

# Let's Agree to Disagree: A Strategy for Trade-Security

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## ABSTRACT

Deliberation of trade security is crucial for maintaining multilateral coordination and enabling governments, businesses, and individuals to navigate global economic networks. World Trade Organization (WTO) members' mounting invocations of security-based trade restrictiveness increasingly challenge an institution that requires persistent coordination and transparency to function. WTO members need space to discuss—and disagree with—the intersection of security and trade policies. While members make use of existing WTO institutions and procedures, the exceptionalism and secrecy of security hinder notification, and review of security-rooted trade practices. This article provides a descriptive analysis and prescriptions for WTO institutional techniques for addressing members' security-related measures daily—that is, on a routine basis, via trade policy review and WTO notification processes. It shows that the trade community already possess the tools to manage the growing issue-area of trade and security.

## I. INTRODUCTION

Foreign trade as an instrument of 'national power'—a power to coerce other states—has long influenced trade relationships.<sup>1</sup> The post-World War II multilateral trading system, however, requires governments to treat trade and security policies analytically separate, though such a separation has always been more theoretical than real. An implicit agreement among the trading community was not to make the post-war General Agreement on Tariffs and Trade (GATT) about the securitization of trade. Economic interdependence and restoration of the global economy required states to liberalize trade (as a rule) and act to protect their essential security interests (as an exception).<sup>2</sup> To champion trade liberalization as (at least part of) insulation from

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<sup>1</sup> See generally, Albert O. Hirschman, *National Power and the Structure of Foreign Trade*, 1st ed. (Berkeley; Los Angeles: University of California Press, 1945).

<sup>2</sup> See Article XXI of the General Agreement on Tariffs and Trade (GATT), 30 October 1947, 55 U.N.T.S. 188; Article XXI of the GATT 1947 is almost identical to the language in the security exceptions respecting trade in services and trade-related aspects of IP rights. See, e.g. Article XIV *bis* of the General Agreement on Trade in Services (GATS), 15 April 1994, 1869 U.N.T.S. 183; Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, 1869 U.N.T.S. 299; see also Article III of the Agreement on Government Procurement, 1915 U.N.T.S. 103 (as amended on 30 March 2012).

future war, states carefully presented security concerns as trade interests.<sup>3</sup> Security persisted but was not the language by which trade negotiators and delegations spoke.<sup>4</sup> Still, security and trade interests remained interconnected despite the legal framework that set them up as antinomies.

Today, security and trade pull against one another, each demanding its own 'exclusivity'.<sup>5</sup> That pull challenges the multilateral trading system, now organized under the World Trade Organization (WTO). International trade policies are increasingly reflecting a national security mentality. Unpredictable dynamics in the global economy, such as the Russian invasion of Ukraine, foster insecurity.<sup>6</sup> Technological innovations, warming temperatures, and pandemics have altered the prevailing wisdom that international rules foster economic growth.<sup>7</sup> Leading economies are re-evaluating the gains of trade. China and the USA take a 'combative approach', aiming to secure their economic and geopolitical interests and weaken competitors in strategically essential sectors.<sup>8</sup> Leaders increasingly caution about the 'erosion of the multilateral trading system' and fear that interdependence exposes them to networked coercion.<sup>9</sup> Moreover, the scope for open, non-discriminatory trade will shrink if the larger economy members reorient their engagement around security interests—even more so if they invoke security exceptions without limitations. What is the role of the WTO in facing these persistent crises? Do members possess the institutional support needed to discuss security measures without clearly defined limits or those that do not directly correlate to an identifiable security threat?

The worst outcome will be if members stop using the WTO altogether, bypassing it through unilateral measures.<sup>10</sup> For example, the USA is choosing to ameliorate trade insecurities with select 'like-minded allies' through WTO-external diplomatic talks.<sup>11</sup> These initiatives may be productive. Nevertheless, these unilateral activities cut starkly against the WTO's multilateral nature. Moreover, such detours do nothing to resolve 'principal antagonisms' within the global economy or growing tensions between the heterogenous WTO membership.<sup>12</sup> Ultimately, the WTO is at the service of its members who drive its mandate and functions. Members choose how the WTO assists in the development of trade policies for economic resilience in response to the growing reconceptualization and operation of national security priorities.<sup>13</sup>

Without WTO-wide discussions about the growing invocation of security in trade actions, a select group of powerful, advanced economy members will reframe the relationship between trade and security. Due to their relative market strength, these elite members will forge a new status quo for *all* WTO members, requiring the latter to conform to rules designed by the powerful. However, crucially, this will not occur through established legislative processes to change the existing trade-offs between security and efficiency within the WTO rules architecture.

It remains unclear whether the GATT security exceptions apply to other agreements concluded in the Uruguay Round, see Second Written Submission, Hong Kong China, *United States—Origin Marking Requirement*, WT/DS597, 11 November 2021, para 134.

<sup>3</sup> Francine McKenzie, *GATT and Global Order in the Postwar Era* (New York: Cambridge University Press, 2020) 102.

<sup>4</sup> *Ibid.*

<sup>5</sup> Kathleen Claussen, 'Trade's Security Exceptionalism', 72 (5) *Stanford Law Review* 1097 (2020), at 1154.

<sup>6</sup> WTO Secretariat, 'The Crisis in Ukraine: Implications of the War for Global Trade and Development' (WTO, 2022); Jonathan Masters, 'Ukraine: Conflict at the Crossroads of Europe and Russia', *Council on Foreign Relations*, 11 October 2022.

<sup>7</sup> Alan Beattie, 'Trade Policy Will Not Determine the Future of Globalisation', *Financial Times*, 5 September 2022; Anthea Roberts and Nicolas Lamp, *Six Faces of Globalization* (Cambridge: Harvard University Press, 2021) 39–41.

<sup>8</sup> Jessica Chen Weiss, 'The China Trap', *Foreign Affairs*, September/October 2022; see below Section IIB and notes therein.

<sup>9</sup> Henry Farrell and Abraham L. Newman, 'Weaponized Interdependence and Networked Coercion: A Research Agenda', in Daniel W. Drezner, Henry Farrell, and Abraham L. Newman (eds), *The Uses and Abuses of Weaponized Interdependence* (Washington: Brookings Institution Press, 2021) 318. See, e.g. Arancha González Laya, 'Global Insecurity is No Reason to Divest from the WTO', *Financial Times*, 19 May 2022.

<sup>10</sup> Mariana Mota Prado and Michael J. Trebilcock, *Institutional Bypasses* (Cambridge: Cambridge University Press, 2019) 134.

<sup>11</sup> See, e.g. the Biden Administration's proposal for a 'new Presidential Forum' to expand engagement on supply chain vulnerabilities, in *The White House*, 'Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-based Growth: 100-day Reviews under Executive Order 14017', June 2021.

<sup>12</sup> The phrase 'principal antagonisms' is from Robert Wolfe, 'Canada's Adventures in Clubland: Trade Clubs and Political Influence', in Chris Kukucha and Duane Bratt (eds), *Readings in Canadian Foreign Policy: Classic Debates and New Ideas* (Toronto: Oxford University Press, 2011) 181–197, at 192 (referring to those states that take principal, but opposing, sides on matters); see Amrita Narlikar, 'How Not to Negotiate: The Case of Trade Multilateralism', 98 (5) *International Affairs* 1553 (2022).

<sup>13</sup> See WTO Secretariat, 'World Trade Report 2021, Economic Resilience and Trade' (WTO, 2021), at 7.

Left unchecked, the WTO will institutionally drift.<sup>14</sup> Without consensus, drift captures an unspoken reorientation of trade towards the terms of the few. Other members invested in an open, global economy are either side-lined, left to pick sides, or forced to prioritize self-sufficiency.<sup>15</sup>

WTO members need space to discuss—and disagree with—the intersection of security and trade policies. Open, frank discussion of trade security is crucial for maintaining multilateral coordination and enabling governments, businesses, and individuals to navigate global economic networks.<sup>16</sup> WTO members talk about security at the WTO with greater frequency. Still, as security becomes less exceptional, members must adapt trade deliberation to the present (and future) reality of trade politics and practices based on security concerns. Discussing the interconnections between trade and security makes it possible for ‘keeping the game going,’ as Friedrich Kratochwil put it, ‘by providing the participants [of an institution] with the necessary information’ to allow for “debates” about behaviour and practices.<sup>17</sup> In particular, members need clear strategies to manage the opacity of security interests within an institution designed to facilitate transparent, deliberative processes. Talking and information sharing may seem insufficient, but they remain a critical first step to rethinking how the WTO can remain relevant.

This article proceeds as follows. [Section II](#) provides an analytical description of how members reimagined the relationship between essential security interests and trade interests. [Section III](#) then evaluates WTO institutional procedures for addressing WTO notification and review. [Section IV](#) explains how members use existing WTO procedures to raise security concerns and justify trade actions, with an assessment of the implications of security exceptions in the covered WTO agreements. [Section V](#) turns prescriptive and assesses how WTO members can build upon existing techniques to develop a sound infrastructure for members changing trade policies and practices based on security, resilience, or efficiency. [Section VI](#) concludes.

## II. MAPPING TRADE-SECURITY ISSUES

This section highlights how members’ security interests change over time in unpredictable ways. It sets up subsequent analysis that evaluates how the prevalence of security in trade policies and practices implicates the tools members can use to resolve tensions between economic and security interests. The accumulation of these changing interests tests the WTO’s ongoing relevance, from an old world that did not foresee intra-member strife to a new world where members regularly invoke national security to restructure their economic relationships.<sup>18</sup>

### A. Geopolitical conflicts and rethinking economic security

The WTO encounters geopolitical tensions within formal disputes and outside of them. For instance, Ukraine brought a dispute to the WTO over Russia’s trade barriers following Russia’s invasion and later annexation of Crimea in 2014.<sup>19</sup> Outside formal disputes, in 2019, India revoked Pakistan’s most-favoured-nation (MFN) tariff entitlement to all imports from Pakistan because it essentially wanted a divorce.<sup>20</sup> Pakistan, in

<sup>14</sup> Jacob S. Hacker, ‘Policy Drift: The Hidden Politics of US Welfare State Retrenchment’, in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (New York: Oxford University Press, 2005) 40–82.

<sup>15</sup> See Eddy Bekkers and Carlos Góes, ‘The Impact of Geopolitical Conflicts on Trade, Growth, and Innovation: An Illustrative Simulation Study’, *VoxEU CEPR*, 29 March 2022.

<sup>16</sup> See Harlan Cohen, ‘The Plural Sources of Customary International Law’ (working paper, on file with author).

<sup>17</sup> Friedrich Kratochwil, ‘Norms versus Numbers’, in John Gerald Ruggie (ed.), *Multilateralism Matters* (New York: Columbia University Press, 1993) [443–475], 448.

<sup>18</sup> See also Dani Rodrik, ‘How to Construct a New Global Order’ Harvard Working Paper (2021).

