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Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception

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Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception

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Abstract

Today, there are an unprecedented number of disputes at the World Trade Organization (WTO) involving national security. The dramatic rise in trade disputes involving national security has resuscitated debate over the degree of discretion afforded to WTO Members as to when and how to invoke Article XXI, the Security Exception, of the General Agreement on Tariffs and Trade (GATT), with binding effect. As this paper will argue, archival investigation into state practice for the construction of the security exception within the framework of the International Trade Organization (ITO) produces a story with a deep context that illuminates the plausible legal interpretive steps involved in invoking Article XXI GATT. Due to the overwhelming influence the United States had in designing and constructing the exception, U.S. practice offers a revealing lens by which to study the history of Article XXI. The U.S. was the main architect in the design and placement of the security exception within the ITO. To the extent that Article XXI GATT is meant to clarify the bounds between trade multilateralism and national security, this paper seeks to

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explore what the text means through an historical investigation into U.S. practice, and the multifaceted considerations that shaped what the U.S. intended to convey with the language, phrasing, and placement of the security exception in the original multilateral trade bargain.

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I. INTRODUCTION

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

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

In a time of complex economic interdependence and rapid technological innovation, the global trading system is confronted[3] by the entanglement of 'trade multilateralism'[4] and 'national security'.[5] Most problematic from a legal perspective is how to address the

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[1] Walter Hollis, Confidential memorandum, 'International Legal Problems Involved in Certain Proposed Modifications of Voluntary Petroleum Restrictions', Nov. 3, 1958, file 'National Security Amendment', A1-5393, box 11, Record Group 59: General Records of the Department of State (RG 59), National Archives at College Park, MD (NACP).

[2] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, (Oct. 29 2018), at 34, *at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

[3] Henry Farrell & Abraham Newman, *The New Interdependence Approach: Theoretical Development and Empirical Demonstration*, 23(5) REV. INT'L POL. ECON. 713, 714 (2016); *see* Anthea Roberts, Henrique Choer Moraes, & Victor Ferguson, *Toward a Geoeconomic World Order*, (May 16, 2019), *at* https://ssrn.com/abstract=3389163.

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

[5] The term 'national security' employed in this paper focuses on the traditional definition, one which primarily refers to a state's 'defensive posture and self-protecting response' to external threats. ROBERT JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 187 (2003); *see also* the WTO

concept of national security within the institutional structure of the World Trade Organization (WTO). The WTO trading system helps trade flow smoothly and provides Members with a constructive way to deal with disputes over trade issues. Recently, however, Members appear willing to resort to what international trade scholar John Jackson termed states' 'power-positions', which prioritize 'power-oriented techniques' in the conduct of international economic affairs and the settling of international trade disputes.[6] In the name of national security, such techniques are demonstrated when WTO Members 'weaponize' trade restrictions, take unilateral actions, and make extra-legal arrangements.[7] At the same time as trade disputes are escalating, there is fear that the WTO cannot serve as an outlet for dealing with disputes involving national security.[8] Members taking security measures suggest they have sole authority to determine when to take 'any action which it considers necessary for the protection of its essential security interests', as so provided in Article XXI, the Security Exception, of the General Agreement on Tariffs and Trade (GATT).[9] This suggestion would remove oversight over the invocation of the security exception, and risks a 'loophole' for governments to act

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panel definition of 'essential security interests' as those 'relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.' Panel Report, *Russia–Measures Concerning Traffic in Transit*, para. 7.130, WT/DS512/R (*Adopted* April 26 2019) [hereinafter Panel Report, *Russia-Traffic in Transit*].

[6] JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 51-52 (1990).

[7] *See, e.g.*, text at notes 16-20.

[8] World Trade Organization, *Panels established to review India, Swiss complaints against US tariffs*, https://www.wto.org/english/news_e/news18_e/dsb_04dec18_e.htm (visited June 23, 2019).

[9] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 UNTS 194 [hereinafter GATT]; *see* Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 187, 33 ILM 1153 (1994). Article XXI of GATT provides,

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

opportunistically and without legal consequence.[10] It further unhinges multilateral rules, norms, and dispute settlement procedures that create the framework for governments to ward off narrow sectoral pressures on trade policy-making, to focus on rules and renegotiate them, and to 'thrash out their differences on trade issues.'[11]

World trade law enables governments to address exigent security circumstances and temporarily suspend or deviate from their international trade commitments.[12] For decades, Article XXI GATT was rarely invoked; it lay like a dormant dragon beneath the mountain, still dangerous but fallen out of memory.[13] Until now. Today, there are an unprecedented number of disputes at the WTO involving national security. After Russia blocked Ukrainian exports from key markets in Central Asia and the Caucasus due to Russian road and rail transport bans and restrictions, Ukraine launched WTO proceedings, which resulted in the first formal WTO panel report, *Russia-Measures Concerning Traffic in Transit* (*Russia-Transit*), on the interpretation of Article XXI in 2019.[14]

Aside from the international crisis involving Russia and Ukraine, there are other conflicts currently involving national security at the WTO. Japan has restricted the export of certain chemicals crucial to South Korea's electronics industry, citing national security

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[10] *See, e.g.* Simon Lester & Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO POL'Y ANAL. No. 874, Jun. 25, 2019, https://www.cato.org/publications/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale.

[11] World Trade Organization, '10 things the WTO can do', https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi00_e.htm (visited June 23, 2019); Frieder Roessler, Book Review, Democracy, Redistribution and the WTO: A comment on Quinn Slobodian's book *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), 18(2) WORLD TRADE REV. 353 (2019).

[12] Caroline Henckels, *Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict*, Working Paper (draft March 2018), EURO. Y.B. INT'L ECON. L. 9 (forthcoming 2018) (observing that the security exception is an 'affirmative defence'). For an assessment of treaties that provide states with the opportunity to invoke national security considerations, *see* Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO*, 43 VA. J. INT'L L. 365, 366-370 (2003).

[13] Panel Report, *Russia-Traffic in Transit*, *supra* note 5, para.7.81 ('Members have generally exercised restraint in their invocations of Article XXI(b)(iii)). *See also* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011). The reference to the dragon is a nod to J.R.R. Tolkien's Middle-earth legend of Smaug, the Dragon of Erebor. See J.R.R. TOLKIEN, THE LORD OF THE RINGS (2012).

[14] Panel Report, *Russia-Traffic in Transit*, *supra* note 5.

risks.[15] India has announced it will withdraw trade preferences to Pakistan due to national security reasons.[16] Qatar has launched several WTO proceedings against Saudi Arabia, Bahrain, and the United Arab Emirates due to alleged violations of international trade rules.[17] These conflicts stem from 2017 when Saudi Arabia and its Gulf Cooperation Council partners imposed an economic embargo on Qatar due to allegations the Qatari government funded terrorism.[18] Recent tensions over global control of fifth generation cellular technology by Chinese firm Huawei Technologies Co., Ltd. has led several States to take action on the grounds of national security, raising speculation of future WTO disputes to come.[19] Seven WTO members have challenged the legality of extra-schedule tariffs imposed by the United States (U.S.) on imports of steel and aluminum deemed to threaten U.S. national security under section 232 of the 1962 Trade Expansion Act of 1962.[20]

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[15] *See* Henry Farrell and Abraham Newman, *Japan has weaponized its trade relationship with South Korea*, THE WASHINGTON POST, Aug. 1, 2019; *see also* Lindsay Maizland, *The Japan-South Korea Trade Dispute: What to Know*, Aug, 5, 2019, COUNCIL FOR. RELNS, https://www.cfr.org/in-brief/japan-south-korea-trade-dispute-what-know (outlining the historical grievances and regional policy tensions between the two states).

[16] Bryce Blaschuk, *India Withdraws Trade Preferences to Pakistan; Cites WTO Clause*, BLOOMBERG LAW, Feb. 15, 2019.

[17] *See* News Item, *DS526: United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (2017), *https://www.wto.org/english/news_e/archive_e/dscases_arc_e.htm?dscase=526* (accessed Aug, 8, 2019); *see United Arab Emirates - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, Request for consultations by Qatar, WT/DS526/1; *Bahrain - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, Request for Consultations by Qatar, WT/DS527/1; *Saudi Arabia - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, Request for consultations by Qatar, WT/DS528/1.

[18] Bryce Baschuk, *WTO to Probe Qatar's TV Piracy Claim Against Saudi Arabia*, BLOOMBERG LAW, Dec. 18, 2018.

[19] *See* Adam Satariano, Raymond Zhong & Daisuke Wakabayashi, *Putting the Squeeze on Huawei*, N.Y. TIMES, May 20, 2019, at B1; see Cassell Bryan-Low & Colin Packham, *How Australia led the US in its global war against Huawei*, THE SYDNEY MORNING HERALD, May 22, 2019, https://www.smh.com.au/world/asia/how-australia-led-the-us-in-its-global-war-against-huawei-20190522-p51pv8.html.

[20] *Trade Expansion Act of 1962*, Oct. 11, 1962, Pub. L. No. 87-794, 76 Stat. 877, sec. 232; *see* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 205 (1989); News Item, *Panels established to review US steel and aluminium tariffs, countermeasures on US imports,* Nov. 21, 2018, https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm.

The historicization of Article XXI was crucial to the *Russia- Traffic in Transit* panel's interpretation of Article XXI GATT.[21] The report delivers a powerful signal to WTO Members relying on national security claims - regardless of political facets, there was a legal question in the *Russia-Traffic in Transit* dispute that was suitable for legal assessment.[22] The panel found that the invoking Member does not have sole authority to interpret the security exception – that Article XXI is not purely 'self-judging'.[23] Against the text of Article XXI and the 'general object and purpose' of the WTO agreements, the panel found that the existence of the circumstances enumerated in the subparagraphs of Article XXI(b) was subject to objective determination.[24] In doing so, the panel found that while the invoking Member has discretion to decide on the necessity of measures, the circumstances when it can do so are eminently justiciable.[25] For this first formal reading of Article XXI, the panel was led by well-known international lawyer and former Appellate Body member Georges Abi Saab. Still, the *Russia-Traffic in Transit* panel report is not the final word on the matter.[26] The dramatic rise in trade disputes involving national security has resuscitated debate over the degree of discretion afforded to WTO Members as to when and how to invoke the security exception, with binding effect.[27]

As this paper will argue, archival investigation into state practice for the construction of the security exception within the framework of the International Trade Organization[28] (ITO) produces a story with a deep context that illuminates the plausible

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[21] *See* Jean d'Aspremont, *Critical Histories of International Law and the Repression of Disciplinary Imagination*, LONDON REV. INT'L L. (forthcoming 2019) (defining historicization as when international lawyers engage 'in the creation of discourses about the past to give the latter a form and a meaning intelligible in the present.')

[22] Panel Report, *Russia-Traffic in Transit*, *supra* note 5, para. 7.103, note 183. *See also, infra* Part VII.

[23] *Id.* at paras. 7.102-7.103; *contra* United States, Third-Party Oral Statement, *Russia- Measures Concerning Traffic in Transit* (DS512), Jan. 25, 2018, para. 35.

[24] Panel Report, *Russia-Traffic in Transit*, *supra* note 5, para 7.66, 7.69-7.77.

[25] *Id.* at paras. 7.100-7.103 (adding 'there is no basis for treating the invocation of Article XXI(b)(iii) [...] as an incantation that shields a challenged measure from all scrutiny.')

[26] *But see* Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, *Working Paper*, (September 2013), https://www.cips-cepi.ca/wp-content/uploads/2013/09/pelc_ottawa.pdf (observing that while there is no formal binding precedent in international law, there is a gap between principle and practice).

[27] *See* Akande & Williams, *supra* note 12 at 384 n 81 (observing the issue is 'whether there is a right of unilateral determination of the obligation by one party which the other party is bound to accept.').

[28] *See*, *infra,* Part II, for background on the ITO. To understand how the ITO Charter is relevant to the interpretation of the GATT, though the GATT was signed on October 30, 1947, and the United Nations

legal interpretive steps involved in invoking Article XXI GATT. Due to the overwhelming influence the United States had in designing and constructing the exception, U.S. practice offers a revealing lens by which to study the history of Article XXI. The U.S. was the main architect in the design and placement of the security exception within the ITO. To the extent that Article XXI is meant to clarify the bounds between trade multilateralism and national security, this paper seeks to explore what the text means through an historical investigation into U.S. practice, and the multifaceted considerations that shaped what the U.S. intended to convey with the language, phrasing, and placement of the security exception in the original multilateral trade bargain.

The language of Article XXI does not precisely define what elements of the exception are self-judging. Nor does it confirm how WTO adjudicative bodies may review trade disputes involving highly sensitive security concerns. Article XXI begins, 'Nothing in this Agreement shall be construed', and continues with the chapeau of Article XXI(b), whereby WTO Members may take 'any action which it considers necessary for the protection of its essential security interests', as relating to certain enumerated circumstances (e.g., those actions relating to fissionable materials, or those relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials for the purpose of supplying a military establishment, or those taken in time of war or other emergency in international relations). Some scholars maintain the adjectival clause "which it considers" renders the security exception wholly self-judging.[29] Emphasis is placed on the words "it" and "considers" as allocating total (or very high) discretion to the state in its determination of its essential security interests and the choice of means it "considers" necessary for its essential security interests.[30] This implies that no Member or WTO body has 'any right to determine whether a measure taken by a sanctioning

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Conference on Trade and Employment held in Havana to conclude the ITO Charter lasted until March 24, 1948, *see* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 46-49 (1969).

[29] *See* Raj Bhala, *National Security and International Trade Law: What the GATT Says and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 268-269 (1998); see also V.A. SEYID MUHAMMAD, THE LEGAL FRAMEWORK OF WORLD TRADE 176-178 (1958).

[30] See Holger P. Hestermeyer, Article XXI Security Exceptions, Peter-Tobias Stoll, *Article XXIII Nullification or Impairment*, in WTO – TRADE IN GOODS 579 (Rüdiger Wolfrum, Peter-Tobias Stoll, and Holger P. Hestermeyer eds, 2010).

member satisfies the requirements' of Article XXI.[31] With total, unfettered discretion, a WTO Member could make a direct jurisdictional defence that a WTO adjudicative body lacks jurisdiction to review an invocation of Article XXI, as Russia had argued in the recent *Russia-Traffic in Transit* dispute.[32] WTO Members may also argue that the dispute is nonjusticiable because WTO adjudicating bodies must defer total interpretation of Article XXI to the discretion of the invoking WTO Member, as the U.S. had argued in its Third Party submissions in the *Russia-Traffic in Transit* dispute.[33] The challenge with either claim is that the WTO lacks recourse to regulate the invocation of the exception. Without WTO oversight, invocation of Article XXI becomes self-regulated; the invoking Member would solely determine the political and economic costs for deviating from their trade commitments.[34] The danger in this approach is the potential for a cascade of unilateral "self-help" actions.[35]

Some commentators have sought nuance to the self-judging nature of the chapeau in an effort to allow for competent dispute settlement bodies to control for abuse.[36] There remains diverse commentary as to whether the adjectival clause 'which it considers' refers to the determination of the 'necessity' of the measures taken, or whether it qualifies the determination of a Member's 'essential security interests.'[37] Another observation is that WTO adjudicative bodies can control opportunistic use of the exception by incorporating

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[31] Bhala, *supra* note 29 at 269.
[32] Panel Report, *Russia-Traffic in Transit*, *supra* note 5 at para. 7.103; see Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93(2) AJIL 424, 438 (1999).
[33] *Id*.
[34] *See* Alan O. Sykes, *Economic "Necessity" in International Law*, Editorial Comment, 109 AJIL 296, 303 (2015); *see* Benton J. Heath, *The New National Security Challenge to the Economic Order*, Draft of Mar. 27, 2019, at 41, YALE L. J. (forthcoming 2020), available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361107.
[35] *See* ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 282 (2013)
[36] *See* Heath, *supra* note 34 at 45; *see, e.g.* Akande & Williams, *supra* note 12 at 386-402 (drawing attention to the nature of the term "considers" in the chapeau, and evaluating a good faith review of the security exception).
[37] *Compare, supra* note 30, with Alford, *supra* note 13 at 704, *with* Michael J Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12(3) MICH. J. OF INT'L L. 558, 589-590 (1991), *and* Akande & Williams, *supra* note 12 at 386, 397, 399. For a comparison of state practice, cf. Panel Report, *Russia-Traffic in Transit*, *supra* note 5 at para. 7.62-7.101, and main arguments of Australia, para. 7.36; The European Union, para. 7.43; and Brazil, para. 7.37.

an obligation of good faith into the interpretation of Article XXI.[38] Such an obligation would set limits to seemingly open-ended terms included in Article XXI, particularly 'security interests' and 'emergency in international relations.'[39] Despite the open-ended nature, commentators have tethered the language to 'bona fide' military and defense paradigms, further noting 'Article XXI does *not* encompass exigencies such as a member government's financial distress or domestic economic crises that are unrelated to war and international emergencies.'[40]

Out of the complex debate among U.S. officials in the construction of the security exception, this paper reveals two insights into the legal choices made by U.S. officials that are relevant to deepening the story underlying the construction of Article XXI GATT. First, exploring the internal U.S. materials adds plausibility to the notion that the U.S. negotiators understood the security exception as justiciable, particularly considering the "balance" of competing interests that were accounted for in the U.S. draft of the security exception. The U.S. negotiators, while mindful of conflicting motivations and means of U.S. national security, sought to nonetheless constrain unfettered invocation of the exception for fear Members would abuse the exception. The history of the internal U.S. debates is also interesting for highlighting what was *not* said by the U.S. in the delegates' meetings, such as a firm position that a Member with security concerns shall have sole, open-ended authority to determine when to suspend or extinguish commitment to the international trade legal framework.

The paper challenges contemporary claims that the exception is, and has historically always been, subject to the sole determination of the invoking Member. It argues that the inclusion of the adjectival clause 'which it considers' is better understood in context, against these internal U.S. debates to show how the security exception would operate within the legal architecture of the ITO. Specifically, consideration to the role of ITO bodies and the International Court of Justice (ICJ), and the functioning of the

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[38] *See* Akande & Williams, *supra* note 12 at 390-396; *see* Schloemann & Ohlhoff, *supra* note 32 at 444; Alford, *supra* note 13 at 708.
[39] Heath, *supra* note 34 at 48-49.
[40] Sykes, at 303 [emphasis in original]; Hahn, *supra* note 37, at 580; *see also* Panel Report, *Russia-Traffic in Transit*, *supra* note 5 at para. 7.130.

nullification or impairment procedure, the legal basis of dispute settlement.[41] Evidence that the U.S. negotiators did not desire a purely self-judging security exception is further revealed in the materials prepared after the conclusion of the ITO Charter in 1948.

The U.S. negotiators outlined the legal interpretive steps required to interpret the security exception. U.S. negotiators presented a two-step approach. First, an invoking ITO member would determine both its 'essential security interests' and the 'necessity' of the measure for the protection of its essential security interests. It appears that these two interpretive questions were placed together, with some discussion revealing that economic domestic interests were excluded. Second, it was a factual question as to whether the invoking ITO Member's security-related actions qualified as one the enumerated set of circumstances in the security exception. Thus, the U.S. negotiators wanted to avoid unilateralism; the exception failed to create an open-ended power for the ITO Members.

An argument has also been made that the reference to the "atmosphere" of the ITO, by a delegate in Geneva, suggested that only power-based techniques would guard against abuses of the security exception.[42] An alternative reading is that the building of the ITO rules and procedures necessarily depended on informal techniques and norms – described as its "atmosphere" or "spirit". [43] As such, reference to the ITO atmosphere does not disqualify justiciability of the exception. As renowned trade scholar Robert Hudec argued decades ago, the nullification or impairment procedure was a crucial element to the ITO "atmosphere."[44] The "normative pressures"[45] created through the nullification and impairment procedure would "contain trade disputes – to rebalance expectations,

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[41] *See, generally* Peter-Tobias Stoll, *Article XXIII Nullification or Impairment*, in WTO – TRADE IN GOODS 598-615 (Rüdiger Wolfrum, Peter-Tobias Stoll, and Holger P. Hestermeyer eds, 2010).
[42] U.S. Third Party Executive Summary, *Russia- Measures Concerning Traffic in Transit* (DS512) Feb. 27, 2018, at para. 26; *see also* Schloemann & Ohlhoff, *supra* note 32 at 441.
[43] ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 30-35, 40-41 (2nd ed. 1990); *see* Joost Pauwelyn, *The Transformation of World Trade*, 104(1) MICH. L. REV. 1, 4 (2005) (observing the emergence of a law-and-politics narrative in the origins of the multilateral trade system).
[44] *Id.*; *see also* Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE 615-665 (1970).
[45] HUDEC, *supra* note 43, at 35.

and to avoid escalation."[46] The ITO "atmosphere" would thus help ITO bodies review whether there was opportunistic abuse of the security exception. This is not evident from the U.S. officials' responses in the delegates meeting, but emerges from the repeated defense of the ITO throughout the internal deliberations. It is further manifested in the post-Havana preparation completed by the U.S. officials, which confirmed an objective step in the legal analysis of the security exception, requiring third-party factual determination as to whether the measure fell into the enumerated circumstances listed within the security exception.

The second insight is that the interaction between the U.S. delegate and the other delegations failed to explore the types of concerns that animated the U.S. negotiators when seeking to construct the language and phrasing of the security exception. In comparison, the delegates did not elaborate on the legal interpretive questions that arose between the DoS and Services officials, especially how the ITO would manage a substantial widening of the scope of the exception if Members unilaterally determined all of the steps for interpreting the exception. The delegates considered the scope of the exception with respect to political interests, and whether a Member could complain about nullification or impairment of any benefits accruing to it under the Charter due to another Member's security-related actions. By the time the delegates met in Havana, after the signing of the GATT, the delegates appeared in agreement that Members would bring non-violation complaints regarding the "effects" of security-related actions, as per the nullification or impairment procedure. After Havana, U.S. negotiators would also confirm in materials prepared for U.S. Congress their understanding that where a Member refused to supply information on grounds of essential security interests, the complainant Member could seek a non-violation complaint via the nullification or impairment procedure.[47] The historical investigation highlights the differences between the discussions among U.S. negotiators and discussions between and among the delegations, and underlines what issues were prioritized.

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[46] ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 205 (2011).
[47] *See, supra,* text accompanying note 430.

