

A PROPOSAL TO REFORM “SECURITY-EMERGENCY” EXCEPTIONS IN TRADE

Nadia Garcia-Santaolalla

Current/Former Affiliation: Tecnológico de Monterrey, School of Government and Public Transformation

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EXECUTIVE SUMMARY

COVID-19 has put international trade law into uncharted waters. The virus has evidenced the shortcomings of the rulebook in the face of global emergencies. The pandemic showed that there are no specific provisions designed to guide a coherent international response to address new global threats to security, such as large-scale natural disasters, pandemics, or even human-made crises. The old security-emergency provisions, such as GATT Art. XXI(b)(iii), are ill-suited to deal with the widening and deepening of security, both in regular times as well as during emergencies. However, the current crisis provides a precious opportunity to revise the shortcomings of this security-emergency provision to reform it. Against the COVID-19 background and taking into consideration the relevance of the General Agreement on Tariffs and Trade (GATT) in international law, this study proposes a general framework to reform Art. XXI and make it suitable for the current international security environment.

Security-emergency provisions typically involve a tension between the need to ensure the effectiveness of treaty obligations and states' discretion and autonomy to protect its security interests, particularly its territory and population.¹ Traditionally, these exceptions have been approached from a military-centered vision of security. Nonetheless, over time, security has become a multifaceted, risk-based concept that embraces nonstate actors and nonhuman threats.² In fact, COVID-19 has challenged our perceptions of what security is by highlighting that issues like disease also have the power to bring society to a standstill.³

In this vein, the relationship between trade and security is undergoing a historical transformation, as Governments' conceptions of their own vital interests are pushing the limits of security to encompass issues such as national industrial policy, corruption, cybersecurity, migration, organized crime, terrorism, climate change, and pandemics. This proliferation of security interests creates the risk of Members invoking a permanent state of emergency to justify broad protectionist measures without clear time frames.⁴ For example, after the pandemic, Members trying to cope with the economic consequences and endeavoring to guarantee an adequate supply of medical products for future crises may perceive economic, legal, or political benefits in invoking security provisions to justify their actions (e.g., industrial policies for economic recovery or self-sufficiency in medical goods).

The key problems with the current framework of Art. XXI(b)(iii) provisions for times of emergency are (1) there are clear overlaps between security provisions and some of the types of public policies addressed in Articles XI(2)(a) for critical shortages and XX general exceptions; (2) it provides insufficient procedural safeguards to prevent misuse, enabling little transparency and accountability in its application; and (3) it has no specific provision to deal with global

¹ SEBASTIÁN MANTILLA BLANCO & ALEXANDER PEHL, NATIONAL SECURITY EXCEPTIONS IN INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS: JUSTICIABILITY AND STANDARDS OF REVIEW 1–2 (2020).

² J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J., 1049 (2020).

³ Michelle Bentley, *Pressure to act: Covid-19 and the global governance of biological weapons*, THE GLOBAL (2020), <https://theglobal.blog/2020/04/21/pressure-to-act-covid-19-and-the-global-governance-of-biological-weapons/> (last visited Jul 24, 2020).

⁴ J. BENTON HEATH, *Trade and Security Among the Ruins* 232 (2020), <https://papers.ssrn.com/abstract=3582639> (last visited Jul 24, 2020).

emergencies and guide international response. Altogether, these issues gave way to the implementation of an array of inconsistent trade policies that arguably made the pandemic worse (e.g., by disrupting global supply chains of medical goods). The post-coronavirus world requires a new strategic approach to the broader and deeper view of security with an emphasis on effective crisis-management mechanisms to address non-traditional threats.

Failure to address these issues might result in spread misuse of security-emergency provisions in the post-coronavirus era as non-traditional threats are currently included in many Member's security agendas.⁵ In the current state, security provisions are an appealing alternative to Members seeking to avoid their obligations because these provisions are not subject to the same close, administrative-law-like scrutiny of other provisions. In light of the above, we propose a model provision that distinguishes two types of emergencies: international emergencies and global emergencies. Under this framework, we designed different procedural safeguards and guidelines to address the problems identified.

The key advantages of our framework are (1) it incentivizes parties to refrain from weaponizing security-emergency provisions by increasing the costs of invoking such provisions; (2) it promotes that measures applied are targeted, proportionate, transparent, temporary, and should not create unnecessary barriers to trade or disruption of global supply chains, especially in essential goods; (3) it enhances cooperation among parties when dealing with common threats to provide a coherent, multi-sectoral, and multi-stakeholder response; (4) it does not impinge on national sovereignty; on the contrary, it encourages the strengthening of the rule of law from a domestic perspective; and (5) it incorporates a mix of binding and nonbinding elements to address the challenges posed by security-emergency exceptions holistically.

Our hope is that this framework offers a roadmap out of the “catch-all clause”⁶ towards a more structured clause and systematic use of security-emergency provisions. This proposal aims to help broaden the toolkit available for negotiators to resort to when dealing with the needs of different economic agreements containing security-emergency provisions. The different elements of our framework are not mutually exclusive, and each can be selectively combined by negotiators to attain the desired level of commitment.

Finally, while nationalism has characterized the initial legal and political responses to the pandemic, international cooperation will determine the next stage. One of the major false dilemmas of our times is that international trade weakens national strength and capabilities.⁷ When, in fact, pooling and sharing capabilities, setting priorities, and improving coordination through international cooperation enhances our response in the face of an emergency and mitigates risks for future ones.⁸ International trade is not a drawback when facing a global threat, it is an essential element of the solution, and during a pandemic, it is a matter of life and death.⁹

⁵ See OECD, *Security-Related Terms in International Investment Law and in National Security Strategies*, INVESTMENT POLICIES RELATED TO NATIONAL SECURITY AND PUBLIC ORDER 14, <http://www.oecd.org/investment/investment-policy/investment-policy-national-security.htm> (last visited Jul 26, 2020) (Table 2 illustrates the broadening of security issues or threats covered in selected National Security Plans).

⁶ JOHN HOWARD JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 229 (2nd ed. 1997).

⁷ Baldwin Richard & Simon J. Evenett, *Introduction*, in *COVID-19 AND TRADE POLICY: WHY TURNING INWARD WON'T WORK*, ix (2020), <https://voxeu.org/content/covid-19-and-trade-policy-why-turning-inward-won-t-work> (last visited Jul 22, 2020).

⁸ *Id.* at 16.

⁹ *Id.* at 2.

ESSAY

A PROPOSAL TO REFORM “SECURITY-EMERGENCY”
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*Nadia Garcia-Santaolalla*¹⁰

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¹⁰ Ph.D. candidate in Public Policy at the School of Government and Public Transformation at Tecnológico de Monterrey.

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INTRODUCTION

Rules are undone when unexpected events happen. Emergencies such as natural disasters, famine, pandemics, wars, coups, or financial crises are among some of the unexpected circumstances that can lead a state to disregard the rule of law.¹¹ Treaty negotiators recognize that, during emergencies, the rules that apply under normal circumstances cannot always be upheld. As the old legal maxim asserts, “necessity knows no law,” and a state’s right to self-preservation is one of the oldest principles in international law.¹² “Escape clauses” are designed precisely to deal with difficult times and exceptional circumstances.¹³ Predominantly, international trade law has addressed the issue of emergencies through the security exceptions of Article XXI(b)(iii) of the General Agreement on Tariffs and Trade (GATT).¹⁴ The exceptions contained in Art. XXI have traditionally been approached from a military-centered vision of security. Nonetheless, over time, security has become a multifaceted, risk-based concept that embraces nonstate actors and nonhuman threats.¹⁵ In fact, COVID-19 has challenged our perceptions of what security is by highlighting that issues like disease also have the power to bring society to a standstill.¹⁶

Because the economic benefits of cooperation are never greater than the need to protect the state’s continued existence,¹⁷ without security exceptions, many states would not be willing to participate in economic agreements. Thus, the inclusion of security exceptions attempts to reconcile international cooperation with sovereignty on sensitive matters such as security-emergencies.¹⁸ Nonetheless, these provisions typically involve a tension between the need to ensure the effectiveness of treaty obligations and states’ discretion and autonomy to protect its security interests, particularly its territory and population.¹⁹ In this vein, “few words are as powerful as security. Any room for discussion ends where ‘security reasons’ are invoked. The call of ‘security’ entails a warning not to ask, not to inquire, and not to doubt.”²⁰ Hence, security exceptions are considered by some to be the “the Achilles’ heel of international law.”²¹

¹¹ KRZYSZTOF J. PELC, MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW 1 (2016).

¹² Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 14, 102–103 (June 27) (describing the right of individual or collective self-defence as a matter of customary international law); U.N. Charter, art. 51.

¹³ Escape clauses provide for rule-governed violations in exceptional circumstances. These clauses have been present since ancient Roman law, early canon law and other religious rules. The very first modern trade escape clause was designed by the US and included in Art. XV of the 1941 US-Argentina Trade Agreement. PELC, *supra* note 11 at 11, 16.

¹⁴ DIANE A DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION 155 (2012).

¹⁵ Heath, *supra* note 2 at 1049.

¹⁶ Bentley, *supra* note 3.

¹⁷ JACKSON, *supra* note 6 at 229.

¹⁸ Stephan Schill & Robyn Briese, “If the State Considers”: *Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE 61–140, 61, 64–67, 138 (2009).

¹⁹ MANTILLA BLANCO AND PEHL, *supra* note 1 at 1–2.

²⁰ *Id.* at 1.

²¹ Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: *National Security as an Issue of Competence*, 93 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 424–451, 426 (1999).

For decades, states practiced self-restraint to prevent the misuse of these provisions, well aware of the risk of opening this “Pandora’s Box.”²² Unfortunately, over the last few years, there has been an increase in invocations of security exceptions as justification for the imposition of restrictive measures in trade and investment. India’s electromagnetic spectrum claim;²³ and Russia’s,²⁴ Saudi Arabia’s²⁵ and the US’s²⁶ disputes at the WTO are examples of this phenomenon. Additionally, certain economic measures imposed during and possibly after COVID-19 could be potentially justified by some states as security measures (e.g., export restrictions on medical supplies or new industrial policies for economic recovery or self-sufficiency in medical goods).

The problem with security provisions is that they often appear as “open-textured clauses,” whose wording offers little guidance regarding their application or justiciability.²⁷ If abused, these provisions can blow a “gaping hole,” undermining the trade regime to the point that it loses any semblance of law.²⁸ Misuse of these exceptions by one state can provoke a domino effect that can then result in a regression to a trading environment where superior might replaces the rule of law as the basis for trade relations. This would be counterproductive for all countries, but especially for most non-developed countries facing a pandemic where global value chains and access to essential goods depend on a predictable and rule-based trading system. Misuse of these provisions, therefore, poses a substantial risk to coping with a global emergency, global economic growth, and recovery, as well as political stability in general.

