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National Security and Economic Globalization: Toward Collision or Reconciliation?

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ESSAY

NATIONAL SECURITY AND ECONOMIC
GLOBALIZATION:
TOWARD COLLISION OR RECONCILIATION?

*J. Benton Heath**

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I. INTRODUCTION

There is understandable anxiety today that the Trump administration’s national-security policies are pushing the world trading system to the brink of collapse.¹ The administration has drawn widespread condemnation by imposing tariffs on steel and aluminum in the name of national security, and it is now threatening similar measures with respect to automobiles.² These measures are consistent

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1. See, e.g., Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 *YALE J. INT’L L. ONLINE* 6, 11 (2018) (contending that the Trump administration’s actions have “undermined the WTO’s authority as a legitimate constraint on member countries and weakened its influence in transnational relations”); Gregory Shaffer, *A 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, 41–42 (2018) (discussing the turn to national security measures as part of a broader swing back toward politics at the WTO).

2. See, e.g., Presidential Proclamation No. 9705, 83 *Fed. Reg.* 11625 (Mar. 8, 2018); Presidential Proclamation No. 9758, 83 *Fed. Reg.* 25849 (June 5, 2018); Notice of Request for

with the Trump administration's broader governing strategy, which has embraced national security as a lever to obtain preferred policies on a range of issues from trade to immigration. It is therefore not surprising that much of the recent commentary on trade and security has focused on curbing abusive and overbroad invocations of national security by the executive branch.³ Other commentators, looking beyond the immediate threat of the Trump administration, have focused on the rise of China as an economic and geostrategic competitor, predicting an even more far-reaching transformation of the trade-security relationship.⁴

Without diminishing either of these challenges, I argue that the national-security threat to the global economic order is both broader than the US-China trade conflict and more intractable than the Trump administration. Trump's actions on trade reflect the increasing entanglement between national security policy and "ordinary" economic regulation—an entanglement that both predates and will outlast his administration and that extends farther than just the United States. This entanglement stems from a dramatic series of shifts in national security policy since the 1990s, such that security measures overlap with trade and investment rules in an ever-widening range of circumstances. Moreover, not all of these new security policies bear the hallmarks of abuse and overreach that characterize the Trump administration. It is unclear whether our international economic institutions have the legal tools, the capacity, or the legitimacy to address this growing body of novel—but not necessarily abusive—national security aims.

Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, 83 Fed. Reg. 24735 (proposed May 24, 2018).

3. See, e.g., Remarks by Rachel Brewster, Symposium, International Trade, Isolationism, Trade Wars & Trump (Feb. 8, 2019); 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> [<https://perma.cc/JMN2-W982>]; Harold Hongju Koh, *Trump v. Hawaii: Korematsu's Ghost and National Security Masquerades*, JUST SECURITY (June 28, 2018), <https://www.justsecurity.org/58615/trump-v-hawaii-korematsu-ghost-national-security-masquerades/> (quoting *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (Sotomayor, J., dissenting)) (“[T]he travel ban represents only the most prominent Trump administration policy that . . . ‘now masquerades behind a façade of national-security concerns’”).

4. See, e.g., Shaffer, *supra* note 1, at 42–43; Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Geoeconomics: The Variable Relationship Between Economics and Security*, LAWFARE (Nov. 27, 2018), <https://www.lawfareblog.com/geoeconomics-variable-relationship-between-economics-and-security> [<https://perma.cc/AE22-2ZYC>].

In this brief contribution, I will sketch these critical claims, which are defended more comprehensively in a forthcoming piece.⁵ Part II will trace the shifts in national security policy since the end of the Cold War. In Part III, I frame the implications of these shifts for international economic institutions. Part IV concludes with preliminary remarks on potential responses. My forthcoming work investigates further the normative outlook for economic law, identifying and theorizing possible reforms to the trade and investment system in light of these challenges.

II. TRANSFORMING NATIONAL SECURITY POLICY

In order to understand fully the national security challenge to economic law, it is important at least initially to take a wider scope, looking beyond the current and past disputes in trade and investment fora.⁶ National security policy has expanded significantly since the 1990s to encompass a wide range of threats, actors, and vulnerabilities.⁷ Some of these developments may appear benign, or even normatively desirable, while others are almost certainly troubling. But all of these developments have led to increasing overlap between security policy and ordinary regulation, to increasing conflict between security imperatives and individual liberties, and to demands for security expertise in an increasingly wide array of policymaking. The following discussion will illustrate these shifts by reference to developments in climate policy, counter-terrorism, and migration, before turning to their implications for economic law.

5. See J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. (forthcoming manuscript on file with author).

6. Until this year, there were no adjudicated cases on “essential security” in the seventy-plus-year history of the GATT/WTO. For an overview of state practice under the GATT/WTO system, see Roger Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011). For discussions of cases under investment and commercial treaties, see, e.g., JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 247–54 (2011). See generally Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law*, 59 INT’L & COMP. L.Q. 325 (2010).

7. See, e.g., BARRY BUZAN, OLE WAEVER & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 210–12 (1998); Alexandra Gheciu & William C. Wohlforth, *The Future of Security Studies*, in OXFORD HANDBOOK OF INTERNATIONAL SECURITY 3, 3–5 (Alexandra Gheciu & William C. Wohlforth eds. 2018); Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1705–51 (2011).