This historical assessment of the security exception further recognizes that the discussion of the exception occurred against a backdrop of the "birth" of the Cold War between the U.S. and the Soviet Union.[48] Economic issues were inlayed into U.S. foreign policy, and internal conflicts developed as completing agencies prescribed different approaches to the post-war international economy. Internal U.S. debates revealed that the challenge to construct a security exception ran deeper than an exercise in linguistics. At the core were fundamental disagreements about U.S. engagement with the multilateral trade system, as it remained unclear at the time whether the ITO/GATT would benefit or hinder U.S. security interests at home and abroad. This placed great stress on the Department of State (DoS) to defend the benefits of U.S. leadership in the multilateral trade system, as part of a larger strategy for U.S. economic-security and peace.

Today, the most remarkable invocation of security in the pursuit of trade actions stems from an unlikely source, considering its role in founding the post-war international economy, the United States. Studying the historical U.S. position necessarily draws comparisons to present day. The Trump administration had broadly cast security concerns over the U.S. trade agenda, arguing 'national security is economic security'.[49] This strategy justified the decision to impose tariffs, government blacklists, and other defensive measures.[50] Japan and the European Union continue to wait to see whether the United States will seek tariffs on automobiles and automobile parts to protect U.S. competitiveness under section 232.[51] A growing 'technological Cold War' between China and the United States is also playing out as the powerful governments engage in tit-for-tat defensive trade measures that further tangle economic and security initiatives.[52] The

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[48] BENN STEIL, THE MARSHALL PLAN: DAWN OF THE COLD WAR 135 (2018) (placing the 'birth' of the Cold War to July 7, 1947 – right in the middle of US construction of the security exception).

[49] Peter Navarro, *Why Economic Security is National Security*, Dec. 10, 2018, https://www.whitehouse.gov/articles/economic-security-national-security/.

[50] Ana Swanson & Paul Mozur, *In Name of Security, Trump Sets off Economic Wars on Multiple Fronts*, N.Y. TIMES, Jun. 8, 2019, at A8.

[51] *See* White House Proclamation, *Adjusting Imports of Automobiles and Automobile parts into the United States*, May 17, 2019, https://www.whitehouse.gov/presidential-actions/adjusting-imports-automobiles-automobile-parts-united-states/; *see also* Jenny Leonard & Shawn Donnan, *Trump Delays EU, Japan Auto Tariffs for 180 Days for Talks*, BLOOMBERG, May 17, 2019.

[52] *See* Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018(1) U. ILL. L. REV. 115 (2018); *see* Shawn Donnan & Jenny Leonard, *Trump's Latest Tariffs Threat Betrays Impatience for a China Deal*, BLOOMBERG, Aug. 1, 2019; Li Yuan, *Huawei Feud is Latest Brick in a Tech Wall*, N.Y.

Trump administration has also threatened an emergency declaration to impose tariffs on the United States' top trading partner, Mexico, in an effort to reduce illegal immigration into the United States.[53] The WTO will soon evaluate the merits of some of these U.S. security claims.[54] Until then, it appears to be perilous times for WTO members in light of the Trump administration's recurrent use of unilateral actions in the name of U.S. national security, and its distrust of multilateralism generally.[55] The repeated use of security measures are more worrisome against the background of on-going U.S. challenge to the WTO Appellate Body's legal interpretations and judicial practices, culminating in the blocking of Appellate Body member appointments.[56] With concern over the function of the WTO dispute settlement system in the future, WTO members detached from these recent conflicts are left hoping to avoid a situation where 'the strongest party to a dispute says [what] the rules are.'[57]

It is likely that future WTO disputes will continue to build from the *Russia- Traffic in Transit* dispute, and therefore emphasize the preparatory materials related to Article XXI of the GATT. Despite reference to interpretive questions that are relevant to the application of Article XXI, a disclaimer is necessary. While the historical facts contained herein capture insights into the making of Article XXI, the concern here is to offer

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TIMES, May 20, 2019, at A1; Raymond Zhong & Paul Mozur, *Icy Maneuvering [sic] by U.S. and China in Tech Cold War*, N.Y. TIMES, Mar. 23, 2018, at A1.

[53] *See* Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, Jun. 3, 2019, LAWFARE, https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico (outlining the dramatic use of the International Emergency Economic Powers Act; *see* Fred Barbash, *Use of emergency declaration to impose tariffs on Mexico is legally questionable, scholars say*, WASH. POST, Jun. 4, 2019.

[54] *See, supra,* text at note 20.

[55] *See* Jacob Lew, Op-Ed., *America is surrendering the moral high ground over Huawei*, FINANCIAL TIMES, Jun. 6, 2019; *see* Quinn Slobodian, *You Live in Robert Lighthizer's World Now*, FOR. POL'Y, Aug. 6, 2018; *see* James Bacchus, *Might Unmakes Right: The American Assault on the Rule of Law in World Trade*, Centre for International Governance Innovation Papers No. 173, May 2018, https://www.cigionline.org/publications/might-unmakes-right; *see* Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements* (Queen's University Legal Research Paper No. 2018-102, Nov. 26, 2018); *see* Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises?*, WORLD TRADE REV. 1–23, published online May 24, 2019.

[56] *See* Robert E. Lighthizer, *2018 Trade Policy Agenda*, (Mar. 2018), at 22-28. https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf (visited Jun. 2019); *see generally* Petersmann, *supra* note 55.

[57] *See* Peter Van den Bossche, *Farewell Speech of Appellate Body Member Peter Van den Bossche*, May 28, 2019, https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

perspective to current debates, and not to make a formal interpretive claim about the GATT.[58] Collectively, the insights captured in this paper offer a historical lens by which to explore the reviewability of security claims, without seeking to resolve the legal interpretive questions presented. Nor does the paper confirm the standards by which to review claims under Article XXI. Arguably, U.S. negotiators anticipated clarification of the standard of review based on the interpretation of a competent dispute settlement body.[59] While the subsequent evolution of U.S. thinking on the security exception is occasionally touched upon, U.S. views expressed in early GATT disputes is a separate story, told elsewhere.[60]

II. ESTABLISHING A TIMELINE FOR THE HISTORICAL DESCRIPTIVE ACCOUNT

The negotiation of the ITO began with a small group of states – the US, the United Kingdom (U.K.) and the Commonwealth states during World War II. The US presented a Suggested Charter for the ITO in September 1946, based on an outline of principles devised with the U.K. from 1941 to 1945.[61] The work of the Preparatory Committee of the United Nations Conference on Trade and Employment was divided into three phases. There were two preparatory committee sessions in London (1946) and in Geneva (1947) and a meeting of the Drafting Committee in New York (1947).

The United Nations Conference on Trade and Employment was then held in Havana, Cuba in 1948. Each meeting produced its own draft ITO Charter. Within each

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[58] To add specificity to this disclaimer, the paper does not concern itself with showing how U.S. practice comes under the Vienna Convention on the Law of Treaties. In particular, the paper does not seek to argue that internal U.S. materials connote a collective effort of all participating governments to demonstrate supplementary means for the process of interpretation, as required by article 32 of the Vienna Convention on the Law of Treaties. *Vienna Convention on the Law of Treaties*, art. 32, May 23, 1969, 1155 UNTS 331. *But see* ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 309-327 (2009) (noting that 'the proposition that preparatory work reflects the common intention of all contracting parties is troubling.') *Id.* at 313.

[59] *See* Schloemann & Ohlhoff, *supra* note 32 at 448; *see also* John H. Jackson & Andreas F. Lowenfeld, Helms-Burton, The U.S., and the WTO 3 (ASIL INSIGHT No. 7, 1997).

[60] *See generally*, Hahn, *supra* note 37; Alford, *supra* note 13; Schloemann & Ohlhoff, *supra* note 32.

[61] *Suggested Charter for an International Trade Organization of the United Nations* (Department of State Publication 2598) (September 1946) [hereinafter Suggested Charter].

session, whether preparatory or in the Havana Conference, participating delegations broke up into smaller committees and commissions to simultaneously address a range of topics based on the US' Suggested Charter, including principles of non-discrimination and fairness, commodities, restrictive business practices, trade barriers and indirect barriers to trade, the response of the Soviet Union to the ITO, establishing trade rules for relations with communist and state-trading economies, consideration of positive approaches to full employment, evaluating the role of occupied territories, addressing war-torn and less-developed states governments' intervention into the economy for balance of payments difficulties and economic development, the interaction between the Bretton Woods institutions, and evaluating dispute settlement in the ITO and the relationship with the World Court and the United Nations in international trade conflicts.

The negotiation of the GATT was completed on schedule, and twenty-three governments signed the Final Act on October 30, 1947.[62] While the security exception remained largely untouched, certain elements from the Havana Charter draft were not included in the GATT. For example, the provision respecting inter-governmental agreements 'made by or for a military establishment' was not included in the final GATT text, nor was the provision regarding the 'special' circumstances of India and Pakistan as newly independent states.[63] Another example is the textual changes to the second enumerated subparagraph, which was simplified for the GATT in allowing 'traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.'[64]

Establishing the Actors in U.S. Government

The construction of the security exception captures a tense battle between the DoS and Services as to how to define post-war U.S. foreign economic policy. While the DoS championed multilateral approaches for trade liberalization and the norm of non-

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[62] HUDEC, *supra* note 43, at 50, *see generally* PETROS MAVROIDIS, DOUGLAS IRWIN, ALAN SYKES, THE GENESIS OF THE GATT 96-97 (2008).
[63] Havana Charter text, Annex M, referred to in paragraph 1(d) of Article 99.
[64] In the Havana Charter, the text was "traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment of the Member or of any other country.'

discrimination, Services prioritized U.S. expansion of power related to rising concerns with Soviet actions in eastern Europe.[65] Archived materials reveal internal U.S. division over the alignment of competing objectives.[66] While the DoS understood national security as an exception to free trade rules, Services did not see national security as the exception – free trade *was* the exception, and national security was the rule. Therefore, not all U.S. postwar planners desired freer trade for global economic recovery and peace.

In fact, the crucial advocate for freer trade were the DoS officials that supported former Secretary of State Cordell Hull's promotion of non-discriminatory, open trade, as led by William Clayton, Assistant Under Secretary of State for Economic Affairs, an advocate of Hull's foreign policy.[67] The DoS officials, James Miller concluded, had 'simply believed that freer trade would lead to global economic recovery and international harmony' and sought to 'democratise [...] international capitalism.'[68] Moreover, the DoS officials defended the ITO and trade liberalization as crucial ingredients to future U.S. security.[69] The DoS success in tethering U.S. interests to trade multilateralism likely stems from the DoS responsibility over foreign and economic policy at the time. As Francine McKenzie observed: 'Trade was not just an instrument of foreign policy; it was also its expression.'[70] Thus, U.S. trade policy was seen as integrated into the broader, diplomatic efforts and long-term objectives for maintaining global peace; a pathway for

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[65] *See* Miller, *supra* note 4, at 286 (similarly observing just *prior* to the negotiation of the ITO: 'Firstly, the Americans sought to open the world economy to suit their own expansionist commercial goals and liberal trade ideals (a predominantly selfish aim); simultaneously they wanted to pay the necessary price to accommodate war town economies and stabilise the international system (a more selfless aim that required economic sacrifices)').

[66] *But see id.*, at 286 (arguing that US negotiators sought both aims with the same approach, liberalising the world economy).

[67] DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY 464 (2017); *see* Miller, *supra* note 4, at 12. Not every official in the State Department aligned with the goal of freer trade. Leroy Stinebower, an economist in the State Department reflected on how certain US officials did not adhere to '[William] Clayton internationalism', understood as freer trade. He further observed that '[Will Clayton] constantly came up against the less convinced, in Dean Acheson and Adloph Berle.', Richard D. McKinzie, *Oral History Interview with Leroy Stinebower*, Columbus, North Carolina, Jun. 9, 1974, at paras. 12-13, https://www.trumanlibrary.org/oralhist/stinebow.htm.

[68] Miller, *supra* note 4, at 286.

[69] Francine McKenzie, *GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947-1959* 10(3) J. OF COLD WAR STUD. 78, 107 (2008) (finding the State Department was 'pervaded by economics' *and* 'formulated with Cold War aims in mind.'). (citations omitted).

[70] *Id*. at 107.

governments to identify common interests and to manage complex domestic and international pressures. DoS responsibility over the negotiation of the ITO Charter and GATT then help to explain why the United States was willing to sacrifice (some) sovereignty for the benefits generated in a multilateral result.[71]

The Influence Of The Cold War

Several commentators have remarked that the ITO was 'a product of the Cold War.'[72] The majority of discussion into the language and phrasing of the security exception occurred at a time when the United States and the Soviet Union seemed 'irrevocably committed to securing their respective spheres of influence – politically, economically, and militarily – without mutual consultation.'[73] It is inescapable then that the broader context of ITO Charter negotiation occurred against the "birth" of the Cold War between the United States and the Soviet Union.[74]

Nonetheless, despite an ideological, political, and economic threat perceived by the United States from the Soviet Union, the DoS' reasons to support trade multilateralism in the late 1940s were not so easily compartmentalized. Traditional reasons, including the U.S. goal to strengthen the West against 'the threat of communism'[75] and the effort 'to prevent a revival of the closed autarkic systems that had contributed to world depression,'[76] fed into each other. The 'ideological' conflict of the U.S. against 'the

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[71] *See generally* Miller, *supra* note 4, at 14 (arguing U.S. officials pursued multilateralism in trade from 1941 to 1945 as a result of 'their own ideals, and British influence').

[72] *Compare* THOMAS W. ZEILER, FREE TRADE FREE WORLD: THE ADVENT OF GATT 138 (1999) *with* Francine McKenzie, *GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947-1959* 10(3) J. OF COLD WAR STUD. 78, 79 (2008) (interviewing former GATT negotiators revealed that 'Cold War politics' did not affect trade liberalisation efforts). *See generally* Michael Mastanduno, *Trade as a Strategic Weapon: American and Alliance Export Control Policy in the Early Postwar Period* 42(1) INT'L ORG. 121, 125 (1988); ROBERT A. POLLARD, ECONOMIC SECURITY AND THE ORIGINS OF THE COLD WAR, 1945-1950, at 201 (1985); Jacob Viner, *Conflicts of Principle in Drafting a Trade Charte*r, 25 FOREIGN AFF. 612 (1946).

[73] STEIL, *supra* note 48 at 135.

[74] *Id.* (placing the 'birth' of the Cold War to July 7, 1947 – right in the middle of US construction of the security exception).

[75] *See* I. MAC DESTLER, AMERICAN TRADE POLITICS (4th ed. 2005) at 7; IRWIN, *supra*, note 67, at 495.

[76] POLLARD, *supra* note 72, at 244; *see* Thomas G. Paterson & Les K. Adler, *Red Fascism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930's-1950's*, 75(4) AMER.

totalitarian-communist identity of the Soviet Union'[77] was supported by American 'political and business elites' who were active in 'promoting liberal capitalism and democracy as the international model'.[78] However, revisionist historians also expose the complexity in a stratigraphy of U.S. post-war planning, observing a U.S. 'strategic-economic' quest for 'expanding empire in the 1940s not simply as a reaction to Soviet machinations but as another and more accelerated step in a long imperial journey from continental to global power.'[79] In sum, the reasoning of the U.S. should be understood as a composite of accounts from different actors and their behaviours, philosophies, actions, and ambitions that constituted international economic law at the dawn of the Cold War.[80]

How did the Cold War serve then as a rationale for the formation of the Charter, as well as the security exception? Early U.S. and U.K. efforts sought to accommodate the Soviet Union, a state-trading economy, into the multilateral trade system.[81] Yet, as elaborated within the paper, tensions mounted and as historian Thomas Zeiler observed, the U.S. would need to combine its foreign and economic policy to 'contain the expansion of Soviet-directed international communism.'[82] Still, the severity of the Cold War did not appear crystallized in U.S. officials minds prior to the 'shock' of the North Korean invasion of South Korea.[83] Services officials were concerned with the Soviet Union exploitation of the 'dramatic unraveling of the geopolitical foundations' in Europe and in Asia.[84] Despite not completely expecting Soviet 'military conquest' in the late 1940s, U.S. service officials

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HIST. REV. 1046-1064 (1970) (exploring US images of totalitarianism and how it impacted US foreign policy towards the Soviet Union).

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

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

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

[80] *See e.g.*, STEIL, *supra* note 48,

[81] James N. Miller, *Origins of the GATT – British Resistance to American Multilateralism*, Working Paper No. 318 (2000), at 18.

[82] ZEILER, *supra* note 72 at 76.

[83] THOMAS OATLEY, A POLITICAL ECONOMY OF AMERICAN HEGEMONY: BUILDUPS, BOOMS, AND BUSTS 48-49 (2015).

[84] Melvyn P. Leffler, *America's National Security Policy: A Source of Cold War Tensions*, in The Origins of the Cold War 83 (Thomas G. Paterson & Robert J. McMahon eds. 3rd ed. 1991).

shaped an expansive conception of U.S. national security in estimation of Soviet capabilities.[85] Melvyn Leffler described the broadening of the conception of U.S. national security by military officials to include: 'a strategic sphere of influence within the Western Hemisphere', a system of bases and transit rights, 'access to the resources and markets of most of Eurasia', nuclear 'superiority', and denying strategic materials and resources to 'prospective' enemies.[86]

Growing U.S.-Soviet tensions do not translate into an explanation for a stronger, wider security exception. Instead, the emerging Cold War placed an urgency on the U.S. negotiators' plans for selling trade multilateralism to other delegations, and back home in Washington. To champion trade liberalization and procedural multilateralism – the creation of 'a talking shop' for developing shared policy[87] – the U.S. negotiators circumscribed the exception. Strengthening the benefits arising from membership to the ITO meant closing opportunity for unbridled government regulation and protectionism. This would be a considerable challenge with 'lingering isolationism'[88] within the U.S. government, and several U.S. officials skeptical of 'liberal ideals and capitalist institutions.'[89]

III. PREPARING FOR TRADE MULTILATERALISM: INITIAL U.S. CONSTRUCTION OF THE NATIONAL SECURITY EXCEPTION

Within the United States, post-war foreign economic policy was managed by an inter-departmental committee, the Executive Committee on Economic Foreign Policy (ECEFP), which itself was sub-divided into smaller committees that considered economic, territorial, and security problems through coordination between the DoS, War,

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[85] *Id.* at 85-86.
[86] *Id.* at 90.
[87] James N. Miller, Origins of the GATT – British Resistance to American Multilateralism, Working Paper No. 318 (2000) at 9.
[88] ZEILER, *supra* note 72 at 78.
[89] Leffler, *supra* note 84 at 87.

Navy, and others.[90] The ECEFP drew from past United States practices and discussions with British and Canadian officials to form the earliest proposals for a multilateral convention on commercial policy during World War II.[91]

U.S. trade agreements from the inter-war period treated national security in different ways. The reciprocal trade agreement between the United States and Argentina had divided national security concerns into two groups in forming a security exception. The first group included actions 'relative to public security' and 'public health and morals' (among others) and these actions were qualified by a commitment against 'arbitrary discrimination', without prejudice to commitments to engage in consultation or third-party adjudication.[92]

The second group within the United States and Argentina trade agreement included the 'control of the export or sale for export of arms, ammunition, or implements of war, and, in exceptional circumstances, all other military supplies' and those 'relating to neutrality'. These actions were unqualified, and introduced, as follows: 'Nothing in this Agreement shall be construed to prevent the adoption or enforcement of such measures as the Government of either country may see fit [...].'[93] By comparison, Article XVII of the Agreement between the United States of America and Mexico respecting reciprocal trade, entered into force Jan. 30, 1943: 'Nothing in this Agreement shall be construed to prevent the adoption or enforcement of measures [...](h) relating to public security, or imposed for the protection of the country's essential interests in time of war or other national

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[90] *See Executive Committee on Economic Foreign Policy*, Jun. 3,1944, 10 DEP'T ST. BULL. 507, 511 (1944); *see also* ROBERT W. OLIVER, INTERNATIONAL ECONOMIC CO-OPERATION AND THE WORLD BANK 102-103 (1975); *see also* HARLEY A. NOTTER, POSTWAR FOREIGN POLICY PREPARATION, 1939-1945, at 222-223, 357-358 (1949).
[91] Committee on Trade Barriers, Report: Proposed Multilateral Convention on Commercial Policy, ECEFP D-62/44, Oct. 4, 1944, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9', RG 59, box 46, NACP, at 1.
[92] Arts. XV(1), XVI(1), Agreement and supplemental exchange of notes between the United States of America and Argentina respecting reciprocal trade, U.S.-Arg., Oct. 14, 1941, E.A.S, 277, 56 Stat. 1685, 1698-1701 [hereinafter US-Arg. Agreement, Oct. 14, 1941]. The chapeau of Art. XV(1) read: Subject to the requirement that, under like circumstances and conditions, there shall be no arbitrary discrimination by either country against the other country in favour of any third country, [...] the provisions of this Agreement shall not extend to prohibitions or restrictions [...].'
[93] *Id.*, at Art. XV(2).

emergency.'[94] In this case, the actions were unqualified and were coupled with open-ended concerns related to "other national emergency".