<sup>19</sup> See *Russia—Measures Concerning Traffic in Transit—Report of the Panel*, WT/DS512/R/, 5 April 2019 [hereinafter DS512 panel report].

<sup>20</sup> Kirtika Suneja, ‘Pakistan’s Most-Favoured Nation Status Scrapped’, *The Economic Times*, 16 February 2019.

turn, denied MFN treatment to India and prohibited exports to India (except for therapeutic drugs).<sup>21</sup> Pakistan asserted that it 'has never statedly denied MFN treatment' and instead requires 'special measures' from India on the grounds of national security.<sup>22</sup> Divorce aside, Pakistan and India sponsored proposals for greater flexibility in intellectual property rights for developing countries dealing with the coronavirus (COVID-19) pandemic.<sup>23</sup>

At present, there remains no clear end to the war in Ukraine.<sup>24</sup> Commentators debate when the war 'began', what an 'end' should entail, and who decides the terms of that ending.<sup>25</sup> Nicholas Mulder speculates that unless Ukraine sees success on the battlefield, Western sanctions will become a 'quasi-permanent feature of Russian-Western relations.'<sup>26</sup> The economic war captured between the West and Russia breaks pre-existing assumptions that participation in a multilateral trading system ensures peace.<sup>27</sup> Indeed, the Western sanctions and Russia's countersanctions created international economic disruptions because of these members' deep economic linkages, not despite them.<sup>28</sup> Not yet fully understood is the extent of the impacts of the war on third-party economic interests. However, there is evidence of third-party members taking trade-restrictive actions in response to the effects caused by the war.<sup>29</sup> It confirms what many members already know—trade disputes can manifest into a global crisis, creating a mess of impacted, diverse interests.

It is equally true, however, that while members regularly use trade to achieve geostrategic ends, there is a growing sense of a paradigm shift in the logic of trade—with leading economy members reassessing the costs of trade to their essential security.<sup>30</sup> The indeterminacy of the WTO's security exceptions accommodates members' novel security concerns and can legitimise domestic policy space.<sup>31</sup> In this sense, unilateral action under a broadened understanding of security can be a positive change for the multilateral trading system in exceptional cases.<sup>32</sup> This logic motivates the USA's assertion that climate change is a security issue, for example.<sup>33</sup>

Overall, the war in Ukraine, with its humanitarian crisis, energy shocks, and food-supply disruptions, persists alongside global climate challenges and ongoing geostrategic rivalries. Repeated invocations of security are already happening within the WTO. Yet, some members prefer to see security as beyond the scope of the WTO agreements—for the WTO is a place of

<sup>21</sup> Report by the Secretariat, 'Trade Policy Review: Pakistan' WT/TPR/424, 23 February 2022, paras 2.23 and 3.63.

<sup>22</sup> *Ibid.*, para 2.23.

<sup>23</sup> Asit Ranjan Mishra, 'India, Pak Bonhomie at WTO Blossoms Despite Fractious Bilateral Relations', *Business Standard*, 16 August 2022.

<sup>24</sup> Patricia Zengerle, Idrees Ali, and Doina Chiacu, 'Russia's Invasion of Ukraine at 'Bit of a Stalemate'—U.S. intel official, *Reuters*, 10 May 2022.

<sup>25</sup> See, e.g. David E. Sanger, Steven Erlanger, and Eric Schitt, 'How does it End? Fissures Emerge Over What Constitutes Victory in Ukraine', *New York Times*, 26 May 2022; Andrew Latham, 'The Folly of Humiliating Russia', *The Hill*, 25 May 2022; Daniel W. Drezner, 'On the Question of Russian Humiliation', *The Washington Post*, 18 May 2022.

<sup>26</sup> Nicholas Mulder, 'The Toll of Economic War', *Foreign Affairs*, 22 March 2022.

<sup>27</sup> See, e.g. Hirschman, above n 1, at 81 ('The internationalisation of power over external economic relations would go far toward the goal of a peaceful world').

<sup>28</sup> Trade Policy Review Body, 'Report of the TPRB from the Director-General on trade-related developments, mid-October 2021 to mid-May 2022', WT/TPR/OV/W/16, 13 July 2022, para 3.23 [hereinafter DG Report on TPRB 2022]; see Ezra Klein, 'Transcript: Ezra Klein Interviews Adam Tooze', *The New York Times*, 1 March 2022.

<sup>29</sup> DG Report on TPRB 2022, above n 28, paras 3.29–3.32; WTO, 'The crisis in Ukraine, implications of the war for global trade and development' (2022), at 4.

<sup>30</sup> See Amrita Narlikar, 'How Not to Negotiate: The Case of Trade Multilateralism', 98 (5) *International Affairs* 1553 (2022), at 1566.

<sup>31</sup> J. Benton Heath, 'The New National Security Challenge to the Economic Order', 129 (4) *The Yale Law Journal* 1020 (2020), at 1081; Gregory Shaffer, 'Governing the Interface of U.S.-China Trade Relations', 115 (4) *American Journal of International Law* 622 (2021); Timothy Meyer, 'The Political Economy of WTO Exceptions', 99 *Washington University Law Review* 1299 (2022).

<sup>32</sup> Alan Wolff, 'State of Multilateral Governance in Times of Increasing Unilateralism', PIIE Working Paper (2022); see Timothy Meyer and Todd N. Tucker, 'A Pragmatic Approach to Carbon Border Measures', 21 (1) *World Trade Review* 109 (2022), at 111.

<sup>33</sup> The White House, 'Fact Sheet: Prioritizing Climate in Foreign Policy and National Security', 21 October 2021; see also The White House, 'National Security Strategy of the United States of America', February 2015.

economics, not politics.<sup>34</sup> Ultimately, the increasing securitization of trade strikes at the WTO more existentially—for some members, when it comes to security, there may be nothing to negotiate about; no predictable rules needed; and no level playing field desired.<sup>35</sup>

## B. A response to the securitization of trade: anti-coercion instruments and resilient trade policies

A series of shocks—from Brexit to the COVID-19 pandemic to the war in Ukraine—revealed to the world which countries dominate critical supply nodes in the interconnected global economy and which do not. Weaponized interdependence occurs when a state with asymmetric power, relative to other states, can control a networked hub (such as a supply chain) for geostrategic objectives.<sup>36</sup> Such coercive practices are possible in 'essential globalized networks that create high levels of interdependence among states.'<sup>37</sup> Globalization enables states with authority over 'central economic nodes' to 'weaponize networks' for information culling or to 'choke off economic and information flows, discover and exploit vulnerabilities, compel policy change, and deter unwanted actions.'<sup>38</sup> The idea of strategic controls being 'weaponized' has become common parlance among policymakers.<sup>39</sup> Russia's block of grain exports to Middle Eastern countries led commentators to describe Russia's 'weaponization of food.'<sup>40</sup> Russia's capacity to cut energy supplies to European Member States in retaliation for western sanctions reinforces how control of energy markets has geostrategic consequences.<sup>41</sup>

For some WTO members, the security consequences of global economic interdependence require rethinking tools for managing supply chains.<sup>42</sup> For instance, China began ramping up domestic manufacturing through its Made in China 2025 initiative to challenge the USA's dominance in the semiconductor industry.<sup>43</sup> The USA sees its economic leadership in this sector as crucial to its security. The USA's response was supply chain 'resilience' and prioritizing 'ties' with 'countries that have a strong adherence to a set of norms and values about how to operate in the global economy'<sup>44</sup> Described as 'friend-shoring', the expected outcome is that 'friends' will not 'unfairly damage' US economic security.<sup>45</sup>

Additionally, the USA plans to support domestic innovation and manufacturing and export controls on China to 'impair' China's manufacturing of advanced semiconductors.<sup>46</sup> As US National Security Advisor Jake Sullivan put it, such trade controls are a 'strategic asset in the USA and allied toolkit to impose costs on adversaries, and even over time degrade their battlefield

<sup>34</sup> Communication from the Russian Federation, WT/GC/245, 16 March 2022 ('[T]he only way of dealing with the current crisis is to talk economics, not politics'). See DSS12 panel report, above n 19, at note 139.

<sup>35</sup> Cf. WTO, 'Overview', [https://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm). For similar thinking, see Nicolas Lamp, Twitter, 8 October 2022, [https://twitter.com/nicolas\\_lamp/status/1578547797049372672?s=20&t=IEI1KrQpQvEUkGihMwxNew](https://twitter.com/nicolas_lamp/status/1578547797049372672?s=20&t=IEI1KrQpQvEUkGihMwxNew) (visited 18 November 2022).

<sup>36</sup> Farrell and Newman, above n 9. See Henry Farrell and Abraham L. Newman, 'Weaponized Interdependence and Networked Coercion: A Research Agenda', in Drezner, Farrell, and Newman (eds), *The Uses and Abuses of Weaponized Interdependence* (Washington: Brookings Institution Press, 2021) 309–11.

<sup>37</sup> *Ibid.*, at 309.

<sup>38</sup> Farrell and Newman, above n 9, at 45.

<sup>39</sup> See, e.g. Henry Mance, 'Sabine Weyand: "The EU Found out We Are Dependent on Russia. We Can't Afford That"', *Financial Times*, 12 September 2022.

<sup>40</sup> John Feffer, 'The Weaponization of Food', *Foreign Policy in Focus*, 27 July 2022; see also Amrita Narlikar, 'How Not to Negotiate: The Case of Trade Multilateralism', 98 (5) *International Affairs* 1553 (2022), at 1564.

<sup>41</sup> Michael E. Webber, 'Russia's Weaponization of Natural Gas Could Backfire by Destroying Demand for It', *The Conversation*, 29 April 2022; Reuters, 'Russia Using Energy as Weapon, White House Says about Nord Stream Shutdown', 2 September 2022; Farrell and Newman, above n 9, at 42.

<sup>42</sup> Henry Farrell and Abraham L. Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion', 44 (1) *International Security* 42 (2019).

<sup>43</sup> FP Analytics, 'Semiconductors and the U.S.-China Innovation Race', *Foreign Policy*, 16 February 2021.

<sup>44</sup> Atlantic Council, 'Transcript: US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and "Friend-Shoring" Supply Chains', 13 April 2022.