Clearly, COVID-19 and other crises evidence the shortcomings of security-emergency clauses in existing trade agreements. First, by highlighting that old security provisions are ill-suited to deal with the widening and deepening of security, both in regular times as well as during emergencies, posing, therefore, a high risk of misuse.²⁹ For example, after the pandemic, Members

²² Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 MICH. J. INT’L L. 558, 596 (1990–1991). “Pandora’s Box” refers to the risk of a domino effect that derives in the widespread embrace of unilateral imposition of measures for security reasons by other states, which could undermine the rule of law to a point where the entire multilateral trading system becomes negligible.

²³ *Deutsche Telekom AG v India*, Interim award, PCA Case No 2014-10, IIC 1549 (2017), 13th December 2017, Permanent Court of Arbitration [PCA], INVESTMENT CLAIMS, <https://oxia.oup.com/view/10.1093/law-iic/1549-2017.case.1/law-iic-1549-2017> (last visited Jul 15, 2020).

²⁴ Panel Report, *Russia—Traffic in Transit*, WTO Doc. WT/DS512/R (Apr. 5, 2019).

²⁵ Panel Report, *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (Jun. 16, 2020).

²⁶ Request for the Establishment of a Panel by China, India, EU, Canada, Mexico, Norway, Russia, Switzerland and Turkey, United States — Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS544/8, WT/DS547/8, WT/DS548/14, WT/DS550/11, WT/DS551/11, WT/DS552/10, WT/DS554/17, WT/DS556/15 and WT/DS564/15 (2018).

²⁷ DESIERTO, *supra* note 14 at 146.

²⁸ Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT’L L. & POL. 437, 492 (2007–2008).

²⁹ The broadening dimension refers to the extension of security to cover other issues besides the military ones. Buzan has identified four key sectors that widen the security agenda in the last century: the political, economic, societal, and environmental. The deepening dimension responds to the question for whom (referent object) is security provided. The referent objects are those entities “things that are seen to be existentially threatened and that have a legitimate claim to survival.” Since the emergence of the modern state, the state has been the preferred referent object, nonetheless Buzan has identified five levels that deepen the security agenda: (1) international systems, e.g., the planet; (2) international subsystems, e.g.,

trying to cope with the economic consequences and endeavoring to guarantee an adequate supply of medical products for future crises may perceive economic, legal, or political benefits in invoking security provisions to justify their actions. Second, by revealing that there are no specific provisions designed to guide a coherent international response to address new global threats to security, such as large-scale natural disasters, pandemics, or even man-made crises.³⁰ For instance, COVID-19 has shown that biological warfare is a major threat by revealing the profound and far-reaching consequences that these weapons could have.³¹

In light of the above, this essay seeks to respond to the call to improve international trade law to address these problems by proposing a model provision that draws on best practices and initiatives to modernize security-emergency exceptions, making them fit for the contemporary realities. This paper proceeds in three parts. Part I briefly reviews the GATT/WTO “security-emergency” exception. This section also examines the difficulties the adjudicatory bodies have when addressing security invocations in general. Part II collects the views and recommendations of experts to improve these provisions. Part III proposes a general framework to reform Art. XXI and make it suitable for the current international security environment.

I. THE GATT/WTO “SECURITY-EMERGENCY” EXCEPTION

International law currently provides states a great deal of leeway to enact restrictive economic measures in times of emergency, especially during a pandemic.³² Under GATT, some carve-outs or exceptions allow the imposition of trade-restrictive measures for a wide range of issues, including the protection of human health, natural resources, culture, public morals, and essential security interests, among others.³³ For instance, regarding the export restrictions implemented by Members during COVID-19, the old-established principle against the use of quantitative restrictions on exports enshrined in Art. XI (1) provides for a carve-out for “critical shortages” in paragraph 2 (a).³⁴ Moreover, Art. XX general exceptions also provide justification under paragraphs (b) to protect human life; (i) to ensure essential quantities on input materials to supply a domestic processing industry; or (j) for the acquisition or distribution of products in general or

OPEC, OAU or ASEAN; (3) units, e.g., states, nations, and transnational firms; (4) subunits, e.g., bureaucracies and lobbies; and (5) individuals. BARRY BUZAN, OLE WÆVER & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 8, 6 (1998).

³⁰ United Nations ESCAP, *Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and other Trade Agreements*, <https://www.unescap.org/events/policy-hackathon-model-provisions-trade-times-crisis-and-pandemic-regional-and-other-trade> (last visited Jul 24, 2020).

³¹ Bentley, *supra* note 3.

³² JOOST PAUWELYN, *Export Restrictions in Times of Pandemic: Options and Limits under International Trade Agreements* 3 (2020), <https://papers.ssrn.com/abstract=3579965> (last visited Jul 22, 2020).

³³ UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 52, 81, <https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=196> (last visited Jul 21, 2020).

³⁴ 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], art. XI.

local short supply. All of the above mentioned provisions allow countries to restrict exports as long as they meet certain conditions.³⁵ However, it is noteworthy that neither Art. XI nor Art. XX allude to emergency — at best, they refer to critical shortages, local short supply, essential quantities or measures necessary to protect human life or health — and in fact, both can be invoked in regular times as well as during emergencies.³⁶

To date, most Members that submitted notifications of the trade-restrictive measures imposed due to COVID-19 did so under Art. XI (2) “critical shortages” and Art. XX (b) “protection of human life or health.”³⁷ Nonetheless, at least one Member did refer to another provision, Art. XXI security exceptions, which does refer to “emergency” in its text. The US justified the imposition of export restrictions of protective equipment during the pandemic on grounds of “protection of human life or health and essential security interests, *inter alia*.”³⁸ In contrast with other Members that did specify the provisions they were invoking, the US did not. However, it is clear that the US is referring to Articles XX (b) and XXI (b)(iii). Conceivably, the majority of Members did not invoke security exceptions because they consider them as provisions of last resort due to their highly controversial character. Nonetheless, this US invocation of Art. XXI, along with its previous (steel and aluminum tariffs),³⁹ current (bulk-power system),⁴⁰ and potentially future (Peter Navarro’s “wake-up call”)⁴¹ invocations prompt us to revise security exceptions urgently.

Unlike Articles XI and XX that narrowly deal with actions or procedures that permit the waiver or inapplicability of GATT obligations, Article XXI does not contain any procedure for its invocation,⁴² and, until recently, there was no ruling regarding its justiciability.⁴³

From the time when Art. XXI was conceived, in the aftermath of WWII, the drafters of GATT faced the challenge of wording a provision to give enough discretion to Members to protect their legitimate essential security interests, while also preventing the abuse of this exception. The drafters of GATT did their best to accommodate this hard balance. Once GATT was concluded, Art. XXI became a reference for subsequent treaties, and since then, treaty-making has revolved

³⁵ PAUWELYN, *supra* note 32 at 6–13.

³⁶ DESIERTO, *supra* note 14 at 159 n. 54.

³⁷ WTO, *Goods Measures - COVID-19: Trade and Trade-Related Measures*, https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm (last visited Jul 22, 2020).

³⁸ Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions, United States, WTO Doc. G/MA/QR/N/USA/4/Add.1 (May 14, 2020).

³⁹ REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA, INDIA, EU, CANADA, MEXICO, NORWAY, RUSSIA, SWITZERLAND AND TURKEY, *supra* note 26.

⁴⁰ Roberto Morales, *EU lanza primer golpe en era T-MEC contra México*, EL ECONOMISTA, <https://www.economista.com.mx/empresas/EU-lanza-primer-golpe-en-era-T-MEC-contra-Mexico-20200713-0004.html> (last visited Jul 26, 2020); The White House, *Executive Order on Securing the United States Bulk-Power System (Executive Order 13920)*, THE WHITE HOUSE, <https://www.whitehouse.gov/presidential-actions/executive-order-securing-united-states-bulk-power-system/> (last visited Jul 14, 2020).

⁴¹ Navarro stated that COVID-19 is a wakeup call for American independence in the pharmaceutical and medical supply sectors that are critical to US economic and national security. James Politi, *US Trade Adviser Seeks to Replace Chinese Drug Supplies*, FINANCIAL TIMES, February 12, 2020, <https://www.ft.com/content/73751cca-4d1a-11ea-95a0-43d18ec715f5> (last visited Jul 23, 2020).

⁴² DESIERTO, *supra* note 14 at 160,161.

⁴³ PANEL REPORT, *supra* note 24.

around the option to use or deviate from the GATT text.⁴⁴ However, the controversy regarding the self-judging nature of Art. XXI has been present since the early days of GATT. And, although a ruling by a WTO panel was recently made, the controversy is far from settled as powerful Members such as the US,⁴⁵ Japan,⁴⁶ Russia,⁴⁷ and Saudi Arabia⁴⁸ have recently invoked security provisions under contestable grounds.

It is worth mentioning that, currently, there is a third-generation of security clauses in economic agreements derived from the text of Art. XXI, these new clauses seek to remove the controversy regarding its justiciability by clearly characterizing them as self-judging.⁴⁹ If no alternative texts are proposed to address the shortcomings of older security provisions, the risks and consequences of third-generation provisions gaining momentum could be disastrous to the rule of law and international cooperation.

The most controversial part of Article XXI is subparagraph (b)⁵⁰ since the risk of members using this provision for protectionist ends is high.⁵¹ Therefore, against this background, and taking into consideration the relevance of Art. XXI in international law and the current pandemic, our analysis concentrates on the text Art. XXI(b), with particular emphasis on subparagraph (iii), which reads as follows:

Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action *which it considers* necessary for the protection of its *essential security interests* (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of *war* or other *emergency* in international relations . . .”⁵²

⁴⁴ MANTILLA BLANCO AND PEHL, *supra* note 1. For instance, provisions found in over 90% of RTAs - (notified to the WTO and currently in force) permit the Members to use GATT Article XX and GATT Article XXI-type measures to restrict imports for health, safety and security reasons. WTO issues new report on treatment of medical products in regional trade agreements, 7, https://www.wto.org/english/news_e/news20_e/rt_a_27apr20_e.htm (last visited Jul 24, 2020).

⁴⁵ REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA, INDIA, EU, CANADA, MEXICO, NORWAY, RUSSIA, SWITZERLAND AND TURKEY, *supra* note 26.

⁴⁶ The Japan Times, *Japan temporarily blocks South Korean WTO dispute request*, June 30, 2020, <https://www.japantimes.co.jp/news/2020/06/30/business/japan-blocks-south-korean-wto-request> (last visited Jul 14, 2020).

⁴⁷ PANEL REPORT, *supra* note 24.

⁴⁸ PANEL REPORT, *supra* note 25 (Saudi Arabia invoked Art. 73 of TRIPS which is identical to Art. XXI of GATT).