Of course, “national security” has always been a capacious and malleable concept.⁸ In legal and political theory, concepts of national security, vital interest, or public safety can take on a wide range of issues, from a narrow focus on military threats to broader concerns with security in all aspects of civil life.⁹ As soon as the term “national security” entered our legal lexicon with the passage of the 1947 National Security Act,¹⁰ it was already clear to observers that the concept was, as one author put it, an “ambiguous political symbol.”¹¹

What is new, then, is not the indeterminacy of national security, but its conceptual explosion since the 1990s. This can be seen by observing changes in US national security policy over this period.¹² The first official US national security strategy, published in 1987, is characterized in large part by the adversarial contest between the United States and the Soviet Union, focusing on military threats, nuclear deterrence, and the balance of power.¹³ Contrast this with the 2015 National Security Strategy of the Obama administration, which lists infectious disease, climate change, disruptions in energy markets, and transnational organized crime among the “top strategic risks” to

8. See, e.g., OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS* 214 (2006) (citing, among others, *United States v. U.S. Dist. Ct. for E.D. Mich.*, 407 U.S. 297, 320 (1972)).

9. For a particularly broad approach to public safety, see THOMAS HOBBS, *LEVIATHAN* 222 (1651) (Oxford Univ. Press 1996). See generally Jeremy Waldron, *Safety and Security*, 85 *NEB. L. REV.* 455 (2006):

Although we know that ‘security’ is a vague and ambiguous concept, and though we should suspect that its vagueness is a source of danger when talk of trade-offs is in the air, still there has been little or no attempt in the literature of legal and political theory to bring any sort of clarity to the concept.

Id. at 456.

10. National Security Law of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947). On the role of the Act in creating a new discourse of national security in the United States, see Aziz Rana, *Who Decides on Security?*, 44 *CONN. L. REV.* 1417, 1451–69 (2012).

11. See generally Arnold Wolfers, “National Security” as an Ambiguous Political Symbol, *LXVII POL. SCI. Q.* 481 (1952).

12. Since 1987, the White House has periodically published a National Security Strategy, which is required by law to publish a “comprehensive report on the national security strategy of the United States,” including on US interests and objectives, foreign policy, defense capabilities, and proposed uses of “the political, economic, military, and other elements of the national power of the United States” to achieve these objectives. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 603, Oct. 1, 1986, 100 Stat. 992, *codified as amended at* 50 U.S.C. § 3043.

13. See WHITE HOUSE, *NATIONAL SECURITY STRATEGY OF THE UNITED STATES* 3–7 (Jan. 1987) [hereinafter *NSS 1987*].

the United States, alongside military attack, terrorism, and proliferation, with no prioritization among these disparate goals.¹⁴

These documents admittedly reveal some continuities between our Cold War past and the increasingly multipolar present, but they also reflect some dramatic evolutions. As to continuity, both the Reagan and Obama strategies recognize many of the security risks that now preoccupy the Trump administration: they each raise concerns about the threats posed by international terrorism, and they each address the need to maintain a healthy domestic economy in the face of economic interdependence.¹⁵ But more recent policies reflect a much greater preoccupation with what Laura Donohue has referred to as “actor-less risks,” such as climate change and disease, along with diffuse risks posed by non-state actors like terrorists, transnational criminal organizations, and cyber-attacks.¹⁶

This phenomenon is not limited to the United States. In 2015, China adopted a broad new national security law that treats security as a multifaceted concept with military, political, economic, technological, and cultural dimensions.¹⁷ In 2009, the Organization for Economic Co-operation and Development (“OECD”) reported that its Member countries were addressing a wide range of risks in their security policies, including terrorism, pandemics, natural disasters, organized crime, cyber threats, human and drug trafficking, migration, and climate change.¹⁸ Another OECD working paper found that, just

14. WHITE HOUSE, NATIONAL SECURITY STRATEGY 2 (Feb. 2015) [hereinafter NSS 2015]. The extent to which these grand strategy documents impact policymaking is debatable. See, e.g., James Goldgeier & Jeremi Suri, *Revitalizing the U.S. National Security Strategy*, WASH. Q., Winter 2016, at 35-36 (contending that the 2015 strategy reflected a lack of strategic focus and was largely ignored upon its release). But these documents provide a rough guide to the policies and measures that can, at least in principle, be justified on national-security grounds.

15. See NSS 1987, *supra* note 13, at 5 (“Economic interdependence has brought tremendous benefits to the United States, but also presents new policy problems which must be resolved.”); *id.* at 7 (“An additional threat, which is particularly insidious in nature and growing in scope, is international terrorism—a worldwide phenomenon that is becoming increasingly frequent, indiscriminate, and state-supported.”); NSS 2015, *supra* note 14, at 4 (noting dangers from economic interdependence); *id.* at 9 (“The threat of catastrophic attacks against our homeland by terrorists has diminished but still persists.”); WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 10, 17–24 (Dec. 2017) (discussing these two issues).

16. Donohue, *supra* note 7, at 1715–22.

17. National Security Law of the People’s Republic of China, arts. 15–24 (2015), available at http://eng.mod.gov.cn/publications/2017-03/03/content_4774229.htm [<https://perma.cc/M2PK-3JAF>].

18. Organisation for Economic Co-operation and Development [OECD], *Security-Related Terms in International Investment Law and in National Security Strategies*, at 11, 13 (May

between 2009 and 2016, the range of industries that national foreign investment policies treat as security-sensitive had widened significantly to include the protection of telecommunications, education, health services, and the media, among other areas.¹⁹

While certainly troubling, the expansion of national security policy to encompass such a wide range of risks cannot always be dismissed as rank authoritarianism. For example, while there may be reasons to be skeptical about treating climate change as a security issue,²⁰ doing so brings needed attention and resources to the regulation of such an overwhelming and urgent threat.²¹ When President Obama stated to *The Atlantic* in 2016 that climate change, and not the Islamic State of Iraq and Syria (“ISIS”), is an existential threat to the United States,²² many observers could only applaud what is a refreshingly sober perspective. In the same vein, the Trump administration’s recent efforts to remove climate change from the list of security issues is easily criticized as yet another cynical move from an administration that traffics in conspiracy theories and climate denialism.²³

As national security policy has grown to encompass diffuse risks like climate change, it has also increasingly targeted non-state actors instead of state governments.²⁴ Beginning in the 1990s and exploding

2009), <https://www.oecd.org/daf/inv/investment-policy/42701587.pdf> [<https://perma.cc/GQ52-2LEB>].

