Commission A, *supra* note 420, at 26–27.

449. *Id.* at 27.

450. *See id.*

451. *Id.* at 29.

452. *Id.* at 28.

453. *See* Comm'n A, Corrigendum 3, *supra* note 423.

454. *See id.* at 1.

455. Verbatim Report of the Thirty-Third Meeting of Commission A, *supra* note 420, at 29.

456. See Third Party Executive Summary of United States of America, *Russia—Traffic in Transit*, *supra* note 416, at ¶ 27 (emphasizing Leddy's remarks as "drafting history" and arguing that they confirm that "the negotiators understood that the essential security exception [provision] was 'so wide in its coverage' that it was not justiciable; while the delegates considered that a claim for nullification or impairment 'whether or not a measure conflicts' with the agreement might be available, they were clear that a Member could not claim that another

whether Leddy sought to exclude review as to whether a Member had abused the security exceptions article, and I found no meeting minutes that recounted this Commission A meeting. It is true that Leddy defended the article's connection to the nullification or impairment procedure. As written at the time, that procedure afforded power to ITO bodies to investigate matters, suggest further consultations, refer disputes to arbitration, and to enable corrective actions.[457] There is nothing in his response to suggest an inability of ITO bodies to make findings and provide a recommendation on the proper invocation of the security exceptions.

However, it may be possible to probe Leddy's explanation against the prior U.S. negotiators' meetings. To the other Commission delegates, Leddy explained that if the U.S. negotiators drafting article 94 had believed that "no Member shall bring any complaint in respect of measures taken pursuant to Article 94," they would have provided for this in a "clear and explicit provision."[458] For Leddy, it was "perfectly clear" from the text that article 35 applied.[459] Consider Leddy's response as compared to another U.S. negotiator's remarks in the internal U.S. negotiators' meeting on July 4, 1947. Recall that DOS official Evans had observed that where the U.S. had a "bona fide national security problem," the ITO would "not be able to do otherwise than make a finding in our favour."[460] As a counterpoint to Neff, who had demanded total unilateral interpretive power, Evans appeared to show that objective analysis was acceptable to the U.S. negotiators, as the ITO could not deny a Member recourse to the security exceptions for bona fide security concerns.[461]

3. Debate over Which Body Would Hold Interpretive Authority

During the Geneva meetings, some delegations proposed the creation of a "quasi-judicial tribunal" to handle issues of interpretation and enforcement of the Charter, which the U.S. delegation feared would be too costly.[462] In this context, in a July 21, 1947 internal U.S. delegation meeting, Wilcox now recommended "freer access of appeal to the World Court" following

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Member had violated the security exception[s] and therefore unsuccessfully invoked that exception.").

457. *See* WILCOX, supra note 187, at 159.

458. Comm'n A, Corrigendum 3, supra note 423.

459. *Id.*

460. Delegation Minutes, July 4, 1947, *supra* note 328, at 3 (emphasis original).

461. I thank Joel Trachtman for this point. As far as the record reflects, good faith was not mentioned during the exchange in Commission A, though the underlying U.S. discussions suggest this to be a relevant principle for national security claims. *See supra* text accompanying note 402 (Rubin, highlighting the requirement of reasonableness).

462. U.S. Delegation to U.N. Secretariat, Second Meeting of the U.S. Preparatory Comm. for the Int'l Conf. on Trade and Employment, Meeting Minutes, at 1 (July 21, 1947) [hereinafter Delegation Minutes, July 21, 1947] (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/June 21–July 30, 1947').

concerns over costs and the politicization of disputes if they were kept strictly in-house at the ITO.[463] He reasoned that an "impartial international tribunal" would prevent "smaller countries" from "gang[ing] up" on the United States.[464] In addition, it would be "better to have disputes and questions relating to the interpretation of the Charter settled by an impartial international tribunal in order to avoid decisions based on political considerations which certainly would be the case with a political body."[465] To resolve their differences, U.S. negotiators agreed that the ICJ would have authority "to decide questions of law only on appeal from a decision reached by the ITO in the same manner that an appellate court in the US operates."[466]

D. *Finalizing the U.S. Position and the Conclusion of Geneva*

Despite the heated internal discussions between Neff and the other U.S. negotiators, a scheduled meeting with U.S. Secretary of War Kenneth Royall suggested that the War Department had accepted the security exceptions' language, despite rejection of Neff's efforts to amend the provision during the U.S. delegation meeting held on July 2, 1947. When Royall visited Geneva in August 1947, he dined with Neff, Wilcox, and Brown.[467] While Royall was interested in Neff's efforts to alter the security exceptions, he "did not insist upon" Neff's proposals.[468]

Shortly thereafter, with the conclusion of Commission A's work, all drafts were reviewed at the final plenary meetings of the Preparatory Committee.[469] As submitted to the Preparatory Committee, article 94 of the Geneva Draft Charter read, *inter alia*:

Nothing in this Charter shall be construed . . .

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463. *Id.* Wilcox's recommendation is a development from a month earlier, when Kellogg, in a U.S. delegation meeting, had elaborated on a proposal to combine articles 35(2) and 86 to address legal disputes and economic matters, and to "defeat the France-Dutch proposal to have all disputes submitted to the International Court without any right on the part of the Organization to cut off such appeals." *See also* U.S. Delegation, Suggested Changes for Chapter VIII, June 16, 1947, *supra* note 362.

464. Delegation Minutes, July 21, 1947, *supra* note 462, at 23.

465. *Id.*

466. U.S. Delegation to U.N. Secretariat, Second Meeting of the U.S. Preparatory Comm. for the Int'l Conf. on Trade and Employment, Meeting Minutes (July 24, 1947) (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/June 21–July 30, 1947').

467. U.S. Delegation to U.N. Secretariat, Second Meeting of the U.S. Preparatory Comm. for the Int'l Conf. on Trade and Employment, Meeting Minutes (Aug. 4, 1947) (on file with NACP, record group 43, box 133, A1 704, file 'US Delegation/Minutes/July 31–August 25, 1947').