For the initial ECEFP proposal, the relevant security-related portions of the draft article XXVIII (General Exceptions) were unqualified, with a few key changes. The exception provided, *inter alia*:

> Nothing in this Convention shall be construed to prevent the adoption or enforcement of measures: [...]
>
> (c) relating to the traffic in arms, ammunition and implements of war, and, in exceptional circumstances, all other military supplies; [...]
>
> (h) [measures] undertaken in pursuance of obligations for the maintenance of international peace or security; [...].[95]

The ECEFP explained that subparagraph (h) was new, and meant to 'replace' language in inter-war trade agreements 'relating to (unilateral) "neutrality" and "public security" measures *and* measures imposed "in time of war or other emergency".'[96] The proposal targeted the open-ended language of past practices that were unrelated to war actions. This meant the ECEFP purposefully rejected expanding the scope of the security exception to 'permitted action under emergency situations'.[97] The ECEFP confirmed its position that 'the scope of the exception should properly be restricted to situations involving war or the threat of war, which would be covered by (h).'[98] For clarity, the

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[94] Agreement between the United States of America and Mexico respecting reciprocal trade, U.S.-Mex., Dec. 23, 1942, 57 Stat. 833, 850 (1942).
[95] Analysis of the Draft Text of the Proposed Multilateral Convention on Commercial Policy, ECEFP, Oct. 1944, ECEFP D-64/44, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9', RG 59, box 46, at 63, NACP [hereinafter ECEFP D-64/44]; Proposed Multilateral Convention on Commercial Policy, ECEFP D-63/44, Oct. 1944, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9', RG 59, box 46, at 44, NACP [hereinafter ECEFP D-63/44]; The bracketed text signaled a drafting suggestion. Identical text is found in, Proposal of Jul. 21, 1945, at 13.
[96] ECEFP D-64/44, *supra* note 95 at 63-64.
[97] *Id.* at 64.
[98] *Id.*

security exception would 'not extend to national emergencies of any other kind, such as those produced by depressions.'[99]

The security exception had to fit within a larger constellation of political and economic goals for trade multilateralism in post-war planning. The ECEFP sought cooperation to 'maximize the production and exchange of goods' and to 'prevent future wars' and to avoid 'measures of economic warfare.'[100] A multilateral approach was meant to aid all governments transition from wartime controls.[101] The ECEFP further believed trade rules fit into the political reality that members needed conditions for the 'expansion of world trade' to address employment, balance-of-payments, or other economic problems.[102] The initial plan for a United Nations organ to address trade was to construct 'agreed principles' and an 'an equitable basis for dealing with the problems of governmental measures affecting international trade'.[103] The ITO would establish machinery for collaboration, but was not described as an international body meant to police protectionism.[104]

Constructing The Suggested Charter's Security Exception

Following the 1944 ECEFP proposal, a sub-committee, the Trade Agreements Committee (TAC) was tasked in 1946 with constructing the initial charter for the ITO, meant as a recommendation for the Secretary of State. The final proposal for the ECEFP was divided. A majority of the TAC, largely DoS officials, offered a security exception that

[99] *Id*.
[100] Opening Letter to the Executive Committee on Economic Foreign Policy from the Committee on Trade Barriers, ECEFP D-62/44, Oct. 4, 1944, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9', RG 59, box 46, NACP, at 2 [hereinafter Letter of Oct. 4, 1944, ECEFP D-62/44].
[101] Committee on Wartime Trade Controls, Report: Basic Foreign Commercial Policy and Wartime Trade Controls, ECEFP D-61/44, A1 353, file 'ECEFP: Meetings, Documents 61/44-/9', RG 59, box 46, at 4, NACP.
[102] Letter of Oct. 4, 1944, ECEFP D-62/44, *supra* note 100, at 2.
[103] Proposal to Establish an International Trade Organization, marked Secret, Jul. 21, 1945, ECEFP D-108/45, A1 353, file '5.19B ECEFP Meetings, Documents 101/45 – 110.45', RG 59, box 48, NACP, at 5 [hereinafter Proposal of Jul. 21, 1945, ECEFP D-108/45].
[104] *Id*. at 5.

maintained the ITO's trade liberalization goals.[105] The Services Departments offered a dissenting report to the Secretary of State.

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

> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures [...]
>
> b. relating to the traffic in arms, ammunition, implements of war and fissionable materials;
>
> c. in time of war or imminent threat of war, relating to the protection of the essential security interests of a Member;
>
> [...]
>
> j. undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace or security.[106]

After 'lengthy discussion' in the ECEFP, the TAC majority observed the Services Departments' meaning of national security constituted 'the maximum which could be included without seriously jeopardizing the expansion of world trade which the Charter seeks to bring about.'[107] However, these exceptions were 'firmly' rejected.[108] TAC members repeatedly defended the ITO and the trading world they sought to establish – one would *not* include open-ended power 'to make economic preparations for war in the indefinite future'.[109] For the TAC majority, the Services' desired exception sought to amplify United States' powers *and* to 'curb the military potential of other powers'.[110] The

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[105] *See* ECEFP, Trade Agreement Committee (TAC) Statement, Exceptions for Security Measures, ECEFP D-42/46, Mat 27, 1946, RG 59, A1 497, Box 33, file 'Executive Committee on Economic Foreign Policy', RG 59, box 33, NACP [hereinafter TAC Statement, ECEFP D-42/46].
[106] *Id.* at 1-2.
[107] *Id.* at 4.
[108] *Id.*
[109] *Id.*
[110] Clair Wilcox to Dean Acheson and Will Clayton, Memorandum, 'National Security Exceptions to Draft ITO Charter', Jul. 8, 1946, A1-698, file 'Charter: Security', RG 43, box 13, NACP, at 2 [hereinafter Wilcox to Acheson and Clayton, Memorandum, Jul. 8, 1946].

DoS officials viewed such measures as undermining, possibly destroying, the international legal framework for peaceful economic and political relations.[111]

The TAC majority argued that a successful ITO was more optimal for U.S. security interests than a broad security exception. The TAC officials remarked that a 'Charter for world trade with real teeth in it' would 'contribute far more to the security of the United States than the reservation of broad freedom of action by all signatories.'[112] In addition, such a Charter would strengthen 'all the nations outside the Soviet orbit [...] and to keep a free enterprise system.'[113] Thus, as Clair Wilcox[114] (who led the Office of International Trade Policy at the State Department) explained, United States' strength 'depends on the integration of the non-collectivist world into a great trading system. It is to our interest to preclude exceptions under the Charter which might result in its breaking up into exclusive trading blocs.'[115]

The TAC majority did not discount the vital character of security interests.[116] States would undertake necessary security measures, regardless of possible infringement of the Charter.[117] However, the key for the TAC exception sought to meet this need and avoid unilateral actions, which were counter to trade multilateralism. Winthrop Brown argued that the security exception language protected 'legitimate security interests' and the United States 'against arbitrary actions by others to our detriment for political or economic warfare reasons.'[118] Thus, the TAC majority argued its proposed security exception permitted several measures necessary for U.S. security interests, *provided* the 'safeguards' against opportunistic and protectionist uses were met. For example,

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[111] TAC Statement, ECEFP D-42/46, *supra* note 105, at 4.
[112] *Id*. at 7.
[113] Winthrop G. Brown on behalf of Clair Wilcox to William Clayton, Letter, National Security Exceptions in the ITO Charter, Jun. 13, 1946, A1 698, file 'Charter: Security', RG 43, box 13, NACP, at 6 [hereinafter Wilcox to Clayton, Letter, Jun. 13, 1946].
[114] Clair Wilcox, a US economist from the faculty of Swarthmore College, served as head negotiator for the ITO Charter and chaired the International Trade Conference that resulted in the GATT 1947. *See* Joshua Hausman, *One Hundred Years of Economics at Swarthmore*, http://www.swarthmore.edu/sites/default/files/assets/documents/economics/econ_history.pdf.
[115] The Minutes of the Meeting of the Executive Committee on Economic Foreign Policy, Jun. 14, 1946, ECEFP M-16/46, A1 353, file 'ECEFP Minutes 16/46 – 33/46', RG 59, box 57, NACP, at 6 [hereinafter Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46].
[116] TAC Statement, ECEFP D-42/46, *supra* note *supra* note 105, at 4.
[117] *Id*.
[118] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 1.

subsidies remained an option for maintaining necessary war industries, provided Services could make 'the case for action on security grounds' to Congress.[119] As for reporting or consulting on subsidy programs, the DoS noted 'the Charter commits no member in advance to take limiting action as a result of consultation'.[120] Another example was that ITO members could take trade actions for security reasons under the auspices of the United Nations Security Council, finding 'agreement among the principal powers on the Security Council for the retention of key industries in key areas.'[121] Finally, controls over trade in fissionable, as well as arms, ammunition, and implements of war were 'specifically excepted' from the Charter.[122]

A significant concern with the Services' dissent was other states' use of the security exception for 'every form of discriminatory and restrictive practice.'[123] A broadened exception could 'give general sanction to the kind of measures envisaged by the service members [and] could be held to justify, for example, the high-cost industrialization of India behind tariff barriers, or the maintenance of high-cost British agriculture by means of quotas'.[124] Wilcox raised the possibility that less-developed states would claim economic development and industrialization as 'essential to their ultimate national security' to justify the use of quantitative restrictions.[125] In this way, 'every special interest in every other country would clothe itself in the mantle of national defense.'[126] Strategically, the TAC officials observed that it was in the United States best interest in 'preventing other countries from imposing harmful trade measures against the United States', and this 'far outweigh[ed] the risk involved in committing [the US] along with other countries to the relaxation of trade controls.'[127]

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[119] TAC Statement, ECEFP D-42/46, *supra* note 105, at 5.
[120] Wilcox to Clayton, Letter, Jun. 13, 1946, *supra* note 113, at 4 [emphasis in original].
[121] TAC Statement, ECEFP D-42/46, *supra* note 105, at 5.
[122] *Id*. at 6.
[123] Wilcox to Clayton, Letter, Jun. 13, 1946, *supra* note 113, at 6.
[124] TAC Statement, ECEFP D-42/46, *supra* note 105, at 6.
[125] Wilcox to Clayton, Letter, Jun. 13, 1946, *supra* note 113, at 6 (India, Brazil, and Australia are specifically named); *see* Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 5
[126] *Id*.
[127] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 6.

An exception that simply excluded all national security measures would 'open the door to economic warfare and to the use of economic power for purely political reasons.'[128] This reference to 'economic warfare' and the desire to build solidarity in favor of the United States-approach rather than the Soviet-approach was referenced by other DoS officials, and U.S. businesses too.[129] As Wilcox later recounted, there were 'two roads leading to industrial power', and it was imperative that other trading nations follow the United States road, rather than the Soviet one.[130] The TAC majority concluded the Services Departments' proposal for widening the scope of the security exception was 'unnecessary, unwise, and possibly dangerous, to carry forward in a multilateral code of commercial behavior'.[131]

The Services Departments' Broadened Scope For A Security Exception

Harold Hopkins Neff (a lawyer with international law and business experience, and Special Assistant to the Under Secretary of War and representative of the War Department) and Captain H.L. Challenger (of the U.S. Navy) presented the Services' dissent to the TAC majority security exception proposal.[132] The Services Departments' overarching thesis was that the proposed security exception was 'much too narrow' and failed to preserve United States' necessary powers.[133] According to Neff, it was crucial the United States address the 'depleted' raw materials required for U.S. security with the power 'to control trade' to both conserve these resources domestically and to develop such resources 'nearby' or in 'friendly countries.'[134] The Services' Departments sought wide

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[128] Wilcox to Clayton, Letter, Jun. 13, 1946, *supra* note 113, at 6.
[129] *See, e.g.* Clair Wilcox, *Statement on Quantitative Restrictions by Vice Chairman of U.S. Delegation*, 18 DEP'T ST. BULL. 37, 40 (1948); John Abbink, *The issues at Havana and what the Charter came to look lik*e, *in* ECONOMIC INSTITUTE ON AMERICA AND THE INTERNATIONAL TRADE ORGANIZATION (1948).
[130] CLAIR WILCOX, A CHARTER FOR WORLD TRADE 141 (1972).
[131] TAC Statement, ECEFP D-42/46, *supra* note 105, at 7.
[132] *See* Harold H. Neff and H.L. Challenger, Memorandum, Attachment to ECEFP D-42/46, Jun. 10, 1946, RG 43 A1 698, file 'Charter: Security', RG 43, box 13, NACP, at 2 [hereinafter Neff and Challenger Memo of Jun. 10, 1946, attachment ECEFP D-42/46]; *see also* Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115. For a biography of Neff, *see generally* US Delegation file, 'Harold Hopkins Neff biography, A1-704, file 'Biographies part 1', RG 43, box 132, NACP; *see also* Harold H. Neff to the Commission on the study of the London Stock Exchange, Jun. 27, 1941, provided to the Securities and Exchange Commission archives, http://www.sechistorical.org/collection/papers/1940/1941_0627_NeffCommission.pdf
[133] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 2.
[134] *Id*. at 1-2.

discretion for all security measures, with a broad understanding of what constitutes U.S. national security.[135] This was not just about the security exception. It became clear that the exception represented the chief tool for escaping the ITO's legal *and* 'moral' obligations to enable access materials 'on equal terms' to all members to trade as 'needed for their economic prosperity.'[136] As elaborated below, Services desired sole discretion to draw on trade powers, in peacetime, to exercise import and export controls, make strategic Government purchases abroad, and to impose economic sanctions on ITO members.[137]

Broadening the scope: accounting for new technology and new weapons

Services pointed to past U.S. commercial treaties and trade agreements that offered 'broad' protections, with legal phrases that excepted measures 'relating to public security' and measures 'in exceptional circumstances, all other military supplies.'[138]

The TAC had replaced 'all other military supplies' in 'exceptional circumstances' with the phrase 'fissionable materials' in the security exception. Neff argued that the reservation of broad powers 'as to munitions of war and fissionable raw materials does not appear realistic.'[139] The narrowness of the existing Charter language ignored the possibility of discovering 'some new technology' or materials for new weapons of war.[140] History of U.S. neutrality legislation, Neff countered, had demonstrated that security interests 'cannot be realistically limited to munitions of war.'[141] Petroleum and metals, for example, were suggested to be equally important.[142]

Neff argued that U.S. trade agreements permitted trade controls for 'public security' which he understood to be broader than with respect to 'police power'.[143] The

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[135] *See* Neff and Challenger Memo of Jun. 10, 1946, attachment ECEFP D-42/46, *supra* note 132, at 1.
[136] *Id*.
[137] *Id*. at 2-3; *see* Wilcox to Acheson and Clayton, Memorandum, Jul. 8, 1946, *supra* note 110; *see* TAC Statement, ECEFP D-42/46, *supra* note 105, at 3.
[138] TAC Statement, ECEFP D-42/46, *supra* note 105, at 2; Neff and Challenger Memo of Jun. 10, 1946, attachment ECEFP D-42/46, *supra* note 132, at 7-8.
[139] Neff and Challenger Memo of Jun. 10, 1946, *supra* note 132, at 2.
[140] *Id*. at 3; *see* Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 2.
[141] *Id*. at 2.
[142] *Id*. at 2-3.
[143] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 2.

TAC majority rejected Services' desire to include a broadly-understood reference to 'public security' within the security exception.[144] Wilcox explained that past U.S. practice suggested the terms "public security" referred 'to domestic police measures.'[145] The DoS observed the phrase "public security" was interpreted 'very narrowly to cover only matters affecting public safety or order.'[146] John Leddy[147] (Trade Agreements Division, State Department) added that trade agreements authorized measures 'required in the face of a clear and present danger to the national security.'[148] The TAC also referred to the narrow interpretations of the phrase in the past, with specific attention placed on the United States position taken when accepting the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions.[149]

Broadening the scope: export restrictions

The Services Departments required an expansive exception to account for its conclusion that the ITO asymmetrically weakened the United States, as other ITO members lacked the constitutional prohibitions on levying export duties.[150] Such 'renunciation' of powers required terminating U.S. statutes desired to 'guard [U.S.] war potential', 'to keep from increasing the war potential of a possible enemy', and limited

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[144] *See* TAC Statement, ECEFP D-42/46, *supra* note 105, at 6.
[145] Wilcox to Acheson and Clayton, Memorandum, Jul. 8, 1946, *supra* note 110, at 2.
[146] Wilcox to Clayton, Letter, Jun. 13, 1946, *supra* note 113, at 6.
[147] In London, Leddy served as an advisor to the US delegation for the commercial policy chapter, which later formed the GATT 1947. See Richard D. McKinzie, *Oral History Interview with John M. Leddy*, Washington, Jun. 15, 1973, Harry S. Truman Presidential Library & Museum, paras. 44-45; see also Richard D. McKinzie, *Oral History Interview with Honore Marc Catudal*, Washington, May 23, 1973, Harry S. Truman Presidential Library & Museum, para. 59; see also *John Marshall Leddy Dies, Obituary*, WASH. POST, https://www.washingtonpost.com/archive/local/1997/09/03/john-marshall-leddy-dies/53943cdd-9046-41a0-8085-6e1ce9cd634e/?utm_term=.53d57e88c2d1. Leddy's views mattered; he was deeply respected by other State Department officials for his skills as a drafter and negotiator. *See* Richard D. McKinzie, *Oral History Interview with Joseph D. Coppock*, Washington, Jul. 29, 1974, Harry S. Truman Presidential Library & Museum, para. 46 ('John Leddy was one of the greatest, one of the really greatest, most knowledgeable people in State for many years.'); Richard D. McKinzie, *Oral History with Winthrop G. Brown*, Washington DC, May 25, 1973, Harry S Truman Presidential Library & Museum, paras. 43-44 [hereinafter Brown Oral History].
[148] John Leddy on behalf of Clair Wilcox to William Clayton, Draft Letter, Jun. 13, 1946, A1 698, file 'Charter: Security', RG 43, box 13, NACP, at 1 [Wilcox to Clayton, Draft Letter of Jun. 13, 1946].
[149] TAC Statement, ECEFP D-42/46, *supra* note 105, at 6.
[150] Neff and Challenger Memo of Jun. 10, 1946, *supra* note. at 3.

action in the name of these goals in the future.[151] Examples provided later by the Services included 'the exportation from the United States of tinplate scrap and helium.'[152] In discussions with the DoS, Neff 'discounted' their arguments that export restrictions, imposed for national security reasons, could lead to retaliation and, consequently, a denial of strategic materials.[153] Neff observed that other countries would still 'need [...] to obtain dollar exchange'.[154]

Broadening the scope: import restrictions

The Services Departments wanted freedom to impose mixing regulations and quantitative import restrictions 'to assure the maintenance of a domestic industry [...] necessary in war.'[155] For example, the U.S. Government could not rely on 'specification controls' (such as mixing regulations) for the protection of the synthetic rubber industry.[156]

Services also rejected the TAC majority's assessment that the U.S. Government could achieve its security goals through subsidies and government operation. Neff argued these choices were unacceptable due to uncertainty created by the dependence on government appropriations.[157] The Services Departments also complained that the use of internal subsidy programs would require reporting to other governments, and consultations with regard to its limitation in the event the subsidy program caused any 'serious effects on international trade,' even if for national security reasons.[158] The Services Departments identified this as 'dangerous' to 'make such undertaking in regard to a subsidy program based on national security reasons.'[159]

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[151] Neff and Challenger Memo of Jun. 10, 1946, *supra* note. at 4.
[152] TAC Statement, ECEFP D-42/46, *supra* note 105, at 3.
[153] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 2.
[154] *Id.* at 2.
[155] TAC Statement, ECEFP D-42/46, *supra* note 105, at 3.
[156] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note *supra* note 115, at 3.
[157] *Id.*; Neff and Challenger Memo of Jun. 10, 1946, *supra* note 132, at 4-5.
[158] Neff and Challenger Memo of Jun. 10, 1946, *supra* note 132, at 5.
[159] *Id*. An unnamed State Department official handwrote 'Nuts!' next to this comment, underlying the word 'dangerous.'

Broadening the scope: strategic purchasing

The Services Departments also sought total discretion for the U.S. Government to apply strategic considerations in effecting foreign purchases.[160] Counter to the Charter's rules and norms of non-discrimination and commitment that 'all nations shall be treated fairly and equitably', discrimination was necessary for U.S. security.[161] Specifically, the U.S. would need to make

discriminatory purchases (specifically, government stockpiles) for strategic reasons, citing the example of petroleum and the tropical products of natural rubber, abaca, and cinchona.[162] According to Services, such purchasing would allow the United States to minimize use of foreign sources of 'scarce materials needed in war' or 'to help maintain in neighboring or near-by countries a possibly noneconomic industry producing materials or goods necessary in war.'[163] The Services ruled out support by a subsidy or loan to foreign producers, observing a commitment to 'deliver the products to this country' as a possible other violation of the commitment 'according "fair and equitable treatment" of other areas.'[164]

Another vocal concern raised by Services was how responsive the U.S. could be against Russia. For free-market economies, the Charter imposed strict commitments to prohibit trade controls. However, a state that controlled trade could make all export and import decisions based on strategic considerations, such that 'prohibitions against trade controls would be meaningless.'[165] The 'vague' obligations imposed on state monopolies 'equal and fair treatment' would be difficult to enforce.[166] The TAC majority ruled that this concern 'did not seem particularly significant' as Russia and satellite states accounted for five percent of world trade at that time.[167]

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[160] *Id*.
[161] *Id*. An unnamed State Department official handwrote, 'Good!' next to this comment.
[162] *Id*. at 5-6.
[163] TAC Statement, ECEFP D-42/46, *supra* note 105, at 3.
[164] Neff and Challenger Memo of Jun. 10, 1946, *supra* note 132, at 6.
[165] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 3.
[166] Neff and Challenger Memo of Jun. 10, 1946, *supra* note 132, at 6; *see* Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 3.
[167] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 5.

