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By Bernard M. Hoekman, Petros C. Mavroidis
and Douglas R. Nelson

Non-economic Objectives, Globalisation and Multilateral Trade Cooperation

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Foreword

High-income states, notably European countries and the United States, use trade policies to pursue national security, economic security and policy autonomy objectives, and to protect and project societal values. Examples include conditioning imports on production requirements pertaining to environmental protection or labour standards, subsidy programmes to reduce dependence on specific sources of supply of critical materials, regulation requiring firms to exercise due diligence and bolster the resilience of global value chains, export restrictions and control of inward or outward investment in sensitive sectors or technologies. A common feature of such interventions is that they are largely unilateral in nature.

The WTO in principle should be the main forum for states to cooperate on the use of trade policies, whether these are motivated by (or aimed at) economic or non-economic objectives. It has not been playing the role it was envisaged to have when it was established in 1995 – to be the forum where the world updates the multilateral trade agenda and resolves trade disputes peacefully. In previous work supported by the Bertelsmann Stiftung, Hoekman, Mavroidis and Nelson worked with colleagues to better understand the reasons for deadlock in the WTO. One finding emerging from the resulting analysis (Bertelsmann Stiftung, 2018) was that in addition to fundamental differences in interests, preferences and priorities across the membership, working practices played a role in reducing the effectiveness of the organisation. In subsequent work undertaken as part of a Horizon 2020 research and innovation programme project (Realizing Europe's Soft Power in External Cooperation and Trade),[1] this analysis was extended through more detailed investigation of key elements of the multilateral trading system, including rules on subsidies (Hoekman and Nelson, 2020), dispute settlement (Hoekman and Mavroidis, 2020) and plurilateral cooperation (Hoekman and Sabel, 2021).

These projects form the basis for the current study, which reconsiders some of the findings and recommendations concerning reform of WTO working practices through the lens of national and economic security as additional types of non-economic objectives being pursued with trade-related policies. Preliminary findings were discussed at the 2022 WTO Public Forum and were subsequently developed in two journal articles (Hoekman et al., 2023a; 2023b). The present monograph elaborates and updates the arguments made in these papers, and adds data to support the various claims, as well as analysis of the prevalence of trade measures motivated by security-related concerns and goals.

1 This project focused on the use of trade policy by the EU to achieve non-economic objectives (see https://respect.eui.eu/), especially sustainable development-related goals.

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CEPR, which takes no institutional positions on economic policy matters, is delighted to provide a platform for an exchange of views on this important topic.

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Robert Schuman Centre, EUI

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Introduction

The establishment of the World Trade Organization (WTO) in 1995 was the capstone of a multi-decade process of building a liberal international trade regime. Among the core trading nations, the years following the formation of the WTO can be characterised as coming close to free trade. While there remain tariff peaks even in Organisation for Economic Co-operation and Development (OECD) member countries and many developing and emerging economies have much higher levels of (often unbound) applied tariffs, for the major part countries that constituted the core of the General Agreement on Tariffs and Trade (GATT) made it their central business to liberalise border measures, and this had largely been achieved by the mid-2000s.[1] Autonomous decisions by states to liberalise trade and expanding participation in the open rules-based global trade regime – membership in the WTO grew from 123 in 1995 to 164 in 2023 – permitted firms around the world to specialise, sourcing inputs from and selling into global markets. In conjunction with dramatic improvements in information and communication technologies (ICT),[2] along with steep reductions in transportation costs, businesses throughout the global economy reorganised production into global value chains (GVCs). Organising production in GVCs allowed large firms to realise economies of scale from distributing research and development, product design, intermediate production, final assembly, sales, and management services around the world while still maintaining efficient control over the whole structure (Baldwin 2016).