19. Frédéric Wehrlé & Joachim Pohl, *Investment Policies Related to National Security*, at 22, OECD Working Papers on Int’l Investment 2016/02 (2016).

20. An excellent critical treatment of this issue, focusing on the securitization of environmental policy in the Clinton administration, is RITA FLOYD, *SECURITY AND THE ENVIRONMENT* (2010).

21. Indeed, many of the efforts to redefine security at the end of the Cold War took a decidedly humanitarian approach, aiming to de-militarize international relations, draw attention to new problems like environmental degradation, and catalyze foreign aid, multilateralism, and other non-military solutions to global problems. *See, e.g.*, U.N. DEV. PROGRAMME., *HUMAN DEVELOPMENT REPORT 1994*, at 22–40 (1994); Jessica Tuchman Mathews, *Redefining Security*, 68 *FOREIGN AFF.* 162 (1989); Richard H. Ullman, *Redefining Security*, 8 *INT’L SECURITY* 129 (1983).

22. Jeffrey Goldberg, *The Obama Doctrine*, *THE ATLANTIC*, at 77 (April 2016), <https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/> [<https://perma.cc/4X59-46TR>].

23. *See, e.g.*, Coral Davenport, *White House Climate Panel to Include a Climate Denialist*, *N.Y. TIMES*, Feb. 20, 2019, at A1.

24. These two developments are not entirely unrelated. *See, e.g.*, Philip Zelickow, *The Transformation of National Security*, *THE NAT’L INTEREST*, Spring 2003, at 17, 19–20 (Mar. 1, 2003), <https://nationalinterest.org/article/the-transformation-of-national-security-491> [<https://perma.cc/47TE-KN6N>] (treating the Bush administration’s focus on terrorists and other non-state actors as being of a piece with the Clinton administration’s concerns with the security dimensions of public health and disease).

after the terrorist attacks of September 11, 2001, national security policy began to shift away from state-to-state adversarial contests, and toward targeting individual terrorists, human rights violators, and other non-state actors.²⁵ This shift is reflected in economic sanctions policy: whereas traditionally economic sanctions were employed in state-to-state conflicts, states and the UN Security Council began in the 1990s to impose “targeted” sanctions on designated individual terrorists and their supporters.²⁶ Today, the United States has declared ongoing national emergencies with respect to not only terrorist networks, but also cyber criminals and transnational criminal organizations like the Yakuza and MS-13, allowing the executive to freeze and block assets of targeted individuals.²⁷ This individualization of national security raises broader concerns about due process in the face of executive discretion—a point that will have significant implications for the application of international economic law.²⁸

All of these concerns—the widening material scope of national security, its application to diffuse risks, and the potential for excess and deprivation of liberty—come together in the United States’ recent actions with respect to migration. In the *Trump v. Hawaii* case, five members of the Supreme Court deferred to the president’s assertion that severe restrictions on travel from several countries—restrictions that were designed to implement a campaign promise for a “Muslim

25. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare*, 88 N.Y.U. L. REV. 1521 (2013); Gabriella Blum, *The Individualization of War*, in LAW AND WAR 48 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds. 2014).

26. See, e.g., GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED 125–54 (3d ed. 2007); Daniel W. Drezner, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*, 13 INT’L STUD. REV. 96 (2011).

27. Exec. Order No. 13694, 80 Fed. Reg. 18077 (Apr. 1, 2015) (malicious cyber activities); Exec. Order No. 13581, 76 Fed. Reg. 44757 (July 24, 2011) (transnational criminal organizations); see also *Specially Designated Nationals List by Program (SDN List)*, U.S. DEP’T OF THE TREASURY, <https://www.treasury.gov/ofac/downloads/prgrmlst.txt> (listing MS-13 and Yakuza under “TCO,” for “transnational criminal organizations”). The finding of “an unusual and extraordinary threat to the national security, foreign policy, or economy of the United States,” leading to a declaration of national emergency, is required by the International Emergency Economic Powers Act, 50 U.S.C. § 1701(a). The procedure for declaring such emergency is provided by the National Emergencies Act, 50 U.S.C. §§ 1621–41. For an early recognition of the executive’s expanding powers under these statutes, see Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense*, 26 INT’L LAW. 715, 742–46 (1992).

28. On the rise of due process concerns in US, EU, and UN sanctions respectively, see Parry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1, 30–37 (2018); Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 YALE J. INT’L L. 1, 14–18 (2019); Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT’L L. 1, 8–29 (2016).

ban”—were in furtherance of US national security interests.²⁹ More recently, the Trump administration has declared “a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency,” in order to obtain the necessary funds to build a wall along the US-Mexico border.³⁰ Both of these policies have rightly been criticized as manifestly motivated by racial and religious animus.³¹

Nevertheless, the tendency to make broad and even politically motivated national-security claims with respect to migration is not limited to Trump or other authoritarian-leaning regimes. National security policies in other Western countries also list migration as a security risk,³² and the specter of migration “crises” is a constant fixture in headlines around the world, not just at the United States’ southern border.³³ In 2016, as part of a broader policy realignment, the Obama administration declared a national emergency with respect to migration from Cuba, stating that “mass migration” would “endanger the security of the United States by posing a disturbance or threatened disturbance of the international relations of the United States.”³⁴ That emergency, too, is ongoing.³⁵

29. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–10, 2420–23 (2018).