<sup>45</sup> *Ibid.*

<sup>46</sup> Alexandra Alper and Karen Freifeld, 'U.S. Considers Crackdown on Memory Chip Makers in China', *Reuters*, 1 August 2022.



capabilities.<sup>47</sup> In October 2022, the Biden administration announced broad export controls to target China's advanced semiconductor industry (with a 'novel' restriction on US citizens and firms from selling equipment with critical chip technology to China or otherwise supporting Chinese companies involved in advanced semiconductor manufacturing).<sup>48</sup> The USA's plans add to mounting concerns about the resurgence of trade blocs and fragmentation in the WTO.<sup>49</sup> From Taiwan's perspective as a global supplier of advanced semiconductors, its advanced chip industry is rooted in its national security and self-governance.<sup>50</sup> This creates a cross-pollination of security issues as, for example, any effort by the USA to develop ties with Taiwan is met with military manoeuvres by China.<sup>51</sup>

Members have adapted their behaviour to address trade and security in complex interdependence, despite the unpredictability of other actors' actions or reactions.<sup>52</sup> For the USA, friend-shoring comes along with strict controls and support of domestic initiatives to secure its tech sector. The pursuit of security led the European Union (EU) to propose a new anti-coercion instrument to 'counteract' coercive practices with 'response measures' that are external to the WTO's institutional procedures.<sup>53</sup> Even where security interests are not in play, Brazil's new legislation enables it to unilaterally take retaliation measures in the event a respondent member appeals a WTO dispute settlement report 'into the void'.<sup>54</sup> These legal innovations enable a readiness to 'go it alone', if needed but do little to settle the unknowable repercussions of doing so.<sup>55</sup>

### C. Sticky problems with unbound security measures

The WTO rules do not set boundaries to any member's prioritization of security interests over its WTO obligations. Members never drew up rules for circumstances where security interests create moving targets. Nor did they anticipate expiration dates for security-based actions. Thus, the WTO rules fail to delineate progress: states are either in a closed, security-justified box or not. Strategic actions may be sudden and discrete or a slow, permanent reframing of trade relations. The USA, for example, presents an example of national security creep—concerns with international commerce that implicate security risks over time and are dependent on a series of incremental steps rather than a single moment.<sup>56</sup>

Within the circumstances accounted for by the GATT security exceptions, only one refers to time. The panel in *Russia-Traffic in Transit* confirmed that the language 'in time of' within Article XXI:b(iii) of the GATT necessitated a 'chronological concurrence', whereby the 'action' had to be taken 'during' the 'war' or 'emergency'.<sup>57</sup> In this sense, the multilateral trading system

<sup>47</sup> The White House, 'Remarks by National Security Advisor Jake Sullivan at the Special Competitive Studies Project Global Emerging Technologies Summit', 16 September 2022; see Demetri Sevastopulo and Kathrin Hille, 'US Hits China with Sweeping Tech Export Controls', *Financial Times*, 7 October 2022.

<sup>48</sup> Demetri Sevastopulo and Kathrin Hille, 'US Hits China with Sweeping Tech Export Controls', *Financial Times*, 7 October 2022.

<sup>49</sup> See Bryce Baschuk, 'WTO Dysfunction Marks Turning Point to New Era of Trade Tensions', *Bloomberg*, 8 June 2022; Branko Milanovic, 'Let's go back to mercantilism and trade blocs!' Global Inequality and More 3.0 Substack, 18 October 2022.

<sup>50</sup> Paul Mozur, John Liu, and Raymond Zhong, "'The Eye of the Storm': Taiwan Is Caught in a Great Game over Microchips', *New York Times*, 29 August 2022.

<sup>51</sup> *Ibid.*

<sup>52</sup> See also Thomas Oatley, 'Toward a Political Economy of Complex Interdependence', 25 (4) *European Journal of International Relations* 957–78 (2019).

<sup>53</sup> European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the protection of the Union and its Member States from Economic Coercion by Third Countries', COM (2021) 775, (2021); see Freya Baetens and Marco Bronckers, 'The EU's Anti-Coercion Instrument: A Big Stick for Big Targets', *EJIL: Talk!*, 19 January 2022.

<sup>54</sup> Provisional Measure No. 1098 of 2022 (Breach of obligations by WTO member), [http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2022/lei/L14353.htm](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/L14353.htm) (visited 18 November 2022). I thank Henrique Choer Moraes for the discussion and the translation of the proposal.

<sup>55</sup> See Alan Beattie, 'Biden Goes It Alone in His Trade Assault on China', *Financial Times*, 20 October 2022.

<sup>56</sup> For example, White House, 'Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States', 15 September 2022.

<sup>57</sup> DS512 panel report, above n 19, paras 7.70, 7.77.

treats wartime and situations of emergency as discrete—a temporary (reversible) deviation from trade liberalization and the GATT norms of reciprocity, transparency, and non-discrimination.<sup>58</sup> Any member may release itself from the core WTO ‘reciprocal and mutually advantageous arrangements’ by invoking security in good faith.<sup>59</sup> There is no guidance on constantly maintained ‘wartime’ or a ‘forever war’.<sup>60</sup>

Historians have challenged the conceptualization of war and security as discrete by showing how wartime planning is endemic.<sup>61</sup> Mary Dudziak calls for attentiveness to ‘wartime’ as a political argument; rather than ‘discrete’ events ‘destined to give way to a state of normality’, wartime is ‘ongoing’ and an ‘urgent occasion for politics.’<sup>62</sup> By being ‘exceptional’ to the WTO rules, governments should—at some point—restore their reciprocal, mutually advantageous commitments under the WTO agreements.<sup>63</sup> However, the reality is that certain security interests are not time-bound; the USA’s technological competition with China, for instance, has no clear end. Without any guidance from WTO institutions on understanding the trade-security nexus, strategic trade policies can transition from temporary, discrete events to permanent ones without question.

### III. WTO TRANSPARENCY AND ACCOUNTABILITY

To discuss all interests impacted by trade, WTO members have three avenues: negotiating new rules, dispute settlement, and information sharing via existing institutional transparency mechanisms.<sup>64</sup> This includes essential security interests. As part of a broader project, this article begins with transparency to understand how security crashes into the daily facilitation of notification and review of members’ commitments.<sup>65</sup>

Collectively, WTO transparency and monitoring activities enable the entire membership to establish commonalities and perpetual interaction, even where that interaction is conflictual.<sup>66</sup> In essence, members’ deliberation on trade policies and rules are social acts driving this member-driven organization—whereby routine communication of agreement and disagreement constitutes a community.<sup>67</sup> As a community, members dictate activities in different councils, committees, working groups, and working parties that form a complex infrastructure supporting the Ministerial Conference (the collective WTO membership and highest decision-making body).<sup>68</sup>

<sup>58</sup> See also Mary L. Dudziak, *War Time* (Oxford: Oxford University Press, 2012) 15, 22, 107 (explaining how ‘wartime’ connects to the notions of ‘temporary’ and ‘exceptional’).

<sup>59</sup> See DSS12 panel report, above n 19, para 7.133, The preamble to the GATT 1947 indicates that contracting parties commit to entering ‘into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce’, GATT, above n 2, Article XVIII *bis* [emphasis added].

<sup>60</sup> Mary L. Dudziak, ‘The Future as a Concept in National Security Law’, 42 (3) *Pepperdine Law Review* 591 (2015); Harold Hongju Koh, ‘How to End the Forever War?’ (Speech given to Oxford Union at Oxford, UK, 7 May 2013).

<sup>61</sup> See Aziz Rana, ‘Who Decides on Security’, 44 (5) *Connecticut Law Review* 1417 (2012); Dudziak, above n 58.

<sup>62</sup> Dudziak, above n 58, at 136.

<sup>63</sup> See Mona Paulsen, ‘The Beginning, End, and Imminence of Invoking Essential Security at the WTO’, *International Economic Law and Policy Blog*, 24 July 2021.

<sup>64</sup> See generally Petros C. Mavroidis and Robert Wolfe, ‘From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO’, RSCAS Policy Paper 2015/01 (2015).

<sup>65</sup> See Steve Charnovitz, ‘Transparency and Participation in the World Trade Organization’, 56 *Rutgers Law Review* 9 (2004); see Panagiotis Delimatsis, ‘Transparency in the WTO’s Decision-Making’, 27 (3) *Leiden Journal of International Law* 701 (2014).

<sup>66</sup> Monica Hakimi, ‘Constructing an International Community’, 111 (2) *American Journal of International Law* 317 (2017), at 324–25.

<sup>67</sup> Monica Hakimi, ‘The Integrative Effects of Global Legal Pluralism’, *Public Law and Legal Theory Research Paper Series No. 657* (January 2020), at 12.

<sup>68</sup> See the WTO organizational chart; see generally Pieter Jan Kuijper, ‘WTO Institutional Aspects’, in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (New York: Oxford University Press, 2009) 97.

### A. The internal and external conceptualization of WTO transparency

As Robert Wolfe and Terry Collins-Williams explain, WTO transparency contains internal and external conceptualizations. All members must inform the WTO about the laws and regulations they adopt when they implicate a WTO agreement or affect other members (internal).<sup>69</sup> To clarify positions, such as in a dispute or to pursue common goals, WTO members depend upon reciprocal information sharing through regular meetings under the auspices of WTO bodies.<sup>70</sup> The WTO cannot police members' policies and practices. Instead, the institution establishes channels for communication among the global trading community, allowing them to structure expectations arising from trade and to work out conflicts. Such transparency builds a routine trust that all WTO trading partners are contributing to trade multilateralism, even when openly disagreeing.<sup>71</sup>

All members agree to publish their trade policies through policy review reports and annual World Trade Reports (external).<sup>72</sup> External transparency fosters 'democratic legitimacy and accountability that elections [otherwise] provide.'<sup>73</sup> Access to information supports the collective public interest in enhancing governance values.<sup>74</sup> Opening the doors to the WTO creates effective public participation and makes deliberation of privileged or confidential information more difficult. Still, public scrutiny before policymaking may deter special interest group capture.<sup>75</sup>

#### 1. WTO committee activities

Beyond the 'formal' negotiation of new rules or 'legalistic' dispute settlement, multilateral trade governance occurs in the 'mundane' daily administrative activities that most often happen within committees.<sup>76</sup> As directed or instructed by the Ministerial Conference, committees carry out their responsibilities as assigned to them under the applicable agreement or by the members.<sup>77</sup> Each committee reports to their respective WTO Council, contributing to the Council's oversight of the implementation of all WTO agreements.<sup>78</sup> Staffed by members' Geneva trade missions, committees are composed of WTO members.<sup>79</sup>

Andrew Lang and Joanne Scott describe committee work as dynamic 'communicative and cognitive processes through which disagreements are framed, arguments are made, knowledge is produced, and ideas are disseminated.'<sup>80</sup> Though it depends on the committee, committees generally create opportunities for members to communicate information about policies and peer review trade measures (though this depends on what the members wish to tell).<sup>81</sup> As Robert

<sup>69</sup> Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows', 9 (4) *World Trade Review* 551 (2010), at 561.

<sup>70</sup> Robert Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System', 11 (3) *European Journal of International Relations* 339 (2005), at 34.

<sup>71</sup> Anne-Marie Slaughter, *New World Order* (Princeton: Princeton University Press, 2005) 205, 212.

<sup>72</sup> Collins-Williams and Wolfe, above n 69, at 561.

<sup>73</sup> Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 (7) *The Yale Law Journal* 1490 (2006), 1520; see Delimatsis, above n 65, at 718–20.