Four consequences or corollaries of this dynamic are salient to this study. All four have the common denominator of increasingly politicising trade and investment policy. First, in the context of low formal border protection, GVCs create demand by participating firms for disciplines on domestic regulatory policies that affect operating costs. The ability to profitably operate GVCs will be affected by policies in each country in which participating firms are located, whether they are engaged in the upstream or downstream parts of value chains, or whether firms import foreign inputs to produce goods and services they export (backward GVC participation) as opposed to exporting domestically produced goods (value added) that is embodied in production processes in foreign countries (forward GVC participation). Domestic policy environments are a major determinant of the design of GVCs (World Bank 2019, Antras and Chor 2022),

1 Average tariffs at less than 2% is a close approximation to free trade. There are, of course, significant tariff peaks and emerging economies maintain higher average tariffs, but these countries have engaged in very considerable liberalisation of border measures. Nontariff measures have become relatively more important as tariffs have fallen, but here also the types of quantitative restrictions and capital controls that were prevalent up to the mid-1980s have largely disappeared. While product standards and other types of product regulation are an increasingly prominent feature of the policy landscape, these are generally not intended as a form of protection for domestic producers but aim to protect consumers. As documented by Bown (2023), the early 2000s also saw a steady fall in the use of 'trade remedies' (antidumping, countervailing duties, safeguards).

2 ICT technologies are central to informatics, constituting a general-purpose technology that had and continues to have wide ranging effects on the organisation and structure of economic activity (Jovanovic and Rousseau 2005, Bresnahan 2010).

explaining why 'behind the border' policies have come to be included in deep trade agreements (Baccini et al. 2021). These differ from shallow trade agreements that primarily involve the reciprocal reduction or removal of tariffs by including disciplines across a range of regulatory areas – e.g. investment facilitation, investor protection, licensing regimes, intellectual property rights, e-commerce regulation, etc. that affect investment incentives for firms and operating costs (Dür et al. 2014, Mattoo et al. 2020).[3] In contrast to tariffs and shallow integration, because many of the policies constitute domestic regulation, they are more politically sensitive, affecting a much larger set of domestic interests (Young 2016).

Second, in parallel with deepening trade agreements to include disciplines and cooperation on 'behind the border' policies that affect GVCs, governments of high-income countries became more concerned with what we, following the standard practice in economics research on trade and public economics, will call non-economic objectives (NEOs): environmental sustainability, public health, labour standards, human rights, and many others. Often the pursuit of NEOs involves policies that target trade and GVC-based production and exchange, reflected in regulatory instruments seeking to make supply chains more resilient to shocks, to prohibit or disincentivise the use of specific inputs or production processes, to reduce national dependence on certain sources of supply, and to require due diligence and third-party auditing of international supply chain operations. The EU has been at the forefront of using trade as an instrument to pursue NEOs, but similar trends are observed in many countries. An implication is that the interest of international business in deeper trade agreements is complemented by a policy focus on conditioning trade and investment relations on a range of NEOs. Linking trade to NEOs has long been resisted by developing nations, complicating trade relations with partner countries.

A third consequence is the 'backlash against globalisation' reflected in the rejection of the so-called 'neoliberal' national economic policies and multilateral institutions that supported international integration, not only through trade and investment flows, but of knowledge (e.g. education services) and people (migration). It has become commonplace to point to the displacement of labour and capital and often highly skewed distribution of the benefits of open trade and GVC-based international specialisation as drivers of anti-globalisation populism in high-income countries on both the left and the right of the political spectrum (Anelli et al. 2021, Kemmerling et al. 2022).[4] The sustained economic growth of major developing economies in Asia that has been a source of adjustment pressures in OECD member countries combined with increasing geo-

3 This is by no means as new a phenomenon. Lawrence (2000) discusses the concept of deep integration at length. Tinbergen (1954) differentiated between negative and positive integration. The former centred around removal of trade restricting or distorting policies (e.g. tariffs); the latter comprises measures requiring states to adopt specific policies, such as common standards of regulatory regimes.

4 There is considerable evidence that this is due in significant part to misattribution of the effects of informatics technologies to trade (Mutz 2021b, Wu 2022).

economic rivalry[5] with China is driving increasing recourse to state intervention in the original core members of the GATT. One reflection is large scale subsidy programmes targeting strategic sectors and technologies. Many of these programmes are motivated by NEOs, notably decarbonising the economy, but increasingly also by economic security and competitiveness concerns.