468. *Id.*

469. U.N. Econ. and Soc. Council, Rep. of the Second Session of the Preparatory Comm. of the U.N. Conf. on Trade and Employment, WTO Archives E/PC/T/180, at 6 (Aug. 19, 1947) [hereinafter Geneva Draft Charter].

> b) to prevent any Member 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; . . . .[470]

A 1947 commentary on the Geneva Draft Charter by Oscar Ryder and the U.S. Tariff Commission notes that article 94

> reserves to the Members complete freedom of action to prohibit or regulate in any manner imports and exports of fissionable materials, implements of war, and supplies for the Army, Navy, and Air-Force; that is to say, with respect to such items[,] exports or imports may be prohibited unqualifiedly or the Member may discriminate as to where it obtains its imports or sends its exports.[471]

Accordingly, the U.S. Tariff Commission concluded that article 94 lacked any requirement that Members obtain the "approval of the Organization for any action they take or refuse to take under these exceptions."[472] However, the commentary added that it appeared "likely that [Member's] charges that the exceptions were being abused for protective or other purposes *would* require consultation under Article 89," with the possibility of a decision by the Organization under article 90 to reach a "satisfactory settlement," if necessary.[473] According to the Tariff Commission, the interpretation and dispute settlement provisions constituted "an overriding authorization for sanctions in any case . . . ."[474] These articles were seen as "recognition that the Charter can be successful only if all the Members cooperate in carrying out its spirit or objective as well as adhering to its detailed terms."[475]

In its *Russia—Traffic in Transit* submissions, the U.S. argued that the removal of the word "may" from the language of article 94(b) of the Geneva Draft Charter "strengthened and emphasized" the "self-judging" nature

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470. *Id.* at 178.
471. 1947 Tariff Commission Report, *supra* note 440, at 95–96.
472. *Id.* at 96.
473. *Id.* (emphasis added).
474. *Id.* at 89.
475. *Id.* at 89–90.

of the security exceptions.[476] (The language, "which it considers necessary," was used in article XXI GATT.) As shown in this section, U.S. negotiators placed little emphasis on the word "may" in their Geneva meetings. Even Neff had retained the phrase "which it may consider" when arguing for Members' sole power to interpret the security exceptions.[477] Moreover, that the U.S. negotiators rejected amendments from the Services Departments to confirm a pure "self-judging" article, suggests that the removal of the word "may" from the adjectival clause does not evidence the United States' intention for total unilateral power to interpret the security exceptions. Nevertheless, there is no further evidence within the archival record I recovered that confirmed the purpose of the word "may."

VII. Debates over Enforcement and Political Questions in Havana

Fifty-nine state delegations attended the United Nations Conference to complete the ITO Charter in Havana, over twice as many delegations as attended the first preparatory session in London.[478] Invocation of the security exceptions was discussed in Havana, and the delegates agreed to construct a new provision to address the question of "the proper allocation of responsibility as between the Organization and the United Nations."[479]

Sub-committee I (of the Conference's Sixth Committee, which focused on ITO organization)—composed of delegates from Australia, Costa Rica, Czechoslovakia, Guatemala, Iraq, India, Pakistan, South Africa, the United Kingdom, and the United States—evaluated the article 94 security exceptions.[480] The group considered the language endorsed at Geneva and recommended editing it to clarify its role within the ITO Charter.[481] Following nine meetings, the Committee recommended minor modifications to the Geneva Draft Charter's article.[482] Among other things, article 94(b) was amended to include a phrase acknowledging Member action "either singly

476. *See* Panel Report, *Russia—Traffic in Transit*, *supra* note 4, at 3, ¶11.

477. *See supra* note 370 and accompanying text.

478. *See generally* BROWN, *supra* note 425, at 135–36.

479. U.N. Conf. on Trade and Employment, Sixth Comm., Rep. of Sub-Committee I (Article 94), GATT Doc. E/Conf.2/c.6/93, at ¶ 13 (Mar. 2, 1948) [hereinafter Report of Sub-Committee I (Article 94), Mar. 2, 1948].

480. *See id.*

481. U.N. Conf. on Trade and Employment, Sixth Comm., Annotated Draft Agenda, GATT Doc. E/Conf.2/C.6/12, at 25 (Dec. 2, 1947) [hereinafter Sixth Committee, Annotated Draft Agenda].

482. *See id.*; U.N. Conf. on Trade and Employment, Joint Sub-Committee of Committees V and VI, Draft Report of the Working Party, GATT Doc. E/Conf.2/C.5&6/W.3 (Jan. 14, 1948); Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 479, at 1 (observing that apart from a "slight drafting change" the "Geneva draft has not been changed."). The meeting notes of the ninth meeting were not found within the publicly-accessible WTO archives.

or with other states," and to "indicate more clearly that the sub-paragraphs refer to [excepted] 'action' and not to 'essential security interests.'"[483] Though Sub-committee I's review of article 94 did not drastically change the language of article 94, it held "formal and informal discussions" as to the interpretation of the text.[484]

For example, in response to an Indian delegation proposal, the Sub-committee discussed how the ITO would address actions taken in consideration of "political" "essential interests."[485] The Indian delegation indicated that the phrase "essential security interests" in article 94 may "not be regarded always as embracing the 'essential interests.'"[486] The Indian delegation raised the topic due to the exception for an "emergency in international relations," where he believed such actions would fall. Other delegations also proposed amending article 94 to cover "any measure" or "any action . . . which serves a political purpose contrary to the essential interests of that Member."[487] This sparked two discussions: First, whether and how the ITO would determine whether disputes involved political considerations or "economic interests under disguise of political interests."[488] Second, whether actions taken out of political interests fell within the scope of the United Nations to manage, rather than under the authority of the ITO.[489]

In seeking to expand the scope of the security exceptions, the Indian delegate added that recourse to the nullification or impairment procedures, outlined in articles 89 and 90 of the draft Charter, could serve as a "deter-

483. Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 479, at ¶ 5, attachment 1 at 6.