30. Presidential Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019). The administration locates the authority for appropriating wall funding in 10 U.S.C. § 2808.

31. *See Hawaii*, 138 S. Ct. at 2441–45 (Sotomayor, J., dissenting); Declaration of Former U.S. Government Officials, ¶¶ 4–6 (Feb. 25, 2019), <https://www.vox.com/2019/2/25/18239736/former-officials-protest-national-emergency> [https://perma.cc/78HS-R5Z6].

32. *See, e.g.*, OECD Investment Division, *supra* note 18, at 13 (discussing Germany’s security strategy).

33. *Cf. Jaya Ramji-Nogales, Migration Crises*, 68 HASTINGS L.J. 609 (2017) (arguing that international law itself reproduces migration “crises” worldwide).

34. Presidential Proclamation No. 9398, 81 Fed. Reg. 9737, 9737–38 (Feb. 25, 2016). The authorizing statute permits the executive to make regulations governing the “anchorage or movement of any vessel” in US territorial waters, and to take certain other extraordinary measures. *See* 46 U.S.C. § 70051 (previously codified as 50 U.S.C. § 191). Prior to the 2016 proclamation, the national security emergency with respect to Cuba declared under this statute stemmed from a 1996 shoot-down by the Cuban military of civilian aircraft in international airspace, resulting in the deaths of three US citizens, as well as Cuba’s support for revolutionary forces in Central America, among other issues. *See* Presidential Proclamation No. 7757, 69 Fed. Reg. 9515 (Feb. 26, 2004); Presidential Proclamation No. 6867, 61 Fed. Reg. 8843 (Mar. 1, 1996). In this context, the 2016 turn to migration and away from issues like the threat and use of force as the basis for this emergency could be said to reflect a de-escalation of Cuba policy, even as it continued the preexisting and long-running national emergency. *See generally, e.g.*, William M. LeoGrande, *Normalizing US-Cuba Relations*, 91 INT’L AFF. 473, 483–88 (2015).

35. Presidential Proclamation No. 9699, 83 Fed. Reg. 8161 (Feb. 22, 2018).

This is not to suggest a moral equivalence between the Trump administration and its predecessors. The migration example, in fact, suggests just the opposite: Obama's 2016 proclamation was part of a broader realignment meant to adjust and relax a moribund Cuba policy; Trump's 2017 Muslim ban was a cynical effort to deliver a hateful campaign promise. We can and should critique these policies on their merits.

But there are legal and structural continuities, which we must contend with as we think about how to respond to the latest national security challenges. The transformation of national security to include a range of matters—from climate change and public health, to terrorism, transnational crime, human rights violations, and corruption, to vulnerabilities in cyberspace—creates a deep reservoir of national security claims, which any state may draw on in an effort to circumvent the ordinary rules of the road. This policy shift was happening before the Trump administration and even before the rise of US-China tensions in the past decade, and it would have continued even without the emergence of nationalism in the United States and abroad. But the increasingly tense geopolitical environment does add fuel to this fire, creating a greater incentive to invoke national security as a justification for contentious policies, as well as a reciprocal incentive for other states to challenge those justifications.

III. THE COLLISION OF NATIONAL SECURITY AND ECONOMIC LAW

As a result of this transformation, it is becoming increasingly difficult to separate security issues from ordinary international economic law. This raises serious questions about the ability of our institutions to manage the boundary between security and the economy, either through political negotiation or judicialized dispute settlement. Here I will focus on just three of these questions, which roughly map on to the three illustrations discussed above: the challenge this transformation poses to the national security exceptionalism that has long governed trade law; the challenge to international tribunals of developing appropriate procedural or substantive standards for novel security policies; and the question of expertise and judicial review. Together, these challenges suggest that neither politics nor judicial review is sufficient to reconcile the new national security with international economic law.

By way of background, security policy is not the only thing that has expanded since the 1990s. Trade law has grown both substantively and institutionally. Substantively, trade policy concerns have shifted from a post-World War II focus on reducing tariff barriers and quotas, to a broader policy concern with “within the border” barriers to trade, such as regulations on health, safety, consumer protection, and the environment.³⁶ Institutionally, the founding of the World Trade Organization (“WTO”) brought a robust dispute-settlement system capable of issuing enforceable judgments—an international trade court in all but name.³⁷ International investment law underwent a similar transformation, as private investors began to use arbitration clauses in investment treaties to win binding and enforceable awards against national governments for expropriation or mistreatment of investments.³⁸ The explosion of investor-state arbitral jurisprudence expanded on vague treaty terms like “fair and equitable treatment,” transforming them into what one author calls “an all-encompassing guarantee of highly flexible notions of fairness, equity, and due process.”³⁹ Investment and trade treaties have even developed—albeit in a very limited way—rules on the admission and sojourn of aliens.⁴⁰

36. See, e.g., DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 37 (1997); MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE 288–90 (4th ed. 2013). This has led to the adoption of new multilateral agreements—such as those on technical barriers and sanitary measures—as well as the increased application of GATT non-discrimination disciplines to such measures. See, e.g., *id.* at 291–93.

37. See generally Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9 (2016).

38. For an early account of this shift, see Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. – FOREIGN INV. L. J. 232 (1995).

39. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 89 (2006). On the expansive interpretation of other treaty standards, see, e.g., Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties*, 111 AM. J. INT’L L. 873 (2018) (critiquing the conventional wisdom that arbitral tribunals have reflexively applied to most-favored-nation clauses); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment?*, 78 N.Y.U. L. REV. 30 (2003) (criticizing expansive “regulatory takings” decisions under the NAFTA investment chapter). These standards, moreover, apply generally to the treatment of any “investor” or “investment”—terms that are often subject to broad and open-ended definitions. See, e.g., Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT’L L. 1 (2019) (demonstrating that investment treaties apply to a wide range of private rights “on a rigid, one-size-fits-all basis, without regard to the wide variation in values reflected in these discrete private law institutions”); Stratos Pahiis, *Investment Misconceived* (forthcoming draft on file with author) (favoring a broad definition of investment).

40. See, e.g., ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 121–46 (2009) (noting that many of these treaty provisions are made expressly subject to local immigration laws).

The dual growth of national security and economic law creates an increasing possibility for overlap, where national security measures are potentially in violation of economic rules. Embargoes, economic sanctions, and export controls are of course the classic examples.⁴¹ But today's security measures, as we have seen, can include a wide range of regulatory efforts aimed at ensuring cybersecurity, preventing the spread of sensitive technologies, halting economic crises, advancing human rights, or even combatting climate change. All of these measures can—and have—come into potential conflict with trade and investment rules.⁴²

In many trade and investment agreements, any potential conflict between economic rules and security imperatives is supposed to be resolved with security exceptions. The prototypical text is Article XXI(b) of the General Agreement on Tariffs and Trade (“GATT”), which provides that nothing in the treaty shall be construed to prevent a state from taking “any action which it considers necessary for the protection of its essential security interests” in certain circumstances.⁴³ The key language in this provision is the phrase “it considers,” which is often interpreted to render all or part of the provision “self-judging”—meaning that the invoking state alone may decide whether

41. For examples of such disputes, see *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)*, Order on Iran's Request for the Indication of Provisional Measures, ¶ 63 (Oct. 3, 2018) (reporting the US position that its sanctions on Iran are lawful under a US-Iran Treaty of Amity, because they are justified as “measures ‘relating to fissionable materials’ . . . or ‘necessary to protect its essential security interests’”); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14, 141–42 (June 27) (finding that a US embargo of Nicaragua had not been shown to be “necessary” to US “essential security interests”).

42. See, e.g., Remarks by Barry Appleton, Fordham International Law Journal Symposium: International Trade, Isolationism, Trade Wars, and Trump, (Feb. 8, 2019) (addressing the relationship between cybersecurity and trade treaties); José E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict*, 30 VA. J. INT'L L. 1, 117–20 (1989) (discussing potential inconsistency between U.S. investment-screening law and its commitments under economic treaties); Anne van Aaken, *International Investment Law Between Commitment and Flexibility*, 12 J. INT'L ECON. L. 507, 525–26, 538 (2009) (discussing the legality of Argentine, US, and European responses to financial crises under investment treaties); Ryan Goodman, *Norms and National Security*, 2 CHI. J. INT'L L. 101, 101–05 (2001) (addressing potential conflicts between WTO rules and human rights sanctions); Jorge E. Viñuales, *Foreign Investment and the Environment in International Law*, 80 BRIT. Y.B. INT'L L. 244 (2010) (discussing environmental measures, including their security dimensions, under investment law).

43. General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 55 U.N.T.S. 188 [hereinafter GATT 1947] (emphasis added). The certain circumstances include actions relating to nuclear materials, arms traffic, or military supplies, and actions “taken in time of war or other emergency in international relations.” *Id.*

the exception applies.⁴⁴ This self-judging formulation is repeated in several other multilateral, regional, and bilateral trade and investment agreements.⁴⁵ It is by no means ubiquitous: some treaties lack a general security exception altogether,⁴⁶ and others use formulations that omit the “it considers” phrase, arguably rendering the provision justiciable.⁴⁷ But, in general, it seems states are increasingly using self-judging security exceptions in their investment treaties and preferential trade agreements.⁴⁸

This increasing preference for self-judging exceptions, however, is not necessarily well-suited to manage the growing scope of security policy.⁴⁹ For years, many states have taken significant steps to avoid any adjudication of security-related disputes under trade treaties. In general, governments avoided making broad security claims in trade fora, and, where they did so, other states either refrained altogether from initiating judicial proceedings, or they have settled their disputes diplomatically.⁵⁰ Under certain conditions, this practice of mutual self-

44. See, e.g., Alford, *supra* note 6, at 698. For a critique of this terminology, see MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION* 550 (3d ed. 2015). I use this well-worn term as a convenient shorthand for treaties that use the “it considers” formulation, not as a judgment on whether this commonly used term is the most appropriate label.

45. See, e.g., U.N. CONF. ON TRADE & DEV., *THE PROTECTION OF NATIONAL SECURITY IN IIAS* 72–96 (2009) (surveying treaty provisions).

46. See, e.g., Agreement for Promotion and Protection of Investments, U.K.-Sri Lanka, Feb. 13, 1980.

47. See, e.g., Kenneth J. Vandeveld, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 *INT’L TAX & BUS. L.* 159, 174–75 (1993) (discussing the absence of self-judging language in early US bilateral investment treaties, and the then-incomplete shift toward self-judging security provisions after the 1986 *Nicaragua* decision); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 *VA. J. INT’L L.* 307, 381–86 (2008) (arguing that security provisions in some US investment treaties are nonetheless “implicitly self-judging”).

48. Karl P. Sauvant & Mevelyn Ong, *The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements*, COLUMBIA F.D.I. PERSP. No. 188 (Dec. 5, 2016).

