

AN INTRODUCTION TO TRADE AND NATIONAL SECURITY: NEW CONCEPTS OF NATIONAL SECURITY IN A TIME OF ECONOMIC UNCERTAINTY

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Within the context of enhanced rhetoric about the need for national security measures to protect domestic economic interests, the Duke Journal of Comparative & International Law hosted a Symposium on National Security and Trade Law in which speakers raised questions as to not only what is meant by national security today, but also the significance of invoking national security exceptions in trade. This Introduction provides an overview of issues discussed as well as some reflections on the use of the national security exception in trade during a time when nations are moving away from international cooperation towards unilateralism and facing global crises such as the COVID-19 pandemic. With the World Trade Organization's recent panel decision, Russia—Measures Concerning Traffic in Transit, the international community received some guidance as to the limited use of this exception under GATT Article XXI and the need for good faith by nations invoking it, but larger questions remained as to its applicability in the context of economic insecurity and in the context of broader global challenges such as cybersecurity and climate change. Furthermore, with the current dysfunction of the Appellate Body of the WTO, there is no central adjudicatory body to address these issues in a systematic fashion, leaving it up to the nations or ad hoc adjudicatory processes to decide, rendering the multilateral trade framework an even more fragmented system. New ways of imagining the role of trade in the context of global and economic crises are needed, as well as more resilient institutional frameworks that can adapt to future forms of insecurity and allow for varied, constructive forms of dialogue among nations.

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As one of the first U.S. Symposia on the topic, speakers at the *Duke Journal of Comparative & International Law* Symposium on National Security and Trade Law held at Duke University School of Law on February 7, 2020 discussed the increasing inter-connection between national security policy and economic policy through trade in their domestic and international dimensions. Within the context of enhanced rhetoric about the need for national security measures to protect domestic economic interests, panelists raised questions as to not only what is meant by national security today, but also the significance of invoking national security exceptions in trade while at the same time countries move away from international cooperation towards unilateralism. Furthermore, the national security exception is being used at a time when global institutions such as the Appellate Body of the World Trade Organization (WTO) are being crippled, undermining the stability of the global order and the rule of law internationally. This Symposium took place just before the COVID-19 outbreak became a pandemic, so the panelists did not specifically address this event; however, as I write this Introduction, the world is enduring the serious personal, social, and economic impacts of this viral outbreak. In a time when international cooperation is crucial to controlling a global pandemic, important questions arise as to the use of national security measures in justifying trade barriers in this context and highlight the interwovenness of the local, national, and global when dealing with global crises. This pandemic also allows us to examine microscopically the local and global impacts of implementing national security measures, and the discussions stemming from this Symposium will have much broader implications for the future than originally envisioned.

Duke Law Professor Rachel Brewster introduced the Symposium with an overview of the major issues concerning national security and trade. The first panel, which she moderated, focused on the domestic dimensions of U.S. trade, with panelists Tim Meyer, Scott Lincicome, and Kathleen Claussen engaging in important topics from the Trump Administration's unprecedented use of import tariffs to combat Chinese importation of steel and aluminum as part of a U.S. strategy on national economic security to the constitutional and administrative law aspects of the use of national security in trade.¹ In focusing on the U.S. actions and perspectives on trade of late, panelists examined the broader question of whether trade is international at all. In other words, framing trade issues within the context of domestic policy leads to different outcomes and engages national economic and national

1. For a discussion on the Trump Administration's trade strategies particularly as they pertain to China, see generally Rachel Brewster, *Analyzing the Trump Administration's International Trade Strategy*, 42 *FORDHAM INT'L L.J.* 1419, 1425–27 (2019).

security frameworks in different ways than its global context. In doing so, the domestic focus also highlights the fragmentation in international trade, which in turn emphasizes the value of engaging with a multilateral framework on international trade that can better coordinate domestic action and set guidelines that discipline unruly government action. The current use of national security as the motivation and defense for domestic use of tariffs, for example, reveals not only the fragility of the multilateral system, but also the loopholes within domestic trade law.

In kicking off the discussion of the Trump administration's use of the national security exception, Scott Lincicome provided an overview of the recent use of Section 232 of the U.S. Trade Act to raise tariffs on aluminum, steel, and titanium against China, as well as U.S. trading allies Mexico and Canada, among others.² After an in-depth discussion of these cases and various related political and administrative challenges, the speaker raised the important question of whether imposing such tariffs actually achieved the goal of protecting national security and stressed the need for more data on this.