⁴⁹ Annex 1 lists provisions where the three generations of provisions are illustrated. The second-generation of security provisions was mainly used in treaties drafted after the 1950s, beginning with the Friendship, Commerce, and Navigation Treaties (FCN Treaties) and Bilateral Investment Treaties (BITs), and has been less controversial regarding its justiciability because it does not contain the words “it considers”.

⁵⁰ Raj Bhala, *National Security and International Trade Law: What the GATT Says, and what the United States Does*, 19 U. PA. J. INT’L ECON. L. 263 (1998).

⁵¹ Raj Bhala refers to Members invoking security interest as a cover for protectionist ends as “cowboy” behavior because the Member invoking the provisions gets to decide what its “essential security interests” are.

⁵² GATT, *supra* note 34 (emphasis added).

The scope of the terms “essential security interests,” “war,” and “emergency” can be either broad or narrow, depending on their given interpretation. The phrase “which it considers” also lends itself to multiple interpretations regarding who is entitled to make the above judgments, which gives rise to the controversy regarding Art. XXI’s justiciability. To better understand the problem posed by these terms, we briefly analyze each one of them.

First, the phrase “which it considers” is regarded by certain Members as bestowing Art. XXI(b) with a non-justiciable character (self-judging); this is not subject to the findings of a Panel. Self-judging clauses are to be understood as those “provisions in international legal instruments by means of which states retain their right to escape or derogate from an international obligation based on unilateral considerations and based on their subjective appreciation of whether to make use of and invoke the clause *vis-à-vis* other states or international organizations.”⁵³ It is evident that such a description can amount to a state being the judge of its own case.⁵⁴ Thus, some jurists consider that such provisions should be inadmissible because they give the power to a party to determine when its obligations exist and when they do not.⁵⁵

Second, the term “war” traditionally refers to the military sector, nonetheless, it could be interpreted more broadly as security policies and interests have evolved. Globalization has profoundly changed the way states perceived security; the new, more interconnected world involves new players and threats. This change in social relations and new technologies imply that wars be fought, taking into consideration new goals, ways of financing, and methods (e.g., trade wars, cyber wars, or currency wars).⁵⁶ Moreover, the recent use of leaders’ parlance of “war” when referring to the fight against COVID-19 may, in the long run, affect the dictates of the meaning and scope of “war” in the public’s consciousness (e.g., President Emmanuel Macron, President Donald Trump, President Xi Jinping, and WHO Director-General Tedros Adhanom Ghebreyesus’ discourses).⁵⁷ Such sensationalist narratives of war – where war has no rules, everyone must fend

⁵³ Schill and Briese, *supra* note 18 at 68.

⁵⁴ Thus, running against the general principle of *nemo iudex in causa sua* (no man should be the judge in his own case). CHARLES T. KOTUBY & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES xviii (2017).

⁵⁵ Judge Lauterpacht, in his Separate Opinion on the case *Certain Norwegian Loans* acutely explained the contradiction one might appreciate in self-judging clauses:

[I]nvalid as lacking in an essential condition of validity of a legal instrument. This is so for the reason that it leaves to the party making the Declaration the right to determine the extent and the very existence of its obligation . . . An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. *It is not a legal instrument. It is a declaration of a political principle and purpose.*

Certain Norwegian Loans (France v. Norway), Judgment, 1957 I.C.J. Rep. 34 (July 6) (emphasis added).

⁵⁶ JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 13, 14 (2005).

⁵⁷ Ishaan Tharoor, *Are we at ‘war’ with coronavirus?*, WASHINGTON POST, <https://www.washingtonpost.com/world/2020/04/06/are-we-war-with-coronavirus/> (last visited Jul 24, 2020); Carbonaro Giulia, *Can we compare the COVID-19 pandemic to a world war?*, CGTN, <https://newseu.cgtn.com/news/2020-05-08/Can-we-compare-the-COVID-19-pandemic-to-a-world-war--Qhw25Ig9Fe/index.html> (last visited Jul 24, 2020); WHO, *WHO Director-General calls on G20 to Fight, Unite, and Ignite against COVID-19*, <https://www.who.int/news-room/detail/26-03-2020-who-s-director-general-calls-on-g20-to-fight-unite-and-ignite-against-covid-19> (last visited Jul 24, 2020).

for themselves, and any means or methods can be used against the enemy – affect our capacity to respond appropriately and in full solidarity to the pandemic.⁵⁸

Furthermore, the war metaphor has also been used in the past to refer to the combat of poverty, cancer, and crime, to name a few. This narrative of war sends all the wrong signals and distorts the policy and public response we need to prevent misuse of Art. XXI (b)(iii).⁵⁹ Thus, depending on the potential deterioration of the current situation worldwide and the war discourse, security provisions might come into play as a wide supported justification for further trade-restrictive measures in the near future.

Third, the definition of the word “emergency” has been recognized to encompass security concerns beyond physical safety or territorial sovereignty, by also focusing on social costs. “An ‘emergency’ occurs when there is general agreement that a nation or some part of it faces a sudden and unexpected rise in social costs, accompanied by a great deal of uncertainty about the length of time the high level of cost will persist . . .”⁶⁰ In this vein, “emergency” is also a malleable term that lends itself to broad interpretations. For instance, although, most constitutions stipulate war, external aggression, or armed rebellion as a condition for the declaration of a state of emergency (only a few refer to natural disasters, epidemics or health emergencies), many Members have already declared a state of emergency in response to COVID-19.⁶¹

Furthermore, the devastating consequences of the pandemic might provoke an economic crisis for some Members. The economic recovery will require significant state intervention, for which many members will recur to industrial policies, trade discrimination, and subsidies, among other measures.⁶² In this vein, it worth mentioning that some international tribunals have already ruled that security provisions also cover economic emergencies. For instance, regarding Argentina’s economic crisis (at the beginning of the new millennium) disputes, all of the tribunals of the International Centre for Settlement of Investment Disputes (ICSID) concurred in the view that security interests encompassed economic emergencies as opposed to only military and political threats.⁶³ The following statement of the *LG&E* tribunal acutely illustrates the argument: “when a State’s economic foundation is under siege, the severity of the problem can equal that of any military invasion.”⁶⁴

⁵⁸ Adriano Iaria, *We are not at ‘war’ with COVID-19: concerns from Italy’s ‘frontline’*, HUMANITARIAN LAW & POLICY BLOG (2020), <https://blogs.icrc.org/law-and-policy/2020/04/09/not-at-war-covid-19-italy/> (last visited Jul 24, 2020).

⁵⁹ Peter W.B. Phillips, *Are we really at war with COVID-19?*, CENTRE FOR THE STUDY OF SCIENCE AND INNOVATION POLICY , <https://www.schoolofpublicpolicy.sk.ca/csip/publications/making-waves/are-we-really-at-war-with-covid19.php> (last visited Jul 24, 2020).

⁶⁰ DESIERTO, *supra* note 14 at 147.

⁶¹ Joelle Grogan, *States of Emergency*, VERFASSUNGSBLOG , <https://verfassungsblog.de/states-of-emergency/> (last visited Jul 24, 2020).

⁶² Richard and Evenett, *supra* note 7 at 6.

⁶³ THE PROTECTION OF NATIONAL SECURITY IN IIAS, 8 (United Nations Conference on Trade and Development ed., 2009).

⁶⁴ *LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v The Argentine Republic*, ICSID case no. ARB/02/1, 3 October 2006, para. 238. Also, the *Continental Casualty* tribunal stated that regarding essential security interests, “It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population.” *Continental Casualty Company v The Argentine Republic*, ICSID case no. ARB/03/9A, award of 5 September 2008, para. 175.

In light of the above, it is clear that the relationship between trade and security is undergoing a historical transformation, as Governments' conceptions of their own vital interests are pushing the limits of security to encompass issues such as national industrial policy, corruption, cybersecurity, migration, organized crime, terrorism, climate change, and pandemics.⁶⁵ This proliferation of security interests creates the risk of Members invoking a permanent state of emergency to justify broad protectionist measures without clear time frames.⁶⁶ For instance, Egypt did not need to declare state of emergency during COVID-19 since, for the most part, it has never left such a state for more than a few days since 2017.⁶⁷

The problem with the current framework of GATT provisions for measures taken during emergencies is that there are clear overlaps between security provisions and some of the types of public policies addressed in Articles XI and XX.⁶⁸ Security-emergency provisions, if available and supported by a widening consensus on non-traditional threats, may provide an appealing alternative because these are not subject to the same close, administrative-law-like scrutiny of other provisions. Under such circumstances, panels would either have to exclude some traditional security interests from Art. XXI because the exceptions of Art. XX also cover them (which is unlikely),⁶⁹ or they would have to envision a mechanism to prevent Members from invoking Article XXI to circumvent the requirements of Article XX.

Against this background, we conducted an extensive review of disputes where Art. XXI has been invoked to identify the challenges Members and Panels had when addressing these disputes. We identified ten key issues: (1) the application of measures in a discriminatory manner (violation of MFN principle); (2) the privilege of secrecy to withhold information to justify the measures plausibly; (3) the lack of convergence on the scope of some concepts; (4) the rationalization of protectionist measures as an imperative to guarantee national security; (5) the weakness of some Members to retaliate and reestablish the balance of rights; (6) the acceptability of *ad hoc* arrangements such as joint action by Members to restore the balance of rights; (7) the use of security measures for geopolitical reasons; (8) the legitimacy of invocations of Art. XXI disregarding which actor bears international responsibility for the emergency; (9) the lack of a mechanism for the adequate rebalancing of rights and obligations; and (10) a highly deferential low standard of review rooted mainly in good faith of the state imposing the measures.⁷⁰

In sum, the current paradigm of security exceptions is ill-suited to deal with the widening and deepening of security. Its framework enables insufficient procedural safeguards to prevent misuse, producing little transparency and accountability in its application. Furthermore, the absence of a specific provision to deal with global emergencies and guide international response gave way to Members choosing among different provisions available. This led to the implementation of an array of inconsistent trade policies that arguably made the pandemic worse (e.g., by disrupting global supply chains of medical goods).⁷¹ Finally, the problems identified pose

⁶⁵ HEATH, *supra* note 4 at 225.

⁶⁶ *Id.* at 232.

⁶⁷ Grogan, *supra* note 61.

⁶⁸ A key difference between Art. XI (2)(a) is that it is an exemption; this is, if the conditions are met, then no obligation exists. In contrast, Art. XX refers to exceptions, where an obligation exists, but under specific conditions, the regular rules do not apply.

⁶⁹ Heath, *supra* note 2 at 1074 n.251.

⁷⁰ Nadia Garcia-Santaolalla, *National Security: A Historic Analysis of the Invocations of Article XXI of the GATT*, WORKING PAPER (2020).