The jurisdiction of the security council over economic disarmament

The Services believed that 'renunciation' of trade powers necessary for security reasons constituted economic disarmament that fell under the jurisdiction of the United Nations' Security Council.[168] In support of this claim, Neff argued that 'the failure by the Allied nations to destroy the German economic potential for war as well as German armaments following World War I was a convincing demonstration of the fallacy of separating economic disarmament from general disarmament'.[169] A related strategic argument was that the U.S. held greater power in the Security Council, where there was weighted representation and a veto right, as opposed to the ITO where there was no such weighted representation.[170] Services also argued it was in U.S. security interests that U.S. allies not renounce powers affecting national security. For example, Neff and Challenger observed it was in U.S. interests that 'Great Britain have complete power to support her domestic agriculture by the measures which at the time she deems most appropriate.'[171] The proposals for unilateral economic sanctions were concerning for the DoS. An undated memorandum provided the DoS position that the proposal 'assumes that any aspect of military security, no matter how remote or indirect, must override all consideration of economic and social well-being'; this assumption 'is wholly at variance with our established foreign policy.'[172]

Finding Compromise: Adding Open-ended Language to the ITO Security Exception

In a June 14, 1946 ECEFP meeting, the TAC majority challenged Neff to reconsider the expansion of the security exception. The contention the United States has been made 'less secure by advocating commitments by all countries of the world completely overlooks what other countries give up and bind themselves to do,' the majority observed, 'and the fact that they are more apt to try to use loopholes in discriminatory ways than

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[168] Neff and Challenger Memo of Jun. 10, 1946, *supra* note 132, at 7; Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 3.
[169] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 3.
[170] Neff and Challenger Memo of Jun. 10, 1946, *supra* note 132, at 7.
[171] *Id*.
[172] Unauthored, Memorandum, Undated, A1 698, file 'Charter: Security', RG 43, box 13, NACP [hereinafter Unauthored, Memorandum, Undated].

we.'[173] They also pointed out that the ITO made the United States 'economically stronger by freeing our access to other people's products'.[174] Moreover, United States' economic power 'is dependent not only on access to raw material but also on technological development, progressive management and an active and expanding industrial plant, to which export markets are essential.'[175] The head of U.S. negotiators, William Clayton (Assistant Under Secretary of State for Economic Affairs) put it simply – the Services Departments 'supported the very proposition which they were intended to oppose.'[176]

Leddy composed a sharp defence of the ITO and trade multilateralism on behalf of Clair Wilcox meant to summarize discussion with the Services officials to William Clayton.[177] Calling the Services Departments' approach 'shortsighted', Leddy noted that there was 'no clear distinction between "security" industries and other industries, and any basic industry might be defended as essential from the security standpoint.'[178] From a strategic perspective, the Services Departments' approach made no sense – citing discrimination on security grounds would allow for *any* kind of discrimination, including the British imperial preferences and the 'system of "integration"' pursued by the Soviet Union in eastern Europe.[179] Leddy concluded that the Services Departments' exception 'would tear the heart out of the Charter.'[180]

In a June 17, 1946 meeting with the Services Departments, Wilcox and Clayton spoke to their questions 'at some length' and emphasized the significance of the ITO to improve living standards, advance technology, and bring peace and national security.[181] They placed the ITO as part of a bigger picture, alongside loans to Britain and France, and operation of the Bretton Woods institutions.[182] The DoS believed that 'the Charter as written, with the safeguards it contains against action by other nations inimical to United

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[173] Meeting Minutes, Jun. 14, 1946, ECEFP M-16/46, *supra* note 115, at 5.
[174] *Id.*
[175] *Id.* at 4-5.
[176] *Id.* at 6.
[177] *See* Wilcox to Clayton, Draft Letter of Jun. 13, 1946, *supra* note 148.
[178] *Id.* at 3.
[179] *Id.* at 4.
[180] *Id.* at 3.
[181] Memorandum of Conversation, *Security Exceptions to Proposed ITO Charter*, Jun. 17, 1946, A1-698, file 'Charter: Security', RG 43, box 13, NACP, at 2 [hereinafter Memorandum of Conversation, Jun. 17, 1946].
[182] *Id.*

States interests, is a better protection for our security than the reservations proposed by the Services.'[183] For the DoS, unison and interdependence superseded a technical exclusion of security in the architecture of the ITO.[184] Though the Services Departments acknowledged Clayton, they reportedly continued 'to plead for a free hand in controlling international transactions for military purposes.'[185] The Services Departments demanded freedom 'to stop any shipment of any raw material, scrap, manufactured product, plant equipment, or technology to Russia at any time without regard to whether or not there was imminent threat of war.'[186] Despite mention of escalating the Services Departments' concerns to the Joint Chief of Staffs, Wilcox stood firm. Though the DoS sought to make 'necessary' provisions for security, 'he insisted that this must be done in a way that would not give a carte blanche to other countries to violate their commitments with respect to commercial policy under the cloak of a sweeping security exception.'[187] At the conclusion of the meeting it was agreed that Neff and Wilcox would work together to develop wording for the Charter exception.[188]

In early July, 1946, Wilcox wrote to Dean Acheson and Clayton and argued that the Services Departments sought a Charter provision 'so broad as to permit any nation, seeking individual advantage in trade under the guise of security, completely to escape from the obligations it had assumed under the ITO Charter.'[189] Wilcox cautioned that the Services Departments sought 'a loophole for everything except consumers' luxury

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[183] Wilcox to Clayton, Letter, Jun. 13, 1946, *supra* note 113, at 2.
[184] Unauthored, Memorandum, Undated, *supra* note 172, at 3. *See, e.g.* the State Department response to the Services Departments' citing of the Anglo-American Petroleum Agreement as past practices for a broad security exception. The memorandum reported the US position 'was that such pre-emptive rights [to oil in time of war or emergency] should be exercised only in the light of the broad (commercial) objectives of the Agreement and that any new agreements regarding such rights should be subject to international review.' The text of the agreement was "subject always to considerations of military security and to the provisions of such arrangements for the preservation of peace and prevention of aggression as may be in force.' [emphasis in original].
[185] Memorandum of Conversation, Jun. 17, 1946, *supra* note 181, at 2.
[186] *Id.* at 1, 2. The language 'imminent threat of war' was seen by the Army-Navy Munitions Board representative, Mr. Deupree as having 'serious diplomatic repercussions' and 'urged a change in the wording.'
[187] *Id.* at 2 [emphasis in original].
[188] *Id.*
[189] Wilcox to Acheson and Clayton, Memorandum, Jul. 8, 1946, *supra* note 110, at 3.

goods.'[190] Taking on the voice of economic authority, Wilcox also explained that U.S. military potential needed export markets. The Services Departments' security exception, Wilcox argued, would 'leave other nations free to close those markets to us' and further seek to 'build our military strength [...] not by methods that would integrate the other economies of the world more closely with our own, but by methods that would isolate them from us.'[191] He closed his letter by noting that the Services and 'civilian departments' fundamentally disagreed on whether to include an exception 'so broad as to leave every Member free to engage in economic warfare and, by unilateral actions, to impose economic sanctions in times of peace'.[192]

The DoS presented a redrafted security exception on July 17, 1946 (Article 32 of the draft Charter).[193] To address the Services Departments' concern with the narrowness of the actions relating to 'arms, ammunition, implements of war and fissionable materials', the DoS proposed adding in 'other supplies of the use of the military establishment.'[194] The DoS also proposed the phrase 'international emergency' in place of the phrase 'imminent threat of war'. This change stemmed from Services' belief that the original wording would be 'unduly restrictive because action taken under this exception would involve formal public admission that war threatened.'[195]

By mid-July, the ECEFP approved three textual changes to the general exception provision of the commercial policy chapter (Article 32).[196] First, the creation of a new paragraph that addressed measures "relating to fissionable materials" since this was considered a separate class of materials from the class as "arms, ammunition and

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[190] *Id*.
[191] *Id*.
[192] *Id*. at 4. Though he sought guidance from Acheson and Clayton, the archive file did not contain a response as to how to address this issue.
[193] Executive Committee on Economic Foreign Policy (ECEFP), *Security Exceptions in the ITO Draft Charter – Memorandum from the Department of State*, Memorandum, Jul. 17, 1946, ECEFP D-64/46, A1 353, file 'ECEFP Meeting Documents 61/46-70/46', RG 59, box 50, NACP [hereinafter ECEFP, *Security Exceptions*, Memorandum, ECEFP D-64/46].
[194] *Id*. at 1.
[195] *Id*.
[196] The group further agreed to amend article 49, dealing with exceptions to provisions relating to intergovernmental commodity agreements, to match the changes made to article 32. The Minutes of the Meeting of the Executive Committee on Economic Foreign Policy, held July 19, 1946 at 2:30pm in room 285, State Department Building, Minutes, Jul. 19, 1946, ECEFP M-23/46, RG 59, A1 353, file 'ECEFP Minutes 16/46-33/46', RG 59, box 57, NACP, at 7 [hereinafter Minutes, Jul. 19, 1946, ECEFP M-23/46].

implements of war".[197] Second, the broadening of sub-paragraph (d) to exempt from the Charter's commercial policy chapter to include 'such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment.'[198] Wilcox observed that under this wording 'only that portion (meaning specific shipments of specific goods) of such traffic conducted with the end purpose of actually supplying the military whether going directly to the military or to private hands could be dealt with by exceptional measures.'[199] The example provided was control over pre-war traffic in scrap metal destined for Japanese military use.[200] Neff required time to study Wilcox's proposal, but offered a tentative acceptance of the language.[201] Third, Wilcox explained a change to subparagraph (e). The phrase "international emergency" substituted "imminent threat of war" 'to avoid the possibility that action under these provisions would appear to be practically an act of war.'[202] The ECEFP then agreed to amend "international emergency" to "emergency in international relations", as suggested by Lynn R. Edminster, Vice Chairman of the U.S. Tariff Commission, 'to avoid the implication that Members would be free to take measures under Article 32 in an economic emergency, such as a world depression.'[203]

Amendments To The Charter's Provisions Respecting Interpretation And Dispute Settlement

The Services Departments' concerns with the security exception also raised questions of review. In particular, the Services Departments questioned whether either ITO body, the Executive Board or the Conference had the power to 'stigmatize a country

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[197] *Id*. at 6.
[198] The ECEFP further approved an amendment to Article 32(d), subject to study by the War Department: 'relating to the traffic in arms, ammunition, and implements of war [and fissionable materials] and to such traffic in other goods and material as is carried on for the purpose of applying a military establishment.' *Id*. at 2.
[199] *Id*. at 6-7.
[200] *Id*. at 7.
[201] *Id*.
[202] The ECEFP also approved a change to Article 32(e), 'in time of war or [imminent threat of war] emergency in international relations, relating to the protection of the essential security interests of a Member.' *Id*. at 2, 7.
[203] *Id*. at 7.

as a violator.'[204] The Services Departments objected to either body retaining full discretion to 'vote upon a "decision" in interpreting the security exceptions of the Charter as to place [the United States] in violation of its commitments thereunder.'[205] It was further objected that the parties to a dispute lacked right of appeal to the International Court of Justice (ICJ), giving the Executive Board 'final discretion'.[206]

To address the alleged stigmatization, the DoS revised Article 76 of the Charter draft, respecting the interpretation and settlement of disputes. Rather than provide a "decision", the Executive Board or Conference would provide a 'ruling' and permitted recourse to the ICJ with consent of the Conference.[207] Further amendments were made to comply with the ECEFP's position that a "ruling" of the Executive Board regarding the interpretation of the Charter should be subject to appeal to the Conference.[208]

Neff raised concern that in the case of a dispute involving the security exception, the Conference could 'refuse[] to allow a Member to carry a case to the Court' under the existing draft.[209] Requiring consent had established 'in effect [...] a screening mechanism for such appeals.'[210] Regarding the interpretation of the security exception by the Executive Board or Conference, the revised language was 'intentionally inexplicit' to 'avoid the implication that a "ruling" of the Conference would be necessarily binding on all Members'.[211] Leddy also explained that 'only should there be sufficient reason would

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[204] ECEFP, *Security Exceptions*, Memorandum, ECEFP D-64/46, *supra* note 193 at 2.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 2-3. Article 76(2) read: Any question or difference concerning the interpretation of this Charter shall be [decided by] referred to the Executive Board for a ruling thereon. [which] The Executive Board may require a preliminary report from any of the Commissions in such cases as it deems appropriate. Any ruling of the Executive Board shall, upon the request of any Member directly affected or, if the ruling is of general application, upon the request of any Member, be referred to the Conference. [A decision of the Executive Board] Any justifiable issue arising out of a ruling of the Conference [shall, in the discretion of the Board] may, with the consent of the Conference, be [referred] submitted by [the] any Party[ies] to the dispute to the International Court of Justice [for review]. The Members accept the jurisdiction of the Court in respect of any dispute submitted to the Court under this Article.'
[208] The Minutes of the Meeting of the Executive Committee on Economic Foreign Policy, held July 12, 1946 at 2:30pm in room 285, State Department Building, Minutes, Jul. 12, 1946, ECEFP M-22/46, RG 59, A1 353, file 'ECEFP Minutes 16/46-33/46', RG 59, box 57, NACP, at 3 [hereinafter Minutes, Jul. 12, 1946, ECEFP M-22/46].
[209] *Id.*
[210] *Id.*
[211] *Id.*

Members be likely to impose, as provided elsewhere in the Charter, sanctions and penalties on a Member not abiding by a ruling of the Conference.'[212] Leddy further confirmed added language to the provision such that the act of a Member in bringing a dispute to the ICJ (with Conference consent) 'will in effect set up the compulsory jurisdiction of the Court over the other party to the dispute.'[213]

Neff desired more time to consider the security implications of the dispute resolution procedure presented by State. At this preliminary basis, Neff argued it was 'unnecessary and undesirable' to require Conference consent for appeals.[214] He believed the U.S. Government should have 'full power' to present a case to the ICJ.[215] Leddy challenged Neff's assessment. He argued that 'many cases involving interpretation of the Charter might place an unnecessary burden on the Court and should be kept within the Organization, as far as possible.'[216] Leddy added that other DoS officials found the screening mechanism for referrals to the ICJ were 'necessary.'[217]

Days later, the ECEFP approved changes proposed by the DoS following consultation with Services. New language was added to Article 76(2) of the Charter, respecting the interpretation of the security exception and the settlement of disputes: 'Any justiciable issue arising out of a ruling of the Conference with respect to the interpretation of subparagraphs (c), (d), (e) or (k) of Article 32 or of Paragraph 2 of Article 49 may be submitted by any Party to the dispute to the International Court of Justice [...].' [218] Other justiciable issues arising out of a Conference ruling could be submitted by the disputing parties to the ICJ, with Conference consent.[219] Wilcox confirmed the goal was to meet the Services Departments' concerns with 'the authority given to the Conference in previous drafts' by offering appeal to the World Court, 'without requiring the consent of the Conference' of justiciable issues 'arising out of a ruling of the

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[212] *Id*.
[213] *Id*.
[214] *Id*. at 3-4.
[215] *Id*. at 4.
[216] *Id*.
[217] *Id*.
[218] Minutes, Jul. 19, 1946, ECEFP M-23/46, *supra* note 196, at 1-2 [insertions underlined and deletions in brackets].
[219] *Id*.

Conference with respect to the [interpretation of the security exception] in contrast to the procedure for referring other justiciable questions to the Court only with the consent of the Conference.[220] Leroy Stinebower (an economist with the DoS, and the special assistant to Assistant Secretary of State for Economic and Business Affairs, Willard Thorp) believed the redraft would be 'acceptable' to the ECEFP Committee on Specialized International Economic Organizations (IO sub-committee), though the subcommittee had not given 'special consideration to security questions.'[221]

Neff also argued that the U.S. negotiators treat the conservation exception (found in subparagraph j of article 32)[222] as among the other "purely" security exceptions, thereby removing its interpretation from the 'absolute competence of the Conference.'[223] A new discussion arose as to whether or not consent of the Conference was required to appeal a justiciable issue concerning the conservation exception to the ICJ, though the analysis offers insights into the treatment of the 'purely security exceptions' too.[224] Stinebower stated that the IO sub-committee sought to have the ITO Charter interpretation provisions 'parallel' the Monetary Fund Agreement.[225] Permitting appeals without Conference consent for an exception 'which has many security aspects but which is not specifically a security exception' would weaken the Charter when other governments began 'to add to these exemptions on grounds of national security.'[226] He did not recommend 'remov[ing] [it] from the interpretative power of the Organization.'[227] Stinebower, Ryder, and others argued the conservation exemption was 'essentially economic and political in character rather than legal' and required a 'political interpretation and not a legal opinion.'[228] As such, the Conference 'as the representative

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[220] *Id.* at 3.
[221] *Id.*
[222] Article 32(j) of the Suggested Charter draft provided an exception 'Relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption'. U.S. Department of State, *Suggested Charter for an International Trade Organization of the United Nations*, Sept. 1946, Publication No. 2598 [hereinafter *Suggested Charter*].
[223] Minutes, Jul. 19, 1946, ECEFP M-23/46, *supra* note 196, at 3.
[224] *Id.*
[225] *Id.*
[226] *Id.* at 3-4.
[227] *Id.* at 3.
[228] *Id.* at 4.

body of the Organization' seemed to be 'the proper authority to interpret such questions.'[229] Leddy interjected that the ECEFP should determine the proper authority for resolving such questions after determining whether voting in the Conference was weighted or not.[230]

The discussion offered an opportunity for Neff to further clarify the Services Departments' position on the jurisdiction to interpret security matters. Neff dismissed Stinebower's desire to match the Charter interpretation provisions with the Monetary Fund due to the Conference presently having "one Member –one vote" representation.[231] The ITO also placed 'greater limitations on national power than the Fund.'[232] Neff proposed striking Conference screening on 'all justiciable questions to the Court.'[233] Wilcox believed the conservation exception was 'limited' in importance, 'but he felt that exemptions regarding appeals should be limited to strictly security matters.'[234] Moreover Wilcox rejected removal of all Organization screening 'even though they were exclusively trade matters where the Organization should have the final say and the Court should not be bothered.'[235]

The final Suggested Charter (published in September 1946) contained Article 32, a general exception provision for the Commercial Policy chapter, with several sub-paragraphs devoted to security concerns (sub-paragraphs (c), (d), (e) and (k)).[236] The

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[229] *Id*.
[230] *Id*.
[231] *Id*.
[232] *Id*.
[233] *Id*. at 4-5.
[234] *Id*. at 6.
[235] *Id*. at 6.
[236] *See Suggested Charter*, *supra* note 222, art. 32. The relevant security exceptions found within the General Exception provision are, as follows: 'Nothing in Chapter IV shall be construed to prevent the adoption or enforcement by any Member of measures [...] (c) relating to fissionable materials; (d) relating to the traffic in arms, ammunition and implements of war and to such traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; [...] (k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security [...]. A brief note on the changing articles. The national security exception first appears in articles 32(c), (d), (e), and (k) and 49(2) of the U.S. Suggested Charter, then article 37 of the London and New York drafts of the ITO Charter, article 94 in the Geneva draft, and finally article 99 of the Havana draft which is almost identical to Article XXI in the General Agreement on Tariffs and Trade (GATT). *See generally* GATT

Suggested Charter also addressed security exceptions within Article 49(2) of the intergovernmental commodity arrangements chapter.[237] The Suggested Charter included consultation among ITO Members on all matters affecting the operation of its commercial policy chapter.[238] Article 30 set out that any Member could initiate consultations with another Member regarding representations made with respect to the operation of internal regulation and laws, and 'generally all matters affecting the operation of this Charter'.[239] Further, Members could work towards a 'mutually satisfactory' solution in the event one Member believes another member's measures 'has the effect of nullifying or impairing any object of this Chapter', regardless of whether or not the measure conflicts with the Chapter's commitments.[240] Members could refer disputes to the Organization that would investigate, 'make appropriate recommendations', and where 'serious enough' could 'determine' when the complainant could suspend obligations or concessions to the other member.[241]

Carving Out Security from Arbitrary Discrimination Requirements

A few months after the publication of the Suggested Charter, delegations met in London for the first preparatory meetings.[242] In November 1946, the United Kingdom delegation raised concern with the potential 'abuse' of Article 32 of the Suggested Charter

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Secretariat, *Article XXI Note by the Secretariat*, Negotiating Group on GATT Articles, MTN.GNG/NG7/W/16, Aug. 18 1987, WTO Archives [hereinafter GATT Secretariat Note, Aug. 18, 1987].

[237] The provisions were similarly worded though Article 49(2) lacked reference to Article 32(k) of the Suggested Charter, *id.*

[238] Article XII of the 1941 US-Argentina reciprocal trade agreement included the nullification or impairment procedure, 'with a view to effecting a mutually satisfactory adjustment' of any disputes arising from measures imposed by other government that have the 'effect of nullifying or impairing any object of the Agreement or of prejudicing an industry or the commerce of that country, [...].' US-Arg. Agreement, Oct. 14, 1941, *supra* note 92.

[239] *Suggested Charter*, *supra* note 222, Art. 30.

[240] *Id.*

[241] *Id.*

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

(the general exception of the commercial policy chapter).[243] The solution proposed was to add introductory language to clarify that, with respect to import and export restrictions, there was a commitment against 'arbitrary discrimination' or 'a disguised restriction on international trade.'[244] There was wide support for the proposal, and Leddy, the Rapporteur of the Procedures Sub-Committee suggested 'further study of the wording.'[245]

Leddy suggested that added language to the general exception was unnecessary, observing that the Article 30 was designed to prevent 'evasion of the provisions' of the Commercial Policy chapter.[246] Article 30 required all disputing ITO members engage in consultation regarding the 'nullification and impairment of any object of the Charter'[247] If an ITO member used an exception 'as a means of protection' then the nullification and impairment provision 'provided that another Member might make representations to the ITO and so obtain satisfaction.' [248] Leddy added it was 'impossible to draft exceptions which could not be abused, if good faith was lacking'. [249] He observed the League of Nations committees had constructed the basis of Article 30 'precisely because they had been unable to formulate exceptions which would exclude all possibility of abuse.'[250]

While the scope of the ICJ review was broadened in the first preparatory meeting in London with amendments to Article 86(2) and (3) (previously Article 76), Seymour Rubin, a lawyer on the U.S. negotiators' team, later explained in scholarship that the absolute right to appeal interpretation of the security articles remained unchanged.[251] The

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[243] Committee II - Technical Sub-Committee, Ninth Meeting Held on Wednesday, 13 November 1946 at 10.30 a. m., Nov. 13, 1946, E/PC/T/C.II/50, WTO Archives, at 7 [hereinafter Technical Sub-Committee, Ninth Meeting Notes, Nov. 13 1946].
[244] *Id.*; *see also* Executive Committee on Economic Foreign Policy (ECEFP), Article 37 – General Exceptions to Chapter V, ECEFP D-55/47, Mar. 31, 1947, A1 353, file 'ECEFP Meeting Documents 46/47-60/47', RG 59, box 51, NACP, at 3 [hereinafter ECEFP, Article 37 – General Exceptions to Chapter V, ECEFP D-55/47, Mar. 31, 1947].
[245] *Id.* at 9.
[246] *Id.* at 6; *see also* ECEFP, Article 37 – General Exceptions to Chapter V, ECEFP D-55/47, Mar. 31, 1947, *supra* note 244, at 5.
[247] Suggested Charter, *supra* note 222, Art. 30.
[248] Technical Sub-Committee, Ninth Meeting Notes, Nov. 13 1946, *supra* note 243, at 6.
[249] *Id.*
[250] *Id.; see generally*, Mona Pinchis, *The Ancestry of* '*Equitable Treatment*' *in Trade*' 15 J WORLD INV. & TRADE 13-72 (2014).
[251] Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARV. L. REV. 78, 81, 82 (1949).