The process of trade liberalisation that occurred during the GATT years (1947-94) was eased by its association with national security in the US, EU, and allied states.[6] Liberal trade was considered to be in the national security interest of the US, leading to the consequent virtual disappearance of trade from public politics: the clear geostrategic threat in the form of the Soviet Union allowed trade to be swept under the national security umbrella (Yergin 1977, McKenzie 2008). Because trade liberalisation and the construction of an open trade system was a tool of US foreign policy (Cooper 1972, 1988), trade policy became a technical issue largely managed by technocrats. In Europe there was a parallel depoliticisation of trade policy in the pursuit of European integration, tying Germany and France together in ways that would make war less likely, with export-led growth an essential support to the US-led global liberal system as part of the Cold War national security order (Eichengreen 2006). This situation has changed. The fourth development that informs this study is the increasing prominence of foreign policy considerations in the design and implementation of trade policy. This is reflected in an increasing use of trade and investment policy motivated by foreign policy and national security objectives. The EU for example has adopted several measures enhancing its ability to respond to coercive use of trade policy by foreign countries,[7] screen inward foreign investment,[8] and control exports of dual use technologies (European Union, 2021).

To date, the main focus of increased intervention in trade and investment by the large trade powers has been to support domestic economic activity in priority sectors through subsidies, complemented by trade and investment measures motivated by national security, pursuit of societal values such as environmental sustainability, protection of workers and human rights, and actions to realise competitive neutrality on domestic and international markets. As a result of the complexities of these issues and the way they interact with each other, the design and implementation of trade policy has become much more intricate. Trade policy instruments may in practice be used to pursue multiple non-economic as well as economic objectives that are difficult to disentangle.[9] A

5 See, for example, Blackwill and Harris (2016).

6 Baldwin (1997) defines national security in an objective sense as comprising a policy environment that entails a low probability of damage to acquired values; in a subjective sense, absence of fear that such values will be attacked. This definition captures both threats to national sovereignty and to societal values.

7 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6642

8 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02019R0452-20200919&from=EN

9 To quote the 2022 US National Security Strategy: "... people all over the world are struggling with the effects of shared challenges that cross borders -whether it is climate change, food insecurity, communicable diseases, terrorism, energy shortages, or inflation. These shared challenges are not marginal issues that are secondary to geopolitics. They are at the very core of national and international insecurity and must be treated as such." (White House 2022, p. 6).

corollary of the increasingly multifaceted trade policy environment is that international trade cooperation to reduce cross-border policy spillovers no longer works as well as it used to when the agenda centred on reciprocal reduction of border barriers on a non-discriminatory basis and the administration of agreed rules on the use of trade remedies and contingent protection. Instead, strategic autonomy, national security and other NEOs motivate calls for collaboration among countries with similar values and political-economic systems (i.e. 'friend-shoring').

In this study we consider implications of these developments for the global trade regime and multilateral trade cooperation. The current rules and institutions of the world trading system are not built to deal with the structural changes affecting the global economy. The erosion of trust among the large economic powers that has resulted from (perceived) increased willingness to 'weaponise' trade policy (Farrell and Newman 2019) is a major constraint to launching negotiations on new rules of the game. Our premise is that for the WTO to remain relevant in the 21st century, the membership must recognise the way that international trade increasingly is linked to system competition, cooperation, and contestation over NEOs for which trade is seen as instrumental to policy success. Efforts to create new 'guardrails' to sustain the rules-based trade order and international economic activity (globalisation) should centre on frameworks to guide initiatives by governments to attain NEOs such as making supply chains more resilient or safeguarding national policy autonomy.