⁷¹ Bentley, *supra* note 3.

a high risk of spread misuse in the post-coronavirus era as non-traditional threats are currently included in many Member’s security agendas.⁷²

II. EXPERTS ASSESSMENTS AND RECOMMENDATIONS

Security-emergency provisions may be seen as “escape valves” that allow a state to relieve pressure, contributing to the maintenance of the treaty system by limiting violations (not every derogation is a violation) and encouraging accession by reserving some autonomy to the Members when the circumstances merit.⁷³ Nonetheless, experts consider that the leeway that these provisions allow may motivate invocation by strategic considerations, other than legitimate security concerns. For instance, many non-developed countries fear broad exceptions because they can be used as weapons for political coercion, tools for punishment, creative colonialism, or disguise for protection for domestic industries. The fact that meaningful retaliation is not an option for non-developed countries and that such provisions can legitimize the imposition of restriction of essential goods during a pandemic or unilateral economic measure for non-economic purposes without identifiable standards, accountability, or significant retaliatory remedies, profoundly worries them. Hence, the misuse of these types of provisions perpetrates the power-based approach in international relations. In light of this, many non-developed countries within the WTO prefer a more stringent framework for these exceptions and in the light of broader international law.⁷⁴

For years, the misuse of these provisions was cemented on self-restraint at GATT/WTO. With few exceptions, Members experiencing distress, both in regular times as well as during emergencies, often resorted to other available means, for instance, anti-dumping and countervailing duties, safeguards, or general exceptions. However, as the panels and the AB disciplined the use of those other means, room to maneuver shrank. In this vein, security-emergency provisions are beginning to be considered by some Members as an alternative, a “safety valve,” to take protectionist measures in a “lawful” manner.⁷⁵ As a result, there is growing concern that these provisions will be resorted to more often, especially after the disastrous economic consequences of COVID-19 and the ongoing tensions between China and the US concerning trade, the so-called “trade war.”

In light of the above, on the one hand, some experts consider that security exceptions, in general, need to be modernized to prevent misuse and further deterioration of the stability and credibility of the multilateral trading system. On the other hand, some experts consider that there is no need to alter the text of Art. XXI, and that its ambiguous design works adequately to achieve the balance needed between sovereignty for sensitive issues and international cooperation. In order

⁷² See OECD, *supra* note 5 at 14 (Table 2 illustrates the broadening of security issues or threats covered in selected National Security Plans).

⁷³ Rose-Ackerman and Billa, *supra* note 28 at 492.

⁷⁴ Wesley A. Jr Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance between Sovereignty and Multilateralism*, 26 YALE J. INT’L L. 413, 414–416 (2001).

⁷⁵ A provision such as Art. XXI is what some experts call grey holes. This is that there are some legal restrictions on the action—it is not a lawless void—but the restrictions are so insubstantial that they pretty well allow the party invoking it to do as it pleases. Grey holes thus present “the façade or form of the rule of law.” ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 89, 97 (2010).

to conduct an objective assessment of both views, we briefly examine the main arguments on both sides to analyze if, indeed, there is a need to improve the text of these provisions.

Although there are nuances in the opinions among scholars and practitioners, the general argument for those in favor of modernization is that the overall ambiguity of Art. XXI has left a legal vacuum that mines the rule of law.⁷⁶ For instance, Raj Bhala considers that Art. XXI is a “weapon” mostly used by the US to respond to the threats of “bad guys” and that when the US invokes this provision, some allies are also hit by friendly fire.⁷⁷ Hannes L. Schloemann and Stefan Ohlhoff assert that security provisions need to have some limits.⁷⁸ In this vein, David Baldwin claims that “no social science concept has been more abused and misused than national security” and warns that the “careless use and abuse of the concept may have already rendered it useless for everyone but the politicians.”⁷⁹ If the security argument is used broadly, as “threats to all acquired values of a state,” then security becomes almost synonymous with welfare or national interest, rendering it useless⁸⁰ and indeed a big loophole.

Moreover, some consider that if Art. XXI is not modernized, then it will become a “bottleneck” for trade and security because the world has to deal with entirely different dimensions of security (e.g., terrorism, energy security, food security, and cyber-security) and Art. XXI is an “arcane security exception” that needs to be addressed as early as possible to avoid overloading the WTO’s Dispute Settlement System (DSS).⁸¹

In contrast, those in favor of the *status quo* argue that the maturity of the international trade law system provides the necessary safeguards against the abuse of Art. XXI.⁸² Also, that the ambiguity in the text of Art. XXI was drafted purposefully⁸³ because a more specific approach could have prevented Members from joining the agreement due to sovereignty concerns.⁸⁴ Some views go as far as stating that one possible explanation for the “success” of this clause in

⁷⁶ Panos Delimatsis & Thomas Cottier, *Article XIV bis GATS: Security Exceptions*, RESEARCHGATE, https://www.researchgate.net/publication/228121387_Article_XIV_bis_GATS_Security_Exceptions (last visited Jul 16, 2020); Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO*, 43 VA. J. INT’L L. 365 (2002–2003); A. Kerr. William & A. Kerr. William, *Loopholes, Legal Interpretations and Game Playing: Whither the WTO without the Spirit of the GATT?* (2019), <https://ageconsearch.umn.edu/record/299755> (last visited Jul 16, 2020); R. V. ANURADHA, *Petrificus Totalus: The Spell of National Security!* (2018), <https://papers.ssrn.com/abstract=3256701> (last visited Jul 16, 2020); JAEMIN LEE, *Commercializing National Security? National Security Exceptions’ Outer Parameter under GATT Article XXI* (2018), <https://papers.ssrn.com/abstract=3256689> (last visited Jul 16, 2020).

⁷⁷ Bhala, *supra* note 50 at 317.

⁷⁸ Schloemann and Ohlhoff, *supra* note 21.

⁷⁹ David A. Baldwin, *The Concept of Security*, 23 REVIEW OF INTERNATIONAL STUDIES 5–26, 26 (1997).

⁸⁰ *Id.* at 17–18.

⁸¹ Ji Yeong Yoo & Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?*, 19 JOURNAL OF INTERNATIONAL ECONOMIC LAW 417–444, 1 (2016).

⁸² Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 757–759 (2011).

⁸³ See Communication from the United States, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, WTO Doc. TN/DS/W/82/Add.1 (Oct 25, 2005) (The US calls this approach to draft text as “constructive ambiguity”; this is, the use of language that allows for more than one interpretation).

⁸⁴ Andreas F. Lowenfeld & Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 89 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 663, 664 (1995).

international trade law is precisely its vagueness, “because the current ambiguity may lead to a workable balance between national sovereignty and multilateral commitment.”⁸⁵

Against this background and bearing in mind that eliminating security exceptions is not a practical or realistic possibility, the next step is to decide whether to keep the current text as it is or to endeavor to modernize it. Although our view acknowledges the validity of the arguments presented by both sides, we consider that without going as far as impinging on states’ sovereignty, there is still room to improve the text of Art. XXI to disincentivize misuse and guide Members in times of global emergency to promote cooperation and ensure minimal disruption to trade and supply chains.

In light of the above, we briefly review the recommendations and suggestions made by experts to address the shortcomings of Art. XXI. We start first with the ideas to modernize security provisions to prevent misuse, and then with the recommendations to better coordinate and guide international response during global emergencies.

Preventing Misuse — among the relevant ideas we find (1) to include rebalancing mechanisms (e.g., compensation or retaliation);⁸⁶ (2) the creation of a National Security Committee;⁸⁷ (3) the establishment of a Permanent Court that responds to political signals, and new and sensitive issues;⁸⁸ (4) to restrict all Art. XXI complaints to non-violation complaints;⁸⁹ (5) to de-judicialize these type of disputes by using Alternative Dispute Resolution (ADR) Mechanisms; (6) to institutionalize forums to carry out “shadow politics” to allow a greater institutional balance between the judicial and political bodies, while retaining the control of the parameters of the negotiation; (7) the establishment of standards for certain types of security procedures (binding and non-binding);⁹⁰ (8) the establishment of a mechanism similar to that of the Trade Promotion Authority (TPA) to control the Executive when imposing security measures;⁹¹ (9) to create a more significant role for the national Courts; (10) to promote greater interaction between the agencies (e.g., a new role for the US International Trade Commission); (11) to promote more involvement of the private sector actors in decision-making; (12) to establish a sunset clause or time-limited constraints for security measures;⁹² and (13) to create a framework specifying how much security is being sought, for which values, of which actors, for which threats.⁹³

Coordinating Global Response — among the relevant ideas we find (1) the design of a platform to share timely and accurate information during the crisis;⁹⁴ (2) to establish and utilize essential goods lists; (3) to designate priority lanes and introduce facilitative measures with regard

⁸⁵ Peter Lindsay, *The Ambiguity of Gatt Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE LAW JOURNAL 1277–1313, 1300 (2003).

⁸⁶ Simon Lester & Huan Zhu, *A Proposal for Rebalancing to Deal with National Security Trade Restrictions*, 42 FORDHAM INT’L L.J. 1451 (2018–2019).

⁸⁷ Simon Lester & Inu Manak, *A Proposal for a Committee on National Security at the WTO*, 30 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 267–281 (2020).

⁸⁸ Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020).

⁸⁹ NICOLAS LAMP, *At the Vanishing Point of Law: Rebalancing, Non-Violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars* (2019), <https://papers.ssrn.com/abstract=3470617> (last visited Jul 16, 2020).

⁹⁰ Heath, *supra* note 2.

⁹¹ Requiring engagement with Congress before, during, and after the President’s decision (robust consultation) to impose measures justified under Art. XXI.

⁹² Claussen, *supra* note 88.

⁹³ Baldwin, *supra* note 79.

⁹⁴ Grogan, *supra* note 61.

to the cross-border movement of essential goods; (4) to waive import duties and taxes and economic import prohibitions or restrictions on essential goods;⁹⁵ (5) to implement an information system where up-to-date critical data on global supply conditions (production capacity, output, stockpiles) and global demand conditions (consumption, imports, exports) of essential goods is generated and shared;⁹⁶ (6) the design of common product standards and mutual recognition procedures to facilitate supply in essential goods;⁹⁷ (7) to coordinate action to finance expansion of production capacity of manufacturers of key essential goods and the companies they source from; (8) to pool international buying power to prevent hoarding and bidding wars among Members;⁹⁸ (9) to strengthen the monitoring role of the Market Access Committee to ensure transparency;⁹⁹ and (10) to “channel”¹⁰⁰ security actions taken in times of emergency to a specific provision to create coordinated policy responses among Members.¹⁰¹

Since the primary purpose of this study is to design a modern security-emergency clause, this essay does not attempt to provide a comprehensive and exhaustive review of all recommendations, but rather to highlight those that can address critical issues relevant to the effective functioning of these exceptions. Our analysis proceeds in four main blocks.