London draft 'eliminated as a Charter requirement the necessity for Conference approval before an appeal could be lodged with the Court.'[252]

After London, the New York Drafting Committee included the U.K. proposal in its revised general exception provision (now also Article 37 instead of Article 32).[253] To prevent the language from blocking justifiably discriminatory measures, the chapeau included a commitment against 'arbitrary or unjustifiable discrimination'.[254]

In Washington, the ECEFP now faced two issues. First, whether the general exception should apply to the entire Charter. The ECEFP agreed to generalize the 'essential' exceptions to apply to the entire Charter.[255] Interestingly, several chapters already contained exceptions, but specific notice was placed on the demand for a security exception for the investment commitments (then Article 12 of the draft).[256] To prevent significant abuse of the exceptions, DoS recommended 'circumscribing the exceptions to fit the particular matters' where needed.[257]

Second, whether the newly-approved chapeau of the general exception should apply to the security exceptions. [258] The ECEFP was cognizant that any dramatic changes would be difficult considering the insistence of the chapeau by other delegations.[259] Nonetheless, the ECEFP found the chapeau to the general exception ineffective as the language was 'vague and diffuse, making it difficult, if not impossible, to assign specific content to it'.[260] Moreover, the broadness of the language could 'preclude the possible

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[252] *Id.*
[253] ECEFP, Article 37 – General Exceptions to Chapter V, ECEFP D-55/47, Mar. 31, 1947, *supra* note 244, at 3.
[254] *Id.* at 4. That chapeau of Article 37 read: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures: [...]. *See* New York Draft Charter, *supra* note 271.
[255] *Id.* at 7.
[256] *Id.* at 7-8. The commercial policy, restrictive business practices, and intergovernmental commodity arrangements (Chapters V, VI, and VII of the New York Draft, respectively) were adequately covered by exceptions.
[257] *Id.*
[258] *Id.* at 1.
[259] *Id.* at 2, 7.
[260] *Id.* at 1.

application of the exceptions' in legitimate circumstances.'[261] Specific to the security exceptions, ECEFP officials added that security measures were often 'specifically intended to be discriminatory in character' and thus in conflict.[262]

The ECEFP considered three options for addressing the security exception. The first and 'best' option was to revert back to the introductory language of Article 32 of the Suggested Charter, and include 'express reference to possible recourse, in the event of abuse of the exceptions, to the nullification and impairment provisions of Article 35 of the Charter.'[263] Explicit reference to the provision would offer members assurances against abuse as it 'advise[d] Members contemplating abuse of the exceptions of the possible consequences.'[264] The nullification and impairment provision would 'prevent any object of the Charter being frustrated', and explicit reference would 'avoid[] any possible unintended limitation that the clause might now convey.'[265]

The second option was for the U.S. negotiators to seek clarification of the phrase "or a disguised restriction on international trade" to clearly explain 'that the exceptions should not be used to disguise protectionist measures or to maintain other restrictive measures contrary to the objectives of the Charter.'[266]

A third option was to bifurcate the exceptions into qualified and un-qualified categories, as done in Article XV of the 1941 reciprocal trade agreement between the United States and Argentina.[267] The DoS recommended that this proposal was 'unnecessary and inadvisable' if the other delegations accepted the first two options.[268] ECEFP officials agreed with the DoS assessment that it was 'difficult[]' to determine which

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[261] *Id.*
[262] *Id.* at 1; The Minutes of the Meeting of the Executive Committee on Economic Foreign Policy, held April 3, 1947 at 2:30pm in Conference Room 1778 Pennsylvania Avenue, Northwest, Minutes, Apr. 3, 1947, ECEFP M-11/47, RG 59, A1 353, file 'ECEFP Minutes 1/47-20/47', RG 59, box 57, NACP at 1-2 [hereinafter Minutes, Apr. 3, 1947, ECEFP M-11/47] .
[263] *Id.* at 2, 6. The chapeau of Article 32 read: 'Nothing in Chapter V of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures [...]'.
[264] *Id.* at 6.
[265] *Id.*
[266] ECEFP, Article 37 – General Exceptions to Chapter V, ECEFP D-55/47, Mar. 31, 1947, *supra* note 244, at 6.
[267] Minutes, Apr. 3, 1947, ECEFP M-11/47, *supra* note 262, at 2, *see* text at note 88.
[268] ECEFP, Article 37 – General Exceptions to Chapter V, ECEFP D-55/47, Mar. 31, 1947, *supra* note 244, at 6.

group each exception fell into.[269] The division was not taken in New York as it implied 'a greater restriction on the possible application of the exceptions in the qualified group than if these exceptions were all placed together under a single uniform qualification.'[270]

Ultimately, the ECEFP approved the decision to generalize the security exceptions[271] to apply to the entire Charter.[272] Next steps would be to compose this general Charter exception. The recommendation was to "qualify" the remaining exceptions within Article 37 with the previously agreed upon introductory language.[273] It bears reiterating that the U.S. negotiators had taken the position that the qualification language in the chapeau of Article 37 was 'unnecessary; due to the nullification and impairment provisions in Article 35, seen as the 'safeguard against abuse of the exceptions'.[274]

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

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[269] *Id.* at 5.
[270] *Id.*
[271] Article 37 sub-paragraphs (c) Relating to fissionable materials; (d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member; [...] (k) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security. *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment* 32 (20 January to 25 February 1947), Mar. 5, 1947, E/PC/T/34, WTO Archives [hereinafter New York Draft Charter].
[272] Minutes, Apr. 3, 1947, ECEFP M-11/47, *supra* note 262, at 3.
[273] *See Id.*
[274] *Id.* at 2.

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

In Geneva, the U.S. negotiators debated the interpretation of the security exceptions while working with other delegations to construct a general exception that would apply to the entire Charter. Captain Wakeman Thorp of the U.S. Navy joined Neff to represent the Services Departments. Concerns with U.S. security were rising during the Geneva meetings, with Services officials observing 'the general situation in the world as changed drastically in the last few months', seeing 'Eastern European policy' as a key example.[275] Wilcox championed the 'careful' consideration of the ITO 'over 5 years', and contested any changes that would make the security exception 'unquestionably[...] a means of evading responsibilities.'[276]

A Security Exception Applicable To The Entire Charter

The U.S. delegation proposed relocating the security exceptions of Article 37 into a newly composed chapter meant to apply to the entire Charter in June 1947.[277] DoS lawyer Edmund Halsey Kellogg[278] drafted the new security exception and authored a memorandum setting out the scope of the new chapter. The new 'Miscellaneous' chapter included the following New York Charter draft provisions: general exception (Article 37, sub-paragraphs c, d, e, and k, Article 59(c), and Article 42(2)(c)(i)), consultation for nullification or impairment (Article 35(2)), dispute settlement and interpretation (Article

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[275] Minutes of Delegation, TAC, and Charter Working Group Meeting, Minutes, May 30, 1947, A1-704, file 'US Delegation/Minutes/April-June 20, 1947', RG 43, box 133, NACP, at 1-2 [hereinafter Delegation Minutes, May 30, 1947].
[276] *Id*.
[277] Minutes of General Staff Meeting, 4 June 1947, A1-704, 'US Delegation/Minutes/April-June 20, 1947', RG 43, box 133, NACP [hereinafter Delegation Minutes, Jun. 4, 1947]; Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Working Party on Technical Articles, Jun. 19, 1947, E/PC/T/103, WTO Archives, at 43. The Working Party had considered the U.S. suggestion 'beyond its terms of reference' but agreed to recommend to the Executive Committee the proposed transfer. For the text of these sub-paragraphs, *see* text at note 271.
[278] U.S. Delegation file, 'Edmund Halsey Kellogg' biography, A1-704, file 'Biographies 2', RG 43, box 132, NACP.

86).[279] It also included some new provisions, including registration of the Charter and a sunset clause for mandatory review of the Charter after ten years.[280] Kellogg's draft security exception (Article 94) read, as follows:

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

[279] Delegation of the United States of America - Proposals for the Amendment of Chapters I and II, Together with Suggestions with regard to Arrangement of the Articles of the Charter as a Whole, and with regard to the Constitution of a New Chapter to Be Called "Miscellaneous", Jul. 4, 1947, E/PC/T/W/236, WTO Archives; *see also* Corrigendum, Jul. 5, 1947, E/PC/T/W/236/Corr.1, WTO Archives; *see also* Corrigendum 2, Jul. 7, 1947, E/PC/T/W/236/Corr.2, [hereinafter U.S. proposal, Jul. 4, 1947].
[280] Minutes of Delegation Meeting at 8:00pm, Jul. 2, 1947, A1-704, file 'US Delegation/Minutes/June 21-July 30, 1947', RG 43, box 133, NACP [hereinafter Delegation Minutes, Jul. 2, 1947].

2. This article shall not be interpreted as limiting the generality of other provisions of this Charter.[281]

Kellogg's draft would differ from both the Suggested Charter and the New York Charter draft. Unlike the Suggested Charter, Kellogg's draft included the phrase 'which it may deem necessary' which sought to clarify that each ITO Member could determine whether measures were 'necessary'.[282] The adjectival clause served as part of the introductory language but was disconnected from the terms 'relating to' or the 'protection of its essential security interests.' In addition, unilateral power of interpretation was softened by the word "may". Unlike the New York draft, Kellogg's draft lacked the requirement against 'arbitrary or unjustifiable discrimination.'

Services' Efforts For Expansion Of The Scope Of The Security Exception

As demonstrated in the internal ECEFP discussions in 1944, Neff sought to maximize the U.S. Government's power to take necessary measures in the name of national security, broadly defined. To this end, Neff sought *specific* language, treating specificity as a remedy for *vagueness.*[283] For example, a chief issue raised by Neff in the meetings devoted to the security exception was amending the security exception to add the words "directly or indirectly" after the words "carried on" in paragraph 1(b), Article 94.[284] Neff's justification was that this language brought the exception into conformity with proposed U.S. legislation, and 'to give the United States Government the widest

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[281] Delegation Minutes, Jul. 2, 1947, *supra* note 280, annex C, Article 94 General Exceptions, attached memorandum [brackets in original, signify edits on the U.S. delegation side]; *see also* U.S. proposal, Jul. 4, 1947, *supra* note 279.

[282] Thanks to Harlan Cohen for pointing out that this was slightly different than the contemporary "it considers necessary" language in Article XXI GATT. Simon Lester has highlighted the importance of the word 'considers' in the phrasing of the national security exception. See Simon Lester, *The Drafting History of GATT Article XXI: The U.S. View of the Scope of the Security Exception*, INT'L L & ECON. POL'Y BLOG, Mar. 11, 2018, https://worldtradelaw.typepad.com/ielpblog/2018/03/draft-of-gatt-security-exception-considers.html and Simon Lester, 'The Drafting History of GATT Article XXI: Where did "considers" come from?, INT'L L & ECON. POL'Y BLOG, Mar. 13, 2018, https://worldtradelaw.typepad.com/ielpblog/2018/03/drafting-history-of-gatt-article-xxi.html.

[283] Jeremy Waldron has observed: '[I]t is a mistake to think that vagueness varies inversely with specificity: the opposite of "specific" is "general", and there is no assurance that a reduction in generality corresponds to a reduction in vagueness.' Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82(3) CAL. L. REV. 509, 522 (1994).

[284] Delegation Minutes, Jul. 2, 1947, *supra* note 280, at 5.

possible latitude in dealing with national security objectives.'[285] Though Neff did not provide which bill he was speaking to, Policy Planning Staff later wrote of the proposed Munitions Control Act, which was intended to authorize controls over exports of military-related goods and technology.[286] As the previous section elaborated, Services sought to control resources and materials that came into the U.S. as well as in other states. In this case, Neff drew attention to legislation regarding how U.S. goods or technology were 'to go forward, directly or indirectly, to the Soviet Union or its satellites', in the name of 'national interest or to the interest of European recovery.'[287] Soviet concerns were fresh on Services members' agenda for a Charter security exception.

Neff's proposal elicited 'sharp discussion' among the U.S. negotiators.[288] Leddy, John Evans (Economist with the Department of Commerce), and lawyers Seymour Rubin (Assistant Legal Advisor for economic affairs and legal advisor for the U.S. delegation) and George Bronz (Special Assistant to General Counsel, Treasury) argued against Neff's proposal. Evans found that the proposal was 'unnecessary' and that the existing draft offered the U.S. 'ample latitude to meet any contingency that might arise.'[289] Moreover, Evans remarked that Neff's draft would 'certainly provoke a great of argument' in the subcommittee and Commission discussions to review the security exception, thereby 'delaying final completion of the work of the Charter.'[290] Leddy, Rubin, and Bronz argued 'with equal fervor' that Neff's draft failed to amplify protection for U.S. security interests.[291] This led Wilcox to remark that Neff's proposal was 'equally destructive of the purposes of the Charter as the amendments proposed by some countries designed to eliminate the ITO control over the use of quantitative restrictions provided for in the

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[285] *Id.* at 5.
[286] See Paper Prepared by the Policy Planning Staff to Under Secretary of State Robert Lovett by George F. Kennan, Director, Policy Planning Staff, Washington, 26 November 1947, Policy Planning Staff Files: Lot 64 D 563, *Foreign Relations of the United States, 1945-1953, Harry S. Truman* (FRUS), 1948 vol. IV, 489, 490-492 (1974).
[287] *Id.* at 492. The paper indicated that any export of military equipment, capital, and technology could improve 'the ability of the U.S.S.R. to sabotage the Marshall Plan.'
[288] Delegation Minutes, Jul. 2, 1947, *supra* note 280, at 5.
[289] *Id.*
[290] *Id.*
[291] *Id.*

Charter.'[292] As was typical for the U.S. negotiators to decide on issues that arose within their meetings, the proposal was put to a vote. The vote was 'unanimous against' Neff's proposal; the vote would have included Captain Thorp, who attended the meeting representing the Navy Department.[293]

After the discussion on amending Kellogg's draft, Neff submitted his own draft of Article 94:

> 1. Without limiting the generality of any other exception or qualification, none of the obligation of this Charter shall apply to any measure or agreement:
>
> a) Relating to fissionable materials or their source materials;
>
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on, directly or indirectly, for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, relating to the protection of its [essential] security interests;
>
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.
>
> 2. Notwithstanding any provision of the Charter, no Member shall have to furnish any information in any report required by, or pursuant to, the Charter the furnishing of which will be contrary to its national security.

[292] *Id.*
[293] *Id.*

> 3. The provisions of Article 86 relating to the interpretation and settlement of disputes shall not apply to paragraphs 1 and 2 of this Article but each Member shall have independent power of interpretation.[294]

Neff's proposal initiated 'considerable discussion' in the July 2, 1947 meeting of U.S. negotiators.[295] Honore Marcel [Marc] Catudal (Legal Advisor to the DoS's commercial policy division) observed that Neff's Article 94(1) was 'unnecessary' and 'added absolutely nothing' to Kellogg's provision where '[e]very possible contingency involving the national security of the United States is covered.'[296] A group of delegates, Catudal, Brown, Leddy, Evans, Bronz, and Rubin agreed that Neff's draft article 94(1) and (2) was unnecessary.[297] Due to the 'legal importance' of the matter, Wilcox asked Rubin to closely evaluate Neff's draft and report on his assessment in a memorandum. Of the four questions Wilcox posed to Rubin, none referred to the power of interpretation or the exclusion of the provision to dispute settlement (Neff's draft article 94(3)).[298] Nevertheless, the question of interpretation would form a core part of Rubin's memorandum.[299]

Discussion on the security exception continued at the July 4, 1947 meeting of U.S. negotiators – but only after Wilcox announced 'he was becoming increasingly apprehensive concerning the possible attitude of the USSR with respect to the World

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[294] *Mr. Neff's Draft*, Chapter IX, Article 94, *attached to* Delegation Minutes, Jul. 2, 1947, *supra* note 280 [underlining in original].
[295] Delegation Minutes, Jul. 2, 1947, *supra* note 280, at 6.
[296] *Id*.
[297] *Id*.
[298] Delegation Minutes, Jul. 2, 1947, *supra* note 280, at 6.Wilcox asked: 1) Whether the clause "Without Limiting ... qualification" adds to the protection of U.S. 'vital national security interests'; 2) Is it necessary to mention the word "agreement" found in the final word of the preamble of Neff's draft; 3) Do we need to mention "directly or indirectly" as found in Article 94(1)(b); and 4) do we need to eliminate the word "essential" from the phrase "essential security interests" to give 'fullest protection to our national security interests'. In defence of a proposed change with respect to 'a general exemption from supplying information' as necessary, Neff commented that there were other Charter provisions 'equally unnecessary and should therefore be eliminated' To this, Wilcox asked Terrill, Hawkins, and Rubin to assess similar provisions and 'decide whether they can be eliminated'.
[299] *See* Part IV.D.

Trade Conference and adoption of the ITO Charter.'[300] Wilcox added that the 'serious rift' with the less-developed states due to the use of quantitative restrictions 'plays directly into the hands of the USSR political propagandists.'[301] Thus, Wilcox was particularly sensitive to impressions that the ITO was 'part of the conspiracy developed by the great powers to interfere with the internal affairs of small states, to dominate them economically and thus hold them in perpetual slavery.'[302] The U.S. delegation continued to see the ITO as vital for 'expanding the area in which free enterprise can flourish and strengthening the hands of all nations that believe in it rather than in the Soviet system.'[303] More than ever, trade multilateralism was at stake and the U.S. delegation needed to 'obtain the widest possible support here at Geneva.'[304]

In the early years of the construction of the ITO, U.S. officials appeared hopeful to work with the Soviet Union.[305] Pollard described the DoS' approach as 'a policy of firm, but not unfriendly, pressure on Moscow early 1946.'[306] The DoS had attempted a loan to Russia (by April 1947 this effort was ceased formally) and continued trade talks, particularly regarding the Soviet Union membership in the ITO.[307] By the start of the Geneva meetings, the two powers were in 'almost irrevocable deadlock'.[308] By mid-July

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[300] Minutes of Delegation Meeting, Jul. 4, 1947, A1 704, file 'US Delegation/Minutes/June 21-July 30, 1947', RG 43, box 133, NACP, at 1 [hereinafter Delegation Minutes, Jul. 4, 1947].
[301] *Id*.
[302] *Id*.
[303] Wilcox to Clayton, Letter, Jun. 13, 1946, *supra* note 113, at 6.
[304] Delegation Minutes, Jul. 4, 1947, *supra* note 300, at 2.
[305] *See* Dean Acheson, Acting Secretary of State to the Ambassador in the Soviet Union (Harriman), Washington, Dec. 12, 1945 560.AL/10-1945, FRUS, 1945 vol. II, 1348-1349 (1967) (offering to the Soviet Union most-favored-nation treatment and seeking non-discriminatory treatment against commerce of other countries); The Ambassador in the Soviet Union (Harriman) to the Secretary of State, Moscow, Dec. 151945, 560.AL/12-1945, FRUS 1945 vol. II, 1350 (1967) (replying to Acheson that seeking to have the Soviet Union refrain from discrimination and make purchases and sales based on commercial considerations was 'unrealistic.'). For the reference to 'hope' from Clayton in 1947, *see* Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948*, 25(2) INT'L HIST. REV. 282, 293-294, 296 (2003).
[306] POLLARD 1985, *supra* note 72, at 50-52. For example, a key instrument of US policy at the time was the Russian loan, though with Soviet repression in Eastern Europe, the loan was refused and remained 'an economic lever for bargaining purposes' until 1947.
[307] *Id*. at 52; ZEILER, *supra* note 72, at 61-62.
[308] *Id*. at 53; *see supra* Part II.B.

1947, Wilcox had reportedly abandoned hope that the Soviet Union would participate in the ITO.[309]

Services' Demands For Unilateral Interpretation Of The Security Exception

On July 4, 1947 the U.S. negotiators met to consider a draft security exception authored by Rubin, following discussions with Neff.[310] At Wilcox's request, Rubin composed a new general exceptions draft provision following discussion with Neff:

> [Without limitation of any other exception or qualification] Nothing in this Charter shall be construed to compell [sic] any Member to furnish any information the furnishing of which it considers contrary to its essential security interests, or to prevent the adoption or enforcement by any Member of any measure or agreement which it may [deem] consider to be necessary and to relate to:
>
> a) [Relating to] Fissionable materials or their source materials;
>
> b) [Relating to] The traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, [relating to] the protection of its essential security interests;
>
> d) [Undertaken] Undertakings in pursuant of obligations under the United Nations Charter for the maintenance of international peace and security.[311]

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[309] ZEILER, *supra* note 72, at 136.
[310] Delegation Minutes, Jul. 4, 1947, *supra* note 300, at 1-2. U.S. negotiators challenged Neff on a variety of elements to the security exception. For example, Neff proposed to refer to 'measures or agreement' rather simply referring to 'measures'; Leddy, Terrill, and Rubin argued that the term 'measure' was broad enough.
[311] *Id. attached with* draft of Article 94 [underlining refers to additions; brackets to indicate changes from the original Neff draft, as provided in original draft]. For *Mr. Neff's Draft*, see note 294.

An important question was whether to include the phrase "and to relate to" in the chapeau of the security exception.[312] Wilcox proposed changing the phrase "and to relate to" within the chapeau of the security exception, and, to replace with the words "relating to".[313] It is unclear from the minutes whether Wilcox sought to include "relating to" within the sub-paragraphs or within the chapeau, though this former proposal aligned with the alternate text provided in Rubin's draft. Rubin explained to the rest of the delegation that his draft included the phrase "and to relate to" due to Neff's 'vigorous' demands for its inclusion.[314]

The difference would matter. For Neff, his proposal meant the ITO Member would have explicit authority to determine the 'necessity' of the measure *and* whether such measure qualified as a circumstance enumerated in the subparagraphs of the provision. Neff argued for the retention of the words "in the context in which it is found because it involves a substantive matter".[315] Neff added that the wording created an 'independent clause' that made it 'clear' that the United States had an opportunity for 'unilateral action'.[316] For Neff, the wording of this provision empowered the U.S. government to self-determine whether a 'measure or agreement' was 'necessary' *and* how it 'relate[d] to' the actions respecting fissionable materials and other source materials; traffic in arms; 'and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment'; and, protection of its essential security interests 'in time of war or other emergency in international relations.'[317] In his own assessment of this meeting, Kenneth Vandevelde concluded that under the proposed language, '[a] member could avoid any Charter obligation by a mere unilateral invocation of its essential security interests.'[318] Vandevelde put it bluntly: 'Neff's proposal regarding the national security

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[312] *Id.*
[313] *Id.* at 2.
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] See KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 148 (2017).
[318] *Id.*

exception was nothing less than an assault on the Charter as an instrument of the rule of law.'[319]

Evans, Leddy, and Robert Terrill (an economist and Associate Chief of the International Resources Division) 'objected strongly' to retaining the words 'and to relate to', arguing that 'such a provision destroyed the entire efficacy of the Charter.'[320] The security exception was not 'what the US may do', and providing 'means for unilateral action will surely be abused by some countries.'[321] It would be the end of the ITO if a member could rely on 'the pretext of national security' to 'take any measure whatsoever it might wish in complete disregard of all provisions of the Charter'.[322] Leddy argued it would be far better to abandon the work on the Charter than allow for such a 'legal escape'.[323] Neff was unwavering that the United States 'be given a free hand to make whatever decisions may be necessary without challenge by the ITO.'[324] Evans challenged Neff, arguing that the United States 'would be a sufficiently strong and important member' and that if the United States had 'a bona fide national security problem, the Organization would not be able to do otherwise than make a finding in our favour.'[325] Oscar Ryder (Chairman of the Tariff Commission) stated that 'as a practical matter no injury could possibly come to the US by ITO intervention to determine whether the measures introduced by the US in a particular instance were in fact taken in the interest of national security.'[326] Wilcox noted that 'he did not think that the ITO would ever become an international forum to discuss national security interests'.[327] There was no further elaboration as to whether, under the Charter's nullification and impairment procedure, members would address the national security exception.