484. *Id.* at 1.

485. See U.N. Conf. on Trade and Employment, Sub-Committee I (Article 94), Notes of the First Meeting, GATT Doc. E/Conf.2/C.6/W.26, at 2 (Jan. 9, 1948) [hereinafter Sub-Committee I (Article 94), Notes of the First Meeting] (detailing the Indian proposal that the exceptions cover "essential national interests" and not just "security interests"); *see also* Sixth Committee, Annotated Draft Agenda, *supra* note 481.

486. *See* U.N. Conf. on Trade and Employment, Sub-Committee I (Article 94), Notes of the Third Meeting, GATT Doc. E/Conf.2/C.6/W.40, at 1 (Jan. 13, 1948) [hereinafter Sub-Committee I (Article 94), Notes of the Third Meeting]; *see also* Sub-Committee I (Article 94), Notes of the First Meeting, *supra* note 485, at 2; U.N. Conf. on Trade and Employment, Sub-Committee I (Article 94), Notes of the Second Meeting, GATT Doc. E/Conf.2/C.6/W.32, at 1 (Jan. 10, 1948) [hereinafter Sub-Committee I (Article 94), Notes of the Second Meeting]. *See also* Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 479, ¶ 13 (acknowledging delegation proposals related to "actions taken in connection with political matters or with the essential interests of Members.").

487. U.N. Conf. on Trade and Employment, Sixth Comm., Iraq: Amendment to Article 94 (General exceptions), GATT Doc. E/Conf.2/C.6/12/Add.9, (Jan. 2, 1948); *see also* U.N. Conf. on Trade and Employment, Sixth Comm., Sub-Committee I (Article 94), Notes of the Fourth Meeting, GATT Doc. E/Conf.2/C.6/W.60, at 2–3 (Jan. 20, 1948) [hereinafter Sub-Committee I (Article 94), Notes of the Fourth Meeting] (elaborating on the amendments proposed by the Iraq delegation).

488. Sub-Committee I (Article 94), Notes of the First Meeting, *supra* note 485, at 2. The identity of the inquiring delegation is not provided in the meeting notes.

489. *Id.*

rent to any misuse of the exceptions."[490] The U.S. delegation did not offer detailed comment to this proposal; instead, it recommended an amendment to the general exceptions of the commercial policy chapter (that imposed a requirement that measures taken not be arbitrary or unjustifiable discrimination between Members) to cover action "necessary to the enforcement of police measures or other laws relating to public safety."[491]

Within the Sub-committee meetings, the UK delegation had also proposed several amendments to article 94. For example, an amendment to the chapeau of article 94(b) to clarify that the sub-paragraphs qualified "any action" rather than the "essential security interests."[492] A UK proposal also sought to clarify that the Charter's commitments would not prevent a member from taking actions in accordance with the United Nations Charter.[493] Moreover, the UK amendment proposed language whereby if action fell under a security exception (the UK's draft article 94(b)(1)(d)), then the Charter's dispute settlement procedures "shall not apply until the United Nations has made recommendations on or otherwise disposed of the matter."[494] At the fourth meeting, the U.S. delegation raised concern with the "practicability" of determining "when the United Nations has 'otherwise disposed of' a matter."[495]

An internal memorandum from Kellogg to Wilcox at this time further elaborates the UK proposals to amend the security exceptions. Kellogg reported that the British interpreted the language "emergency in international relations" in article 94(b)(iii) "very narrowly."[496] Kellogg reported on three concerns by the British and his recommended U.S. responses. First, the British, Kellogg explained, believed that under the current text "a matter [that] has been referred to the UN would not be a clear indication that there was

490. Sub-Committee I (Article 94), Notes of the Second Meeting, *supra* note 486, at 2.

491. *Id.*

492. U.N. Conf. on Trade and Employment, Sixth Comm., Amendment to Article 94 Proposed by the United Kingdom Delegation, GATT Doc. E/Conf.2/C.6/W.48, art. 94(1)(d), at 1 (Jan. 16, 1948) [hereinafter Amendment to Article 94 Proposed by the UK Delegation]; *see also* Sub-Committee I (Article 94), Notes of the Third Meeting, *supra* note 486, at 4 (explaining the suggestion that there be an amendment to "make it clear that the subsequent sub-paragraphs qualified the word 'action' and not 'interests.'"). The added text in article 94(b) was: "to prevent a[ny] Member, either singly or with other Members, from taking any action which it considers necessary for the protection of its essential security interests; where such action . . . ." *See* Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 479, at 1–2; Sub-Committee I (Article 94), Notes of the Fourth Meeting, *supra* note 487.

493. Amendment to Article 94 Proposed by the UK Delegation, supra note 492.

494. *Id.* (referring to article 94(2), reproduced infra note 532).

495. Sub-Committee I (Article 94), Notes of the Fourth Meeting, *supra* note 487, at 3.

496. Edmund Halsey Kellogg, U.S. Dep't of State, Draft Memorandum to Clair Wilcox on Divergence of Views with British on Security Exceptions—Article 94, at 1 (Jan. 8, 1948) [hereinafter Kellogg Memorandum to Wilcox] (on file with NACP, record group 43, box 13, A1 698, file 'Trade-Habana').

an emergency in international relations."[497] Kellogg responded that the British desire to widen the scope of the exception was "unrealistic" and, in any case, "[u]nder the present language" the ITO would "decide by a majority vote" as to "whether an 'emergency exists'."[498] Despite the British proposed language, the "decision [for the ITO] on substance would be the same:" "[W]hether or not the matter was actually political in nature or was a disguised effort to circumvent the Charter." [499] Second, the British sought to exempt "action taken in connection with political issues arising in the future . . . in connection with issues now before the UN."[500] Third, the British sought "exemption in connection with political matters not involving essential security interests," whereas the U.S. delegation felt "the exception should be confined to bona fide security matters."[501] For the second and third concern, Kellogg offered a succinct response: The U.S. position was that future cases were addressed, but only those that involve "*security interests*."[502]

To address the allocation of responsibility between the ITO and the United Nations, the Sub-committee responsible for article 94 recommended a new provision, which became article 86(3) of the Havana Charter.[503] Buried in an annex, an interpretive note clarified that the Organization was responsible for questions raised by Members as to whether a measure was "in

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497. *Id.* at 1–2.