First, the mainstream view recognizes that states sometimes violate treaties when their interests are strong enough to outweigh their sense of obligation.¹⁰² States choose to cooperate in their own interest, but if circumstances change (costs and benefits), states may eventually renegotiate or deviate from their obligations.¹⁰³ In order to create incentives for Members to stick

⁹⁵ WCO, *How to Establish and Utilize Essential Goods Lists During a Disaster*, WORLD CUSTOMS ORGANIZATION, <http://www.wcoomd.org/en/media/newsroom/2020/may/how-to-establish-and-utilize-essential-goods-lists-during-a-disaster.aspx> (last visited Jul 25, 2020).

⁹⁶ Chad P Bown, *China’s Role in Facilitating a COVID-19 Trade and Transparency Agreement* 6, <https://www.piie.com/system/files/documents/bown2020-07-15ppt.pdf>.

⁹⁷ Matteo Fiorini, Bernard Hoekman & Aydin Yildirim, *COVID-19: Expanding Access to Essential Supplies in a Value Chain World*, in *COVID-19 AND TRADE POLICY: WHY TURNING INWARD WON’T WORK*, 73 (2020), <https://voxeu.org/content/covid-19-and-trade-policy-why-turning-inward-won-t-work> (last visited Jul 22, 2020).

⁹⁸ Simon J. Evenett, *Flawed Prescription: Export Curbs on Medical Goods Won’t Tackle Shortages*, in *COVID-19 AND TRADE POLICY: WHY TURNING INWARD WON’T WORK*, 59 (2020), <https://voxeu.org/content/covid-19-and-trade-policy-why-turning-inward-won-t-work> (last visited Jul 22, 2020).

⁹⁹ WTO, *WTO Members Commend Efforts to Monitor Governments’ Trade Measures During COVID-19 Crisis*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/news_e/news20_e/mark_08jun20_e.htm (last visited Jul 26, 2020).

¹⁰⁰ HEATH, *supra* note 4 at 252.

¹⁰¹ This idea was inspired by the “channeling approach” introduced by J. Benton Heath while we were conducting field research on the obstacles that countries were facing to provide the health sector with Personal Protective Equipment (PPE) supplies to face the pandemic in the North-American region. See Nadia García-Santaolalla, *Obstáculos que Enfrentan los Países Actualmente para Proveer al Sector Salud y a la Sociedad en General de Insumos Médicos Esenciales para Hacer Frente a la Pandemia*, TECNOLÓGICO DE MONTERREY | INVESTIGACIÓN DE COVID-19 EN MÉXICO, <https://mexicovid19.app/> (last visited Jul 26, 2020).

¹⁰² GOLDSMITH AND POSNER, *supra* note 56.

¹⁰³ Any state action that is incompatible with existing international law is open to two interpretations (1) the act is a violation of the norm by a state that only intends to take advantage of other states; or (2) the state is acting inconsistently with the rule to change it, to stimulate a new balance that best serves its interests (this is generally performed by states that have sufficient power and influence). Thus, it could be said that

to their commitments, an “optimal cost” should be attached to allow the benefits of flexibility that security-emergency exceptions convey meanwhile discouraging misuse. If escape is costly, it is more likely that the escaping Member will re-enter compliance as soon as it becomes feasible.¹⁰⁴ In light of this, a rebalancing mechanism is a desired element to modernize Art. XXI.

Second, domestic politics are one primary reason why states join trade agreements and are also the main reason why negotiators include flexibility clauses such as security-emergency exceptions, to act as an insurance policy against unexpected events. Nevertheless, the majority of times, it is domestic groups that are tempted to deviate from international obligations and exert pressure on the decision-maker (the Executive) during times of crisis.¹⁰⁵ Eric A. Posner argues that precisely political constraints, unlike most legal constraints, operate and increase in times of crisis. Even when legal constraints have atrophied, political constraints on the Executive remain real.¹⁰⁶ In this vein, a national mechanism to temper the use of security-emergency exceptions is a desired element to modernize Art. XXI.

That said, domestic regulation cannot be too constraining as emergencies and crises are just one end of a continuum where the economic and political environment changes rapidly, and where problems or threatened problems compel immediate response and sometimes large-scale rapid shifts in policy. In the case of democratic states, delegating to the Executive is the legislature’s first tool for coping with such problems. Because legislators and judges understand that the Executive’s comparative institutional advantages in speed, secrecy, force, and unity are even more useful during such events, so it is worth to transfer more discretion to the Executive even if this implies an increased risk of Executive misuse.¹⁰⁷

Third, when states coordinate policies but do not know what the future will bring, they will not accept specific rules.¹⁰⁸ Thus, realistically, emergencies cannot be governed by highly specific *ex-ante* rules, but at best by general *ex-post* standards, because rule makers can foresee that the unforeseen may happen but cannot guess what shape it will take. No rulebook can be expected to specify in advance the substantive conditions that will count as an emergency, since emergencies are by nature unanticipated, much less to specify what to do in those circumstances.¹⁰⁹ In this vein, a Committee on National Security is a suitable tool to “help to build common conceptual frameworks and shared ideas about the fundamental objectives and limits”¹¹⁰ of security-emergency provisions. Such a Committee can provide guidance and room to exchange information and views, develop best practices, and improve the framework for better cooperation when addressing common challenges.¹¹¹ In light of this, a Committee on National Security is also a necessary element to modernize Art. XXI.

the latter is a proposal to review current international law, and if violations by other states are sufficiently spread, then a change in the rule might materialize. Posner asserts that “many states bypass conventions and press for new legal changes by violating the old law.” *Id.* at 199.

¹⁰⁴ PELC, *supra* note 11 at 17.

¹⁰⁵ *Id.* at 19–20.

¹⁰⁶ POSNER AND VERMEULE, *supra* note 75 at 13–14.

¹⁰⁷ *Id.* at 30, 32.

¹⁰⁸ GOLDSMITH AND POSNER, *supra* note 56 at 161.

¹⁰⁹ POSNER AND VERMEULE, *supra* note 75 at 91.

¹¹⁰ A. Lang & J. Scott, *The Hidden World of WTO Governance*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 575–614, 587 (2009).

¹¹¹ Lester and Manak, *supra* note 87 at 227.

Fourth, a broad and ambiguous “catch-all clause”¹¹² is ill-suited for the current international security environment. Security has expanded in recent years from a predominating focus on “traditional” threats compromising the physical integrity of the state like military conflicts, to clearly non-traditional threats like pandemics or climate change.¹¹³ The complexity of new global threats rarely can be dealt only by recourse to classic military options, and the mastery of those threats is basically a matter of cooperation.¹¹⁴ For example, national trade barriers in a world of internationalized manufacturing processes make it harder for every nation to produce and secure vital medical supplies to face a pandemic like COVID-19.¹¹⁵ Members that implemented trade-restrictive measures may have in the short-term secured essential goods and achieved an immediate reduction in the spread of the disease.¹¹⁶ However, in the medium-term, those measures ultimately made it harder for every Member to access medical supplies to fight the virus.¹¹⁷

It is understandable that emergencies leave little time for deliberation and that many Members implemented measures relying on old domestic statutes promulgated for different times, or enacted amendments with not much time for meaningful review.¹¹⁸ For instance, the EU, as well as some of its Member states, introduced regulations that shortly had to be readjusted.¹¹⁹ In this vein, Members need to realize that there are many public policy tools available when it comes to dealing with major crises. However, before choosing any, Members need not ask if a particular policy is helpful to achieve the intended objective, but instead to reflect, “which available policy instrument has the greatest positive impact?”¹²⁰ Protectionist measures almost always fall short as they do not address the root causes of the challenges policymakers face during emergencies. Moreover, when it comes to boosting the production of essential goods, history has demonstrated that international cooperation is critical.¹²¹

One of the major false dilemmas of our times is that international trade weakens national strength and capabilities.¹²² When, in fact, pooling and sharing capabilities, setting priorities, and improving coordination through international cooperation enhances our response in the face of an emergency and mitigates risks for future ones.¹²³ International trade is not a drawback when facing a global threat, it is an essential element of the solution, and during a pandemic, it is a matter of life and death.¹²⁴ To address these and new threats, we need more cooperation, regulation, organization, and prevention. Regrettably, in the current political environment, it is far-fetched to propose that Members revise their approach to sovereignty for non-traditional security threats

¹¹² JACKSON, *supra* note 6 at 229.

¹¹³ DESIERTO, *supra* note 14 at 146.

¹¹⁴ PASCAL LAMY & NICOLE GNESOTTO, *STRANGE NEW WORLD, GEOECONOMICS VS. GEOPOLITICS* 139 (2020).

¹¹⁵ Richard and Evenett, *supra* note 7 at 1.

¹¹⁶ WORLD BANK, *MANAGING RISK AND FACILITATING TRADE IN THE COVID-19 PANDEMIC* 1 (2020), <http://elibrary.worldbank.org/doi/book/10.1596/33515> (last visited Jul 26, 2020).

¹¹⁷ Richard and Evenett, *supra* note 7 at 6.

¹¹⁸ Grogan, *supra* note 61.

¹¹⁹ See PAUWELYN, *supra* note 32 at 3–6.

¹²⁰ Richard and Evenett, *supra* note 7 at 10.

¹²¹ *Id.* at 10, 13.

¹²² *Id.* at ix.

¹²³ *Id.* at 16.

¹²⁴ *Id.* at 2.

(which they often feel threatened by more in-depth international regulation). Nonetheless, Members must recognize that the risk of noncooperation is probably the greatest threat.¹²⁵

As Pascal Lamy stated, this is a “no-brainer,” whether we are dealing with climate change, pandemics, economic crises, or any of the global issues brought to light by globalization, none of the solutions can be undertaken by any state alone, even the most powerful. In light of this, a distinction between measures taken for two types of security emergencies may contribute to more systematic use of security-emergency exceptions, because different-scales of threats require different levels and mechanisms of response.

III. LAW REFORM PROPOSAL

A. General Framework

This law reform proposal draws on suggestions by experts and WTO Members¹²⁶ for dealing with security-emergency exceptions. It offers a framework designed to deal with different levels of emergencies.¹²⁷ To operationalize our approach, we distinguish two categories of events:

1. International Emergencies: In this category, measures are taken to address local or regional threats. They may be enacted by a single Member or a narrow set of Members. The very nature of these measures reveals that the balance of rights and obligations among the concerned Members has been upset. These measures may create significant distortions in international or even global markets (depending on the economic weight of the Members involved). To prevent misuse, a rebalancing mechanism should be implemented. To operate this, we suggest first allowing consultations among the Members concerned to work towards a mutually beneficial compensation bargain. However, if compensation cannot be worked out, then the affected Member should be allowed to retaliate automatically. In the case where meaningful retaliation is not an option to restore the balance (e.g., LCD countries), an *ad hoc* arrangement such as joint action by Members should take place (e.g., to authorize other Members that desire to alleviate the effects of the measures a differential and more favorable treatment to goods of the Member affected). A Security Committee should oversee such negotiations to supervise that every arrangement arrives at a substantially equivalent level of concessions.¹²⁸ Furthermore, the Committee shall promote discussions on the enhancement of domestic mechanisms to prevent misuse of security-emergency measures.