Professor Claussen's presentation highlighted the structural predisposition of U.S. trade statutes that allows various expansive uses of the national security exception; namely, in Sections 232, 338, and 337 of the U.S. Trade Act.³ She proposed that divergences in applying this exception, especially with respect to economic security, is a function of the ways in which Congress has understood free trade and economic delegations over

2. Request for Consultations by Switzerland, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/1 (Jul. 12, 2018); Request for Consultations by Russian Federation, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS554/1 (July 2, 2018); Request for Consultations by Norway, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/1 (June 19, 2018); Request for Consultations by Mexico, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS551/1 (June 7, 2018); Request for Consultations by Canada, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS550/1 (June 6, 2018); Request for Consultations by European Union, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/1 (June 6, 2018); Request for Consultations by China, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS547/1 (May 23, 2018); Request for Consultations by China, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/1 (Apr. 9, 2018); Request for the Establishment of a Panel by Qatar, *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS526/2 (Oct. 6, 2017); Request for Consultations by Qatar, *Saudi Arabia—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS528/1 (Aug. 4, 2017); Request for Consultations by Qatar, *Bahrain—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS527/1 (Aug. 4, 2017).

3. Trade Expansion Act of 1962, 19 U.S.C. § 1862 (2018); Tariff Act of 1930, 19 U.S.C. § 1337–1338 (2018); Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN L. REV. (forthcoming 2020) (Aug. 29, 2019 draft available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3439705).

time.⁴ She concluded by proposing various solutions to this structural mismatch so as to “de-exceptionalize” trade and security issues at the domestic level.⁵ Professor Meyer stressed the importance of finding solutions by first framing trade as domestic and not international; more specifically, as a function of U.S. constitutional and administrative law and delegation of powers. He argued that in rethinking the non-delegation doctrine in the context of domestic economic law, there can be more clarity into the nuanced ways in which domestic law shapes executive power, particularly in the use of national security exceptions.⁶

The second panel discussed the international aspects of trade in the context of national security. Speakers included Ben Heath and Simon Lester. As the moderator, I began this discussion by setting up the context of the international dimension to trade and provided some background into the national security exception under the General Agreement on Tariffs and Trade (GATT).⁷

Most scholars would consider the national security exception as a kind of safety valve for nations, particularly after World War II, with the Cold War looming and nuclear non-proliferation uncertain, to allow nations to retain sovereignty over their national security.⁸ The summary report of the

4. *See id.* at 4–7.

5. *See id.* Some of those solutions include enhancement in agency coordination to better review the use of the national security exception, as well as revisions to U.S. Trade Act and trade agreements that allow for more transparency and accountability. For more discussion on possible solutions, see *id.* at Part III.B–C.

6. For more discussion on trade as part of domestic economic policy and as a function of the distribution of constitutional powers, see Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. 583 (2019).

7. GATT Article XXI states:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

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

8. For a history of how the national security perspective has evolved in the United States since the beginning of the Union illustrating a gradual expansion in the concept from purely military but within certain limits, see generally Laura K. Donohue, *The Limits of National Security*, 48 CRIM. L. REV. 1573 (2011).

Geneva Draft in 1947 (informal summary of the ITO Charter) stated the following about this exception: “Members may . . . do whatever they think necessary to protect their security interests relating to atomic materials, arms traffic, and wartime or other international emergencies”⁹ Though little guidance was given in the GATT or its negotiating history as to how to interpret this exception, most scholars traditionally have agreed that it was meant to be interpreted narrowly, and, if invoked, should have some connection to military action or conflict to which a Member is subject.¹⁰ There has been debate as to the self-judging nature of the exception—whether it was completely in the discretion of Members or whether it also contained an objective security exception.¹¹ An example of the objective aspect of this exception is in the last part of GATT Article XXI, which refers to the use of national security adhering to the UN charter.¹² Finally, last year, the international community received some answers with the WTO panel case, *Russia—Measures Concerning Traffic in Transit*,¹³ though it also left us with many unanswered questions.