498. *Id.*

499. *Id.* (the British text was: "related to the maintenance of international peace and security or to the avoidance of political friction between states.").

500. *Id.* at 2.

501. *Id.*

502. *Id.* at 3 (emphasis original).

503. The original text was devised as article 83A, later to become article 86(3). The provision stated:

> The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.

Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 479, ¶¶13–15. One of the discussions in the Havana meeting that led to the aforementioned report (on the link between economic measures and political questions) contained confirmation from Clair Wilcox that the U.S. considered the Organization an economic one, and it "should therefore not judge any measure employed in connection with a political dispute when that political dispute was within the jurisdiction of the United Nations." U.N. Conf. on Trade and Employment, Sixth Comm., Summary Record of the 37th Meeting, GATT Doc. E/Conf.2/C.6/SR.37, at 3 (Mar. 11, 1948); *see* Michael J Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 612–614 (1991) (offering analysis on the implications of art. 86(3)).

fact taken directly in connection with a political matter brought before the United Nations."[504] However, the note added that "if political issues beyond the competence of the Organization are involved the question shall be deemed to fall within the scope of the United Nations."[505]

Additionally, the UK delegation sought changes to the text of article 94 with sub-paragraph (2) to make explicit that Members could seek recourse under the nullification or impairment procedures for compensatory measures when appropriate.[506] A U.S. delegate offered the "preliminary" view that an explicit reference to this procedure within article 94 was "unnecessary" since it repeated the text of the consultation – nullification or impairment provision in article 89(b).[507] While the UK delegation was happy to have the "applicability of articles 89 and 90 written into the record" rather than in the text of article 94, it added that "the proviso suggested in paragraph 2 was not intended to exclude the ITO from participation in the ultimate solution of a matter after the United Nations had acted."[508] Further discussion was required to understand "at what stage" the Charter's dispute settlement procedure would apply.[509] It appeared that further clarification of the text was in order.

On this matter, Sub-committee I recognized that Sub-committee G was responsible for confirming the relationship between article 94 and the dispute settlement provisions (articles 89, 90, and 91).[510] Nevertheless, Sub-committee I recorded that "[t]here was some suggestion that action taken under Article 94 could not be prevented, or questioned, under other articles, but that the effects of that action might be the subject of consultation or

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504. 1948 Havana Charter, *supra* note 64, art. 86, ¶ 3.

505. Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 479, ¶ 4; *see also* 1948 Havana Charter, *supra* note 64, art. 86, ¶ 3.

506. U.N. Conf. on Trade and Employment, Sixth Comm., Sub-Committee on Chapter VIII (Settlement of Differences - Interpretation), Summary Record of the Third Meeting, GATT Doc. E/Conf.2/C.6/W.41, at 1 (Jan. 13, 1948) [hereinafter Sub-Committee on Chapter VIII, Summary Record of the Third Meeting, Jan. 13, 1948]; Amendment to Article 94 Proposed by the UK Delegation. Article 94(2) of the British proposal read:

> If any action taken by a Member under paragraph 1 of this Article nullifies or impairs any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the Member taking the action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate; provided that where the action is taken under paragraph 1(d) of this Article the procedure set forth in Chapter VIII of this Charter shall not apply until the United Nations has made recommendations on or otherwise disposed of the matter.

507. Sub-Committee I (Article 94), Notes of the Fourth Meeting, *supra* note 487 at 3.

508. *Id.*

509. *Id.*

510. Sub-Committee I (Article 94), Notes of the Third Meeting, *supra* note 486, at 3.

complaint, and that a member affected by such action might accordingly seek release from some corresponding obligations."[511]

According to the meeting notes, it was the Indian delegation which had the last word in the fourth meeting of sub-Committee I. The Indian representative "expressed some doubt" as to whether under the UK's proposed article 94(2) "the bona fides of an action allegedly coming within article 94 could be questioned and also whether such an action could be countered collectively by Members of the Organization or only by affected Members individually."[512] The Indian delegation added that it understood the "intention" of the UK proposed draft to be to confirm that "counteraction" was limited to "compensatory action" and not "punitive action."[513] The next meeting discussed political measures brought before the United Nations and confirmed the delegations' agreement to create a new provision, as derived from the UK delegation's draft of sub-articles 94(1)(d) and (2), in a new article on "Relations with the United Nations."[514]

Just before Sub-committee I's third meeting, the Sixth Committee's Sub-committee G offered its own report as to whether the draft Charter's nullification or impairment procedure (article 89) should cover the invocation of the security exceptions.[515] The outcome was that non-violation complaints of nullification or impairment (article 89(b)) "would apply to the situation of action taken by a Member[,] such as action pursuant to Article 94 of the Charter."[516] Sub-committee G confirmed that:

> Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measures taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.[517]

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511. *Id.* (emphasis original); *see also* Sub-Committee on Chapter VIII, Summary Record of the Third Meeting, Jan. 13, 1948.

512. Sub-Committee I (Article 94), Notes of the Fourth Meeting, *supra* note 487, at 3. It is unclear whether the Indian position was that there *should* be review and this language failed to confirm that, or whether there should not be review at all.

513. *Id.*

514. U.N. Conf. on Trade and Employment, Sixth Comm., Organisation, Sub-Committee I (Article 94), Notes of the Fifth Meeting, GATT Doc. E/Conf.2/C.6/W.95, at 2–3 (Feb. 10, 1948).