49. For a similar argument on “national security exceptionalism” in US trade law, see Remarks by Kathleen Claussen, Fordham International Law Journal Symposium: International Trade, Isolationism, Trade Wars, and Trump (Feb. 8, 2019). Elsewhere, see Aziz Huq, *Against National Security Exceptionalism*, 2009 *SUPREME CT. REV.* 225, 267–73 (arguing that scholars should recognize the continuities between national security and other domains of law, rather than accentuating perceived differences); Maryam Jamshidi, *The Travel Ban: Part of a Broad National Security Exceptionalism in U.S. Law*, JUST SECURITY (July 3, 2018), <https://www.justsecurity.org/58794/travel-ban-part-broad-national-security-exceptionalism-u-s-law/> (arguing, to the contrary, that there is an increasing and trans-substantive “judicial tendency since 9/11 to . . . subordinate legal norms to national security interests”).

50. This history is discussed in Alford, *supra* note 6, at 706–25.

restraint and diplomatic settlement can keep opportunism within tolerable limits, while allowing states the flexibility to address security imperatives.

These conditions may be breaking down. Today, geopolitical rivalries are taking place within international economic institutions like the WTO, rather than outside of them.⁵¹ In this environment, states are less likely to unilaterally restrain themselves from taking security-related measures, and they are more likely to use the judicial system to challenge the measures taken by their political and economic adversaries.⁵² Indeed, after two decades where mutual restraint mostly prevailed, the WTO dispute settlement system is now facing more than a dozen cases in which security exceptions may be invoked.⁵³ As a result of this sudden uptick in security-related disputes, the first ever WTO panel decision to interpret and apply the GATT security exception was issued earlier this year.⁵⁴ In a watershed ruling, the *Russia—Transit* panel determined that the GATT security exception is “not totally ‘self-judging’” and is subject to judicial review.⁵⁵ This result is likely to catalyze further disputes under trade treaties and could also give comfort to private investors to challenge security-related measures in investor-state arbitral proceedings.⁵⁶

51. See, e.g., Roberts, Choer Moraes & Ferguson, *supra* note 4.

52. For a firsthand account of the political reasons why a state might choose to challenge a rival’s security measures before an international court, see Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. J. INT’L L. 15, 22–25 (2001).

53. These include cases challenging measures by Russia, the United Arab Emirates, Bahrain, Saudi Arabia, and the United States. See George-Dian Balan, *On Fissionable Cows and the Limits to the WTO Security Exceptions*, 14 GLOBAL TRADE & CUSTOMS J. 2, 2 & n.7 (2019) (listing cases). In at least two earlier cases, the respondent state signaled its intent to invoke the self-judging security exception, and the cases were withdrawn or settled prior to any decision. See *WTO—Dispute Settlement Body: Hearing Before the Subcomm. on International Economic Policy and Trade of the H. Comm. on International Relations*, 105th Cong., 2d Sess., 15 (1998) (statement of Susan G. Esserman, General Counsel, U.S. Trade Representative) (explaining the US position on a EU challenge to the Helms-Burton Act); Minutes of Meeting Held in the Centre William Rappard on 7 April 2000, WTO Doc. WT/DSB/M/78, at 12–15 (May 12, 2000) (concerning a dispute between Colombia and Nicaragua).

54. See Panel Report, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

55. *Id.* ¶ 7.102. This decision issued after the date of this symposium. A full examination of the *Russia—Transit* case will be included in Heath, *supra* note 5.

56. Unlike trade cases, which are state-to-state disputes, investors have no diplomatic incentive to restrain themselves from challenging other states’ sensitive security policies. But the reverse is also true: investors lack a strong financial incentive to initiate security-related disputes if the relevant treaty contains a self-judging security clause, because the investor faces low prospects of success. A decision that the GATT self-judging clause is to some extent

This prospect of judicial review raises further questions about the ability of international economic tribunals to craft workable standards to review national security policies. Because there is currently a dearth of case law under self-judging security exceptions,⁵⁷ there is naturally a wide range of opinions on the appropriate scope and standard of judicial review.⁵⁸ Many commentators, recognizing that the self-judging treaty language was meant to afford a great deal of deference to the invoking state, focus on judicial review as a way to constrain obvious and flagrant abuses of national security, such as where security is invoked in bad faith or as a thin disguise for discriminatory restrictions on trade or investment.⁵⁹ But, as noted above, the transformation of national security suggests that the more critical long-term problem for the system may not be preventing abusive security claims, but managing novel ones. If that is right, then review for good faith, pretext, or abuse may help address some of our current crises, but it may not go very far toward resolving the more systemic problems.

If tribunals go further, they will struggle to find an approach that provides meaningful review while still affording the level of deference implied by the self-judging treaty language. In this respect, the

justiciable could thus embolden investors to test the limits of similar clauses in investment treaties.

57. *But cf.* Certain Questions of Mutual Legal Assistance in Criminal Matters (*Djibouti v. France*), 2008 I.C.J. 177, 229–30 (June 4) (finding that a self-judging treaty clause in another context is still subject to the overarching requirement that it be applied in good faith).

58. *Compare* European Union Third Party Written Submission, *Russia – Measures Concerning Traffic in Transit*, ¶¶ 38–69, DS512 (Nov. 8, 2017) (arguing that, when applying GATT Article XXI, a trade panel should take *nine* discrete analytical steps, with varying degrees of deference), *with* Third Party Oral Statement of Australia, *Russia – Traffic in Transit*, ¶¶ 12–20, WTO Dispute No. DS 512 (Jan. 25, 2018) (identifying just two highly deferential stages of the analysis).