<sup>74</sup> Slaughter, above n 71, at 218.

<sup>75</sup> Collins-Williams and Wolfe, above n 69, at 561.

<sup>76</sup> Fabian Bohnenberger, 'What Is the "Regular Work"? Constructing and Contesting Everyday Committee Practices in the World Trade Organization', *Review of International Political Economy* 1 [2021], at 7; Inu Manak, 'Enforcing International Trade Law in the World Trade Organization's Committees: Courting Third Party Opinion', Ph.D. Dissertation, (Washington, Georgetown University, 24 November 2019) 54–55.

<sup>77</sup> See, e.g. the establishment of the Committee on Anti-Dumping Practices, Article 16.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

<sup>78</sup> Note that WTO Committee on Trade and the Environment is not directly responsible for any WTO agreements, see Robert Wolfe, 'An Anatomy of Accountability at the WTO', 6 (1) *Global Policy* 13 (2015), at 19.

<sup>79</sup> Richard H Steinberg, 'The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott', 20 (4) *European Journal of International Law* 1063 (2009), at 1069, 1071.

<sup>80</sup> Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance: A Rejoinder to Richard H. Steinberg', 20 *European Journal of International Law* 1073 (2009), 1074.

<sup>81</sup> Wolfe, above n 78, at 20; Manak, above n 76; Steinberg, above n 79.



Wolfe explains, '[a]s a result of questions and challenge in a committee, a government may provide more information, change policy or pressure other units of government to respond.'<sup>82</sup> Additionally, there is a 'normative' aspect of committee work, for committee discussions create opportunities to discuss different approaches to trade regulation; this can (but does not always) lead to procedural norms or soft law elaborations seen as 'best practices' for facilitating the implementation of the WTO rules.<sup>83</sup> Thus, even in conflict, committee engagement creates accountability, as committees actively and repeatedly discuss the meaning of WTO law, even 'without codification in the treaty or an appellate body decision.'<sup>84</sup>

Members can raise 'specific trade concerns' or STCs within WTO committees, which enables them to vocalize and seek negotiated resolutions of other members' trade measures or broader policies.<sup>85</sup> External to the formal dispute settlement mechanism, committee discussion of STCs creates 'decentralized peer review.'<sup>86</sup> Inu Manak assesses how members participate in or observe committee discussions of STCs 'strategically' to study the memberships' responses to the tabled concerns, building coalitions to achieve marginal adjustments in trade regulation.<sup>87</sup> Often, transnational corporations form part of this picture, advancing interpretations of the rules as members debate the relationship of the rules to new or existing measures.<sup>88</sup> Some argue that committee dialogue both 'substitutes' and 'complements' WTO dispute settlement.<sup>89</sup> Repeated engagement within WTO committees can thus create solutions for members' offensive interests and foster intra-member trust to coordinate on matters affecting trade.<sup>90</sup>

## 2. Publishing information

Policy transparency builds upon 'right-to-know' domestic tools, where members publish information domestically about the measures they adopt if the measures might affect other members.<sup>91</sup> Members then, in turn, notify the WTO membership via the relevant body.<sup>92</sup> There are three basic notification obligations: ad hoc, one-time, and regular notification obligations.<sup>93</sup> Over 50% of notifications are ad hoc.<sup>94</sup>

There are several 'generations' of the WTO system of notification obligations, beginning with the principle of transparency in Article X of the GATT.<sup>95</sup> The members agree in advance on the implementation of transparency commitments (where possible) whenever a trade measure affects the operation of the GATT.<sup>96</sup> In creating the WTO, members built infrastructure to centralize notifications within a registry and develop processes for peer review of notification

<sup>82</sup> Ibid.

<sup>83</sup> Erik Wijkström, 'The Third Pillar: Behind the Scenes, WTO Committee Work Delivers', E15 Initiative (Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, 2015) 10; Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance', 20 (3) *European Journal of International Law* 575 (2009), at 603–604.

<sup>84</sup> Wolfe, above n 78, at 20.

<sup>85</sup> See generally, Robert Wolfe, 'Reforming WTO Conflict Management: Why and How to Improve the Use of "Specific Trade Concerns"', 23 (4) *Journal of International Economic Law* 817 (2020).

<sup>86</sup> Bohnenberger, above n 76, at 10.

<sup>87</sup> Manak, above n 76, at 147.

<sup>88</sup> Note that members may raise STCs in all WTO bodies, see Wolfe, above n 85, at 33. Tim Dorch and Paul Mertensköter, 'Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label', 54 (3) *Law & Society Review* 571 (2020), at 576.

<sup>89</sup> See Marianna B. Karttunen, *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown* (Cambridge: Cambridge University Press, 2020); See also Kateryna Holzer, 'Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee', 14 (3) *Global Trade and Customs Journal* 102 (2019), 103.

<sup>90</sup> Wolfe, above n 78, at 20; Mavroidis and Wolfe, above n 64, at 122.

<sup>91</sup> Collins-Williams and Wolfe, above n 69, at 557. For example, GATT, above n 2, Article X; GATS, above n 2, Article III:1; TRIPS Agreement, above n 2, Article 63.

<sup>92</sup> Ibid.

<sup>93</sup> Jan Karlas and Michael Parizek, 'Supply of Policy Information in the World Trade Organization: Cross-National Compliance with One-Time and Regular Notification Obligations, 1995–2014', 19 (1) *World Trade Review* 30 (2020), at 33.

<sup>94</sup> Ibid.

<sup>95</sup> GATT, above n 2, at Article X; Mavroidis and Wolfe, above n 64, at 119.

<sup>96</sup> Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted 28 November 1979/L/4907, 3 December 1979, Article 3.

requirements and unfulfilled notifications.<sup>97</sup> Today, the notification system is a tangle of commitments, leaving it up to the members to determine when to notify measures and consult with trading partners.<sup>98</sup> Members can submit counter notifications of other members' unreported activities too.<sup>99</sup>

### 3. *Trade policy review*

Surveillance of members' trade regulations and policies is an essential part of WTO transparency. All members submit to the WTO's Trade Policy Review Mechanism.<sup>100</sup> The review enables peer review of members' trade policies and practices over a set period, based upon reports written by the WTO secretariat and members under review.<sup>101</sup> Members meet to discuss the reports and consider the wider systemic ramifications of the multilateral trading system. The trade policy review mechanism is an opportunity to improve a member's adherence to the WTO rules through public praising and shaming.<sup>102</sup> Distinct from dispute settlement, the mechanism cannot interpret or enforce international trade rules.<sup>103</sup>

Today, the quality and breadth of information depend on members' willingness to participate. For example, the secretariat reports that, as of 27 May 2021, members had communicated 61% of COVID-19-related support measures to the WTO.<sup>104</sup> In 2021, 106 members and observers responded to the secretariat's requests for verification of measures.<sup>105</sup> In addition to incomplete information, the secretariat observes that some members 'vigorously contested' economic support measures identified by the secretariat, highlighting challenges for the secretariat to verify the information.<sup>106</sup>

## IV. HOW SECURITY INTERESTS FEED INTO EVERYDAY WTO WORK

As suggested in Section III, the WTO creates space for active 'arguing and deliberating' among trading partners.<sup>107</sup> This part unpacks how security interests (both confined by the security exceptions and not) challenge the scope for deliberation at the WTO. It explains that members *do* notify security measures. Further research must examine the underlying narrative of this security transparency and the adequacy of the information supplied. Even with evidence that members invoke security regularly, today's geopolitical climate makes the intermix of strategic trade policies sticky and difficult to bind. The next question is whether the members could better use the WTO secretariat staff to help support institutional transparency and domestic security.

<sup>97</sup> Collins-Williams and Wolfe, above n 69, at 559; WTO Decision on Notification Procedures, Uruguay Round Agreement (1994).

<sup>98</sup> Collins-Williams and Wolfe, above n 69, at 558.

<sup>99</sup> Thanks to Inu Manak for identifying this point.

<sup>100</sup> See Trade Policy Review Mechanism (TPRM), Adopted 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 480, amended by the General Council (revision, effective 1 January 2019).

<sup>101</sup> Mavroidis and Wolfe, above n 64, at 121.

<sup>102</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 5th ed. (Cambridge: Cambridge University Press, 2021) 109.

<sup>103</sup> Collins-Williams and Wolfe, above n 69, at 559; see, e.g. Trade Policy Review Body, 'Trade Policy Review: Russian Federation 27 and 29 October 2021', Minutes of the meeting, WT/TPR/M/416, 4 February 2022, paras 4.241–4.258.

<sup>104</sup> Trade Policy Review Body, 'Report of the TPRB from the Director-General on Trade-Related Developments—Mid-October 2020 to Mid-May 2021', WT/TPR/OV/W/15, 13 July 2021, para 10 [hereinafter Report of the TPRB 2021].

<sup>105</sup> *Ibid.*, para 1.10. See Joost Pauwelyn and Ayelet Berman, 'Emergency Action by the WTO Director-General: Global Administrative Law and the WTO's Initial Response to the 2008–09 Financial Crisis', 6 *International Organizations Law Review* 499 (2009), at 511 (explaining that 'verified' information refers to information from 'official documents or received from the respective delegations').

<sup>106</sup> Peter Pedersen and Antonia Diakantoni, 'Lessons Learned and Challenges Ahead for the WTO Trade Monitoring Exercise' WTO Staff Working Paper, ERSD-2020-03, 24 February 2020, at 16.

<sup>107</sup> Thomas Risse, "'Let's Argue!': Communicative Action in World Politics', 54 (1) *International Organization* 1 (2000), at 33.

### A. Notifying security measures to GATT and WTO bodies

Members do not need a separate WTO agreement on the trade-security nexus to notify WTO members about measures related to essential security interests. They may raise security concerns when providing notification of trade measures or discussing any topic covered by a WTO agreement. For example, the Republic of Seychelles informed the WTO's Committee on Market Access of restrictions on pyrotechnic products and blasting explosives taken for security reasons (citing Article XXI of the GATT for justification).<sup>108</sup> Likewise, Botswana notified WTO members of trade restrictions on low foam laundry detergent for environmental reasons, consumer information, and national security.<sup>109</sup>

Members provide one 'complete' notification (covering two years) of quantitative restrictions (QRs) on trade in goods. From 2012 to 2022, 84 WTO members notified the WTO of QRs (with the EU members counted individually) at least once.<sup>110</sup> Members have justified 282 QRs by invoking the security exceptions stated in Article XXI of the GATT and have justified 22 based on United Nation (UN) Security Council Resolutions.<sup>111</sup> As of 22 March 2022, there were 1762 QRs that accounted for 2289 measures.<sup>112</sup> That number translates to just over 16% of QRs justified by the GATT security exceptions.