515. *See* U.N. Conf. on Trade and Employment, Sixth Comm., Rep. of Working Party of Sub-Committee G of Committee VI on Chapter VIII, GATT Doc. E/Conf.2/C.6/W.30 (Jan. 9, 1948) [hereinafter Report of Sub-Committee G of Jan. 9, 1948].

516. *Id.* at 2.

517. *Id.*

The findings of Sub-committee G aligned with those of Sub-committee I, especially the attention to the "effects" of Members' actions, and recourse to the ITO legal design in the event of nullification or impairment of benefits accruing to complaining Members. The final report of Sub-committee G did not offer further insights into the possibility of abuse of the exceptions.

With the Final Act of the UN Conference on Trade and Employment in March 1948, Article 99(1)(a) and (b) of the completed Havana Charter read, *inter alia*:

> 1. Nothing in this Charter shall be construed
>
> (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent a Member from taking, either singly or with other States, any action which it considers necessary for the protection of its essential security interests, where such action
>
> (i) relates to fissionable materials or to the materials from which they are derived, or
>
> (ii) relates to the traffic in arms, ammunition or implements of war, or to traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment of the Member or of any country; or
>
> (iii) is taken in time of war or other emergency in international relations.[518]

VIII. A BIFURCATED APPROACH TO THE INTERPRETATION OF THE SECURITY EXCEPTIONS

Following completion of the Havana Charter, the U.S. delegation prepared notes in anticipation of questions at U.S. Congressional hearings. The DOS archived files contained a collection of undated and unauthored materials to this effect.[519] This final work on the ITO occurred after DOS staffing

518. 1948 Havana Charter, *supra* note 64.

519. Clues as to timing are found in references to earlier Congressional hearings in 1947 and to articles of the Havana draft. For example, with reference to article 99 (General Exceptions), the memorandum observed: "Article 99 is a considerable revision of the text before the Senate Committee in 1947."). U.S. Dep't of State, Comments on Questions Asked in Senate Finance Committee, Chapter IX, at 5 (on file with NACP, record group 43, box 18, A1 698,

changes, with key trade multilateralism advocates departing. William Clayton had resigned as Undersecretary of State in October 1947. Clair Wilcox resigned in 1948 following the Havana Conference.[520]

The DOS prepared responses to questions on every provision of the ITO Charter, including questions regarding the scope of the security exceptions.[521] The DOS confirmed that each ITO Member has "the right of self-defence under International Law," and that the security exceptions ensured that "nothing in the Charter shall interfere with the exercise of a member's security interests."[522] However, the DOS was prepared to argue that there were "limits to the scope" of the exceptions, "since the action taken by a Member under Paragraph 1(b) must relate to fissionable materials, the supply of a military establishment or be taken in a time of war or other international emergency."[523]

In response to a follow-up question as to whether such actions would be reviewable by the ITO or the ICJ, the U.S. negotiators planned to answer:

> The necessity for the action taken is not subject to review; *the relationship of such action to the subjects referred to is subject to review*. Thus, in case a Member imposes export controls which the Member considers necessary for the protection of its essential security interests on traffic in goods to supply the military establishments of itself and certain other countries, it is necessary to decide where final authority lies to determine (1) the necessity for the protective measures and (2) the fact that the traffic is or is not to supply military establishments.[524]

On the "necessity" of the measure, the DOS was prepared to argue that the invoking member's "judgment" was "final" and "not subject to review by the Organization or the Court."[525] Here, the DOS likely referred to the "it considers" language found in article 99(1)(a) and (b) of the Havana Charter. But, disputing Members could call upon the Organization to assess the "factual question" of whether the measure "relates to" the circumstances enumerated in the article's subparagraphs.[526] As "with any other decision of the

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file 'Chapter IX'). The folder contains several versions of the same memorandum, with some containing handwritten edits, which are otherwise identical in the case of the portion related to article 99. There is one version of the memorandum from Kellogg to Burns, dated Feb. 15, 1949, that reflects changes made by John Evans.

520. Leddy Oral History, *supra* note 133, at ¶¶ 50, 72.

521. Comments on Questions Asked in Senate Finance Committee, *supra* note 519, at 10.

522. *Id.* at 4.

523. *Id.*

524. *Id.* (emphasis added).

525. *Id.*

526. *Id.*

Conference," DOS understood article 96 of the Havana Charter to provide recourse to the ICJ.[527]

Notwithstanding the bifurcated test outlined above, the U.S. negotiators also prepared a response to a question about the United States' obligation to supply certain information under the Havana Charter's security exceptions. The DOS began by explaining that where a Member refused to establish the relationship between the security measure and the enumerated circumstances by supplying this information, then "subparagraph (b) [of article 94, requiring factual assessment] must be construed to permit the Member concerned to establish its case simply by testifying that the relationship in fact exists, without requiring substantiating evidence."[528] Although the complainant Member could not argue that the invoking Member had violated the Charter, it could seek "appropriate and compensatory" relief, pursuant to the nullification or impairment procedure, in article 93 of the Havana Charter.[529] There was no further elaboration as to how to connect this response to the separate question as to whether or not ITO bodies could make an objective determination as to whether a Member's security measure constituted an enumerated circumstance within the security exception provision.

Nonetheless, this historiography suggests that one possible reading of this prepared answer is that the U.S. negotiators sought to explain that regardless of the natural security rationale for certain actions, a procedure for relief was required to maintain the "mutuality of obligations and benefits" of all ITO Members.[530]

However, this procedure went beyond compensation. Wilcox explained in June 1947 that the nullification or impairment procedure was recognized as a "check" on the power of other Members to retaliate, and "to convert it from a weapon of economic warfare to an instrument of international or-

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527. *Id.* at 4–5 (article 96 set out how the Organization could request from the ICJ an advisory opinion on legal questions).

528. *Id.* at 5.