2. Global Emergencies: In this category, measures are taken to address a global threat that no national security apparatus could handle alone and where the state’s security needs cannot be

¹²⁵ LAMY AND GNESOTTO, *supra* note 114 at 144. Globalization conceivably reasserted the sacred status of the sovereign state as the main player in international relations, nevertheless concurrently it exhibits its increasing ineffectiveness. The world is moving towards cosmopolitanism, whether we want it or not. *Id.* at 180, 136.

¹²⁶ WTO Members, *COVID-19 Proposals* (2020), https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm (last visited Jul 14, 2020).

¹²⁷ The idea to create this framework was inspired by the Trade Policy Working Group, *The US-China Trade Relations: A way Forward*, DANI RODRIK’S WEBLOG (2019), https://rodrik.typepad.com/dani_rodriks_weblog/ (last visited Jul 14, 2020).

¹²⁸ The Rebalancing Mechanism and Security Committee proposals draw ideas from Simon Lester’s Proposals, as well as other experts’ suggestions.

realistically managed without taking into consideration the security needs of the other states.¹²⁹ In such cases, it is appropriate that international norms and governance procedures be applied to manage coordination, collaboration, cooperation, and synergy between state apparatuses and mechanisms to prevent global losses. To implement this approach, we suggest focusing on promoting a set of principles to encourage the development and adoption of specific practices. It is important to stress that the world is only at the very beginning of the learning curve when dealing with these types of global threats. Moreover, international law recognizes not only the exceptional character of a state of emergency but also the undeniable truth that in times of crisis, the force of legal constraints may be limited.¹³⁰ We, therefore, suggest that the approach to this problem be based on a soft law strategy that, in the future, might be developed into a hard law proposal. A Global Emergency Working Group should also be implemented to facilitate the flow of information, coordinate efforts according to the nature of the crises, as well as to collect and preserve valuable data during and after the emergency.

One advantage of this framework is that it incentivizes Members to refrain from weaponizing security-emergency provisions by increasing the costs of invoking such provisions. A mandatory rebalancing mechanism will contribute to discouraging the misuse of these provisions. Furthermore, *ad hoc* arrangements are instrumental in preventing powerful countries from actively sabotaging the achievement of bilateral, mutually beneficial bargains to restore the balance of rights and obligations, especially with non-developed countries.

A second advantage of this framework is that it enhances cooperation among Members when dealing with common threats to provide a unified response. Over time, such attempts for collective action will lead to concurrence (or at least coexistence) of values, approaches, norms, and policies when facing these events, because practice generates transformation.¹³¹ The proposed Security Committee and Global Emergency Working Group will be instrumental in developing a convergent heatmap to assess global risks (based on governments' National Security Plans, Strategies, or Policies) and to promote discussions and engagement to build an international "*minima* ethics"¹³² to respond to global emergencies.

A third advantage of this framework is that it does not impinge on national sovereignty; on the contrary, it encourages the strengthening of the rule of law from a domestic perspective. It provides room for continuous discussions, through the Security Committee, to share ideas and tools used by Members at the national level to restrain the abuse of emergency powers.

Under our framework, Members are encouraged (1) to refrain from misusing security-emergency provisions; (2) to ensure that measures applied are targeted, proportionate, transparent, temporary, and should not create unnecessary barriers to trade or disruption of global supply chains, especially in essential goods; and (3) to respond to global threats in a coherent, multi-sectoral, and multi-stakeholder approach.¹³³

We do not claim that all abuses of security measures will be prevented, but at least in the case of blatant abuse, this framework provides a mechanism to offer effective redress to affected

¹²⁹ Segun Osisanya, *National Security versus Global Security*, UN CHRONICLE, 2014, <https://unchronicle.un.org/article/national-security-versus-global-security> (last visited Jul 14, 2020).

¹³⁰ PAUWELYN, *supra* note 32 at 15.

¹³¹ EMANUEL ADLER & VINCENT POULIOT, INTERNATIONAL PRACTICES (2011).

¹³² LAMY AND GNESOTTO, *supra* note 114 at 136. The principal obstacle towards a more cooperative and coordinated response to address crises and emergencies at the international level is that of a shortage of shared values to achieve collective action on a global scale. *Id.* at 180, 136.

¹³³ WTO Members, *supra* note 126.

Members. Also, it increases the cost of misuse, making it less appealing and generating criticism and disapproval from third parties.

Furthermore, the application of our framework is not limited to the GATT, and it can also be extended to other international economic agreements.

Our framework is intended, on the one hand, to preserve the ability of Members to invoke security provisions to protect legitimate and essential security interests, both in regular times as well as during emergencies, and, on the other hand, to prevent their misuse. Our hope is that the proposed framework will offer a means to recognize and offset the growing temptation to justify politically motivated trade-restrictive measures under the pretext of security-emergencies.

Overall, we believe this framework is one that could be used to draft a model provision for Art. XXI. It provides a language and motivating structure for defusing and disaggregating the problem posed by security exceptions into a more manageable set of provisions. It is a roadmap out of the “catch-all clause”¹³⁴ towards a more structured clause and systematic use of security-emergency provisions.

B. Model Provision

Article XXI: Security Exceptions

1. Nothing in this Agreement shall be construed to:

- (a) require a Member to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
- (b) preclude a Member from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, the protection of its own essential security interests, or in circumstances of extreme emergency in accordance with its laws.

2. Notwithstanding paragraph 1,

- (a) Members shall comply with the Security Measures Code for the adoption and application of measures mentioned in paragraph 1(b).
- (b) Members recognize that their interconnectedness and vulnerabilities in the face of global emergencies require a coherent, multi-sectoral, multi-stakeholder, and whole of the WTO Community approach. Accordingly, in times of global emergency or similar serious catastrophe as declared by a competent international organization, Members should take action in accordance with the Guiding Principles for Times of Global Emergency.
- (c) The adoption of measures to give effect to paragraphs 2(a) and 2(b) shall be a matter of conscious and purposeful effort on the part of the Members both individually and jointly.

¹³⁴ JACKSON, *supra* note 6 at 229.

Two fundamental changes are introduced to the text of Art. XXI in the proposed model provision. First, the elimination of subparagraphs (i)-(iii) because although politics and trade should ideally be kept separate, total separation is not realistic. In this vein, we consider that the judicialization¹³⁵ of economic matters tied to political issues,¹³⁶ such as the validity of implementation of security measures, can only compromise the credibility of DSS and undermine the treaty regime. Besides, the objective of a ruling is to preserve the balance of rights and obligations; therefore, with the presented rebalancing mechanism, there is little point in judicializing a dispute.

Second, the inclusion of Paragraph 2, which introduces procedural safeguards to prevent misuse of security provisions in general (a), and a specific provision to guide international response in times of global emergencies (b). The former is presented through a Code (Annex 2) and the latter through a set of Guiding Principles (Annex 3). The idea was to identify and draft a set of desirable operational norms for security provisions based on the foundational principles of non-discrimination, transparency, predictability, proportionality, and accountability.

Even though the proposed text introduces a hard law approach to measures taken in international emergencies and a soft law approach for measures taken during global emergencies, the fact is that, depending on the political atmosphere, the text may be adjusted to the will of the Members by interchanging the terms “shall/should”: this provides the negotiator with room to maneuver between binding and non-binding language. We do acknowledge the possibility that if the political will is missing, a hard law proposal might not be plausible. In this case, both proposals may need to be launched from a soft law approach (to alleviate the sovereignty loss many Members fear when it comes to discipline the use of Art. XXI further) and gradually work towards a plurilateral binding commitment of like-minded parties.¹³⁷

While at first glance the above ideas may appear as wishful thinking, it is important to stress that many of the rules agreed in the Tokyo Round codes became part of the WTO rulebook when time and circumstances allowed. “Crises, ultimately, provide signals that an existing order is no longer viable” (in fact, GATT was born out of a major crisis).¹³⁸ Thus, we must remain hopeful that once the storm has passed, similar enthusiasm as that experienced in the two critical moments of history when GATT and WTO were created will eventually return and allow for further coordination and cooperation in international trade.

¹³⁵ In *Russia — Traffic in Transit*, the Panel conducted an interpretative analysis and concluded that Art. XXI allows a panel the power to review whether the requirements of the subparagraphs (i), (ii) and (iii) are met. PANEL REPORT, *supra* note 24 at at 56-57.

¹³⁶ Legal interpretation of provision as well as securitization of issues are both political acts. See Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 445–474 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012), https://www.cambridge.org/core/product/identifier/CBO9781139107310A029/type/book_part (last visited Jul 14, 2020); BUZAN, WÆVER, AND WILDE, *supra* note 29 at 23–26.

¹³⁷ A soft law approach is introduced due to the nimbleness at which it can be drafted and adopted. Also, the political interests that resist binding legal instruments are more less resistant to soft law because soft law instruments do not require the complete accommodation of domestic law with international law, and instead allow states to selectively pick certain provisions for a specific need for better coordination. Henry Gabriel, *The Use of Soft Law in the Creation of Legal Norms in International Commercial Law: How Successful Has It Been?*, 40 MICHIGAN JOURNAL OF INTERNATIONAL LAW 413–432, 416 (2019).

¹³⁸ Jakovleski Velibor, *Governance, in Crisis: What COVID-19 Means for the Present and Future of Global Governance*, THE GLOBAL (2020), <https://theglobal.blog/2020/04/08/governance-in-crisis-what-covid-19-means-for-the-present-and-future-of-global-governance/> (last visited Jul 21, 2020).

CONCLUSIONS

COVID-19 has put the whole world into uncharted waters, and while nationalism has characterized the initial legal and political responses to the pandemic, international cooperation will determine the next stage. The virus has evidenced the lack of trade rules to address global emergencies, providing a precious opportunity to revise the shortcomings of security-emergency provisions and how to overcome them. The post-coronavirus world will require a new strategic approach to the broader and deeper view of security with an emphasis on effective crisis-management mechanisms to address non-traditional threats.

The problem of balance when addressing security-emergency provisions is not exclusive to Art. XXI, it is a problem of life itself. Achieving a proper balance between competing values has always been a challenge, whether we talk about globalization, liberalization, or protection. Experimenting with different approaches is what, in the end, leads us to an optimal equilibrium, but such equilibriums are only valid as long as the circumstances remain constant. However, disruptive new technologies (entailing potential new threats) reduce the duration of the balances achieved. Thus, we must keep pace with the world's developments with creative thinking and institutional engineering to reach new balances to function more efficiently as a whole.