Some agreements offer greater clarity regarding how to approach national security matters. For example, the Agreement on Technical Barriers to Trade clarifies the notification process of technical barriers to trade (TBT), including those taken to address national security concerns (national security is a 'legitimate objective' of TBT measures).<sup>113</sup> Normally, all members must publish a measure in 'reasonable' time to allow producers to adapt their production processes or products.<sup>114</sup> However, if there are 'urgent problems' where 'national security' risks exist or threaten to arise, a member can set aside the *ex-ante* notification requirements for TBT measures ('publication at an early appropriate stage').<sup>115</sup> In such cases, the member is subject to notification obligations after the measure's adoption, with a 'brief indication of the objective and rationale of the technical regulation, including the nature of the urgent problems.'<sup>116</sup> Members can provide the responsible domestic agency, products covered, and a brief assessment of the measure's objective and rationale. One example is Colombia's notification of a new emergency technical regulation to establish 'quality parameters for petroleum-based liquid fuels, biofuels and their blends' for use in engines; Colombia reported that improving the quality of liquid fuels was needed to provide essential 'health, trade, industry, and national security' services.<sup>117</sup> Despite the altered notification process in these exceptional times, members must, 'without discrimination,' permit other members to present comments, discuss these comments, and take

<sup>108</sup> Committee on Market Access, 'Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions—Seychelles', G/MA/QR/N/SYC/1, 19 January 2018, at 23.

<sup>109</sup> Committee on Technical Barriers to Trade, 'Notification—Botswana—Low Foam Laundry Detergent', G/TBT/N/BWA/159, 1 June 2022.

<sup>110</sup> WTO, 'Notifications', Quantitative Restrictions Database, <https://qr.wto.org/en#/home> (visited 18 November 2022).

<sup>111</sup> *Ibid.* Calculated as of 30 October 2022. Members, such as Ukraine and Japan, invoke several sub-sections of GATT Article XXI in their QR notifications.

<sup>112</sup> Report by the Secretariat, 'Quantitative Restrictions: Factual Information on Notifications Received', G/MA/W/114/Rev.4, 22 March 2022. My thanks to Bob Wolfe for alerting me to this report.

<sup>113</sup> See Agreement on Technical Barriers to Trade (TBT Agreement), 15 April 1994, 1868 U.N.T.S. 120, Articles 2.2, 2.9, and 5.6.

<sup>114</sup> *Ibid.*, Articles 2.11, 2.12, 5.8, and 5.9.

<sup>115</sup> *Ibid.*, Articles 2.10 and 5.7.

<sup>116</sup> *Ibid.*, Articles 2.10, 2.10.1, 2.11, and 5.7.

<sup>117</sup> See Committee on Technical Barriers to Trade, 'Colombia Notification', G/TBT/N/COL/253, 27 January 2022, regarding a resolution entered into force on 31 December 2021.

both the comments and discussion ‘into account.’<sup>118</sup> In the event of a dispute regarding a violation of these rules, a WTO panel can assess whether conditions of urgency were present to determine whether these exceptional notification obligations apply.<sup>119</sup>

Although these extensive provisions respecting TBT measures with national security objectives exist, the TBT Agreement blankets this process with strong language that defers any members’ essential security.<sup>120</sup> Additionally, the TBT Agreement maintains the same non-disclosure exception as the GATT, whereby ‘nothing in this Agreement’ requires any member ‘to furnish any information which they consider contrary to their essential security interests.’<sup>121</sup>

A review of the TBT Committee minutes of 10–12 November 2021 showcases the debate over security schemes for information security equipment and communications supply chains.<sup>122</sup> As of October 2022, there were 238 notifications of TBT measures based on ‘national security’ requirements.<sup>123</sup> Notifications cover measures affecting various products, such as Switzerland’s notification of a draft energy efficiency ordinance respecting several products, including combined refrigerator-freezers with separate external doors.<sup>124</sup> Members may support their notifications with relevant documents. For example, Namibia’s notification of new ‘urgent’ standards respecting the production of hand sanitizer referred to World Health Organization recommendations, citing consumer information and the ‘national security objective towards the protection of human health.’<sup>125</sup> Members may provide addenda explaining whether the notified measure is adopted or entered into force and may provide the content or scope of the applicable text.<sup>126</sup>

Additionally, members may implicate security concerns when presenting specific trade concerns. At the time of writing, the WTO information management system reported over 100 concerns with other members’ sanitary and phytosanitary (SPS) or TBT measures raising the issue of security.<sup>127</sup> There are 22 concerns with TBT measures with the objective of ‘national security requirements.’<sup>128</sup> Some concerns remain ongoing, such as the EU’s concerns with China’s data and cybersecurity regulatory frameworks, which began with a trade concern regarding Chinese regulation of commercial encryption products that the EU first raised in 2011.<sup>129</sup>

Members can also raise security issues when presenting trade concerns to the Committee on Market Access. The WTO trade concerns database identifies eight concerns that touch on members’ food security, cybersecurity, public health, and human security regarding the COVID-19 pandemic.<sup>130</sup> For example, China raised a concern on 28 May 2019 about Australia’s prohibition of Chinese equipment from the Australian 5G rollout, which it claimed was discriminatory

<sup>118</sup> TBT Agreement, Article 2.10.3.

<sup>119</sup> See Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, para 7.507, as modified by Appellate Body Report WT/DS406/AB/R, finding a respondent bears the burden to demonstrate ‘urgent circumstances’ surrounded the adoption of the technical regulation.

<sup>120</sup> See TBT Agreement, above n 113, at recital 5.

<sup>121</sup> *Ibid.*, Article 10.8.3. Security interests appear in Article 5.4 too.

<sup>122</sup> Committee on Technical Barriers to Trade, ‘Minutes of the Meeting—10–12 November 2021—Note by the Secretariat’, G/TBT/M/85, 2 February 2022.

<sup>123</sup> This number is based upon the new ePing WTO SPS & TBT Platform. <https://epingalert.org/> (visited 18 November 2022). For example, from the State of Kuwait on food technology, Committee on Technical Barriers to Trade, ‘The State of Kuwait Notification’, G/TBT/N/KWT/600, 20 June 2022. Kuwait’s notification is under Article 2.10.1 listing ‘national security requirements; Protection of human health or safety; Quality requirements; Harmonization.’

<sup>124</sup> See, e.g. Committee on Technical Barriers to Trade, ‘Switzerland Notification’, G/TBT/N/CHE/268, 22 April 2022, listing refrigerators as relevant for increasing ‘the national security of electricity supply.’

<sup>125</sup> Committee on Technical Barriers to Trade, ‘Namibia Notification’, G/TBT/N/NAM/2, 23 April 2020.

<sup>126</sup> See, e.g. Committee on Technical Barriers to Trade, ‘Uganda, Addendum Notification’, G/TBT/N/UGA/1320/Add.1, 8 August 2022.

<sup>127</sup> See the ePing SPS & TBT Platform, <https://epingalert.org/en/Search/TradeConcerns?freeText=Security> (visited 18 November 2022)

<sup>128</sup> See WTO Trade Concerns database, <https://tradeconcerns.wto.org/en> (visited 18 November 2022).

<sup>129</sup> See Committee on Technical Barriers to Trade, ‘Note by the Secretariat—Minutes of the Meeting of 24–25 March 2011’, G/TBT/M/53, 26 May 2011; see European Union, ‘Statement to the Committee on Technical Barriers to Trade, 13–15 November 2019’, G/TBT/W/682, 25 November 2019.

<sup>130</sup> See WTO Trade Concerns database, above n 128.

and inconsistent with Article XI of the GATT.<sup>131</sup> Additionally, China has claimed that the USA's export control measures that, among other things, bar US companies from buying or using telecommunications equipment from Chinese enterprises deemed 'national security threats' violates Articles I and XI of the GATT.<sup>132</sup> More importantly, China critiqued the USA 'repeated over-generalization' and 'abuse' of the GATT security exceptions as causing 'great concern to the Membership.'<sup>133</sup> The USA declined to comment. Nevertheless, the entire membership heard China's concerns that day.

On an ad hoc basis, WTO members inform the membership of security measures that affect trade in services. The GATS maintains the GATT carve out from information disclosure, which may (or may not) impact members' notification obligations.<sup>134</sup> However, the GATS contains an additional commitment that members must 'inform' the Council for Trade in Services 'to the fullest extent possible' of all security-based measures taken 'and of their termination.'<sup>135</sup> For example, the USA reported on its 'national security' measures concerning China-based ByteDance and the TikTok and WeChat applications.<sup>136</sup> The notification form asks members to list the relevant GATS article, describe the measure, and state the responsible agency for enforcing the measure domestically.<sup>137</sup>

### B. The security exceptions' impact on WTO notification and information sharing

Two dispute settlement panel reports dealing with the invocation of security exceptions offer a critical 'benchmark' to examine trade-security actions.<sup>138</sup> Nevertheless, like other WTO rules, the security exceptions remain 'open-ended' and 'in flux through constant interpretation.'<sup>139</sup> Accordingly, until tethered to a particular dispute, the indeterminate language of the security exceptions renders equally valid interpretations of the exceptions as too 'narrow' in applicability,<sup>140</sup> 'potentially so broad,'<sup>141</sup> and also quite flexible 'to expand what counts as a security interest in future cases.'<sup>142</sup>

Inevitably, what matters most is whether members continue to find relevance with the broader transparency and monitoring functions of the WTO to sustain engagement with the institution, even when pursuing security policy objectives. The overarching lesson from the two-panel reports is that no WTO member possesses unfettered discretionary space to protect its essential security interests over its commitments to the WTO agreements. However, controlling for abuse presumes an ongoing toggle between trade and security, denying the nexus.<sup>143</sup> But WTO panels cannot undertake alternative routes without members clearing the path. As argued below,

<sup>131</sup> Committee on Market Access, 'Minutes of the Committee on Market Access, 28 May 2019', G/MA/M/70, 30 October 2019, para. 8.2.

<sup>132</sup> *Ibid.*, paras. 19.2 and 19.3.

<sup>133</sup> *Ibid.*

<sup>134</sup> GATS, above n 2, at Articles III:3 and XIV *bis*:1(a).

<sup>135</sup> *Ibid.*, at Article XIV *bis*:2.

<sup>136</sup> Council for Trade in Services, 'Annual Report of the Council for Trade in Services to the General Council—2020', S/C/60, 4 December 2020, paras 9.1–9.2; Council for Trade in Services, 'Annual Report of the Council for Trade in Services to the General Council—2021', S/C/62, 26 October 2021, para 9.1 (China noted the 'revoking of the measures').

<sup>137</sup> Council for Trade in Services, 'Guidelines for Notifications under the General Agreement on Trade in Services', adopted on 1 March 1995, S/L/S, 4 April 1995

<sup>138</sup> The DSS12 panel granted wide discretionary space to what a member considers 'necessary' in these circumstances. In contrast, the DSS67 panel declined to assess whether or not a security interest was 'essential'. However, the DSS67 panel appeared careful to reconnect questions about 'necessity' to the relationship between the measures and the 'essential security interests' when evaluating Saudi Arabia's stated essential security interests and its authorities' non-application of criminal procedures and penalties to beoutQ. Compare DSS12 panel report, above n 19, para 7.146 to *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, WT/DSS67, 16 June 2020, paras. 7.271, 7.281, 7.289, 7.293 [hereinafter DSS67 panel report].