529. *Id*. (stating "injured Members might still be found entitled under clauses (b) and (c) of paragraph (1) of article 93, to compensatory relief in any appropriate case."); 1948 Havana Charter, *supra* note 64, arts. 93–95. Article 93(1) provided:

> If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the provisions of this Charter other than Article 1, is being nullified or impaired as a result of . . . (b) the application by a Member of a measure not conflicting with the provisions of this Charter, or (c) the existence of any other situation the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving them shall give sympathetic consideration thereto.

530. U.N. Econ. and Soc. Council Comm'n, Preparatory Committee of the U.N. Conf. on Trade and Employment, Second Sess., Comm'n A, Verbatim Report of Its Sixth Meeting, GATT Doc. E/PC/T/A/PV/6 (June 2, 1947) (Wilcox Statement) [hereinafter Sixth Delegation Meeting of Commission A, June 2, 1947].

der."[531] The nullification or impairment procedure was seen by Wilcox as "fundamental" to the establishment of rules governing economic relations among states.[532]

IX. THE GATT: A NEW CONTEXT FOR THE SECURITY EXCEPTION

With the failure of the U.S. Congress to approve the ITO, the GATT, a provisional agreement for the reciprocal reduction of tariffs and other restrictions on trade, had to fill its absence.[533] Eventually, the multilateral trade regime grew into the WTO and with it a more formal and legalized space than that which emerged from the GATT.[534] That the GATT was *not* an organization, like the ITO would have been, meant a new context for the interpretation of the security exceptions.[535]

Due to the timing of the GATT negotiation during the Geneva ITO preparatory session, the text of article XXI was largely transplanted from the ITO's New York and Geneva drafts.[536] Still, when the GATT Secretariat analyzed the final Havana Charter's security exceptions (now in article 99(1)(b)) and the security exceptions in article XXI(1)(b) of the GATT, it found the two nearly identical.[537]

Following Havana, there was discussion as to whether to review the GATT in light of the work completed in Havana on the ITO Charter, espe-

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531. *Id.* at 4. Compare this against the statements of Dr. Holloway, the South African delegate, who had raised alarm in Geneva about the power of the ITO bodies to pass judgment on national policies and to authorize sanctions for "political" decision-making. *Id.* at 14.

532. *Id.* at 4.

533. The ITO was never ratified, largely due to the U.S. decision to abandon the effort in 1950. *See* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 12–17 (1990) (setting out how the GATT tariff bargain grew into the WTO); HUDEC, *supra* note 65, chs. 4–5.

534. HUDEC, *supra* note 65; Pauwelyn, *supra* note 433, at 14; J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001).

535. *See* JACKSON, RESTRUCTURING THE GATT SYSTEM, *supra* note 533, at 18 (explaining that the GATT was not the ITO or an organization, and thus the GATT lacked "Members").

536. JACKSON, WORLD TRADE AND THE LAW OF GATT, *supra* note 43 at 45; *see also* Report of the Drafting Committee—New York Draft Charter and Draft GATT, *supra* note 274 at 65 (containing a draft GATT that confirmed that the "draft Agreement reproduces many provisions of the Charter," specifically the commercial policy chapter). While the discussions leading to the conclusion of the GATT offer the most interpretive value, the Havana discussions reveal further intentions of the delegations as to the separation of political and economic matters, as well as recourse to the nullification or impairment procedure. JACKSON, WORLD TRADE AND THE LAW OF GATT, *supra* note 43 at 46-49.

537. GATT Secretariat Note, Aug. 18, 1987, *supra* note 258, ¶ 5. The GATT lacked article 86(3) regarding political actions and the jurisdiction of the UN, though article XXI(c) did observe: "Nothing in this Agreement shall be construed . . . 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, art XXI(c), *supra* note 8.

cially with regard to the ITO's dispute resolution procedure.[538] The First Session of the GATT Contracting Parties established a Sub-committee on Supersession to consider the incorporation of certain articles of the Havana Charter into the GATT.[539] This GATT Sub-committee elected not to include certain parts of the ITO's dispute resolution procedure that were present in the Havana Charter in the GATT on the basis that "the form in which these articles appear in the Charter is not suitable for the General Agreement."[540] This is not too surprising, as the original plan was for the GATT to exist within the institutional setting of the ITO.[541]

In another example, in the Second Session for the GATT Contracting Parties, there was consideration as to whether to bring in the "general principles" of Chapters VII and VIII of the Havana Charter (which outlined the structure of the ITO and its dispute settlement procedure). Mr. Adarkar of the Indian delegation expressed his interest in referencing elements of the disputes procedure, quoting article 86(4) as an example.[542] This provision, Leddy argued, was already in article XXI(c) of the GATT.[543] Leddy further cautioned that certain governments "disliked" the idea of treating the Contracting Parties as "an organization" and that "it would be wise to omit referring to the chapters of the Charter dealing with procedural matters."[544] The Indian delegation later agreed to exclude reference to the chapters dealing with the organization, functions, and procedures of the ITO on the basis

538. *See generally*, HUDEC, *supra* note 65, at 56–62; JACKSON, RESTRUCTURING THE GATT SYSTEM, *supra* note 533, at 9–18.

539. The Sub-committee on Supersession reported to the GATT Contracting Parties on March 11, 1948 with a draft protocol for modifying certain provisions. *See* GATT Sub-committee on Supersession, Report to the Contracting Parties, GATT Doc. GATT/1/21 (Mar. 11, 1948) [hereinafter Sub-committee on Supersession, Report to the Contracting Parties].

540. *Id.* at 3.

541. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 113 (1997). *See* HUDEC, *supra* note 65 at 53–58 (explaining how the GATT negotiations thereafter reviewed the language of the GATT, making corrections if desired). In the "final analysis, the substantive differences between GATT and the final ITO Charter were not very great." *Id.* at 57.

542. GATT Contracting Parties, Second Sess., Summary Record of the Seventeenth Meeting, at 6, GATT Doc. GATT/CP.2/SR.17 (Sept. 2, 1948) [hereinafter Summary Record of the 17th Meeting]. Article 86(4) of the Havana Charter reads: "No action, taken by a Member in pursuance of its obligations under the United Nations Charter for the maintenance or restoration of international peace and security, shall be deemed to conflict with the provisions of this Charter." 1948 Havana Charter, *supra* note 64.