As researchers, we are well aware of the limits of academic suggestions and recommendations to policymakers and negotiators. Nonetheless, this proposal aims to help broaden the toolkit available for negotiators to resort to when dealing with the needs of different economic agreements containing security-emergency provisions. The proposals introduced in this essay are not designed to be mutually exclusive. In fact, elements of each proposal can be selectively combined by negotiators to attain the desired level of commitment. A mix of domestic and international, binding and nonbinding elements is considered best for holistically addressing the challenges posed by security-emergency exceptions.

ANNEX 1. SECURITY – RELATED PROVISIONS IN INTERNATIONAL AGREEMENTS

AGREEMENTS	TEXT OF THE PROVISION
WTO	
GATT, GATS, AND TRIPS	<p>Articles XXI, IV bis and 73 accordingly *</p> <p>Nothing in this Agreement shall be construed</p> <p>(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests;</p> <p>(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations;</p> <p>(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</p>
OECD	
CODE OF LIBERALISATION OF CAPITAL MOVEMENTS AND OF CURRENT INVISIBLE OPERATIONS	<p>Article 3: Public Order and Security *</p> <p>The provisions of this Code shall not prevent a Member from taking action which it <u>considers</u> necessary for: i) the maintenance of public order or the protection of public health, morals or safety; ii) the protection of its essential security interests; iii) the fulfilment of its obligations relating to international peace and security.</p>
DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (DIIME)	<p>National Treatment II.</p> <p>1. That adhering governments <u>should, consistent with their needs</u> to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government (hereinafter referred to as (“Foreign-Controlled Enterprises”) treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises . . .</p>
EUROPEAN UNION	
CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION	<p>Article 4</p> <p>1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.</p> <p>2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. <u>In particular, national security remains the sole responsibility of each Member State. . .</u></p>
OTHER ECONOMIC TREATIES	
US MODEL BIT (1984)	<p>(1984) Article X: General Exceptions**</p> <p>1. This Treaty shall not preclude the application by either Party of measures <u>necessary</u> in</p>

	its jurisdiction for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests .
NAFTA (1994), GATS (1995), CANADA MODEL BIT (2004), CHINA/AUSTRALIA FTA (2015) AND CHINA/CHILE FTA (2019)	Articles 2102, XIV bis, 10(4), 16.3 and 100, accordingly* Substantially the same as GATT Art. XXI.
INDIA MODEL BIT (2003)	Article 12: Applicable Laws ** (1) Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made. (2) Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency <u>in accordance with its laws normally and reasonably applied on a non discriminatory basis</u> .
ASEAN/CHINA FTA (2004)	Article: 13 Security Exceptions* Nothing in this Agreement shall be construed: (a) to require any Party to furnish any information the disclosure of which <u>it considers</u> contrary to its essential security interests; (b) to prevent any Party from taking any action which <u>it considers</u> necessary for the protection of its essential security interests , including but not limited to: (i) action relating to fissionable materials or the materials from which they are derived; (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) action taken so as to protect critical communications infrastructure from deliberate attempts intended to disable or degrade such infrastructure; (iv) action taken in time of war or other emergency in domestic or international relations; or (c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
US/CHILE FTA (2004), US MODEL BIT (2004), CPTPP (2018), US/JAPAN FTA (2019) , AND USMCA (2020)	Articles 23.2, 18, 29.2, 4 and 32.2, accordingly* 1. Nothing in this Agreement shall be construed to: (a) require a Party to furnish or allow access to information the disclosure of which <u>it determines</u> to be contrary to <u>its essential security interests</u> ; or (b) preclude a Party from applying measures that <u>it considers</u> necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.
CECA INDIA/SINGAPOR E (2005)	Article 6.12: Security Exceptions* 1. Nothing in this Chapter shall be construed: (a) to require a Party to furnish any information, the disclosure of which <u>it considers</u>

	<p>contrary to its essential security interests; or</p> <p>(b) to prevent a Party from taking any action which <u>it considers</u> necessary for the protection of its essential security interests (i) relating to fissionable and fissionable materials or the materials from which they are derived; (ii) in time of war or other emergency in international relations; (iii) relating to the production or supply of arms and ammunition; or (iv) to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures; or</p> <p>(c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.</p> <p><i>4. This Article shall be interpreted in accordance with the understanding of the Parties on non-justiciability of security exceptions as set out in their exchange of letters, which shall form an integral part of this Agreement.</i></p>
GERMAN MODEL BIT (2008)	<p>Article 3: National and Most-Favoured-Nation Treatment</p> <p>(1) Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.</p> <p>(2) Neither Contracting State shall in its territory subject investors of the other Contracting State, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State. The following shall, in particular, be deemed treatment less favourable within the meaning of this Article: 1. different treatment in the event of restrictions on the procurement of raw or auxiliary materials, of energy and fuels, and of all types of means of production and operation; 2. different treatment in the event of impediments to the sale of products at home and abroad; And 3. other measures of similar effect.</p> <p>Measures that have to be taken for reasons of public security and order shall not be deemed treatment less favourable within the meaning of this Article...</p>
EU/CANADA CETA (2017)	<p>Article: 28.6 National security*</p> <p>Nothing in this Agreement shall be construed:</p> <p>(a) to require a Party to furnish or allow access to information if that Party <u>determines</u> that the disclosure of this information would be contrary to its essential security interests; or</p> <p>(b) to prevent a Party from taking an action that <u>it considers</u> necessary to protect its essential security interests: (i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment;³⁵ (ii) taken in time of war or other emergency in international relations; or (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or</p> <p>(a) prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.</p> <p>³⁵ The expression “traffic in arms, ammunition and implements of war” in this Article is equivalent to the expression “trade in arms, munitions and war material.”</p>
US/PERU FTA (2006) AND KORUS (2018)	<p>Article 22.2: Essential Security/ Article 23.2***</p> <p>Nothing in this Agreement shall be construed:</p>

	<p>(a) to require a Party to furnish or allow access to any information the disclosure of which <u>it determines</u> to be contrary to its essential security interests; or</p> <p>(b) to preclude a Party from applying measures that <u>it considers</u> necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.²</p> <p>² <i>For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.</i></p>
EU/MEXICO FTA (2000 AND 2018 PENDING)	<p>(2000) Article 52: National security clause*</p> <p>No provision of this Agreement shall preclude a Party taking measures:</p> <p>(a) which <u>it considers</u> necessary to prevent disclosures of information which are contrary to the essential interests of its security;</p> <p>(b) relating to the production of, or trade in, arms, munitions or war material or to research, development or production necessary to guarantee its defence, provided these measures do not adversely affect the conditions of competition regarding products which are not intended for specifically military purposes;</p> <p>(c) which <u>it considers</u> essential to its security in the event of serious domestic disturbances liable to jeopardise public order, of war or serious international tensions that might erupt into armed conflict or to fulfill obligations it has entered into for the maintenance of peace and international security.</p> <p>(2018) Pending - Article X.3: Security exception*</p> <p>Nothing in this Agreement shall be construed:</p> <p>(a) to require a Party to furnish or allow access to any information the disclosure of which <u>it considers</u> contrary to its essential security interests; or</p> <p>(b) to prevent a Party from taking any action which <u>it considers</u> necessary for the protection of its essential security interests: (ii) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, carried out directly or indirectly for the purpose of supplying a military establishment; (iii) relating to the supply of services and technology, and to economic activities, carried out directly or indirectly for the purpose of supplying a military establishment; (i) relating to fissionable and fissionable materials or the materials from which they are derived; or (iv) taken in time of war or other emergency in international relations; or</p> <p>(c) to prevent a Party from taking any action in order to carry out its international obligations under the UN Charter for the purpose of maintaining international peace and security.</p>
BILATERAL FRIENDSHIP TREATIES	
US/IRAN (1955) AND US/NICARAGUA (1956)	<p>Article XX and XXI**</p> <p>1. The present Treaty shall not preclude the application of measures:</p> <p>(a) regulating the importation or exportation of gold or silver;</p> <p>(b) relating to fissionable materials, the radio-active by products thereof, or the sources thereof;</p> <p>(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and</p>

	(d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or <u>necessary</u> to protect its essential security interests .
OTHER TREATIES	
ENERGY CHARTER TREATY (1991)	<p>Article 24: Exceptions (3)*</p> <p>The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which <u>it considers necessary</u>:</p> <p>(a) for the protection of its essential security interests including those (i) relating to the supply of Energy Materials and Products to a military establishment; or (ii) taken in time of war, armed conflict or other emergency in international relations;</p> <p>(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfill its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or</p> <p>(c) for the maintenance of public order. Such measure shall not constitute a disguised restriction on Transit.</p>

*First Generation of security provisions

Source: by the author, based on OECD and UN data

** Second of security provisions

***Third of security provisions (emphasis added)

Note1: There might be security exceptions that resist classification under these categories.

Note2: The relevant terms are in “bold” and “underlined.”

ANNEX 2. SECURITY MEASURES CODE

AGREEMENT ON IMPLEMENTATION OF ARTICLE XXI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Members,

Having in mind the overall objective of the Members to improve and strengthen the international trading system based on the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as “General Agreement” or “GATT”);

Recognizing that security measures should not constitute an unjustifiable impediment to international trade;

Recognizing that their interconnectedness and vulnerabilities in the face of global emergencies require a coherent, multi-sectoral, multi-stakeholder and whole of WTO Community approach;

Taking into account the particular trade, development and financial needs of least-developed and developing country Members;

Desiring to interpret the provisions of Article XXI of GATT and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation; and

Desiring to preserve the balance of rights and obligations between the Members concerned under this Agreement;

Hereby agree as follows:

SECURITY MEASURES CODE

Article 1

Application of Article XXI of the General Agreement

This Code establishes rules for the application of security measures, which shall be understood to mean those measures provided for in Article XXI of GATT 1994.

Article 2

Nature and Scope of Obligations

The Members shall give effect to the provisions of this Code. All Members shall take necessary action, consistent with their domestic laws and procedures, to prevent misuse of security measures within their territory. Members shall be free to determine the appropriate adjustments to their own legal system and practice.

Article 3

Principles

The imposition of a security measure is to be taken only under the circumstances provided for in Article XXI of GATT 1994 and conducted in accordance with the provisions of this Code.

Article 4

General Provision

1. A Member shall apply security measures only to the extent it considers necessary to protect those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.
2. Members shall choose measures most suitable for the achievement of these objectives.

Article 5

Application of Security Measures

1. Measures shall be targeted, proportionate, transparent, temporary, and shall not create unnecessary barriers to trade or disruption to global supply chains. Measures shall be withdrawn as soon as reasonably practicable.
2. The measures at issue must meet a minimum requirement of plausibility in relation to the proffered essential security interests.

Article 6

Domestic procedures and related matters

Members shall report without delay to the Committee all preliminary or final actions taken with respect to security measures. Such reports will be available for inspection by government representatives. Members shall also submit, on a semi-annual basis, reports on their National Security Plans, Strategies, or Policies.