This 2017 dispute, which concluded in April 2019, concerned Ukraine’s challenges to Russian bans and restrictions on traffic in transit by road and rail from Ukraine, across Russia, and destined for Kazakhstan and the Kyrgyz Republic, as well as to the alleged de facto extension of these bans and restrictions to Ukrainian traffic in transit destined for Mongolia, Tajikistan, Turkmenistan, and Uzbekistan. Ukraine claimed that Russia had violated its obligations under the Freedom of Transit provision under GATT Article V and publication obligations under GATT Article X, as well as related obligations under Russia’s Accession Protocol. Russia responded by invoking GATT Article XXI’s national security exception, specifically arguing that the restrictions were necessary for its essential security interests.¹⁴ It argued that its actions were in response to the 2014 “emergency in international relations” and that its actions should not be “doubted or re-evaluated by any other party.”¹⁵ It also argued that Article XXI(b)(iii) was

9. U.N. Conference on Trade and Employment, *An Informal Summary of the ITO Charter*, 35, U.N. Doc. E/CONF.2/INF.8 (Nov. 21, 1947).

10. For an overview of the national security exception in international trade and its predominant use in military contexts, see Roger Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011).

11. *See id.* at 704–08.

12. *See* GATT, *supra* note 6, art. XXI(c).

13. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.21, WT/DS512/R (adopted Apr. 5, 2019) [hereinafter *Russia Traffic in Transit Panel Report*].

14. *Id.* ¶ 7.27.

15. *Id.* ¶ 7.29. The international community considered Russia’s actions in 2014 as an annexation of part of Ukraine and, therefore, a violation of international law. *See* G.A. Res. 68/262 (Mar. 27, 2014); G.A. Res. 71/205 (Dec. 19, 2016).

essentially a “self-judging” provision for Members and that, therefore, the Panel did not have jurisdiction to further address the matter.¹⁶

Overall, the Panel decision provided a narrow interpretation of GATT Article XXI, but it also left the door open for continued debate on its applicability. First, the Panel clarified that “emergencies” under this provision refer to a situation of armed conflict or latent armed conflict, heightened tension or crisis, or “general instability engulfing or surrounding a state.”¹⁷ It also clarified that it was irrelevant which actor or actors bore the brunt of the responsibility of the emergency.¹⁸ Second, the Panel concluded that there is an objective standard to use when determining whether the action is taken in a time of an emergency in international relations.¹⁹ It also interpreted Article XXI(b) narrowly, determining that if a case fell within that provision, it must meet objective requirements in one of the enumerated subparagraphs of that provision, such as Article XXI(c), which refers specifically to obligations under the UN Charter for the maintenance of peace and security.²⁰ Third, the Panel recognized the self-judging nature of the provision, but stated that it was limited by Members’ obligation to interpret and apply Art. XXI(b)(iii), which states that a Member should not be prevented from taking measures it considers “necessary for the protection of its essential security interests . . . in time of war or other emergency in international relations”²¹ The Panel stressed that this latter part of the provision must be applied in good faith and that “good faith” also applies to the connection the measure has to addressing the essential interest at play, in addition to its definition of essential security interests in that context.²² In other words, there must be some nexus between the measure taken and the essential security interest being addressed; that is, the measure must meet a minimum standard of plausibility in relation to the essential security interest. Finally, the Panel placed the burden of proof on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations, determining that the further removed from armed conflict situation the emergency was, the greater specificity the Member

16. See Russia Traffic in Transit Panel Report, *supra* note 13, ¶ 7.28.

17. See *id.* ¶¶ 7.108–109, 7.111–126. The Panel was referring to GATT Art. XXI(b)(iii), which states: “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations.” See GATT, *supra* note 6, art. XXI(b)(iii).

18. See Russia Traffic in Transit Panel Report, *supra* note 13, ¶ 7.121.

19. See *id.* ¶¶ 7.69–82.

20. See GATT, *supra* note 6, art. XXI(c).

21. See Russia Traffic in Transit Panel Report, *supra* note 13, ¶ 7.102; see also GATT, *supra* note 6, art. XXI(b)(iii).