543. *Id.*

544. *Id.* Hudec analyzed the review of the GATT in light of the Havana Charter, and concluded that, as "the leading countries saw it, the original GATT was not intended to be a comprehensive world organization." HUDEC, *supra* note 65, at 57. *See also* SUSAN AARONSON, TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY 130-132 (1996) (explaining how U.S. officials abandoned the ITO to preserve successful GATT negotiations); BROWN, *supra* note 425; IRWIN ET AL., *supra* note 65; JACKSON, THE WORLD TRADING SYSTEM, *supra* note 541, at 113; Miller, *supra* note 3.

"the contracting parties must regard themselves morally bound not to go back on the principles evolved at Havana."[545]

X. Application to Russia—Traffic in Transit

Decades later, analyzing a dispute under GATT XXI(1)(b)(iii), the *Russia—Traffic in Transit* panel echoed the DOS's proposed bifurcated analysis of Havana Charter article 99, but it also imposed a good faith requirement on WTO Members invoking the security exception provision. Like the DOS, the WTO panel divided the legal analysis of article XXI(b) into different elements.[546] First, the invoking member must demonstrate objectively that its measure falls under one of the circumstances enumerated in article XXI(b). The panel found that whether a measure qualifies as one of the enumerated actions in the subparagraphs of Article XXI(b) GATT, such as "supplying a military establishment" or "emergency in international relations," was an "objective fact," amenable to "objective determination" by a WTO panel.[547]

The WTO panel then considered the chapeau of article XXI GATT. Under the chapeau, an invoking member must "sufficiently"[548] articulate the "essential security interests" it seeks to protect.[549] The panel understood the term "essential security interests" in the sense of the "quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[550] In addition, the invoking member must meet "a minimum requirement of plausibility" that the measures taken were protective of its essential security interests.[551]

The WTO panel limited Member discretion in this area through the "obligation of good faith," which is "a general principle of law and a principle of general international law" as codified in articles 26 and 31 of the Vienna Convention on the Law of Treaties.[552] The obligation of good faith requires Members not "re-label[] trade interests" as "essential security interests,"

545. GATT Contracting Parties, Second Sess., Summary Record of the Eighteenth Meeting, at 2, GATT Doc. GATT/CP.2/SR.18 (Sept. 3, 1948).

546. *See supra* note 8 and accompanying text.

547. Panel Report, *Russia—Traffic in Transit*, *supra* note 4, ¶¶ 7.64, 7.77.

548. What qualified as "sufficient" depended on a WTO panel's determination of how "characteristic" the member's essential security interests are to the circumstances described in the subparagraphs of article XXI(b). In the *Russia—Traffic in Transit* dispute, this meant the panel evaluated how "characteristic" the "emergency in international relations" was; *i.e.*, how "obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise." *Id.* ¶ 7.135.

549. *Id.* ¶ 7.134.

550. *Id.* ¶ 7.130.

551. *Id.* ¶ 7.138.

552. *Id*. ¶ 7.132.

thereby circumventing the rules and norms established by the multilateral trade system.[553]

As to the "subjective" evaluation of article XXI GATT, the panel determined that the adjectival clause "which it considers" meant that "it is for Russia to determine the 'necessity' of the measures for the protection of its essential security interests."[554]

It remains to be seen how the current national security controversies will be resolved at the WTO. Despite the vital nature of security concerns, several scholars concluded that the WTO panel's analysis reinforced (and championed) WTO adjudication as a necessary element in establishing international stability in the multilateral trade system.[555] Trade scholar Nicolas Lamp has offered a convincing argument that where Members have invoked article XXI GATT, they may "sidestep" the debates about the self-judging and non-justiciable nature of article XXI by seeking non-violation nullification or impairment claims.[556] Lamp's recommendation would allow WTO Members to address trade-security disputes while avoiding escalation, and returns the focus to "the level of benefits which have been nullified or impaired."[557] In this way, Lamp seeks to maintain the functions of trade multilateralism for all WTO Members, which U.S. negotiators once believed was a necessary element for the success of each participating country and the global economy overall.

XI. CONCLUDING THOUGHTS

The goal of this article is to shed light on contemporary questions and concerns involving national security and international trade, particularly questions involving the appropriate invocation of article XXI GATT, through careful attention to the article's historical context. The article began by elucidating the diverse strategic and economic considerations that shaped

553. *Id.* ¶ 7.133 (drawing attention to the commitments under the GATT and the WTO Agreement).

554. *Id.* ¶ 7.146.

555. *See generally* Geraldo Vidigal, *WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed—Something Blue?* 46 LEGAL ISSUES ECON. INTEGRATION 203 (2019) (offering an in-depth assessment of the panel report); Benton Heath, *Trade, Security, and Stewardship (Part I): The Russia—Transit Report's Vision of WTO Dispute Settlement*, INT'L ECON. L. & POL'Y BLOG (May 5, 2019, 6:59 PM), https://ielp.worldtradelaw.net/2019/05/guest-post-trade-security-and-stewardship-part-i-the-russia-transit-reports-vision-of-wto-dispute-se.html.

556. Nicolas Lamp, *Why WTO Members Should Bring Pure Non-Violation Claims Against National Security Measures*, INT'L ECON. L. & POL'Y BLOG (Oct. 15, 2018, 10:24 AM), https://worldtradelaw.typepad.com/ielpblog/2018/10/guest-post-why-wto-members-should-bring-pure-non-violation-claims-against-national-security-measures.html; Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, 1869 U.N.T.S. 40, art. 26 (1994).