Article 7

Provisional Security Measures

In circumstances of extreme emergency, Members may take a provisional security measure. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 9 through 11 shall be met. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1 and 2 of Article 8.

Article 8

Duration and Review of Security Measures

1. A Member shall apply security measures only for such a period of time it considers necessary to protect its essential security interests. The period shall not exceed four years unless it is extended under paragraph 2.
2. The period mentioned in paragraph 1 may be extended provided that the Member applying such a measure shall review with the Security Committee the situation not later than the mid-term of the measure in accordance with the provisions of paragraph 2 of Article 11.

Article 9

Level of Concessions and Other Obligations

1. A Member proposing to apply a security measure or seeking an extension of a security measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the Members, which would be affected by such a measure. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.
2. If no agreement is reached within 30 days in the consultations, the affected Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Security Committee, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the security measure, the suspension of which the Security Committee does not disapprove.

Article 10

Developing and Least-Developed Country Members

1. If compensation to restore the previous substantially equivalent level of concessions and other obligations is not feasible between the Members concerned within a reasonable time. Any developing or least-developed country Member shall have the right to requests other Members to alleviate the effects of the security measure applied by means of a differential and more favorable treatment, the application of which the Security Committee does not disapprove.
2. A request for a waiver concerning Paragraph 1 shall be submitted initially to the Council for Trade in Goods for consideration during a time-period, which shall not exceed 90 days. At the end of the time period, the Council shall submit a report with its recommendations.
3. Waivers under the provisions of Paragraph 2 shall be granted only in accordance with Article XXV:5 of GATT 1994.

Article 11

Notification and Consultation

1. A Member shall immediately notify the Security Committee upon:
 - a) initiating an investigatory process relating to security threat concerning trade and the reasons for it;
 - b) making findings of serious threat to essential security interests concerning trade and the reasons for it; and
 - c) taking a decision to apply or extend a security measure.
2. In making the notifications referred to in paragraph 1(b) and 1(c), the Member proposing to apply or extend a security measure shall provide the Security Committee with all pertinent information, which shall include a precise description of the product involved and the proposed measure, obligation or Article in respect of the measure, domestic legal source of the measure, proposed date of introduction, expected duration, the purpose of the measure, the rationale that led the Member to “consider” it necessary, and the nature of the extreme emergency where applicable. The Security Committee may request such additional information as it may consider necessary from the Member proposing to apply or extend the measure.
3. The requirement set forth in paragraph 2 may be waived by a Member in the case of circumstances of extreme emergency. In any such case, a Member shall make a notification to the Security Committee before taking a provisional security measure referred to in Article 7 or as soon as reasonably practicable. Consultations shall be initiated immediately after the measure is taken.
4. The provisions on notification in this Code shall not require any Member to disclose confidential information the disclosure of which it considers contrary to its essential security interests.

Article 12

Surveillance

1. There shall be established under this Agreement a Committee on Security Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Member, and it shall afford Member the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives.
2. The Committee will have the following functions:
 - (a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

- (b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a security measure, and report its findings to the Council for Trade in Goods;
- (c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;
- (d) to examine pre-existing Article XXI measures and report as appropriate to the Council for Trade in Goods;
- (e) to review, at the request of the Member taking a security measure, whether proposals to suspend concessions or other obligations are “substantially equivalent,” and report as appropriate to the Council for Trade in Goods;
- (f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods;
- (g) to discuss effective approaches and develop information-sharing activities to support efforts to enhance domestic mechanisms to prevent misuse of security measures;
- (h) to provide advice and recommendations to the Council for Trade in Goods on ways to further enhance the cooperation of Members in times of global emergencies or similar serious catastrophes;
- (i) to prepare an annual report with respect to security measures implemented by Members and their best practices. The report shall include a convergent heatmap to assess global risks based on governments National Security Plans, Strategies and/or Policies; and
- (j) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

3. The Committee may set up subsidiary bodies as appropriate.

4. In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

Article 13

Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.

Article 14

Final Provisions

1. No specific security measures can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement.¹³⁹

Acceptance and accession

2. (a) This Agreement shall be open for acceptance by signature by Members to the GATT 1994.
- (b) This Agreement shall be open for acceptance by signature or otherwise by governments having provisionally acceded to the GATT, on terms related to the effective application of rights and obligations under this Agreement, which take into account rights and obligations in the instruments providing for their provisional accession.
- (c) This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Members, by the deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed.
- (d) In regard to acceptance, the provisions of Article XXVI:5(a) and (b) of the General Agreement would be applicable.

Reservations

3. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Entry into force

4. This Agreement shall enter into force on 1 January 20XX for the governments which have accepted or acceded to it by that date. For each other government, it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

National legislation

6. (a) Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.
- (b) Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

¹³⁹ This is not intended to preclude action under other relevant provisions of the General Agreement, as appropriate.

Review

7. The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the period covered by such reviews.

Amendments

8. The Members may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Members have concurred in accordance with procedures established by the Committee, shall not come into force for any Member until it has been accepted by such Member.

Withdrawal

9. Any Member may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of withdrawal is received by the Director-General of the WTO. Any Member may upon such notification request an immediate meeting of the Committee.

Non-application of this Agreement between particular Members

10. This Agreement shall not apply as between any two Members if either of the Members, at the time either accepts or accedes to this Agreement, does not consent to such application.

Deposit

11. This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Member to the GATT a certified copy thereof and of each amendment thereto pursuant to paragraph 8, and a notification of each acceptance thereof or accession thereto pursuant to paragraph 2, and of each withdrawal therefrom pursuant to paragraph 9 of this Article.

Registration

12. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this xx day of xxx two thousand and xxxx in a single copy, in the English, French and Spanish languages, each text being authentic.

ANNEX 3. GUIDING PRINCIPLES FOR GLOBAL EMERGENCIES

GUIDING PRINCIPLES FOR GLOBAL EMERGENCIES (GPGE)

GPGE 1. Principle

Members agree to cooperate with each other in times of global emergency or similar serious catastrophe as declared by a competent international organization.

GPGE 2. Principle

Members should apply emergency measures only to the extent necessary to protect the quintessential functions of the state, namely, the protection of its territory and its population, and the maintenance of law and public order internally.

GPGE 3. Principle

Members should take additional steps to protect against any trade measure misuse within their territory during global emergencies.

GPGE 3.1. Subprinciple. Members should be free to determine the appropriate adjustments to their own legal system and practice.

GPGE 4. Principle

Emergency measures should be targeted, proportionate, transparent, temporary, and should not create unnecessary barriers to trade or disruption to global supply chains in essential goods.

GPGE 4.1. Subprinciple. Members should choose measures most suitable for the achievement of these objectives.

GPGE 4.2. Subprinciple. Emergency measures must meet a minimum requirement of plausibility in relation to the proffered purpose.

GPGE 4.3. Subprinciple. Measures should be withdrawn as soon as reasonably practicable.

GPGE 5. Principle

Members should give public notice before taking emergency measures or as soon as reasonably practicable.

GPGE 5.1. Subprinciple. Members should give notice to the Global Emergency Working Group with all pertinent information, which shall include a precise description of the product involved, the proposed measure, date of introduction, expected duration, the purpose of the measure, and the rationale underpinning it. The Global Emergency Working Group may request such additional information as it may consider necessary.

GPGE 5.2. Subprinciple. Members should initiate consultations as reasonably practicable with the Members, which would be affected by the measure at issue.

GPGE 6. Principle

Members should promote the exchange of information and cooperation between authorities and a designed group of experts with regard to implementation of measures, emergency plans or strategies, scientific evidence, and effects of the measures on other Members.

GPGE 6.1. Subprinciple. Members should establish and notify contact points in their administrations and be ready to exchange information on all pertinent issues, especially to identify and address trade disruptions that affect essential goods.

GPGE 6.2. Subprinciple. Members should designate priority lanes and introduce facilitative measures concerning the cross-border movement of essential goods.

GPGE 6.3. Subprinciple. Members should waive import duties and taxes and economic import prohibitions or restrictions on essential goods.

GPGE 6.4. Subprinciple. Members should consult with international organizations to promote a coordinated global response.

GPGE 7. Principle

Members should develop a platform to exchange timely and accurate information during the emergency.

GPGE 7.1. Subprinciple. This platform must include an information system where up-to-date critical data on global supply conditions (production capacity, output, stockpiles) and global demand conditions (consumption, imports, exports) of essential goods is generated and shared.

GPGE 7.2. Subprinciple. This platform should be specially designed for least-developed Members to access information and participate easily.

GPGE 7.3. Subprinciple. Recommendations and suggestions of best practices may be shared in this platform to guide least-developed Members to address the emergency.

GPGE 7.4. Subprinciple. This platform should provide a designated space for other sectors and stakeholders to participate, namely, the private sector (especially MSMEs), academia, and civil society.

GPGE 8. Principle

Members should create a Global Emergency Working Group (GEWG) to promote the design of international norms and governance procedures to manage coordination, collaboration, cooperation, and synergy between states' apparatuses and mechanisms to prevent global losses during the emergency.

GPGE 8.1. Subprinciple. The GEWG shall disseminate prompt, accurate, and comprehensive information to Members.

GPGE 8.2. Subprinciple. The GEWG shall coordinate the creation of essential goods lists according to the nature of the emergency.

GPGE 8.3. Subprinciple. The GEWG shall coordinate the design of common product standards and mutual recognition procedures to facilitate supply in essential goods.

GPGE 8.4. Subprinciple. The GEWG shall promote coordination among Members to finance the expansion of the production capacity of manufacturers of key essential goods and the companies they source from.

GPGE 8.5. Subprinciple. The GEWG shall promote coordination to pool international buying power to prevent hoarding and bidding wars among Members.

GPGE 8.6. Subprinciple. The GEWG shall monitor all measures notified and keep an up-to-date record available in the platform mentioned above to ensure transparency.

GPGE 8.7. Subprinciple. The GEWG shall create effective communication channels to disseminate among the public and private sectors relevant information regarding the importance of preventing actions that may result in trade disruptions that affect trade in essential goods.

GPGE 9. Principle

The GEWG shall maintain constant communication with the Committee on Security Measures.

GPGE 9.1. Subprinciple. The GEWG should prepare in a timely fashion a report to the Committee on Security Measures concerning emergency measures implemented by Members during the emergency.

GPGE 9.2. Subprinciple. The report should include Members' strategies or policies taken during the emergency, as well as relevant information regarding their application and outcomes.

GPGE 9.3. Subprinciple. The report should include the best practices and experience gained by Members' implementation of measures during the emergency, as well as recommendations for future events.

GPGE 10. Principle

After the emergency, Members should engage in discussions to share ideas to address the collective action problem. Dialogues towards a *minima* ethics during global emergencies should be launched among Members and include the participation of other stakeholders. An inclusive approach, as opposed to an exclusive one, is crucial to identifying concurrent values for better coordination of international response in future emergencies.

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