22. See Russia Traffic in Transit Panel Report, *supra* note 13, ¶¶ 7.132–133.

would need to articulate.²³

This was the first decision by a WTO Panel on Article XXI, and therefore an important step providing guidance on how to interpret this provision. Probably the most significant outcome of this case was that the Panel concluded that issues under Article XXI are justiciable,²⁴ disagreeing with Russia's arguments that the provision was entirely self-judging and, as a result, provided full discretion to a Member in deciding what was *necessary* for the protection of its essential security interests.²⁵ In a time where rule of law is being undermined by unilateralism, this decision came at a crucial moment, despite the fact that only a few months later, the Appellate Body became effectively unfunctional due to the blocking of reappointment of judges.²⁶ At the same time, as Ben Heath pointed out in his presentation, this is a crucial time in the history of international trade, one in which we may engage in what he calls "institutional experimentation" and find modern ways of managing trade that better address the "structured politics" at the WTO and work outside the traditional adjudicatory process.²⁷

While *Russia—Measures Concerning Traffic in Transit* is important in defining the parameters of Article XXI, it also left open much room for debate, as it did not answer important questions that the speakers on this second panel touched upon. There remained questions of what constitutes an emergency in international relations. Who decides and under what standards is there an assessment of good faith by the Member invoking the exception? While the case implied that the further removed from a conflict or military action the emergency is, the higher the burden of proof for the invoking Member in proving that such an emergency exists, the parameters of instability or conflict in this context remain unclear. For example, would a purely economic security argument fall under the GATT exception? What about climate change? This latter topic is one that Professor Heath addressed in his presentation, stressing that the parameters of how we define national security have broader reach than traditional military conflicts, extending to areas of industrial policy, cybersecurity, and climate change.²⁸ In discussing

23. *See id.* ¶¶ 7.134–135.

24. *See id.* ¶ 7.103.

25. *See id.* ¶¶ 7.134–135. There were also other allegations of trade violations discussed in this case as well; namely, violations under GATT Article V and the Russian Accession Protocol. *See id.* ¶¶ 7.2–4.

26. *The World Trade Organization: The Appellate Body Crisis Report*, CTR. FOR STRATEGIC & INT'L STUDIES, <https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis> (last visited Apr. 25, 2020).

27. J. Benton Heath, *Trade and Security Among the Ruins*, 30 DUKE J. COMP. & INT'L L. 223, Part III (2020).

28. *Id.* at Part II.A–C.

these trends and proposing legal reforms for dealing with national security and trade matters, Professor Heath emphasized the point that “security itself is helpfully viewed as an intersubjective and socially-constructed concept, wherein any matter can plausibly be ‘securitized’ if an actor successfully claims that extraordinary measures are necessary to address an existential threat.”²⁹ While this is a particularly useful perspective in understanding the current use of national security doctrines, especially with looming global threats related to cybersecurity or climate change, it becomes increasingly important to also step back and consider whether addressing these broader issues as national security is truly helpful in finding solutions, or whether instead it just expands the notion so broadly that national security as a self-defense measure becomes undermined and loses its relevance all together. This traditional carve-out for state sovereignty in cases of military conflict, for example, cannot serve its original purpose in a world dealing with crises that are inherently global rather than domestic, in a world where solutions depend on unhindered supply chains to exchange necessary supplies, such as face masks and test kits for addressing the COVID-19 pandemic for example, or where countries manufacturing necessary supplies may become submerged due to rising sea levels caused by climate change.³⁰ Would climate change or a global health pandemic become the type of emergency contemplated by a crisis involving “other emergency in international relations,”³¹ as expressed in the GATT national security exception?

With global adjudication losing its relevance and fragmentation on the rise, avenues for dialogue across borders and expert communities become increasingly important. Simon Lester from the Cato Institute emphasized this point in his presentation on the international trade panel. In the spirit of dialogue and increased oversight, he proposed using the committee structure already found in WTO committees to establish a Committee on National Security that would allow a “rebalancing” process akin to what is found in the Safeguards Agreement, allowing for retaliation within certain guidelines

29. *Id.* at 228.

30. See Charlene Barshefky et al., *COVID-19: EU Imposes Export Restrictions on Protective Gear for Healthcare Providers; Additional Restrictions on Range of Healthcare Products Likely to Follow*, WILMERHALE (Mar. 24, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200324-eu-imposes-export-restrictions-on-protective-gear-for-healthcare-providers-additional-restrictions-on-a-range-of-healthcare-products-likely-to-follow>; see also Chad P. Bown, *COVID-19: Trump’s Curbs on Exports of Medical Gear Put Americans and Others at Risk*, PIIIE (Apr. 9, 2020), <https://www.piiie.com/blogs/trade-and-investment-policy-watch/covid-19-trumps-curbs-exports-medical-gear-put-americans-and>; see Denise Lu & Christopher Flavelle, *Rising Seas Will Erase More Cities by 2050, New Research Shows*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/interactive/2019/10/29/climate/coastal-cities-underwater.html>.