<sup>139</sup> Alvaro Santos, 'Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil & Mexico', 52 (3) *Virginia Journal of International Law* 551 (2012), at 553.

<sup>140</sup> Danae Azaria, 'Trade Countermeasures for Breaches of International Law Outside the WTO', 71 (2) *International and Comparative Law Quarterly* 389 (2022).

<sup>141</sup> Meyer, above n 31, at 1361.

<sup>142</sup> J. Benton Heath, 'Making Sense of Security', 116 (2) *American Journal of International Law* 289 (2022), at 329.

<sup>143</sup> Harlan Cohen, 'Nations and Markets', 23 (4) *Journal of International Economic Law* 793 (2020), at 814.



cooperation and propagative learning about the trade-security nexus begin with cracking open the presumptions of secrecy to enable communication—and conflict.

There is no clear answer regarding how Article XXI:a of the GATT or equivalent exceptions could impact WTO notification obligations.<sup>144</sup> Subparagraph (a) of Article XXI of the GATT confirms that '[n]othing' in the GATT requires any member to disclose 'any information [...] which it considers contrary to its essential security interests.' Early discussions on the notification of security measures produced a non-binding decision dated 30 November 1982, whereby subject to Article XXI:a, a GATT Contracting Parties had a duty to inform the other Contracting Parties of measures taken under Article XXI.<sup>145</sup> As explored above, members may speak about security beyond invoking specific objectives or exceptions.

In *United States—Certain Measures on Steel and Aluminium Products*, the USA and the EU considered how subparagraph (a) impacted the invocation of subparagraph (b) of Article XXI of the GATT.<sup>146</sup> The USA asserted a broad reading of subparagraph (a) whereby no information was needed when invoking Article XXI.<sup>147</sup> In contrast, the EU stated that any member asserting non-disclosure on the grounds of essential security *must* explain *why* it refuses to share information.<sup>148</sup> The answer depends on whether the invoking member has total discretion to assert Article XXI—whether it is a purely self-judging provision or not. The USA maintains that the invocation of Article XXI 'is sufficient to establish the application of this provision.'<sup>149</sup> Article XXI:a anticipates there may be no facts on the record before a panel.<sup>150</sup>

Russia relied on Article XXI:a of the GATT when it refused to supply *any* factual evidence and legal arguments in the *Russia-Traffic in Transit* dispute. The panel constructed its fact-finding through 'publicly known' information and 'hypothetical' facts to account for this.<sup>151</sup> Ukraine (joined by third parties) argued that Russia could not evade its burden of proof under Article XXI(b)(iii) of the GATT by relying on Article XXI:a of the GATT.<sup>152</sup> The panel restricted its report to 'reference' the parties' arguments regarding Article XXI:a of the GATT but declined to 'further address' arguments 'unnecessary' for the settlement of the dispute.<sup>153</sup> It remains under debate whether Article XXI:a can 'shelter' a member from its obligations under Article XXI:b.<sup>154</sup>

A member gains significant power in a dispute by invoking security to control information sharing. It prevents probing, for example, when one member raises concerns that there is evidence of internal agency strife regarding whether actions taken are sincerely rooted in security interests.<sup>155</sup> A blanket refusal to articulate essential security interests, such as in *Russia-Traffic in Transit*, renders all legal arguments entirely hypothetical. It leaves it to each panel to assess how

<sup>144</sup> DSS12 panel report, above n 19, para 7.133. See also TBT Agreement, above n 113, at Article 10.8.3.

<sup>145</sup> GATT, 'Decision Concerning Article XXI of the General Agreement', Decision of 30 November 1982, L/5426, 2 December 1982 [hereinafter 1982 Decision]. The context of that decision emerged after the European Community, Canada, and Australia failed to provide notification to the GATT of economic sanctions imposed on Argentina due to its armed attack on the Falkland Islands. See GATT Council, 'Minutes of Meeting', C/M/157, 22 June 1982, 2, 10, 11; see also GATT Council, 'Trade Measures Affecting Argentina Applied for Non-Economic Reasons', Draft Decision, C/W/402, 2 November 1982.

<sup>146</sup> See, e.g. European Union, Second Written Submission by the European Union, *United States—Certain Measures on Steel and Aluminium Products (US—Steel and Aluminium Products (EU))*, WT/DSS48, 17 April 2020, para 125.

<sup>147</sup> United States, Responses of the United States of America to the Panel's First Set of Questions to the Parties, *US—Steel and Aluminium Products (EU)*, WT/DSS48, 14 February 2020, paras 246–48.

<sup>148</sup> European Union submission, above n 146, para 125.

<sup>149</sup> United States of America submission, above n 147, para 321.

<sup>150</sup> *Ibid.*, para 247.

<sup>151</sup> DSS12 panel report, above n 19, paras 7.118, 7.119. See also Mona Paulsen and Pramila Crivelli, 'Separating the Political from the Economic: The Russia-Traffic in Transit Panel Report', 20 (4) *World Trade Review* 582 (2021).

<sup>152</sup> *Ibid.*, at paras 7.32, 7.38, 7.129; see also *Russia—Measures Concerning Traffic in Transit—Report of the Panel—Addendum*, WT/DSS12/R/Add.1, 5 April 2019 [hereinafter DSS12 Addendum], Annex D-3, Executive Summary of the Arguments of Canada, para 8, at 77; Annex D-6, Executive Summary of the Arguments of Japan, paras 26–27, at 93.

<sup>153</sup> DSS12 Addendum, above n 152, para 2.70, at 123; DSS12 panel report, above n 19, para 7.129.

<sup>154</sup> See e.g. European Union, 'Comments on the Statements Delivered by the United States at

the Second Substantive Meeting by the European Union', *US—Steel and Aluminium Products (EU)*, WT/DSS48, 25 February 2021, para 83.

<sup>155</sup> The European Union questioned the USA's dismissal of the US Department of Defense conclusions that the tariffs were unwarranted as but 'one piece of information'. See *ibid.*, paras 76–77.

far to probe disputing members about the factual evidence.<sup>156</sup> It remains unclear how future disputes will connect the objective applicability of the security exceptions with the obligation of good faith that requires members to articulate essential security interests well enough 'to demonstrate their veracity'.<sup>157</sup>

## V. DELIBERATING TRADE AND SECURITY IN THE FUTURE

There are multiple existing proposals for addressing the growing trade-security nexus. For example, there is a proposal to constitute a WTO committee on national security to afford a specific forum to discuss security measures and offer opportunities to consider the implications for trade.<sup>158</sup> Such a proposal would require the entire membership to agree to a newly formed committee's terms of reference. A different option is to prioritize the management of the principal antagonists and develop a detailed institutional framework for the interface of USA and China trade relations.<sup>159</sup> Another proposal is to 'sidestep' the legality of trade-security matters and prioritize diffusing tension among trading partners if a dispute arises through non-violation complaints under Article XXIII:1b of the GATT.<sup>160</sup> Another proposal seeks to advance transparency through domestic administrative review.<sup>161</sup> Another option stems from the premise that governments face insurmountable pressures in certain circumstances (presumably temporary) and must deviate from WTO commitments. A plausible solution to addressing these circumstances is to 'legalize' the deviation, akin to safeguard measures.<sup>162</sup> Another option is to appreciate that domestic trade policies can attract protectionist objectives. Accordingly, the WTO dispute settlement mechanism requires infrastructure to address mixed motives, even if a member pursues security objectives.<sup>163</sup> These proposals scrutinize the increasing role of security in international economic relations. Several crafted their ideas from a pluralist conception of trade governance that can accommodate profound differences among the trade community.<sup>164</sup>

As discussed in Section III, participation in notification and review remains at the discretion of every member. WTO transparency needs work. Current reforms are underway to improve both members' compliance with transparency obligations and the quality of notifications.<sup>165</sup> Proposals to accord 'teeth' to notification requirements with the possibility of penalties or 'naming-and-shaming' techniques for untimely notifications seem unlikely.<sup>166</sup> This section opens a conversation about improving notifications concerning security interests and setting a research agenda for expanding these prescriptions.

<sup>156</sup> See DS512 panel report, above n 19; see also Integrated Executive Summary of Hong Kong, China, *United States-Origin Marking Requirement*, WT/DS597, 3 May 2022, para 60.

<sup>157</sup> DS512 panel report, above n 19, para 7.134.

<sup>158</sup> Inu Manak and Simon Lester, 'A Proposal for a Committee on National Security at the WTO', 30 (2) *Duke Journal of Comparative & International Law* 267 (2020).

<sup>159</sup> Shaffer, above n 31 (detailing a 'social dumping agreement'); see Robert Howse, 'The Limits of the WTO', 116 *AJIL Unbound* 41 (2022).

<sup>160</sup> Nicolas Lamp, 'At the Vanishing Point of Law: Rebalancing, Non-Violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars', 22 (4) *Journal of International Economic Law* 721 (2019), at 723, 738.

<sup>161</sup> See Shaffer, above n 31, at 656 and accompanying notes; see also Henry Farrell and Abraham L. Newman, 'The U.S. is the Only Sanctions Superpower. It Must Use That Power Wisely', *New York Times*, 16 March 2022.

<sup>162</sup> Simon Lester and Huan Zhu, 'A Proposal for "Rebalancing" to Deal with "National Security" Trade Restrictions', 42 (5) *Fordham International Law Journal* 1451 (2019).

<sup>163</sup> See Meyer, above n 31.

<sup>164</sup> See Shaffer, above n 31; Heath, above n 142; for a broader discussion on legal pluralism, see Robert Howse and Joanna Languille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values', 37 *The Yale Journal of International Law* 367 (2012), at Part V.

<sup>165</sup> Peter Ungphakorn, 'Notification and Review Sounds Dull but is Essential for WTO Reform', *TradeBetaBlog*, 18 July 2022; Hannah Monicken, 'As U.S.-Led Transparency Proposal Falters, Backers Lament WTO Reform Prospects' *InsideUSTrade*, 26 July 2022.

<sup>166</sup> *Ibid*; see General Council, 'Minutes of the Meeting 9–10 May 2022', WT/GC/M/198, 21 July 2022, para 9.3.