59. *See, e.g.*, Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 403 (2003) (sketching an approach that the authors argue “recognizes the competing considerations and will prevent abuse, but is nevertheless faithful to the text of the WTO Agreements”); Burke-White & von Staden, *supra* note 47, at 379 (contending that tribunals can overturn security measures where “evidence exists that a state uses the exception just as a pretext for ulterior economic motives, or where the connection between the measures taken and national security is so spurious as to clearly breach the good faith requirement”). This approach has also been codified in the security exceptions of some investment and trade treaties. *See, e.g.*, Agreement on the Reciprocal Liberalisation, Promotion and Protection of Investment, Japan-Mozambique, art. 18(e), available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3114> (subjecting the self-judging security exception to an overarching requirement “that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party”).

experience in analogous contexts is far from reassuring.⁶⁰ For instance, the review by investor-state tribunals of Argentina's emergency economic measures was widely recognized as a "frustrating" experience—one that led to a series of inconsistent and contradictory decisions.⁶¹ Elsewhere, the judicial review of UN Security Council economic sanctions—which were adopted pursuant to the Security Council's binding and supreme authority on matters relating to international peace and security—has been arguably counter-productive, "stringing courts between the poles of inert deference and overreaching defiance."⁶² The resulting decisions can thus tax the legitimacy of judicial bodies, while providing little in the way of clear guidance for national security policies.⁶³

The prospect of judicial review leads to a third question, which concerns the nature of expertise on security matters. One suggestion in the literature is that tribunals should adopt a form of procedural review, modeled on domestic administrative law, which would allow states to set their own security policies while regulating only the manner by which states adopt particular security measures—the inclusiveness of the process, the robustness of factfinding, and so on.⁶⁴ This is a potentially useful suggestion, but it raises difficult second-order questions about the kind of administrative procedure we should expect from the expanding national security state. Already, administrative judgments about risk and cost-benefit analysis in the context of health,

60. There is also little guidance from the International Court of Justice, whose jurisprudence on treaty-based security exceptions is sporadic and often carefully confined to the circumstances of the case at hand. *See, e.g.,* Military and Paramilitary Activities, 1986 I.C.J. at 141–42 (focusing on the United States' failure to appear and justify its change in policy vis-à-vis Nicaragua in 1985); *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, 182 (Nov. 6) (in a case involving the use of force, treating a treaty-based essential-security exception effectively as a *renvoi* to the international law of self-defense).

61. Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT'L L. 169, 190 (2018); *see also* Giorgio Sacerdoti, *BIT Protections and Economic Crises*, 28 ICSID REV. 351, 375–81 (2013). Even the case that was most deferential to the host state took an approach to the security exception that involved balancing the "relative importance" of the state's security interests against its impact on international commerce. *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 194 (Sept. 5, 2008). It is unlikely that self-judging treaty provisions were designed to empower tribunals to engage in this kind of weighing and balancing.

62. Hovell, *supra* note 28, at 11.

63. *But see* Chachko, *supra* note 28, at 41–43 (telling a more cautiously optimistic story about the review of economic sanctions by the Court of Justice of the European Union).

64. *See* Stephan Schill & Robyn Briese, *'If the State Considers': Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. OF U.N. L. 61, 136–37 (2009) (suggesting an ambitious set of procedural principles).

safety, and environmental regulation are notoriously political, and they are not neatly resolved by the application of bureaucratic expertise.⁶⁵ If and when such measures are reclassified as security issues, what types of expertise, process, and findings should an international tribunal expect?

The problem of security expertise is reflected, in stark form, in the debate on Trump's migration policy. In the days after the president's border emergency declaration, two very different discourses began developing in opposition to the administration's policy. One appeared under the headline "Can the Border Really Be Called an 'Emergency'? Not According to the Dictionary."⁶⁶ This piece was explicitly the language of the lay public—a common-sense attitude that the ordinary English speaker knows what an emergency is, and the situation at the border does not cut it. The other was a joint statement by 58 former executive branch national security officials, touting their expertise, their high-level security clearances, and their experience having "lived and worked through national emergencies," and explaining in detail why, in their considered judgment, there was no emergency at the US southern border.⁶⁷ This discourse is in a sense the opposite of the first: Even as it also challenges the particular determinations of the Trump White House, the joint statement affirms the primacy of a particular kind of expertise—security expertise—in national-security decision making.⁶⁸

These discourses pull in opposite directions for international tribunals charged with reviewing security measures. The lay discourse is reflected in arguments urging tribunals to consider the ordinary meaning of terms like "security" and "emergency" in order to limit

65. See, e.g., TREBILCOCK, HOWSE & ELIASON, *supra* note 36, at 293–94 (observing that such issues as "scientific justification and allowable risk are difficult to arbitrate and lie at the heart of a country's sovereignty"); cf. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUPREME CT. REV. 51, 54–64 (discussing the "politicization" of US agency expertise in connection with climate change).

66. Colby Izkowitz, *Can the Border Really Be Called an 'Emergency'? Not According to the Dictionary*, WASH. POST (Feb. 15, 2019) ("We could look at the law, but there's no official definition of a 'national emergency.' So instead we'll just turn to the dictionary.").

67. Joint Statement, *supra* note 31, ¶¶ 1–6.

68. For discussions of the rise of "security" expertise, see Rana, *supra* note 10, at 1469–83 (observing that "faith in security expertise" has become a defining feature of the US courts' approach to "questions of threat and emergency"); Ole Wæver, *The History and Social Structure of Security Studies as a Practico-Academic Field*, in SECURITY EXPERTISE 76 (Trine Villumsen Berling & Christian Bueger eds. 2015).

their scope.⁶⁹ In a pair of cases dealing with identical measures adopted by the Indian government, two tribunals appeared to adopt something close to this approach, asserting without much argument that the notion of “essential security” must be limited to military and quasi-military functions.⁷⁰ This decision effectively excluded from the treaties’ security exceptions any measures relating to natural disaster response, critical infrastructure, and other areas that states are increasingly treating as security-sensitive.⁷¹ While there may have been principled reasons for reaching this decision,⁷² this approach inevitably limits the ability of states to innovate when it comes to redefining their security interests.