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[319] *Id.* at 153.
[320] Delegation Minutes, Jul. 4, 1947, *supra* note 300, at 2.
[321] *Id.*
[322] *Id.* at 3.
[323] *Id.*
[324] *Id.*
[325] *Id.* [emphasis in original].
[326] *Id.*
[327] *Id.*

On vote, Thorp, Neff, and Brossard[328] voted for retaining the language 'and to relate to'; whereas Julean Arnold (Policy Division, State Department), Brown, Evans, Harry C. Hawkins[329] (Chief of the Commercial Policy Division and Agreements), Leddy, Rubin, Ryder, Robert B. Schwenger (Department of Agriculture), and Terrill voted against Neff's language and sought to instead include the phrase "relating to" within the sub-paragraphs.[330] Defeated, Neff asked to record his dissent, and was granted the opportunity to author a memorandum on the subject.[331]

Neff then proposed a provision whereby any challenges relating to national security measures were heard by the ICJ, rather than the Organization.[332] Neff justified this amendment on the basis that Senator Millikin of the Senate Finance Committee had 'vigorously objected' to having the ITO determine 'whether measures adopted by the US were taken in defense of the national security'.[333] Senator Millikin feared 'excessive interference in domestic matters'.[334] Neff added that Millikin had objected to the ICJ determining these questions too, though as set out further in his memoranda,[335] Millikin was staunchly against the general interpretive power of the ITO or ICJ when it came to questions of national security.[336]

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[328] The identity of the delegate is unclear, but is likely Edgar Brossard, an agricultural economist who had served on the Tariff Commission staff, *see* UNITED STATES INTERNATIONAL TRADE COMMISSION, A CENTENNIAL HISTORY OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION, USITC PUB'N 4744, at 204 (Nov. 2017), https://www.usitc.gov/publications/other/centennial.

[329] Many in the State Department held Hawkins in the highest respect. In an oral interview, John Leddy said that Hawkins was 'probably the most influential and important man second to Cordell Hull, in launching, operating and administering the Reciprocal Trade Agreements.' Winthrop Brown further noted it was Hawkins that was 'Hull's right-hand man in trade agreements' and, in late 1945, 'had a vision of a postwar world in which tariffs and trade barriers would be reduced, and there would be an international institution which would bring order into international trade and provide a forum for settlement of disputes; which would generally aid in international cooperation in trade expansion.' *See* Brown Oral History, *supra* note 147, paras. 4-5.

[330] Delegation Minutes, Jul. 4, 1947, *supra* note 300, at 3.

[331] *Id.*

[332] *Id.*

[333] *Id.*

[334] Memorandum for U.S. Delegation, Suggested Changes for Chapter VIII, articles 81-89, at 5 *attached to* Minutes of Delegation meeting, Jun. 16, 1947, A1-704, file 'US Delegation/Minutes/April-June 20, 1947', RG 43, box 133, NACP.

[335] *See* text at notes 339-363.

[336] Delegation Minutes, Jul. 4, 1947, *supra* note 300, at 3.

After the U.S. negotiators held their heated meeting, all delegations participating in the Geneva preparatory work received the U.S. proposed 'Miscellaneous' chapter and revised security exception, based on agreed changes to Rubin's draft exception.[337] The introductory language of the submitted security exception read:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:
>
> a) Relating to fissionable materials or their source materials;
>
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
>
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.[338]

The draft lacked the phrase "and to relate to" within the chapeau, and lacked Neff's draft of subparagraph 3 of article 94 – the declaration that the exception did not limit the interpretation of other Charter provisions.

Neff And Rubin Memorandums On Unilateral Power To Interpret National Security

While other U.S. negotiators came from economic or foreign service backgrounds, Neff and Rubin were both skilled lawyers in international business and law.[339] Rubin was a young assistant legal advisor for economic affairs that joined the DoS in 1943.[340] As legal

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[337] U.S. proposal, Jul. 4, 1947, *supra* note 279, at 13.
[338] *Id*.
[339] For a background on Neff, *see supra* note 132.
[340] Bennet Boskey, *Seymour J. Rubin – Some of the Origins, A Festschrift in Honor of Seymour J. Rubin*, 10(4) AMER. UNIV. INT'L L. REV. 1245 (1995).

advisor, Rubin and Wilcox became dear friends; Rubin acknowledged that he served as one of Wilcox's 'principal assistants'.[341] Rubin later became a key international law figure, a professor at Washington College of Law, and later Executive Director of the American Society of International Law from 1975 to 1982.[342]

Following the meetings of July 2 and 4, 1947, Neff, Thorp, and Rubin each provided a memorandum to Wilcox regarding the interpretation of the security exception.[343] Rubin and Neff took opposing positions on the need for explicit unilateral authority to invoke the exception, the role of ITO bodies (the Executive Board and Conference) in interpreting the exception, and the scope of the exception.

Neff's argument: unilateral power to interpret the security exception

Among several issues, Neff sought to make explicit that 'a political body such as the ITO' should not have 'full power' to interpret the security exception.[344] Neff's goal was to ensure that the United States would always have total, unilateral power to interpret the invocation of the exception. As Neff noted: '[t]he power to interpret is the power to destroy.[345]

In previous Charter drafts, the Services had sought to afford 'full power' to the ICJ, a preferred choice over a political body.[346] U.S. Senate Committee hearings following the New York drafting meeting confirmed that Senator Eugene Millikin, Chair of the Senate Finance Committee had raised concern about the ICJ addressing questions involving

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[341] Oral History with Seymour Rubin, Jan. 6, 1997, United States Holocaust Memorial Museum, Archives RG 50.030*0449, at 11.
[342] Claudio Grossman, *A Festschrift in Honor of Seymour J. Rubin: Opening Remarks*, 10(4) AMER. UNIV. INT'L L. REV. 1215 (1995).
[343] These memoranda are attached to Minutes of Delegation Meeting, Minutes, Jul. 16, 1947, A1-704, file 'US Delegation/Minutes/June 21-July 30, 1947', RG 43, box 133, NACP.
[344] Harold Neff, 'Security Exceptions to the ITO Charter', Memorandum for the Chairman of the US Delegation, Jul. 10, 1947, A1-704, file 'US Delegation/Minutes/June 21-July 30, 1947', RG 43, box 133, NACP at 1 [hereinafter Neff Memorandum]. Neff also discussed amendments to ensure the security exception aligned with U.S. policy and legislation, and the omission of the words "directly or indirectly" and the inclusion of the word "essential" for "essential security interests."
[345] *Id*.
[346] *Id*.

security issues.[347] According to Neff, the DoS had guaranteed Millikin that the security exception would 'be worded so as to give to each Member freedom to apply them as it determines in the interests of its own security.[348] Neff believed the recent July 4, 1947 draft provision confirmed that the ITO would have 'general power' to interpret the Charter.[349] Neff insisted U.S. negotiators amend the security exception to clarify that 'the unilateral power of interpretation will [...] rest with the United States as to the content of the exceptions.'[350]

For Neff, the 'power of unilateral determination' stemmed from the word "consider" in the chapeau of the exception, which Neff argued was 'put in the middle of a phrase in a completely unemphasized form.'[351] The U.S. negotiators should be 'clear and conspicuous' about reserving unilateral power for interpretation when departing from Charter principles. [352] In seeking to lend support to his proposal Neff added that based on the July 4 version, 'unilateral interpretation is not really reserved by the language used even if the person interpreting gave the most complete value to the word "consider", which is not in itself inevitable.'[353]

Neff then turned to enumerated sub-paragraphs: 'a) Relating to fissionable materials or their source materials and b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment [...].'[354] He argued that 'the "relating" clauses modify the term "action",' and that they 'qualify and condition that noun.'[355] Neff argued that the 'extent of the qualification and condition' presented a question of interpretation. However, the word "considers" according to Neff failed to modify 'the content of the condition.'[356] Neff explained that the 'effect of the language is to say that, if

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[347] *Id*.
[348] *Id*. [underlining in original, for emphasis].
[349] *Id*.
[350] *Id*.
[351] *Id*. at 2.
[352] *Id*.
[353] *Id*.
[354] *Id*.
[355] *Id*. [underlining in original].
[356] *Id*.

a measure relates, for example, to arms, ammunition and implements of war, then a Member may take such action as it deems necessary.'[357] Thus, the draft fails to grant unilateral power to Members 'to determine with finality what falls within the terms used.'[358] Neff argued that the 'content' of the exceptions 'does not fall within the power of any individual Member to determine.'[359] This problem was amplified by the "one-member one-vote" voting representation currently in the ITO Charter, whereby the United States 'would not have any greater vote in the ITO than Lebanon.'[360]

Neff added that the approach taken in the Charter contravened the approach the U.S. took for the United Nations Charter, where the US 'reserved the complete power of unilateral action in regard to any matter affecting its national security.'[361] Neff observed that in those circumstances, the ECEFP had compromised on a formula and 'specifically stated' their intent that 'the formula was such as to reserve power to the United States to prohibit, in time of peace, shipments such as would correspond to the scrap and petroleum shipments to Japan' in World War II.[362] However, since 'any export control exercised in peacetime pursuant to the powers reserved by the security exceptions' would interfere with other states' domestic economies, 'it would seem imperative that the power of interpretation should not rest with a political body such as the ITO.'[363]

Neff was particularly troubled by the July 4, 1947 meeting where Neff failed to 'make it absolutely clear that there was unilateral power to interpret', finding the U.S. negotiators lacked 'the intent to reserve full power of unilateral interpretation.'[364] Neff reiterated that the political ITO bodies cannot have authority to determine the 'relatively imprecise content' of the security exception.[365] Neff's final word on the matter was that

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[357] *Id*.
[358] *Id*.
[359] *Id*.
[360] *Id*.; *see* New York Draft Charter *supra* note 271, Art. 64 (laying out the voting representation of the Conference).
[361] *Id*.
[362] *Id*. at 3.
[363] *Id*.
[364] *Id*.
[365] *Id*.

the DoS had told the U.S. Senate that each ITO member 'was to have freedom to apply the security exceptions "as it determines in the interests of its own security".'[366]

Captain Thorp's brief memorandum did not add much to Neff's argument, though he doubted whether 'iron bound military exceptions would have very little, if any, effect on world trade.'[367] Nor would it contravene the 'spirit' of the Charter. To Thorp, it was impossible to imagine the Charter not containing 'legal loopholes.' Thorp did acknowledge that the "Munitions Control Act" was deemed consistent with the United Nations Charter when it was presented to U.S. Congress, and it would 'therefore seem that if any international body were to have the power of interpretation in such matters it should be the International Court of Justice.'[368]

Rubin's Argument: oversight to ensure bona fide invocation of the exception

Rubin focused on the power of interpretation and argued that the existing U.S. delegation's draft afforded the leeway the U.S. government needed to address its security matters. Rubin began his memorandum observing that Neff's proposed language, "[...] from taking any action which it may consider to relate to:' made 'it perfectly clear that any Member had the unilateral power to decide that any action which it proposed to take did relate to the matters contained in the lettered paragraphs.'[369] The effect of Neff's version would 'make unchallengeable by the Organization or any other Member a justification, however far-fetched, of any action on this basis.' [370] That the July 4 amendment does not 'permit this completely open escape from the Charter' could be seen, as Neff had argued, to 'limit the scope of the unilateral interpretation' of the security exception.[371] The benefit

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[366] *Id*.
[367] Captain Thorp, Memorandum for the Chairman, U.S. Delegation, 'Security Exceptions to the ITO Charter', Jul. 11, 1947, A1-704, file 'U.S. Delegation/Minutes/June 21-July 30, 1947', RG 43, box 133, NACP, at 1 [hereinafter Thorp Memorandum]. Thorp agreed with Neff that the ITO was 'not satisfactory' to interpret the national security exception.
[368] *Id*.
[369] Seymour Rubin, 'Memo of Mr. Neff, of July 10, and of Captain Thorp, of July 11, 1947, relating to security exceptions to ITO Charter', Memorandum for the Chairman of the U.S. Delegation, Jul. 14, 1947, A1-704, file 'US Delegation/Minutes/June 21-July 30, 1947', RG 43, box 133, NACP, at 1 [underlining maintained by Rubin from Neff] [hereinafter Rubin Memorandum].
[370] *Id*.
[371] *Id*.

of the July 4 exception was that it prevented other ITO Members from invoking the 'broader' exception, a sincere concern with complying with Neff's demands.[372]

The security exception was 'drafted sufficiently broad to take care of any *reasonable* case.'[373] Rubin's redraft of the security exception aspired 'to provide for unilateral determination by each Member, unchallenged by any other Member, as to what action it deems necessary in a field "relating to" the listed subjects.'[374] As such, no challenge to US actions could be that:

> 1) falls in the field of fissionable materials , etc; no challenge can be made to <u>any</u> regulation which we may enact regulating the use of "source materials" for fissionable materials, or the traffic in arms, ammunition, and implements of war, no matter how remote may be considered the relevance of the measures undertaken to the problem to be solved, if the measure falls in any of these fields; <u>or</u>
>
> 2) if the measure <u>relates to</u> any of these fields of interest – another phrase which grants broad power of unilateral determination.[375]

Rubin corrected Neff's assessment of the Senate Finance Committee testimony. There was no 'commitment to go farther than these broad and unilateral exceptions' offered by the U.S. delegation, Rubin argued.[376] Nor did the Senate Finance Committee display any interest in negating the Charter 'by such a broad and unilateral security exception that any action, *no matter how little related to security, would be immune even from question*.'[377] Reciting the transcript, Rubin demonstrated that Senator Millikin did not ever suggest that 'a safeguard ought to be written into the Charter so broad that actions which are not "arrangements regarding fissionable materials" must, on the unilateral statement of a Member, be regarded as such.'[378] Senator Millikin, Rubin

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[372] *Id*.
[373] *Id*. at 2 [emphasis added].
[374] *Id*.
[375] *Id*. [emphasis in original].
[376] *Id*.
[377] *Id*. [emphasis added].
[378] *Id*.

explained, was concerned with wording that 'would have allowed any action taken under the security exception to be brought before the International Court by any complainant Member.'[379] However, the July 4 amendment made clear that 'no action in or relating to *certain* fields where national security is concerned can be questioned, whether before the Organisation or the Court.'[380] Rubin explained that this amendment was in line with the DoS' commitment that the security exception 'would be worded so as to give each Member freedom to apply them as it determines in the interest of its own security.'[381]

Rubin also quashed Neff's claim that the ITO Charter exception should correspond with the U.S. reservation of its power of unilateral action for the United Nations Charter. Rubin supposed this referred to veto power, but simply concluded that 'it is not, as far as I know, present (if it was past) U.S. policy to support the veto principle in international affairs.'[382] 'Certainly', Rubin opined, U.S. attitude is 'not that the veto must be reserved for all nations which come into any international organization, ITO or any other.'[383]

The security exception retained 'a great deal of leeway for unilateral interpretation' *without* rendering the Charter 'an illusory document.'[384] Rubin concluded that 'the U.S. can justify such security measures as it may contemplate as "relating to" one of the listed subjects; and that the present phraseology does give to the U.S. freedom to apply the exception - *provided* that it is the exception and not something else which it applies – "as it determines in the interest of its own security".'[385] Rubin's memorandum suggested a role for the ITO bodies and the ICJ to objectively determine whether an ITO member was abusing the exception.

V. A BACKDROP TO THE INTERNAL U.S. DELIBERATIONS: THE GENEVA PREPARATORY MEETINGS

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[379] *Id*. at 3.
[380] *Id*. [emphasis added].
[381] *Id*.
[382] *Id*.
[383] *Id*.
[384] *Id*.
[385] *Id*. [emphasis added].

The internal U.S. debates occurred while the U.S. negotiators participated in the Geneva preparatory committee meetings. In Geneva, the U.S. delegation had to offer explanation for the newly phrased security exception, and to clarify how the Organization would address disputes that involved national security. Over seventy years later, U.S. delegate John Leddy's remarks in these Geneva meetings were heavily cited by the *Russia -Traffic in Transit* WTO panel as evidence that the U.S. delegation had long recognized necessary oversight of the security exception due to the significant risk of its abuse for protectionist purposes.[386] The delegates' discussion was also relied upon by the U.S. in its' third party submissions to emphasize that the delegations always recognized that there would be 'no formal review' of a Member's invocation of the security exception.[387] This section considers the exchanges between the U.S. delegate and the other delegates, finding that there appeared agreement that trade disputes involving political sensitive matters were reviewable within the nullification and impairment procedure of the ITO.

On July 24, 1947, Commission A of the United Nations Preparatory Committee considered two versions of the security exception.[388] It is useful to bifurcate the delegates' meeting, as the delegates debated two different security exceptions within the same meeting. First, the delegates debated the language of Article 37 of the New York draft Charter, which maintained an introductory requirement for non-arbitrary or non-justifiable discrimination. In this discussion, the delegates debated the open-ended language of essential security interests, and an emergency as set out in subparagraph (e), Article 37. Second, the delegates debated the U.S. proposal to create a new chapter that would render the security exception applicable to the entire Chapter, along with provisions respecting the nullification and impairment procedure, and the interpretation and settlement of differences provisions (a newly created Article 94).

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[386] Panel Report, *Russia-Traffic in Transit, supra* note 5 at para. 7.90.
[387] U.S. Third Party, Executive Summary, *Russia-Measures concerning Traffic in Transit* (DS512), Feb. 27, 2018, at 26.
[388] *See* Commission A - Summary Record of the 33rd Meeting of Commission A, 24 Jul. 24, 1947, E/PC/T/A/SR/33, WTO Archives [hereinafter Summary Record of the 33rd Meeting of Commission A].

Delegates' meeting regarding the scope and meaning of the New York Charter security exception

On July 24, 1947, Commission A of the United Nations Preparatory Committee began by debating the language and phrasing of Article 37 of the New York Charter draft.[389] In particular, Dr. Antonius Bernadus Speekenbrink[390] (Director General, Foreign Economic Relations, Ministry of Economic Affairs), the delegate from the Netherlands, sought clarification as to the meaning of the phrases "emergency in international relations" and "essential security interests", as both were contained within subparagraph e of Article 37.[391] Dr. Speekenbrink specifically raised the issue of agriculture, noting that in a time of emergency 'it is essential for me to bring as much food to the country as possible.'[392] As the language stemmed from the original U.S. draft, Leddy explained the U.S. thinking on the language. He elaborated that the phrase "essential security interests" was a product of the U.S. government's concern with having 'too wide an exception', and the fact they could not simply say: 'by any Member of measures relating to a Member's security interests,' that would 'permit anything under the sun.'[393] It bears mention that in the first preparatory meeting in London, Speekenbrink (Chairman of the Procedures sub-committee) and Leddy (Rapporteur of the Procedures Sub-committee) had already discussed the potential abuse of the exceptions provisions.[394] In addition, throughout the entire Charter negotiation, the Netherlands took 'the lead in advocating maximum use of the International Court of Justice.'[395]

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[389] *Id.*
[390] The State Department's private notes on Dr. Speekenbrink identified him as having a '[v]ery attractive personality' and '[e]ffective in negotiation' based on his work in London in the preparatory committee. Speekenbrink Biography, A1-704, file 'Biographic Data 2 of 2', RG 43, box 132, NACP.
[391] Commission A, Verbatim Report, 33rd Meeting of Commission A, Jul. 24, 1947, E/PC/T/A/PV/33, WTO Archives, at 19 [hereinafter Verbatim Report of the 33rd Meeting of Commission A]. Subparagraph e of Article 37 read: In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member'.
[392] *Id.* at 19.
[393] *Id.* at 20.
[394] Committee II - Technical Sub-Committee – 9th Meeting Held on Wednesday, 13 November 1946 at 10.30 a. m., Nov. 13, 1946, E/PC/T/C.II/50, WTO Archives.
[395] WILLIAM ADAMS BROWN JR. THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 92 (1950).

As for the consideration of 'emergency', Leddy observed the limitation of 'time' – that is, 'in time of war'.[396] Speaking to the context of 'time of war', Leddy remarked 'no one would question the need of a Member, or the *right* of a Member, to take action relating to its security interests and to determine for itself – which I think we cannot deny – what its security interests are.'[397] As for the reference to emergency, Leddy remarked that the U.S. had in mind the situation that existed before it entered the World War at the end of 1941, with the U.S. Government 'required, for our own protection, to take many measures which would have been prohibited by the Charter.'[398] Chairman Erik Colban reminded the delegates that 'the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention.'[399] A final observation came from Dr. H.C. Coombs, Chief of the Australian delegation. He raised concern with separating trade and security considerations regarding fissionable materials, especially with the possibility that atomic energy could become an important source of industrial energy.[400] He further recommended consultation with an appropriate international body, though he did not provide a name.

Evaluating the ITO atmosphere as safeguarding invocation of the security exception.