31. See GATT, *supra* note 6, art. XXI(b)(iii).

established by this Committee.³² Such focus on the discussions and the “specific work” within the proposed Committee on National Security would allow for both transparent discussion and collaboration in developing guidelines on technical issues related to national security as well as private discussions on more sensitive issues for Members.³³ He argued that it would also increase oversight on the use of the national security exception and hopefully help to establish mutually-agreed norms on its applicability. Simon Lester and his co-author, Inu Manak, in their paper develop these proposals and specify important factors to be considered as such an oversight mechanism is established. Even with a robust adjudicatory process, the WTO has always relied on the work of its committees. Furthermore, guidelines and interpretations of rules developed at the committee level have found their way into the adjudicatory process of the WTO, establishing new trade norms around specific areas such as technical barriers and the environment. In other work, I have referred to this “dialogical” interaction between the adjudicatory and the administrative branches of the WTO as having norm-generating qualities.³⁴ There are other ways in which institutional dialogue, as well as less formal dialogical approaches, may render solutions outside adjudication.³⁵

In the final panel, speakers Chad Bown and Jennifer Hillman and moderator Rachel Brewster discussed the future of trade and national security. As his paper further discusses, Chad Bown highlighted the possible use by governments of export restraints as a tool for implementing national security goals, even though these are rarely used and overall frowned upon by GATT and WTO rules. Export controls have increasingly become part of the national security rhetoric in the United States after President Trump threatened to use them on artificial intelligence software and exports of American jet-engines to China for commercial use. Most recently, they have been invoked by some European countries regarding necessary supplies for dealing with the COVID-19 pandemic, such as surgical masks and gloves and other related pharmaceutical and medical supplies.³⁶ The U.S. Congress

32. Simon Lester & Inu Manak, *A Proposal for a Committee on National Security*, 30 DUKE J. COMP. & INT’L L. 267 (2020).

33. *Id.*

34. For a general discussion of the dialogical approach to committee work with the adjudicatory branch of the WTO, see, e.g., Elizabeth Trujillo, *A Dialogical Approach to Trade and Environment*, 16 J. INT’L ECON. L. 535, Part III.B (2013). For more discussion on the role of dialogue in reframing the trade and environmental linkage, see generally ELIZABETH TRUJILLO, *SHATTERED PRISMS: RECONFIGURING TRADE THROUGH A SUSTAINABLE DEVELOPMENT FRAMEWORK* (Cambridge Univ. Press, forthcoming 2021).

35. *See id.*

36. Chad P. Bown, *Export Controls: America’s Other National Security Threat*, 30 DUKE J. COMP. & INT’L L. 283 (2020).

passed in 2018 the Export Control Reform Act of 2018 (ECRA) as part of the John S. McCain National Defense Authorization Act, which heightened concerns among the business sector that controls would be placed on their global exports.³⁷ In reviewing the history of export controls in trade and their various economic externalities on trading partners and global effects when countries use them, Chad Bown also stressed the challenges of ensuring the national security effects of using export restrictions due to the “political or economic incentives” governments have in using them for “alternative reasons.”³⁸ He noted as an example the 2019 *Japan v. Korea* case in which Japan placed export restrictions on Korea on important chemicals used in semi-conductors and television screens based on national security concerns about possible military use of such chemicals by North Korea, accusing South Korea of not sufficiently overseeing their end-uses.³⁹

Jennifer Hillman picked up on the issue of export restrictions in her presentation to highlight broader issues concerning not only the global challenges around using national security exceptions to restrict trade more generally, but also the legal strain of placing the decision-making power of such cases on global institutions like the WTO.⁴⁰ She reminded us of the diplomatic challenges global institutions face in balancing the interests of its various Member states and of the immense progress the international trading community had achieved in executing the vision of the Bretton Woods project. She discussed the stress being put on two important legal doctrines concerning national security exceptions: the most-favored-nation principle under export controls and the use of good faith, as outlined in *Russia-Measures Concerning Traffic in Transit*. How do we restore a sense of good faith in today’s trading climate? Who should decide this, especially with the Appellate Body non-functional? She posited that more countries may join the E.U. proposal to use alternative forms of arbitration under WTO DSU Article 25 to solve cases and deal with national security exceptions, but that compliance and enforcement may continue to be compromised.⁴¹ Finally, she considered ways of revising the Appellate Body process itself, encouraging the international community to finally address some of the U.S. concerns with this global institution, which were expressed long before the

37. Export Control Reform Act, 50 U.S.C. §§ 4801–4852 (2018).

38. Bown, *supra* note 36.

39. *Id.*

40. For a prior discussion of some of these issues, see Jennifer A. Hillman, *Trump Tariffs Threaten National Security*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/opinion/trump-national-security-tariffs.html>.

41. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 25, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

Trump Administration. The Symposium closed with a rigorous discussion among all participants on these issues and others raised throughout the day, signaling just how important trade and national security is for global economic relations moving forward and how much work is yet to be done both domestically regarding wealth gaps among various communities and internationally, and the need for modernizing the global trading system to better address today's challenges.

Since *Russia—Measures Concerning in Transit*, more WTO Members have invoked the national security exception, including in the *U.S.—Certain Measures Against Steel and Aluminum Products* cases and recent Qatar disputes concerning intellectual property rights.⁴² The current COVID-19 pandemic also raises concerns about increased export controls around the necessary supplies to combat this virus. While the trade community is trying to work out solutions to global problems and improve the effective use of supply-chains and technology to transition economies towards being more resilient to such global crises, governments are turning away from international cooperation towards nationalism and raising barriers to trade. At the same time, countries are negotiating regional and bilateral trade agreements, such as the recent USMCA between the United States, Mexico, and Canada, which also contains its own national treatment provision that arguably provides Parties with stronger self-judging authority than the one in GATT Article XXI.⁴³

These are interesting times for international economic relations—ones in which a confluence of forces is rendering this moment transformational, particularly for trade and for national security. First, faith in government and in the rule of law is wavering and the reliance on international institutions as backstops to nationalist movements has weakened, allowing power politics to dominate diplomacy over the more objective recourse to rule of law.⁴⁴ Second, fragmentation in trade, as well as other areas of international law, has become the new normal, making it increasingly important to find ways of engaging local governance and citizenry in finding solutions to global

42. See *supra* note 1.

43. USMCA national security exception states:

Nothing in this Agreement shall be construed to:

- (a) require a Party to furnish or allow access to information the disclosure of which it determines to be contrary to its essential security interests; or
- (b) preclude a Party from applying measures that it considers 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.

Agreement between the United States of America, the United Mexican States, and Canada art 32.2, Dec. 10, 2019.

44. See e.g. Gregory Shaffer, *Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. ONLINE 37 (2019).

problems. At the same time, crises, such as health pandemics, climate change, and cybersecurity, are increasingly intertwined with trade patterns and with the global economy, which in turn will require international cooperation and new legal frameworks to allow for more dialogue, technological progress, and information exchange. Third, the increased use of the national security exception raises questions around why nations comply with international law at all, harkening back to Harold Koh's infamous article on the topic, *Why do Nations Obey International Law?*⁴⁵ Challenges to compliance and enforcement of the law resonate today more than ever as we are forced to consider once again what has actually held together the multilateral system and find the thread that has unraveled it so quickly. Can it be fixed or rebuilt in a better, more resilient way, or will fragmentation be our only way forward as we strive to protect our local interests while still needing to engage globally?⁴⁶ Roger Alford has argued that the national security exception was indeed that weak link in the multilateral system,⁴⁷ but perhaps other weaknesses must be addressed as well.

Either way, in this unique COVID-19 moment of social distancing in which it feels that we are all suspended in time, clinging to our computers to communicate with the outside world, despite the safety of our homes, engagement outside our circles is necessary. This intricate dance between our insular community and the external ones with which we associate—the tangible and the virtual—becomes a reflection of our broader connection to both the local and the global. As such, this is a time for transformation, for the hard work ahead in readjusting our economies towards increased use of technology and new forms of energies that can properly sustain such technologies without accelerating climate change, and, at the same time, the concept of national security will also need to adapt to such changes. National security, as an emblem of national sovereignty, to be effective, will need to be used narrowly once again, rather than as a weapon for disengagement with others, as we move forward into a post-COVID-19 world of many unknown sources of insecurity.

45. Harold Koh, *Why Do Nations Comply to International Law?*, 106 YALE L. J. 2599 (1997).

46. For more discussion on ways of reconstituting trade in the midst of fragmentation, see *supra* note 34.

47. See Alford, *supra* note 10, at 750.

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