### A. Is disclosure the right solution to the problem?

The breadth and duration of security measures remain unknown, which raises complex issues for information sharing and monitoring among all WTO members. First, members must decide the scope of the exceptions found in the agreements on trade in goods and services, considering that security measures are no longer exceptional and *may no longer be reversible*. Second, security interests may test the normative foundations of a non-discriminatory, reciprocal-based trade institution—reviving old debates about institutional cooperation when its members view the globalized economy in relative terms.<sup>167</sup> A potential outcome of the war in Ukraine is that the sanctioning members *permanently* cut trade ties with Russia and block Belarus' membership in the WTO.<sup>168</sup> Should the global economy fracture into competing blocs, developing countries must pick sides, posing high costs to the lowest-income regions.<sup>169</sup> Many developing economies that worked hard to participate in the multilateral trading system will find that an open, global economy no longer exists. In this case, the membership must consider how to navigate such severe fractures within the trading rules, particularly for those members caught in the crossfire of geostrategic trade policies.<sup>170</sup>

Thus, members must negotiate how *trade* aspects of a security measure are subject to review, as detailed in the next section. In some cases, members raise security issues in their trade concerns to clarify the legal basis of a measure.<sup>171</sup> The difficulty is addressing circumstances where trade is *the* tool for security ends. This possibility makes proposals calling for a new Trade-Security Committee challenging to implement. Typically, in WTO committees, members can raise trade concerns about policies and regulations to find less restrictive alternatives.<sup>172</sup> There may be no desired alternative for security because maximizing trade pain *is the point*, as in the case of the sanctions imposed on Russia. In other cases, there are alternatives and trade-offs; for example, with the settlement of US steel and aluminium tariffs with a tariff-rate quota.<sup>173</sup>

### B. Reframing the problem to find a remedy

As members develop trade policies based on essential security interests, they must complement this with cooperation to integrate security into trade talks. Accordingly, members should question a blanket acceptance of secrecy.<sup>174</sup> Secrecy conceals all 'effects, both past and planned'.<sup>175</sup> Without temporal limitations to the secrecy attached to security, members can never discuss the contingency of security interests.<sup>176</sup> More importantly, secrecy invalidates future

<sup>167</sup> See Duncan Snidal, 'Relative Gains and the Pattern of International Cooperation', 85 *American Political Science Review* 701 (1991), at 703; see Eddy S.F. Yeung and Kai Quek, 'Relative Gains in the Shadow of a Trade War', 76 *International Organization* 741 (2022).

<sup>168</sup> For example, Ukraine proposed to the WTO members that they all agree to suspend Russian participation in the WTO. See Letter from Yevheniia Filipenko, Ukrainian Representative to Didier Chambovey, Chairman WTO General Council, 2 March 2022, made available on *Current Thoughts On Trade*, March 2022.

<sup>169</sup> Bekkers and Góes, above n 15.

<sup>170</sup> See Inu Manak and Mona Paulsen, 'How Trade Security Could Unravel the Fabric of Globalization' (working paper, on file with author).

<sup>171</sup> See, e.g. Committee on Market Access, Minutes of the Committee on Market Access—9 October 2018, Statement by China, G/MA/M/68, 17 May 2019, para 82.

<sup>172</sup> See, e.g. Committee on Technical Barriers to Trade, Statement by the USA, India—Testing and Certification of Telegraph (the Indian Telegraph (Amendment) Rules, 2017)—20 and 21 June 2018, G/TBT/W/540, 20 June 2018.

<sup>173</sup> See U.S. Dept of Commerce, 'Announcement of Activities on EU Imports Under Section 232', 31 October 2021; see also Manak and Lester, above n 158 (proposing a scheme for compensation against security measures).

<sup>174</sup> One of the challenges of folding security into a deliberative space like the WTO community is the realist take on security that supports its control via secrecy for executive and defense decision-making. See Heath, above n 142, at 315. Yet, in the US context, Rana's deconstruction of institutional secrecy complicates a blanketing of security without question. See Aziz Rana, 'Who Decides on Security', 44 (5) *Connecticut Law Review* 1417 (2012).

<sup>175</sup> Paul Gowder, 'Secrecy as Mystification of Power: Meaning and Ethics in the Security State', 2 (1) *I/S: A Journal of Law and Policy for the Information Society* 1 (2006), at 23.

<sup>176</sup> See *ibid.*, at 23.

inquiries 'to determine if new insight proves us wrong.'<sup>177</sup> Beginning to unpack the secrecy of security measures could generate practical solutions for improving WTO notification and review.

To begin, members can delineate the forms of non-disclosure based on security interests and use these as separate frames for action. Marlen Heide and Jean-Patrick Villeneuve's typology of secrecy rationales as frames constitute a helpful example.<sup>178</sup> Each frame treats security differently, either as a 'primary value' (threat frame), a strategic resource (effectiveness frame) or as a privilege (elite governance frame).<sup>179</sup> Is the desire to not disclose due to a fear of an imminent threat? Is it to enhance executive decision-making? Is secrecy necessary to ensure informed decision-making? These questions entail different responses for secrecy. However, secrecy runs along a continuum, thus making binary categories less helpful considering the heterogeneity of security interests and the secrecy that toggles along with it.<sup>180</sup> Likewise, Ben Heath breaks down a monolithic conception of security, offering competing views on how to see access to information about security.<sup>181</sup> Collectively, these scholars reinforce strong reasons not to presume a single response to the secrecy of security information.

### 1. *Imminent threats and retroactive disclosure*

Members will invoke security concerns to justify trade restrictions and other measures. Members know that vastly different situations—from war to cybersecurity—will entail various regulations and policy responses at different times. However, presently, there are no limitations to a member's general refusal to disclose information deemed contrary to its security interests. Thus, members may withhold information regardless of actions taken to respond to imminent threats or to pursue sustained economic security policies.

To break down the broad scope for non-disclosure, a viable path forward is composing guidelines for retroactively disclosing restrictions or other measures justified by security interests. Even ex-post notification requires governments to be accountable for their actions.<sup>182</sup> WTO members already submit to retroactive disclosure with trade policy reviews. They may implement alternate notification procedures for security concerns, as is the case for urgent TBT or SPS measures discussed above. Moreover, retroactive disclosure addresses governments' concerns with advertising security plans or imminent threats.

Another possibility is that members agree to a narrower form of retroactive disclosure of decisions not to disclose critical information. Depending on the security concern, members would reveal evidence of domestic reviews of security measures without disclosing internal deliberations or outcomes. This aligns with the EU's observation that the USA must explain its refusals to share information.<sup>183</sup> Members continue to commit to notifying changes to the entire membership as circumstances deem it necessary. Notification deadlines could be shortened depending on other members' concerns regarding a measure's trade-restrictive effects. Persistent monitoring further identifies instances where trade and trade-related measures are extended 'indefinitely' without official notification, even if the original notification included termination dates.<sup>184</sup>

<sup>177</sup> Ibid; cf. David Stasavage, 'Open-Door or Closed-Door? Transparency in Domestic and International Bargaining,' 58 International Organization 667 (2004) (emphasizing the costs to openness in domestic law-making).

<sup>178</sup> Marlen Heide and Jean-Patrick Villeneuve, 'Framing National Security Secrecy: A Conceptual Review,' 76 International Journal: Canada's Journal of Global Policy Analysis 238 (2021). Another excellent typology is from Paul Gowder, which considers when a state keeps secret 'the fact of the act' or the 'reasons for its decision to act' or the 'risk to a citizen, of which it is aware, from a third party'. Gowder, above n 175, at 13.

<sup>179</sup> Ibid, at 253.

<sup>180</sup> David E. Pozen, 'Deep Secrecy,' 62 Stanford Law Review 257 (2010).

<sup>181</sup> Heath, above n 142, at 314.

<sup>182</sup> See Heide and Villeneuve, above n 178, at 245.

<sup>183</sup> See text accompanying note 148.

<sup>184</sup> Pedersen and Diakantoni, above n 106, at 16 (noting this problem).

## 2. Strategic information control and oversight

An open question is whether members will accept some form of international governance of geo-economic plans. Secrecy is seen to enhance defence operations, forming a part of deceptive tactics and a strategy to suppress an opponent's capabilities.<sup>185</sup> Members may want to pursue WTO-external discussions to control the secrecy of plans, such as the EU–US Trade and Technology Council (TTC). In this case, the TTC enabled the EU and USA to initiate sanctions on Russia following its invasion of Ukraine.<sup>186</sup> However, the secrecy of security creates an information asymmetry. While members control how secrecy factors in strategic planning, the WTO can propose oversight of these decisions and review the extent of secrecy when taking security measures.<sup>187</sup> Oversight, or coordination with other international organs, comports with the original GATT design, which foresaw a greater engagement with the UN to navigate the balancing of trade and non-trade (or outside) interests.<sup>188</sup> Today, within the WTO, members could borrow from the GATS and extend the commitment to report on disclosure issues with the GATS Council to the GATT and Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement Councils.<sup>189</sup>

Additionally, members may decide to include wide-scoped, 'second-order' disclosure notifications—notification of 'certain types of information to be concealed pursuant to certain criteria'.<sup>190</sup> The effort here is to render specific measures 'translucent' where 'transparency' is impossible.<sup>191</sup> While the member is not justifying its security, it nonetheless needs to notify other members of its decision to withhold information, the types of activities taken, and for how long. Members can attach a classified annex (stating the types of documents applicable or particular agencies) to their notifications.<sup>192</sup> Such requirements may spur a decision by members to set some bounds to the security exceptions without confirming any substantive assessments of potentially WTO-inconsistent security measures.<sup>193</sup> As Pozen remarks, though governments may break their 'second-order' requirements, the existence of the requirement 'raises the costs of such secrecy'.<sup>194</sup>

Finally, Kathleen Claussen observes that maintaining 'economic security' is an interest 'beyond the reach of the state' as it 'depends on private actors' and economic networks.<sup>195</sup> Members may consider how to create engagement on the types of disclosure through dialogue with producers and suppliers, such as by advancing multi-stakeholder engagement like the WTO's global supply chains forum.

## 3. Expanding the secretariat's mandate

The last prescription is controversial for a member-driven institution: expand the secretariat's mandate to improve information collection.<sup>196</sup> Acknowledging the difficulty with the monitoring exercise in general, members will require significant incentives to expand the substantive coverage of monitoring to security measures. Another way to frame this proposal is to begin with what is feasible.

<sup>185</sup> Heide and Villeneuve, above n 178, at 246.

<sup>186</sup> International Trade Today's Export Compliance Daily, 'EU Ambassador Says EU, EU Sanctions Closely Coordinated', 10 March 2022.

<sup>187</sup> See Heide and Villeneuve, above n 178, at 247.

<sup>188</sup> Mona Pinchis-Paulsen, 'Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions', 41 *Michigan Journal of International Law* 109 (2020), 181.

<sup>189</sup> See text accompanying note 135.

<sup>190</sup> Pozen, above n 180, at 272.

<sup>191</sup> *Ibid.*, at 327.

<sup>192</sup> *Ibid.*, at 326, 328.

<sup>193</sup> This permits Members to retain the power to access the full scope of the security exceptions.

<sup>194</sup> Pozen, above n 180, at 326.

<sup>195</sup> Claussen, above n 5, at 1154.