The alternative approach leads to potentially far greater deference, for better and worse. On this view, tribunals presume that states—and in particular executive branches—have unique expertise when it comes to defining their national interests and responding to risks and threats. Giving some deference on sensitive political matters like national security makes sense, and can contribute to greater adherence, stability, and legitimacy for international tribunals over the long term.⁷³ But this approach has also been faulted for deferring to expertise where there is really no such thing: critics have charged, for example, that the European Court of Human Rights has been overly deferential to national declarations of emergency, leading to a “structural inability”

69. See, e.g., Holger P. Hestermeyer, *Article XXI*, in WTO—TRADE IN GOODS 569, 588 (Rüdiger Wolfrum, Peter-Tobias Stoll & Holger P. Hestermeyer eds. 2010) (using a dictionary to explain the meaning of “emergency in international relations” in GATT Article XXI); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 MICH. J. INT’L L. 558, 589 (1991) (discussing and extrapolating from the ordinary meaning of the term “emergency”).

70. *CC/Devas v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, ¶¶ 354–56 (July 25, 2016); *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award, ¶ 281 (Dec. 13, 2017).

71. See, e.g., *CC/Devas v. India*, Award on Jurisdiction and Merits, ¶ 332.

72. A close reading of the cases suggests that the tribunals’ reasoning was not only textual and instinctive, but also principled. If “essential security” in the treaties were read to encompass essentially any public purpose, such a reading would undercut other provisions, such as the requirement that any taking for a public purpose be accompanied by adequate compensation. See, e.g., *Deutsche Telekom v. India*, Interim Award, ¶ 281. This argument has significant force and is grounded in a structural and contextual reading of the relevant treaties. But this principled reading suggests only that a line must be drawn, not how to draw that line, and for that there is little in the awards explaining why military functions are on one side and other matters, like disaster response, are on the other.

73. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Successful Supranational Adjudication*, 107 YALE L.J. 273, 314–16 (1997) (discussing the political sensitivity of successful international tribunals).

on the part of the court to police these kinds of national declarations.⁷⁴ This kind of deference to the unique fact-finding abilities of the executive is also reflected in *Trump v. Hawaii*, which is perhaps unwittingly ironic in the characteristics it ascribes to the Trump administration.⁷⁵

IV. TOWARD A RECONCILIATION?

The overarching question is whether the evolving national security state and international economic law can be reconciled. As noted above, it is unlikely that a return to the national security exceptionalism of the GATT era will be manageable in the long run, even if that is the option states take in the short term.⁷⁶ But it is equally unclear that we should pin our hopes on international tribunals to manage the increasing overlap between national security policy and international economic disciplines. While judicial review can potentially play a role in constraining abusive and pretextual security policies, the existing law does not effectively equip international adjudicators to address the proper scope of novel, but potentially good faith, security issues such as cyberspace and climate change.

One potentially promising way forward is to think beyond this binary between self-judging provisions and judicial review. Some proposals already on the table suggest that national security measures might be effectively managed through innovative institutional designs that blend political, administrative, and judicial mechanisms, at both

74. GROSS & NÍ AOLÁIN, *supra* note 8, at 282–83.

75. See, for example, the Court's rejection of the plaintiffs' Establishment Clause claim:

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy."

Hawaii, 138 S. Ct. at 2421–22 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). For a lucid argument that some legal constraints on presidential factfinding can be discerned even in this decision, see Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. __ (forthcoming 2019).

76. See, e.g., Shaffer, *supra* note 1, at 49–50 (noting a proposal that would formally exclude certain matters, potentially including national security, from trade disputes).

national and international levels.⁷⁷ My forthcoming work explores and theorizes these design options, including reforms that seek a renewed balance between international deliberative and judicial institutions, as well as complementarity between international obligations and domestic administrative processes. Such reforms could provide an appropriate balance between flexibility and constraint at a time when national security interests are undergoing a transformation, while also creating opportunities for mutual recognition and learning between international institutions and the national security state.

In closing, it serves to emphasize that the problems identified here have both nothing and everything to do with the challenges described in this symposium's title—Isolationism, Trade Wars, and Trump. I have argued that the most difficult national security challenges for international economic law come from novel and good-faith evolutions in security policy. The national-security actions of the Trump administration are not especially novel,⁷⁸ and some of those actions are not taken in good faith. But the changes that we make to our economic institutions in response to today's crises will have a profound effect on our ability to deal with the more systemic challenges I have described. This is an opportunity to think creatively about the design and purpose of the international economic order as we respond to the challenges of today and prepare for the challenges to come.⁷⁹

77. For a timely example, see Remarks by Simon Lester, Fordham International Law Journal Symposium: International Trade, Isolationism, Trade Wars, and Trump (Feb. 8, 2019) (on file with author).

78. Compare U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS ON STEEL ON THE NATIONAL SECURITY 2 (Jan. 11, 2018) (finding, *inter alia*, that "domestic [steel] production capability is essential for defense requirements and critical infrastructure needs, and ultimately to the national security of the United States"), with KENNETH J. VANDELDE, THE FIRST BILATERAL INVESTMENT TREATIES 145 (2017) (describing US national security concerns going into negotiations for an International Trade Organization in 1945).

79. For a similar argument, see Harold Hongju Koh, *Trump Change: Unilateralism and the "Disruption Myth" in International Trade*, 44 YALE J. INT'L L. 96, 102 (2019).