In its *Russia-Traffic in Transit* submissions, the U.S. placed emphasis on Chairman Eric Colban's reference to 'atmosphere' as evidence the delegations recognized both the self-judging and non-justiciability of the security exception.[401] Another reading is that Colban was seeking to strengthen ITO review over the exception, not to dismiss it outright. Due to the complexity of designing the ITO, there had to be something 'else' – an undefined element – that would circumscribe the breadth of open-ended terms found within the

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[396] Verbatim Report of the 33rd Meeting of Commission A, *supra* note 391, at 20.
[397] *Id.*
[398] *Id.*
[399] *Id.* at 21.
[400] Commission A - Verbatim Report – 30th Meeting of Commission A Held on Wednesday, 16 July 1947, at 2.30 p.m. in the Palais des Nations, Geneva, Jul. 16, 1947, E/PC/T/A/PV/30, WTO Archives, at 16.
[401] See U.S. Third Party Executive Summary, *Russia-Measures Concerning Traffic in Transit* (DS512), Feb. 27, 2018, para. 26.

security exception. Colban's belief in the atmosphere revealed the 'moral pressures' which would not serve as an alternative to the disputes procedure, but instead supported it, by incorporating 'milder' law into the legal design.[402]

As Robert Hudec has convincingly demonstrated, the delegates, including the U.S. negotiators, relied on the 'techniques of the diplomat' to shape the ITO legal remedies via the nullification and impairment procedure. The 'normative pressures'[403] created through the ITO nullification and impairment procedure would 'contain trade disputes – to rebalance expectations, and to avoid escalation.'[404] The goal was to 'modulate the pressures according to circumstances, one that would not spell failure whenever full compliance was not possible.'[405] In the early days of the Charter, the community would 'focus the pressures at a particular time, on a particular part, and toward a particular result.'[406] Thus, Colban's remarks do not suggest non-reviewability; instead they signal the complexity of a design that would marry diplomacy and law for managing the Charter's commitments.[407] Even within the U.S., there were references to faith in the ITO. The U.S. Tariff Commission had observed the need for Members to recognize the 'spirit' of the multilateral trade system, rather than seek to simply obey its rules.[408]

Therefore, the ITO atmosphere was a necessary part of the institutional design of the ITO in its early days. Other commentators have drawn on this feature of the early legal design, as a way to illustrate the delegations' awareness that political controversies may not always be 'settled' with judicial decision-making.[409] There were two elements to the idea of an atmosphere of the ITO: first, some diplomatic techniques were required in aid of the legal rules and procedures; and, second, the delegates sought to maintain the

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[402] See HUDEC, *supra* note 43, at 30, *citing* Note for Preparatory Commission B - Submitted by the Delegation of Belgium-Luxembourg, E/PC/T/W/257, Jul. 31, 1947, paras. 4-5.
[403] HUDEC, *supra* note 43, at 35.
[404] LANG, *supra note* 46, at 205.
[405] HUDEC, *supra* note 43, at 34.
[406] *Id.* at 35.
[407] *See generally* Pauwelyn, *supra* note 43.
[408] *See, supra* note 448.
[409] *See* Hahn, *supra* note 37, at 613; LANG, *supra note* 46, at 202-203.

balance of reciprocity.[410] Applying this to the invocation of the security exception, the reference to 'atmosphere' signaled that the delegates accepted the imprecision of the language, knowing the ITO and its procedures would facilitate consultations if and when disputes arose.[411] The early multilateral trade organization was therefore not simply made up of rules, it included 'background processes', community opinion, and flexibility towards rules and remedies.[412]

Delegates' meeting reviewing the new U.S. proposal for a security exception

In the same July 24, 1947 meeting, Commission A continued the discussion on the security exception, turning now to the U.S. proposal for Article 94. The Chairman began by questioning whether the new exception, Article 94, was now segregated from the 'sanction clauses of Chapter V.'[413] The Chairman asked the delegations to 'make up our minds whether we are in agreement that these clauses should not provide for any possibility of redress.'[414] It was a puzzling place to begin, as the U.S. proposal (matching Kellogg's initial proposal for a new Miscellaneous chapter) was quite clear that the new chapter included the nullification or impairment procedure and the settlement of disputes procedure, as contained in Articles 35(2) and 86 of the New York draft Charter.[415] While Leddy initially responded to the Chairman's dismissal of a discussion on the language of the subparagraphs relocated to the new Article 94, he responded to the relationship between the exception and the nullification or impairment procedure in Article 35:

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[410] HUDEC, *supra* note 43, at 30-31.
[411] HUDEC, *supra* note 43, at 30; *see* ECEFP, Interpretive Articles on the ITO Charter, Report, ECEFP D-135/47, Oct. 29, 1947, E.192, file '5.19B ECEFP Meetings, Documents 116/47-135/47', Record Group 353: Records of Interdepartmental and Intradepartmental Committees (RG 353), box 52, NACP, at 2.
[412] *See* LANG, *supra note* 46, at 202-205.
[413] Verbatim Report of the 33rd Meeting of Commission A, *supra* note 391, at 25-26.
[414] *Id.* at 26.
[415] Delegation of the United States of America - Proposals for the Amendment of Chapters I and II, Together with Suggestions with regard to Arrangement of the Articles of the Charter as a Whole, and with regard to the Constitution of a New Chapter to Be Called "Miscellaneous", E/PC/T/W/236, Jul. 4, 1947, WTO Archives, at 12.

> [...] I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35. Article 35 is very broad in its terms, and I think probably covers any action by any Member under any provision of the Charter. It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that Member should have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article.[416]

Mr. Morton, the Australian delegate was 'very glad to have the assurance of the United States Delegate' that a Member's rights under the nullification or impairment process (Article 35(2)), were not in any way impinged.[417] He proposed including a note in the report of the Commission clarifying Leddy's statement, adding a flippant remark that perhaps the U.S. only meant to give 'one of those "kerbside" opinions'.[418] Leddy rejected a note for Article 94, on the basis it would 'raise doubts elsewhere in the Charter.'[419] Leddy confirmed that 'Article 35, in its terms, covers everything in the Charter.'[420] Leddy explained that if the delegates agreed that Article 35 should not apply to Article 94, then 'a clear and explicit provision in Article 35 saying that no Member shall bring any complaint in respect of measures taken pursuant to Article 94' was required.[421] But, this was an interpretation issue, and in response to the request to place such a limit in Article 94, rather than the dispute settlement procedure itself. Leddy stated 'it is perfectly clear from the text that Article 35 does apply to Article 94' and that he would 'rather have it left

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[416] Verbatim Report of the 33rd Meeting of Commission A, *supra* note 391 at 26-27.
[417] *Id*. at 27.
[418] *Id*.
[419] *Id*. at 29.
[420] *Id*. at 28.
[421] *Id*. at 29; *see* Commission A, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, Jul. 30, 1947, E/PC/T/A/PV/33.Corr.3, WTO Archives, at 1.

that way.'[422] The discussion on this point concluded, suggesting Leddy had satisfied Morton that the nullification and impairment process outlined in Article 35 applied to the entire Charter.[423]

Is Leddy's response to the Chairman evidence that the exception was non-justiciable, as so claimed by the U.S. in its recent *Russia-Traffic in Transit* submissions? Leddy defended the connection to the nullification or impairment procedure which – in Geneva, 1947 – afforded power to ITO bodies to investigate matters, suggest further consultations, refer to arbitration, or enable corrective actions.[424] There is nothing in his response to suggest the U.S. was referring to the inability of ITO bodies to make findings and provide a recommendation on the invocation of the exception. Nor did Leddy outline the breakdown of interpretive questions involved in invoking the exception. This was not the focus of the discussion. Leddy explained that if the U.S. negotiators believed that 'no Member shall bring any complaint in respect of measures taken pursuant to Article 94', they would have provided for this in a 'clear and explicit provision.'[425] For Leddy, it was 'perfectly clear' from the text Article 35 does apply.[426] Leddy's response mirrors another U.S. negotiator remarks in the internal U.S. negotiators' meeting on July 4, 1947. The DoS official Evans had observed that where the U.S. had a 'bona fide national security problem', the ITO would 'not be able to do otherwise than make a finding in our favour'.[427] As a counterpoint to Neff who had demanded total unilateral determination, Evans had attempted to show that objective analysis was acceptable to the U.S. negotiators as the ITO could not deny a Member recourse to the security exception for bona fide security concerns.[428]

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[422] *Id*.; *see* Commission A, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, Jul. 30, 1947, E/PC/T/A/PV/33.Corr.3, WTO Archives, at 1.
[423] Verbatim Report of the 33rd Meeting of Commission A, *supra* note 391, at 29.
[424] *See* WILCOX, supra note 130 at 159.
[425] Corrigendum to Verbatim Report of Thirty-third Meeting of Commission A, E/PC/T/A/PV/33, Jul. 30, 1947, at 1.
[426] *Id*.
[427] *Supra* note 325.
[428] I thank Joel Trachtman for this point.

Leddy is not explicitly stating that the ITO could not determine whether the measures taken by a Member were in fact taken in the interest of national security, or whether they fell into the enumerated circumstances of the exception. As elaborated years later, the DoS would offer greater insights into Leddy's response. Following Havana, the U.S. negotiators would prepare questions and answers for U.S. Congress respecting the interpretation and application of the Havana Charter. In answer to a prepared question posed about the security exception of the Havana Charter, the DoS stated that where a Member refused to establish the relationship between the security measure and the enumerated circumstances by supplying information, then 'subparagraph (b) [of Article 94, requiring factual assessment] must be construed to permit the Member concerned to establish its case simply by testifying that the relationship in fact exists, without requiring substantiating evidence.'[429] Although the complainant Member could not argue the invoking Member had violated the Charter, it could seek 'appropriate and compensatory' relief, pursuant to the nullification and impairment procedure, in Article 93 of the Havana Charter.[430] However, this was a separate question as to whether or not ITO bodies could make an objective determination on the fact that the security measure constituted an enumerated circumstances.[431]

Rather than pass judgment on national policies, the nullification and impairment procedure was recognized as a 'check' on the power of retaliation by other states, and 'to convert it from a weapon of economic warfare to an instrument of international order.'[432]

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[429] Unauthored, memorandum, file 'Chapter IX', *supra* note 488, at 5.
[430] *Id*. (stating 'injured Members might still be found entitled under clauses (b) and (c) of paragraph (1) of Article 93, to compensatory relief in any appropriate case.'); Havana Charter, *supra* note 471, Arts. 93-95. Article 93 of the Havana Charter provided: 1. If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the provisions of this Charter other than Article 1, is being nullified or impaired as a result of [...] (b) the application by a Member of a measure not conflicting with the provisions of this Charter, or (c) the existence of any other situation the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving them shall give sympathetic consideration thereto.
[431] *See* note 493 and accompanying text.
[432] E/PC/T/A/PV/6, at 4. Compare this against the statements of Dr. Holloway, the South African delegate, who had raised alarm about the power of the ITO bodies to pass judgment on national policies and to authorize sanctions for 'political' decision-making.

It was 'fundamental' to the establishment of rules governing economic relations among states.[433] These explanations suggest that the U.S. negotiators understood the security exception as part of the legal commitments that developed 'a mutuality of obligations and benefits' arising from the Charter, and recognized – without assessment of the underlying situation – the need for a process to 'restore this balance by providing for a compensatory adjustment.'[434] The legal or factual test to determine a 'bona fide security problem' was not considered in the July 24, 1947 delegates' meeting. The delegates recognized 'danger' in the open-ended language, but seemed satisfied to not push further considering the discussion of the nullification and impairment procedure.

This also occurred against broader discussions about the creation of a 'quasi-judicial tribunal' proposed by some delegations, which the U.S. delegation feared was too costly.[435] In this context, in a July 21, 1947 internal U.S. negotiators meeting, Wilcox recommended 'freer access of appeal to the World Court' following discussion on a concern of costs and the politicisation of disputes if kept strictly in-house at the ITO.[436] He reasoned an 'impartial international tribunal' would prevent 'smaller countries' 'gang[ing] up' on the United States.[437] In addition, it would be 'better to have disputes and questions relating to the interpretation of the Charter settled by an impartial international tribunal in order to avoid decisions based on political considerations which certainly would be the case with a political body.'[438] The U.S. position was later 'resolved' where it was agreed the ICJ would have authority 'to decide questions of law only on appeal from

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[433] Wilcox Statement, Commission A, Verbatim Report - Sixth Meeting of Commission A, Held on Monday, 2 June, 1947 at 2.30 p.m. in the Palais des Nations, Geneva, E/PC/T/A/PV/6, at 4.
[434] *Id.* at 5.
[435] Minutes of Delegation Meeting, Jul. 21, 1947, A1-704, file 'US Delegation/Minutes/June 21-July 30, 1947', RG 43, box 133, NACP, at 1 [hereinafter Delegation Minutes, Jul. 21, 1947].
[436] *Id.* Wilcox's concerns are a development from a month earlier, when Kellogg elaborated on a proposal to combine articles 35(2) and 86 to address legal disputes and economic matters, and to 'defeat the France-Dutch proposal to have all disputes submitted to the International Court without any right on the part of the Organization to cut off such appeals.' Memorandum for U.S. Delegation, Suggested Changes for Chapter VIII, articles 81-89, attached to Delegation Minutes, Jun. 16, 1947, *supra* note 334.
[437] *Id.*
[438] *Id.*

a decision reached by the ITO in the same manner that an appellate court in the US operates'.[439]

Despite the heated discussions between Neff and the other U.S. negotiators, a future meeting with U.S. Secretary of War Kenneth Royall suggested the War Department had accepted the security exception as drafted. When Royall visited Geneva in August, 1947, he dined with Neff, Wilcox, and Brown.[440] While Royall was interested in Neff's efforts to alter the security exception, he 'did not insist upon' Neff's proposals.[441] Article 94 of the Geneva draft Charter read, *inter alia*:

> Nothing in this Charter shall be construed [...]
>
> b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests
>
> i. relating to fissionable materials or the materials from which they are derived;
>
> ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> iii. taken in time of war or other emergency in international relations; [...].[442]

[439] Minutes of Delegation Meeting, Jul. 24, 1947, A1-704, file 'Minutes – U.S. Delegation (Geneva 1947) June 21-July 30, 1947', RG 43, box 133, NACP.
[440] Delegation of the United States of America, Minutes, Aug. 5,1947, A1-704, file 'US Delegation/Minutes/July 31-August 25, 1947', RG 43, box 133, NACP, at 1-2 [hereinafter Delegation Minutes, Aug. 5, 1947].
[441] *Id*.
[442] Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Aug. 19, 1947, E/PC/T/180, WTO Archives [hereinafter Geneva Draft Charter].

A commentary of the Geneva draft was provided by Oscar Ryder and the U.S. Tariff Commission.[443] The commentary noted that article 94,

> [...] reserves to the Members complete freedom of action to prohibit or regulate in any manner imports and exports of fissionable materials, implements of war, and supplies for the Army, Navy, and Air-Force; that is to say, with respect to such items exports or imports may be prohibited unqualifiedly or the Member may discriminate as to where it obtains its imports or sends its exports.[444]

Article 94 lacked any requirement that Members obtain 'approval of the Organization for any action they take or refuse to take under these exceptions.'[445] The commentary added that 'although it appears likely that charges that the exceptions were being abused for protective or other purposes would require consultation under Article 89 and decision by the Organization under Article 90 if the consultations should not result in a satisfactory settlement.'[446] ITO members could invoke the nullification and impairment provision, regardless of allegation of Charter breach, and had recourse to refer the matter to the Executive Board or directly to the Conference. According to the Tariff Commission, the interpretation and dispute settlement provisions constituted 'an overriding authorization for sanctions in any case [...].'[447] These Articles were seen as 'recognition that the Charter can be successful only if all the Members cooperate in carrying out its spirit or objective as well as adhering to its detailed terms.'[448] The Tariff Commission's position aligned with a first draft report written to the U.S. Senate Finance Committee in early November, 1947.[449]

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[443] U.S. TARIFF COMMISSION, ANALYSIS, GENEVA DRAFT, OF CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION [AS ADOPTED BY THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT], Washington, 1947, available https://catalog.hathitrust.org/Record/011422015 [hereinafter 1947 Tariff Commission Report].
[444] *Id*. at 95-96.
[445] *Id*. at 96.
[446] *Id*.
[447] *Id*. at 89.
[448] *Id*. at 89-90.
[449] *See* Unauthored, Report for the Senate Finance Committee on Geneva Charter, Nov. 6, 1947, No. TC26053, A1 698, file 'Chapter IX', RG 43, box 18, NACP (stating that 'Members need not obtain the

VI. THE ENFORCEMENT OF LEGAL OBLIGATIONS, POLITICAL QUESTIONS, AND NATIONAL SECURITY DEBATES IN HAVANA

In Havana, fifty-nine state delegations attended the United Nations Conference to complete the ITO Charter, over twice as many delegations as that attended the first preparatory session in London.[450] Invocation of the security exception was discussed in Havana, where the delegates agreed to construct a new provision to address the question of 'the proper allocation of responsibility as between the Organization and the United Nations.[451]

Sub-committee I (of the Sixth Committee focused on ITO organization) assembled in Havana composed of delegates from Australia, Costa Rica, Czechoslovakia, Guatemala, Iraq, India, Pakistan, South Africa, the United Kingdom, and the United States evaluated the security exception (Article 94).[452] The group had to consider the interpretation endorsed at Geneva, and further recommended edits of the security exception to clarify its role within the ITO Charter.[453] Following nine meetings, minor modifications were made to the exception designed in Geneva by the United States.[454] Article 94(b) was amended to include a phrase to acknowledge members taking action 'either singly or with other states', and to 'indicate more clearly that the sub-paragraphs refer to "action" and not to "essential security interests."[455]

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approval of the Organization for any action they take or refuse to take under these exceptions, although it appears likely that charges that the exceptions were being abused for protective or other purposes would require consultation under Article 89 and decision by the Organization under Article 90 if the consultations do not result in a satisfactory settlement.).

[450] *See generally* BROWN, *supra* note 395, at 135-136.

[451] Sixth Committee: Organization: Report of Sub-Committee I (Article 94), Mar. 2, 1948, E/Conf.2/c.6/93, WTO Archives, at para. 13 [hereinafter Report of Sub-Committee I (Article 94), Mar. 2, 1948].

[452] *See id.*

[453] Sixth Committee: Organization, Annotated Draft Agenda, Dec. 2, 1947, E/Conf.2/C.6/12, WTO Archives, at 25.

[454] *See id.*; Joint Sub-Committee of Committees V and VI - Draft Report of the Working Party, E/Conf.2/C.5&6/W.3, Jan. 14, 1948, WTO Archives.

[455] *Id.* at para. 5, attachment 1 at 6.

Though the sub-committee I review of Article 94 did not drastically change the language of Article 94, there were "formal and informal discussions" as to the interpretation of the text.[456] Arising from the Indian delegations' proposed changes, the sub-committee discussed how the ITO would address actions taken in consideration of "political" "essential interests".[457] The Indian delegation sought to indicate that the phrase "essential security interests" in Article 94 may 'not be regarded always as embracing the "essential interests".'[458] The Indian query sparked two discussions. First, whether and how the ITO would determine whether disputes involved considerations of political matters or "economic interests under disguise of political interests."[459] The Indian delegate raised the topic particularly mindful of the phrase "emergency in international relations", where he believed such actions would fall. Second, whether political interests fell within the scope of the United Nations.[460] In seeking to expand the scope of the security exception, the Indian delegate added that recourse to the nullification or impairment procedures, outlined in Articles 89 and 90 of the draft Charter, could serve as a 'deterrent to any misuse of the exceptions.'[461] The U.S. delegate did not offer detailed comment to this proposal; and, instead, recommended an amendment to the general exception of the commercial policy chapter (the original exception that required non-arbitrary and justifiable discrimination) to cover action "necessary to the enforcement of police measures or other laws relating to public safety."[462]

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[456] Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 451 at 1.
[457] See Sub-Committee I (Article 94), Notes of the First Meeting, Jan. 9, 1948, E/Conf.2/C.6/W.26, WTO Archives, at 2 [hereinafter Sub-Committee I (Article 94), Notes of the First Meeting]; see also Sixth Committee: Organization, Annotated Draft Agenda, Feb. 12, 1947, E/Conf.2/C.6/12, WTO Archives, at 25 [hereinafter Sixth Committee, Annotated Draft Agenda].
[458] E/conf.2/c.6/w.40, at 1; see also E/Conf.2/c.6/W.26, at 2; see also E/Conf.2/C.6/W.32, at 1.
[459] Sub-Committee I (Article 94), Notes of the 1st Meeting, Jan. 9, 1948, E/Conf.2/c.6/W.26, WTO Archives, at 2. The identity of the delegation is not provided in the meeting notes.
[460] Sub-Committee I (Article 94), Notes of the First Meeting, *supra* note 457, at 2.
[461] Sub-Committee I (Article 94), Notes of the Second Meeting, Jan. 10, 1948, E/Conf.2/C.6/W.32, WTO Archives, at 2 [hereinafter Sub-Committee I (Article 94), Notes of the Second Meeting].
[462] *Id.*, at 2.

Sub-committee I recognized that a different committee needed to confirm the relationship between Article 94 and the dispute settlement provisions (Articles 89, 90, and 91).[463] Nevertheless, sub-committee I recorded that '[t]here was some suggestion that action taken under Article 94 could not be prevented, or questioned, under other articles, but that the effects of that action might be the subject of consultation or complaint, and that a member affected by such action might accordingly seek release from some corresponding obligations.'[464]

Over the course of the sub-committee's work, the delegates evaluated proposals relating to 'actions taken in connection with political matters or with the essential interests of Members'.[465] Other delegations proposed amending the security exception to cover 'any measure', or 'any action [...] which serves a political purpose'.[466] A U.K. proposal also sought to clarify that the Charter commitments would not prevent a member from taking actions in accordance with the United Nations Charter.[467] The U.K. delegation also sought to clarify within the text of Article 94 that Members may seek recourse under the nullification and impairment procedures for compensatory measures when appropriate.[468]A U.S. delegate observed that this explicit reference to this

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[463] *See* Sub-Committee I (Article 94), Notes of the 3rd Meeting, Jan. 13, 1948, E/Conf.2/C.6/W.40, WTO Archives, at 3 [hereinafter Sub-Committee I (Article 94), Notes of the 3rd Meeting].

[464] *Id*. [emphasis in original]; *see also* Sub-Committee on Chapter VIII (Settlement of Differences - Interpretation), Summary Record of the 3rd Meeting, Jan. 13, 1948, E/Conf.2/C.6/W.41, WTO Archives [hereinafter Sub-Committee on Chapter VIII, Summary Record of the 3rd Meeting, Jan. 13, 1948].

[465] Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 452, para. 13.

[466] Iraq: Amendment to Article 94 (General exceptions), Jan. 2, 1948, E/Conf.2/C.6/12/Add.9, WTO Archives; *see also* Sub-Committee I (Article 94), Notes of the 4th Meeting, Jan. 20, 1948, *supra* note 469, at 2-3.

[467] Amendment to Article 94 Proposed by the UK Delegation, *supra* note 468, Art. 94(1)(d).

[468] Sub-Committee on Chapter VIII, Summary Record of the 3rd Meeting, Jan. 13, 1948, *supra* note 464, at 1; Amendment to Article 94 Proposed by the United Kingdom Delegation, Jan. 16, 1948, E/Conf.2/C.6/W.48, WTO Archives [hereinafter Amendment to Article 94 Proposed by the UK Delegation]. Article 94(2) of the British proposal read:

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

procedure within Article 94 was "unnecessary" since it repeated the text of the consultation provision in article 89(b).[469]

To address the allocation of responsibility between the ITO and the United Nations, the sub-committee responsible for Article 94 recommended a new provision, which became Article 86(3) of the Havana Charter.[470] Buried in an annex on interpretive notes, clarification was added that the Organization was responsible for questions raised by Members as to whether a measure was 'in fact taken directly in connection with a political matter brought before the United Nations.'[471] However, the note added that 'if political issues beyond the competence of the Organization are involved the question shall be deemed to fall within the scope of the United Nations.'[472]

A sub-committee G of Committee VI (Organization) offered a report as to whether the draft Charter's nullification and impairment procedure (Article 89) should cover the

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[469] Sixth Committee: Organization, Sub-Committee I (Article 94), Notes of the 4th Meeting, Jan. 20, 1948, E/Conf.2/C.6/W.60, WTO Archives, at 3 [hereinafter Sub-Committee I (Article 94), Notes of the 4th Meeting].