<sup>196</sup> For past proposals to expand the secretariat's role in transparency, see Wolfe, above n 78; Mavroidis and Wolfe, above n 64.



To set the stage for such an undertaking, members can expand the secretariat's mandate to solidify a confidentiality system. In this case, when a member invokes security interests in a notification (or counter notification), within committee discussions, or in trade policy reviews, members trust that such disclosure does not equate to 'going public'.<sup>197</sup> Additional to concerns of broad disclosure, a confidentiality system should credibly vet information (while still safeguarding it).<sup>198</sup> Examples of innovations in procedures include limiting the people eligible to view the information requiring declarations of non-disclosure; storing data at each mission in Geneva or other secure areas; and destroying information after pre-defined periods.<sup>199</sup>

Creating space for security secrecy within the WTO makes trade-offs for WTO members. First, enhancing confidentiality to monitor and notify security measures challenges institutional transparency.<sup>200</sup> Second, confidentiality may limit third-party participation, with Manak's research showing the value of third-party involvement in committee discussions regarding trade concerns.<sup>201</sup> Finally, these prescriptions may produce power asymmetry if some members refuse to comply with this voluntary endeavour.<sup>202</sup> Left unchecked, members' ability to derive power from information asymmetry could challenge the WTO's maintenance of transparency generally and, more specifically, the 'evenhandedness of rule enforcement'.<sup>203</sup>

The USA has made clear that no person or institution shall dictate the terms of measures taken to protect security interests.<sup>204</sup> If considering the desire to form allied relationships, there is more significant reason to suspect that members may wish to share information to 'defend and protect their security partners' but not share information that 'touches on their own misdeeds'.<sup>205</sup> Support for developing additional procedures for disclosure in daily decision-making will require member champions, as was the case for improving the confidentiality systems of the Understanding on rules and procedures governing the settlement of disputes.<sup>206</sup>

Beyond the creation of confidentiality systems, there is the potential to probe security implications beyond discrete disputes, where trade liberalization has come into conflict with essential security interests.<sup>207</sup> In line with existing practice, the secretariat can reaffirm that information sharing does not lead to any judgment on the members' right to take such actions (as they state for COVID-19 trade-related measures).<sup>208</sup> With greater access to information, the secretariat can work with members to classify different operations of security. This classification could lead to a conceptual framework whereby security measures are classified based on trade-distorting effects, as is done with 'boxes' of domestic agricultural support measures under the Agreement on Agriculture.<sup>209</sup> The members would set the terms of information collection and categorization of the operation of security. The secretariat may work with security scholars and policymakers to process the complexity of security. Enhancing the WTO's administrative role can help members understand the contours of security—especially as circumstances arise that fail to fit neatly in a single box. One consequence may be that members install added control

<sup>197</sup> See Allison Carnegie and Austin Carson, *Secrets in Global Governance: Disclosure Dilemmas and the Challenge of International Cooperation* (Cambridge: Cambridge University Press, 2020), at 159 (detailing the fear of 'going public').

<sup>198</sup> *Ibid.*, at 40–44. Note that the WTO secretariat already verifies information, see Pauwelyn and Berman n 105.

<sup>199</sup> *Ibid.*, at 192; Jesse Kreier, 'Contingent Trade Remedies and WTO Dispute Settlement: Some Particularities', in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge: WTO/Cambridge University Press, 2005) 46–62 at 55–56.

<sup>200</sup> *Ibid.*, at 273.

<sup>201</sup> See Manak, above n 76; Carnegie and Carson, above n 197, at 192.

<sup>202</sup> Carnegie and Carson, above n 197, at 268.

<sup>203</sup> *Ibid.*, at 269.

<sup>204</sup> See, e.g. United States, First Written Submission of the United States of America, *United States—Certain Measures on Steel and Aluminum Products (Switzerland)*, WT/DSS56/20, 12 June 2019.

<sup>205</sup> Carnegie and Carson, above n 197, at 31.

<sup>206</sup> See, e.g. Dispute Settlement Body, Communication from Canada, TN/DS/W/41, 24 January 2003.

<sup>207</sup> But see Meyer, above n 31 (proposing a way to use channelling to avoid this derogation problem).

<sup>208</sup> See Report of the TPRB 2021, above n 104, at Annex 6, at 164.

<sup>209</sup> I thank Manfred Elsig for the discussion of this idea. See WTO, 'Domestic Support in Agriculture: The Boxes' [https://www.wto.org/english/tratop\\_e/agric\\_e/agboxes\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm) (visited 18 November 2022).

mechanisms for the secretariat's work.<sup>210</sup> One possibility is Alan Wolff's proposal of an executive branch for oversight.<sup>211</sup>

Should members choose to enhance existing information sharing and peer review, there is a precedent for expanding the secretariat's mandate. The experience of the 2008–2009 global financial crisis serves to provide lessons for addressing security concerns with trade.<sup>212</sup> Initially, trade observers feared governments would respond to the crisis with an 'outbreak' of protectionism—unilaterally enforced measures inconsistent with WTO commitments.<sup>213</sup> Then Director-General Pascal Lamy quickly set up an internal Task Force within the WTO secretariat to capture a 'radar picture' for collective discussion.<sup>214</sup> Though the WTO rules do not cover fiscal programmes, Lamy stressed to the members that they must understand how, 'in operational terms', they impact trade and the WTO's institutional functions.<sup>215</sup> With an eye to transparency, secretariat reports listed country-specific trade-related measures for presentation by the Director-General to the Trade Policy Review Body (TPRB) for an informal discussion.<sup>216</sup> The WTO secretariat coordinated with other international institutions and organizations' secretariats to develop greater knowledge about the intersection of global financial and commodity crises.<sup>217</sup>

DG Lamy did not consult the membership to authorize the review of fiscal programmes, despite stressing that the work was 'carried out by, and for the benefit of, the whole membership'.<sup>218</sup> Legal authority came afterwards, with the DG emphasizing the Trade Policy Review Mechanism, which enabled the secretariat to monitor the impact of monetary and fiscal measures on trade.<sup>219</sup> The reports emphasised that all monitoring undertaken would not impinge on the legal 'rights and obligations of Members'.<sup>220</sup> In this case, the urgency of the circumstances seemed to justify the actions. Endorsing the monitoring of trade-related measures following the global financial crisis, the ministers called upon 'the TPRB to continue discussing the strengthening of the monitoring exercise' based on members' future inputs.<sup>221</sup>

While members were generally supportive of strengthening trade monitoring of trade and trade-related measures, they asserted authority over discussions of future improvements.<sup>222</sup> Ultimately, proposals to expand the trade monitoring exercise were abandoned—for example, with illustrative lists of measures, identifying non-participating members, inviting discussants to trade monitoring meetings, or engaging in trade-impact analysis.<sup>223</sup> It seemed members lacked agreement on how to enhance monitoring of trade or trade-related measures and preferred

<sup>210</sup> Cf. Joost Pauwelyn and Krzysztof Pelc, 'Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement', 116 (3) *American Journal of International Law* 534 (2022) (raising concerns as to the influence of the secretariat, by interrogating dispute settlement report-making).

<sup>211</sup> Alan Wolff, 'WTO 2025: Constructing an Executive Branch', PIIE Working Paper 22–8, May 2022.

<sup>212</sup> See generally, Robert Wolfe, 'Protectionism and Multilateral Accountability During the Great Recession: Drawing Inferences from Dogs Not Barking', 46 (4) *Journal of World Trade* 777 (2012).

<sup>213</sup> *Ibid.*, at 777.

<sup>214</sup> WTO News, 'WTO to move quickly on wider front in 2009—Lamy', 18 December 2008; Pascal Lamy, 'Coherence in Global Economic Policy-Making—Report (2008) by the Director-General', WT/TF/COH/S/14, 7 May 2009, para 14; Pauwelyn and Berman, above n 105, at 503 (explaining the 'radar picture' as 'pulse-taking' but without substantive assessment of measures).

<sup>215</sup> WTO News, 'Lamy calls for greater transparency in fiscal support measures', 1 July 2011.

<sup>216</sup> Trade Policy Review Body, 'Report to the TPRB from the Director-General on the Financial and Economic Crisis and Trade-Related Developments', WT/TPR/OV/W/1, 20 April 2009, para 11 [hereinafter TPRB Report 2009]; Lamy, above n 214, para 14.

<sup>217</sup> See Report of the TPRB 2021, above n 104, at note 1; see also The 1994 Ministerial Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, sec 5.

<sup>218</sup> WTO News, 'Lamy: "We must remain extremely vigilant"', 9 February 2009. Peter Pedersen and others, 'WTO Trade Monitoring Ten Years on Lessons Learned and Challenges Ahead', (WTO, 2018) ERSD-2018-07, at 7. Scholars viewed the secretariat's work as in service of the Members, see, e.g. Wolfe, above n 212; Pauwelyn and Berman above n 105, at 506.

<sup>219</sup> TPRM, above n 100; Pauwelyn and Berman, above n 105, at 506.

<sup>220</sup> TPRB Report 2009, above n 216; see also Trade Policy Review Body, 'Symposium—The Financial and Economic Crisis and the Role of the WTO—Background Note by the Secretariat', WT/TPR/OV/W/4, 14 June 2011.

<sup>221</sup> Trade Policy Review Mechanism, Decision of 17 December 2011, WT/L/858, 19 December 2011.

<sup>222</sup> Pedersen and Diakantoni, above n 106, at 9.

<sup>223</sup> Pedersen and others, above n 218, at 7.

instead to 'rein in the exercise'.<sup>224</sup> This experience reinforces the crucial relationship between the secretariat and members and the uphill battle in shaping a process for supplying accurate information and increased collaboration for verifying security measures (and their limits).

## VI. CONCLUSION

The article makes two contributions. The first contribution of this article is descriptive, explaining how the multilateral trading system accommodates the relationship between trade and essential security interests and the existing means for information sharing and monitoring via notification, surveillance of policies, and dispute settlement at the WTO.

The article's second contribution is prescriptive. It hopes to improve members' infrastructure to connect trade and security to the everyday engagement between WTO members and the secretariat. Tackling institutional change depends on considerable trust in the multilateral trading system.<sup>225</sup> Such trust may be hard to come by, considering the mixed reviews for the twelfth Ministerial Conference and the sustained inoperability of the Appellate Body. The ideas presented do not capture all possible choices and carry competing advantages and disadvantages. Still, the effort here explains how a 'do nothing' approach fails to preserve the purported old design that sets boundaries between trade and security. This article conceptualizes different reasons for the non-disclosure of security interests against a thorough unpacking of the *existing* opportunities for WTO members to learn from one another. It then provides ideas for strengthening existing WTO functions, recognizing that members require knowledge of how securitized trade concerns are formed, protected, and resolved.

<sup>224</sup> Pedersen and Diakantoni, above n 106, at 9.

<sup>225</sup> On the importance of trust towards any institutional or political change in the WTO, see Howse, above n 159.