557. Lamp, *supra* note 556.

the meaning of U.S. national security interests at the time when national delegations were drafting the post-war multilateral trade system, the ITO. It provided the internal deliberations of U.S. officials who served as key architects of the multilateral trade system and of the ITO Charter's security exceptions. The article then demonstrated how U.S. interests, in turn, created the language, phrasing, and placement of the security exceptions within the ITO Charter, and it details when and to what extent this language was adopted in the GATT. Throughout this process, the article offered an informative look at how U.S. negotiators balanced inclusion of security exceptions, a necessary political reality, with the goals and functions of trade multilateralism.[558]

The insights introduced by this article help illuminate, but also complicate, current debates about the interpretation of article XXI GATT. First, the article reveals that U.S. negotiators sought to balance competing U.S. concerns, particularly the demands of U.S. national security and defense, with the benefits of developing the U.S. and international economies through trade multilateralism. The Services Departments desired that the proposed ITO Charter contain broad security exceptions to protect the United States and advance its interests, without any other Member's approval. Services appeared little concerned with how other ITO Members could apply such exceptions. By contrast, the DOS opposed broad exceptions for security that would apply at a Member's unilateral determination.

Why would the most powerful negotiating state at the time not seek a self-judging, non-justiciable exception article? The Department of State's negotiators often repeated the same argument—which formed a pattern that shaped the security exceptions: National security could not exist in opposition to the ITO; it would have to co-exist within it *because* freer trade was better for the world, and the United States, in the long-term.

The Cold War and building tensions between the United States and the Soviet Union framed a multiplicity of U.S. national security concerns, which impacted the formulation of the security exceptions. While the Soviet Union never participated in the drafting of the ITO Charter, U.S. negotiators sought to develop the ITO as an institution for trade liberalization and non-discriminatory trade, which could be used to build an interdependent global economy. In this light, officials from the U.S. State Department wanted the ITO to bind Members together, making the success of the ITO an economic and strategic goal. DOS officials believed it was better to tear down walls by opening trade than to use the concept of national security to build them up. Even beyond the DOS's concerns of abuse of broadly written security exceptions, archived materials reveal that U.S. negotiators refused to allow a broadly scoped provision to unravel other hard-fought compromises made with other governments.

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558. *See* 1 PETROS C. MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE 479–480 (2016).

To achieve balance between competing U.S. agencies, the U.S. negotiators had to compromise. U.S. proposals paired open-ended phrases and self-judging language with enumerated circumstances that limited the types of actions that qualified under the exceptions. Open-ended terms and phrases could, when reported to officials in Washington, seem to comply with the demands for total U.S. discretion over security policies in the future. The language allowed ITO members to determine for themselves what was "necessary for the protection of its essential security interests." But to constrain abuse, the negotiators also drafted in factual questions about the actions taken by invoking Members, such as whether they were "relating to fissionable materials;" "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials;" or "taken in time of war or other emergency in international relations." Over seventy years later, a WTO panel adopted this same approach in the first formal dispute over invocation of article XXI GATT.

This article also provides insights into how the national security exceptions would have operated within the ITO's legal design. If the United States (or another ITO Member) had a *bona fide* national security problem, the DOS believed that the ITO membership would not challenge measures taken in response.[559] Yet where such a security measure nullified or impaired the benefits accruing to a Member under the Charter, the ITO offered a forum for Members to restore the "mutuality of obligations and benefits."[560] This "non-violation complaint" procedure emphasized redress rather than an evaluation of the merits of security actions.[561] It aimed to restore the "careful balance of the interests of the contracting States."[562]

But, crucially, advocating access to non-violation complaints did not resolve a larger question as to how the ITO would regulate or address potential abuses of the security exceptions. As the internal U.S. materials suggest, the DOS attempted to answer this question by making the exceptions subject to the ITO's dispute settlement mechanism and by bifurcating the interpretive steps required to invoke a security exception. Though some aspects of the exceptions' invocation were considered subjective, Members could only invoke an exception if they could demonstrate that their security actions were among those enumerated as permissible.

Ultimately, this article also informs our understanding of the evolution of the world trade system. Over the past seventy years, the language of the security exceptions has remained unchanged, whereas the approach to resolving trade disputes between governments has not.[563] Despite an evolu-

559. *See supra* text accompanying notes 347–353.

560. Sixth Meeting of Commission A, June 2, 1947, *supra* note 530, at 5.

561. *See* Verbatim Report of the Thirty-Third Meeting of Commission A, *supra* note 420, at 27.

562. Sixth Meeting of Commission A, June 2, 1947, *supra* note 530, at 5.

563. While Article XXI GATT has not been amended, the contracting parties adopted a Decision Concerning Article XXI of the GATT in 1982, setting forth procedural guidelines

tion from the GATT to the WTO, the original rationale for the ITO's nullification or impairment procedure continues to exist within WTO dispute settlement, and the procedure is found within article XXIII of the GATT. This ITO procedure offered a legal basis for Members to claim damages without having to point to specific illegality by another Member under the Charter rules. Clair Wilcox, the lead U.S. negotiator for the U.S. delegation, explained the value the United States placed on this procedure, then article 35(2) of the Geneva Charter draft: "We have introduced a new principle into international economic relations. We have asked the nations of the world to confer upon an international organization the right to limit their power to retaliate."[564] And, in light of the nascent dispute settlement mechanism, Members recognized that peaceful resolution of disputes depended on informal techniques and norms– described as the ITO's "atmosphere" or "spirit."

The article provides not only context for evaluation of WTO Members' interpretations of article XXI GATT but also a fascinating story as to how different U.S. agencies competed to define U.S. national security policy. The State Department advocated that trade multilateralism was a necessary ingredient for national security. If that has changed over the course of time, then our next question must be: Why?

for the application of article XXI. *See* GATT, Decision Concerning Article XXI of the General Agreement, GATT Doc. L/5426 (Dec. 2, 1982) (setting out, *inter alia*, a requirement that contracting parties should "be informed to the fullest extent possible of trade measures taken under Article XXI"). For information on the transformation from GATT to WTO, *see supra* note 550 and accompanying text.

564. Sixth Meeting of Commission A, June 2, 1947, *supra* note 530, at 4.