[470] The original text was devised as Article 83A, later to become Article 86(3). The provision stated:

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

Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 452, paras. 13-15. One of the discussions in the Havana meeting that led to the aforementioned report on the link between economic measures and political questions contained confirmation from Clair Wilcox that the Organization was an economic one, and 'should therefore not judge any measure employed in connection with a political dispute when that political dispute was within the jurisdiction of the United Nations.' Sixth Committee: Organization, Summary Record of the 37th Meeting, Mar. 11, 1948, E/Conf.2/C.6/SR.37, WTO Archives, at 3; *see* Michael J Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12(3) MICH. J. OF INT'L L. 558, 612-614 (1991) (offering analysis on the implications of Art. 86(3)).

[471] United Nations Conference on Trade and Employment, Havana, Jan. 1, 1948, E/Conf.2/78. ad Art. 86, para. 3 note 1 [hereinafter Havana Charter]

[472] Report of Sub-Committee I (Article 94), Mar. 2, 1948, *supra* note 452, para. 4; *see also* final text of Article 86 of the Havana Charter and ad Art. 86, para. 3, note 1, *supra* note 471.

invocation of the security exception.[473] The outcome was that non-violation complaints of nullification and impairment (Article 89(b)) 'would apply to the situation of action taken by a Member such as action pursuant to Article 94 of the Charter.'[474] Sub-committee G confirmed that:

> Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, not on the ground that the measures taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.[475]

The findings of sub-committee G aligned with sub-committee I and its attentiveness to the "effects" of Members' actions and recourse to the ITO legal design in the event of nullification or impairment of benefits accruing to complaining Members. The final report of sub-committee G did not offer further insights into the possibility of abuse of the exception. As elaborated in the previous section, the U.S. negotiators would later prepare materials confirming their position that where a Member refused to supply information on grounds of essential security interests, the complainant Member could seek a non-violation complaint via the nullification or impairment procedure.[476]

Following the completion of the GATT negotiations, the delegations also reviewed the GATT in light of Havana.[477] A sub-committee was established in the First Session of the GATT Contracting Parties to consider the incorporation of certain articles of the Havana

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[473] *See* Report of Working Party of Sub-Committee G of Committee VI (Organization) on Chapter VIII, Jan. 9 1948, E/Conf.2/C.6/W.30, WTO Archives [hereinafter Report of Sub-Committee G of Jan. 9, 1948].
[474] *Id.* at 2.
[475] *Id.*
[476] *See, infra*, text accompanying note 430.
[477] See generally, HUDEC, *supra* note 43, at 56-62; JACKSON, *supra* note 6, at ch.2.

Charter into the GATT.[478] The initial GATT sub-committee meant to address the post-Havana changes elected to not include certain parts of the ITO disputes procedure from the Havana Charter on the basis that 'the form in which these articles appear in the Charter is not suitable for the General Agreement.'[479]

Months later, in the second session, the GATT delegates considered modifications again with new language that would bring in the "general principles" of certain Havana Charter chapters. John Leddy expressed his interest in including Chapter IX, which included the national security exception (Article 99 of the Havana Charter). While Leddy's proposal found support, Mr. Adarkar of the Indian delegation expressed his interest in referencing elements in the disputes procedures, quoting Article 86(4) as an example.[480] This provision, Leddy argued, was captured in Article XXI(c) of the GATT.[481] Leddy further added caution, noting certain governments "disliked" the idea of treating the Contracting Parties as "an organization" and that "it would be wise to omit referring to the chapters of the Charter dealing with procedural matters."[482] The Indian delegation later agreed to exclude reference to the chapters dealing with the organization, functions, and procedures of the ITO on the basis "the contracting parties must regard themselves morally bound not to go back on the principles evolved at Havana."[483]

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[478] The subcommittee on supersession reported to the GATT Contracting Parties on March 11, 1948, and had composed a draft protocol for modifying certain provisions. See, Sub-committee on Supersession, Report to the Contracting Parties, GATT/1/21, Mar. 11, 1948, WTO archives [hereinafter Sub-committee on Supersession, Report to the Contracting Parties]

[479] Sub-committee on Supersession, Report to the Contracting Parties, Mar. 11, 1948, *supra* note 478, at 3.

[480] Summary Record of the Seventeenth Meeting, Second Session, GATT/CP.2/SR.17, Sept. 2, 1948, WTO Archives, at 6. Article 86(4) of the Havana Charter read: No action, taken by a Member in pursuance of its obligations under the United Nations Charter for the maintenance or restoration of international peace and security, shall be deemed to conflict with the provisions of this Charter.

[481] *Id.*

[482] *Id.* Hudec analyzed the review of the GATT in light of the Havana Charter, and concluded that, as "the leading countries saw it, the original GATT was not intended to be a comprehensive world organization. HUDEC, *supra* note 43, at 57. *See generally* JACKSON, *supra* note 6; BROWN, *supra* note 395; PETROS MAVROIDIS, DOUGLAS IRWIN, ALAN SYKES, THE GENESIS OF THE GATT (2008); Miller, *supra* note 4; SUSAN AARONSON, TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY (1996).

[483] Summary Record of the Eighteenth Meeting, Second Session, GATT/CP.2/SR.18, Sept. 3, 1948, WTO Archives, at 2.

The ITO never came into being, meaning the GATT, a provisional agreement for the reciprocal reduction of tariffs and other restrictions on trade, had to fill its absence.[484] The multilateral trade regime finally grew into the WTO, and with it a more formal and legalized space than that which emerged from the GATT.[485] Yet, the original construction of the security exception remained predominantly based on the legal design of the ITO in the Geneva meetings.[486] The GATT Secretariat analyzed the final Havana Charter security exception (relocated to become article 99) and article XXI of the GATT, finding the two nearly identical.[487]

VII. A BIFURCATED APPROACH TO THE INTERPRETATION OF THE SECURITY EXCEPTION

Following completion of the Havana Charter, the U.S. delegation prepared notes in anticipation of questions for the U.S. Congressional hearings. The DoS archived files contained a collection of undated and unauthored materials to this effect. Clues as to timing are found from reference to earlier Congressional hearings in 1947 and the fact that the materials reference articles of the Havana draft.[488] This final work on the ITO occurred after DoS staffing changes, with key advocates of trade multilateralism

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[484] The ITO was never ratified, largely due to the decision of the United States to abandon the effort in 1950. *See* JACKSON, *supra* note 6, at 12-17 (setting out how the tariff bargain of the GATT grew into becoming a trade institution); *see* HUDEC, *supra* note 43, at chs. 4-5.

[485] HUDEC, *supra* note 43; Pauwelyn, *supra* note 43 at 13; J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35(2) J. WORLD TRADE 191 (2001).

[486] The security exception of the Geneva draft ITO Charter is virtually identical to Article XXI GATT. *See* HUDEC, *supra* note 43, at 53-58 (explaining how the GATT negotiations thereafter reviewed the language of the GATT, making corrections if desired, also noting that in the 'final analysis, the substantive differences between GATT and the final ITO Charter were not very great.'). *Id.* at 57.

[487] GATT Secretariat Note, Aug. 18, 1987, *supra* note 236, para. 5.

[488] For example, with reference to Article 99 (general exceptions), the memorandum observed: 'Article 99 is a considerable revision of the text before the Senate Committee in 1947.') Unauthored, memorandum, Chapter IX, undated, A1 698, file 'Chapter IX', RG 43, box 18, NACP, at 5 [hereinafter Unauthored, memorandum, file 'Chapter IX']. The folder contains several versions of the same memorandum, with some containing handwritten edits, but are otherwise identical in the case of the portion related to article 99. There is one memorandum from E. Kellogg to Burns dated Feb. 15, 1949, which reflected changes made by John Evans.

departing. William Clayton had resigned as Undersecretary of State in October 1947. Clair Wilcox resigned in 1948 following the Havana Conference.[489]

The DoS prepared questions and responses to every provision of the ITO Charter, including the scope of the security exception.[490] The DoS confirmed that while each ITO Member has 'the right of self-defence under International Law', the security exception confirmed that 'nothing in the Charter shall interfere with the exercise of a member's security interests.'[491] However, there were 'limits to the scope' of the exception, 'since the action taken by a Member under Paragraph 1(b) must relate to fissionable materials, the supply of a military establishment or be taken in a time of war or other international emergency.'[492] In a follow up question as to whether such actions are reviewable by the ITO or the ICJ, the U.S. negotiators answered:

> The necessity for the action taken is not subject to review; *the relationship of such action to the subjects referred to is subject to review*. Thus, in case a Member imposes export controls which the Member considers necessary for the protection of its essential security interests on traffic in goods to supply the military establishments of itself and certain other countries, it is necessary to decide where final authority lies to determine (1) the necessity for the protective measures and (2) the fact that the traffic is or is not to supply military establishments.[493]

On the 'necessity' of the measure, the invoking member's 'judgment' was 'final' and 'not subject to review by the Organization or the Court'.[494] Disputing members could call upon the Organization to assess the 'factual question' as to whether the measure 'relates

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[489] Oral History Interview with John M. Leddy, *supra* note 147, paras. 50, 72.
[490] Unauthored, memorandum, file 'Chapter IX', *supra* note 488, at 10.
[491] *Id*. at 3.
[492] *Id*. at 4.
[493] *Id*. at 4 [emphasis added].
[494] *Id*. This referred to the language "it considers" found in article 99(1)(a) and (b) of the Havana Charter.

to' the circumstances enumerated in the subparagraphs.[495] As 'with any other decision of the Conference', Article 96 of the Havana Charter provided recourse to the ICJ.[496]

Decades later, the *Russia-Traffic in Transit* panel would echo this bifurcated legal analysis, but set further requirements for WTO Member invoking the security exception. The WTO panel limited member discretion by the 'obligation of good faith', 'a general principle of law and a principle of general international law' as codified in Articles 26 and 31 of the Vienna Convention on the Law of Treaties.[497] Despite the vital nature of security concerns, several scholars observed the WTO panel's analysis as reinforcing (and championing) WTO adjudication as a necessary element in establishing international stability in the multilateral trade system.[498]

The WTO panel divided the legal analysis of Article XXI(b) into different elements. First, the invoking member must demonstrate objectively that the measure falls under one of the circumstances enumerated in Article XXI(b). The panel found that whether a measure qualifies as one of the enumerated actions in the subparagraphs of Article XXI(b) GATT, such as 'supplying a military establishment' or 'emergency in international relations', was an 'objective fact', amenable to 'objective determination' by a WTO panel.[499] The obligation of good faith required that members not use the security exception by 're-labelling trade interests [...] as "essential security interests", thereby circumventing the rules and norms established by the WTO legal design.[500] The WTO panel then considered the chapeau of Article XXI GATT. The invoking member must

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[495] *Id*.
[496] *Id*. at 4-5.
[497] Panel Report, *Russia-Traffic in Transit*, *supra* note 5, at para. 7.132.
[498] *See* Geraldo Vidigal, *WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed – Something Blue?*, Amsterdam Law School Research Paper No. 2019-21, Jun. 7, 2019, at 20-21, 46(3) LEGAL ISSUES OF ECONOMIC INTEGRATION (forthcoming 2019) (offering an in-depth assessment of the panel report); *see* J. Benton Heath, *Trade, Security, and Stewardship (Part I): The Russia — Transit report's vision of WTO dispute settlement*, INT'L ECON. L. & POL'Y BLOG, May 5, 2019,
[499] Panel Report, *Russia-Traffic in Transit*, *supra* note 5 at para. 7.64, 7.77.
[500] *Id*. at para. 7.133.

'sufficiently'[501] articulate the 'essential security interests' it seeks to protect.[502] The term 'essential security interests' was understood in the sense of the 'quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.'[503] Finally, the invoking member must present 'a minimum requirement of plausibility' that the measures taken were protective of its essential security interests.[504] The WTO panel determined that the adjectival clause "which it considers" meant that 'it is for Russia to determine the "necessity" of the measures for the protection of its essential security interests.'[505]

VIII. CONCLUDING THOUGHTS

The goal of the paper was to elucidate the diverse strategic and economic considerations that shaped the meaning of U.S. national security interests which, in turn, created the language, phrasing, and placement of the security exception within the post-war multilateral trade institution, the ITO. The paper began by emphasizing that contemporary questions and concerns involving national security and international trade would benefit from greater attention to historical context. In this case, the internal deliberations of U.S. officials that served as key architects of the multilateral trade system and the security exception. To complete the goal of creating an international trade institution, the security exception was just one of the escapes from the Charter and a necessary political reality.[506] As Judith Goldstein observed, it was 'multilateralism with exceptions.'[507]

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[501] What qualified as 'sufficient' depended on a WTO panel's determination of how 'characteristic' the member's essential security interests are to the circumstances described in the subparagraphs of Article XXI(b). In the *Russia-Traffic in Transit* dispute, this meant the panel's evaluation as to how 'characteristic' was the 'emergency in international relations'; that is how 'obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise.' *Id.* para. 7.135.
[502] *Id.* at para. 7.134.
[503] *Id.* at para 7.130.
[504] *Id.* at para. 7.138.
[505] *Id.* at para. 7.146.
[506] *See* PETROS C. MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE, VOLUME 2 (2016).
[507] Judith Goldstein, *Creating the GATT Rules: Politics, Institutions, and American Policy, in* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 219 (John G. Ruggie ed., 1993).

The paper introduced two insights that help illuminate the stakes of current debates about the interpretation of Article XXI GATT. First, the U.S. negotiators sought to balance competing U.S. concerns, particularly the demands of U.S. security and defense with the benefits to developing the international economy by advancing trade multilateralism. The DoS opposed a broad conception of security that depended on unilateral determination, as desired by the Services Department (the U.S. agencies tasked with post-war U.S. military and defence planning). The achievement of this balance required compromise; the U.S. proposals reflect such a compromise with the pairing of open-ended phrases and self-judging language with enumerated circumstances that limits the types of actions that qualify under the exception.

Why would the most powerful negotiating state at the time not seek a self-judging, non-justiciable exception? The U.S. negotiators often repeated the same argument – which formed a pattern that shaped the security exception: national security could not exist in opposition to the ITO, but would have to co-exist within it *because* freer trade was better for the world, and the United States, in the long-term. Whether right or wrong, the DoS officials believed it was better to tear down walls with opening of trade, rather than use the concept of national security to build them up. With a great risk of abuse, the DoS refused to allow a broadly scoped exception unravel the hard-fought compromises made with other governments. This was not due to a rejection of security policy. It was because the DoS believed trade liberalism was a better approach to strengthening U.S. security.

The result of the internal U.S. debates was a clause that sought to capture competing concerns that the U.S. negotiators had sought to balance through the text. The security exception included selective open-ended terms and phrases that could, when reported to officials in Washington, seem to comply with the demands for total discretion for United States security policies in the future. ITO members would determine for themselves what was 'necessary for the protection of its essential security interests.' However, it was a factual question as to whether the actions taken by the invoking member were related to matters described in the subparagraphs of the security exception, such as 'relating to fissionable materials'; 'relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials'; 'taken in time of war or other emergency in international relations.' Over seventy years later, this approach was

adopted by the WTO panel in the first formal dispute considering Russia's invocation of Article XXI GATT.

The U.S. debates also show how the exception would operate within the ITO legal design. In the situation where the United States (or another member) had a *bona fide* national security problem, the DoS believed the ITO membership would not challenge measures taken.[508] However, where a member's benefits accruing to it under the Charter were nullified or impaired due to another member's security measures, the ITO offered a forum for members to restore a 'mutuality of obligations and benefits.'[509]

The nullification or impairment procedure within the ITO (later to become Article XXIII of the GATT) offered a legal basis of dispute settlement, without a claim of illegality under the Charter rules. Wilcox explained the U.S. thinking on this procedure, then Article 35(2) under the Geneva Charter draft: 'We have introduced a new principle into international economic relations. We have asked the nations of the world to confer upon an international organization the right to limit their power to retaliate.'[510] Further, the non-violation complaint emphasized redress rather than an evaluation of the merits of security actions.[511] The aim was for governments to restore the 'careful balance of the interests of the contracting States.'[512] Wilcox emphasized 'this balance rests upon certain assumption as to the character of the underlying situation in the years to come.'[513] The "atmosphere" of the ITO supported the legal design, with the informal, diplomatic interactions of members as a tool to "sharpen the pressures and thereby make them more forceful."[514] By Havana, the delegates agreed that recourse to the nullification or impairment procedure would require assessment of the "effects" of security-related actions, rather than evaluation of the Member's right to take security-related actions "necessary for the protection of its essential security interests."

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[508] See notes 320 to 326 and accompanying text.
[509] Clair Wilcox, Verbatim Report, Sixth Meeting of Commission A, Jun. 2, 1947, E/PC/T/A/PV/6, WTO Archives, at 5 [hereinafter 6th Meeting of Commission A, Jun. 2, 1947].
[510] *Id*. at 4.
[511] *See* Verbatim Report of the 33rd Meeting of Commission A, *supra* note 391, at 27.
[512] 6th Meeting of Commission A, Jun. 2, 1947, *supra* note 509 at 5.
[513] *Id*.
[514] HUDEC, *supra* note 43, at 35; LANG, *supra* note 46 at 202-205.

Finally, the Cold War and the building of tensions between the U.S. and the Soviet Union displayed the multiplicity of U.S. national security concerns, which impacted the formulation of the security exception. While the Soviet Union never participated in the drafting of the ITO Charter, the U.S. negotiators sought to develop the ITO as a strong institution for trade liberalization and non-discriminatory trade to build an inter-dependent global economy. In this light, the ITO would bind Members together, making the success of the ITO an economic and strategic goal.

Any institutional or rules-based reform should now include the changing purposes of security, within the sphere of modern demands for concert strategy, accounting for globalization and a plurality of global, domestic, and non-state interests.[515] It is not the purpose of this paper to offer prescriptive claims as to how the WTO dispute governance model should adapt to the complex legal questions that arise with the highly political challenges made by invoking the security exception. The WTO is seen as a 'thickened' 'legalized' framework for international trade affairs and binding dispute settlement mechanism.[516] Joost Pauwelyn has offered the most comprehensive analysis of WTO reform in light of the 'transformation' from the GATT to the WTO, observing 'the WTO needs more, not less, politics and participation of individual members and nonstate actors; and more, not less, control by domestic politics and consideration of nontrade concerns.'[517] Most recently, J. Benton Heath has argued that WTO reforms must 'blend political and legal means' and recommended the WTO rely on its political arenas of Ministerial Conferences, General Council, specialized councils and committees to address

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[515] *See* Gregory C. Shaffer, *How Do We Get Along? International Economic Law and The Nation-State*, UC Irvine School of Law Research Paper No. 2018-57; *see* Bernard Hoekman, *Expanding WTO membership and heterogenous interests*, 4(3) WORLD TRADE REV. 401-408 (2005); *see* Bruce W. Jentleson, *The Liberal order isn't coming back: what next?*, DEMOCRACY: A JOURNAL OF IDEAS, Spring 2018 no. 48, https://democracyjournal.org/magazine/48/the-liberal-order-isnt-coming-back-what-next/; *see* Stephen Pampinella, 'The Internationalist Disposition and US Grand Strategy, THE DISORDER OF THINGS, Jan. 23, 2019, https://thedisorderofthings.com/2019/01/23/the-internationalist-disposition-and-us-grand-strategy/.

[516] *See*, *e.g.* Frieder Roessler, The role of law in international trade relations and the establishment of the Legal Affairs Division of the GATT, in A History of Law and Lawyers in the GATT/WTO 162 (Gabrielle Marceau ed. 2015); Weiler, *supra* note 485.

[517] Pauwelyn, *supra* note 43 at 60.

security-related trade matters.[518] These proposals are insightful, and in the long-term offer flexibility for politics in the legal design.

In the immediate term, the paper concludes by emphasizing that the WTO dispute settlement system – with its ethos of lawyers – still maintains the nullification or impairment procedure. Nicolas Lamp proposed that members address the number of disputes involving national security by relying on Article 26 of the WTO Dispute Settlement Understanding (DSU).[519] Article 26 provides that Members may rely on Article 21.3(c) arbitration to make 'a determination of the level of benefits which have been nullified or impaired'.[520] This, Lamp argued, could 'sidestep' the legal inquiry as to whether the security claim legally falls under Article XXI GATT, focusing instead on the benefits accruing under the trade obligations.[521] Lamp emphasized that in the WTO when the security exception is invoked in exigent circumstances, this 'leaves the scope of benefits that a trading partner can reasonably anticipate under the provision wildly uncertain.'[522] In this case, even a legal invocation of the security exception could lead to nullification or impairment of benefits.[523] Lamp's recommendation would allow WTO members to address trade-security disputes and avoid escalation. It further emphasizes the underlying motivation in the post-war period: constructing an international legal framework for governments 'to overcome the domestic political obstacles to the adoption of policies furthering the national welfare balance'.[524]

It is yet to be seen how WTO Members themselves will address the development of positions regarding both Article XXI GATT and trade multilateralism since the post-war period. However, despite the rise of security claims and the complexity of today's global

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[518] Heath, *supra* note 34 at 66-67.
[519] Nicolas Lamp, *Why WTO Members should bring pure non-violation claims against national security measures*, INT'L L. & POLICY BLOG (Oct. 15, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/10/guest-post-why-wto-members-should-bring-pure-non-violation-claims-against-national-security-measures.html; Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994), Art. 26.
[520] *Id.*
[521] *Id.*
[522] *Id.*
[523] *Cf.* Alford, *supra* note 13 at 749 (observing the possibility of a successful non-violation claim for a bad faith invocation of the security exception).
[524] *See* Roessler, *supra* note 11, at 4.

economy, a foundational feature of the WTO remains – access to "a framework and a forum for sensible, and sometimes calm discussion."[525] Even going back to the ITO, this was seen as part of the making of the security exception. It is now up to the Members to decide whether this institutional feature can continue to apply today.

[525] Seymour J. Rubin, *supra* note **Error! Bookmark not defined.** at 157.