A central feature of cooperation should be to establish processes in which states can engage in deliberation and dialogue with a view to identifying shared NEOs and reducing negative spillovers of associated policies on GVCs and globalisation more broadly. Going beyond the traditional (and still important) 'bread-and-butter' agenda of reducing trade-distorting border barriers to agree on rules of the road for the use of trade policy for NEOs is necessary to support an open rule-based trade order that enables firms and households around the globe to sell goods and services in which they have a comparative advantage, and source those in which they have a comparative disadvantage. Both empirical research and historical experience demonstrate that a world in which mutually agreed rules no longer apply to all trading nations, especially the large powers, is one that can only have detrimental consequences for all countries. The opportunity cost of non-cooperative policies is greatly increased because the world confronts major, existential, threats and collective action problems.[10]

Systemic differences and geopolitical rivalry need not preclude cooperation to attenuate and/or manage policy spillovers. Insofar as multilateral agreements on the underlying policies are not feasible, the WTO currently gives states the option of taking non-discriminatory unilateral regulatory actions or negotiating preferential trade agreements (PTAs). The Biden administration has made clear that it is not interested

10 See e.g. Góes and Bekkers (2023) and IMF (2023).

in negotiating traditional PTAs that centre on reciprocal reduction of tariffs and nontariff barriers on substantially all trade.[11] Instead, the US is pursuing issue-specific cooperation and frameworks to coordinate policies – e.g. agreeing on good regulatory practices towards the digital economy, export controls, foreign direct investment, and GVCs. Recent examples include the EU-US Trade and Technology Council,[12] the Indo-Pacific Economic Framework for Prosperity,[13] calls for 'friend shoring' value chains and associated trade and investment (Yellen 2022) and proposals to cooperate in 'critical materials clubs'. Such arrangements have implications for the trading system insofar as they act as frameworks for cooperation among states to jointly condition trade and investment on shared values through, for example, production requirements relating to labour, human rights, and/or environmental sustainability. If associated regulatory cooperation arrangements are open to any country interested in participating, with benefits extended conditional on implementing agreed regulatory standards or principles independent of national political systems and governance, they can support a process of gradual multilateralisation. If instead they are designed to be exclusive arrangements, they can foster greater fragmentation of the world trade system.

Alliances (clubs) have long been a form of cooperation among states and are likely to figure more in the future as vehicles to support deeper integration among like-minded states. We argue that WTO reform discussions should include a focus on developing a multilateral framework to guide the use of trade and industrial policy by groups of like-minded economies motivated by NEOs. This would benefit members of potential (non-PTA) clubs to design and implement policies that are efficient. It would also benefit non-members by reducing potential negative spillovers and adverse effects on the trading system. A basic element of any such framework should centre on using the WTO as a forum to ensure transparency, and support policy dialogue and peer review of the use of trade policy instruments.

We proceed as follows. Chapter 1 sets the scene with a discussion of national security and other NEOs, including some reflections on whether and how these intersect with GVCs. Chapter 2 provides a framework for thinking about economic objectives and NEOs and why the distinction matters for both national policy and the design of international cooperation. Chapter 3 summarises extant information on the use of trade measures justified by NEOs, based on notifications to the WTO of national security and other NEO-motivated trade measures and the Global Trade Alert database of trade policy actions taken by states since the global crisis in 2009. Chapter 4 discusses international cooperation to attain security objectives and other NEOs, including salient WTO disciplines. Chapters 5 and 6 discuss the practice in the GATT (1948-94) and WTO (1995-

11 Illustrated in the 2022 US Trade Policy Agenda not mentioning negotiation of new trade agreements as an objective. See https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2022/march/fact-sheet-ustr-releases-2022-trade-policy-agenda-and-2021-annual-report

12 https://www.state.gov/u-s-eu-trade-and-technology-council-ttc/

13 https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/indo-pacific-economic-framework-prosperity-biden-harris-administrations-negotiating-goals-connected

2022) period, respectively, on the use of trade policy for national security through the lens of negotiating history and dispute settlement. Chapter 7 turns to potential WTO reform to improve management of the negative spillovers from using trade policy, distinguishing between national security and other NEOs. It reflects on the question whether dispute settlement is an appropriate and effective mechanism to address national security-related trade conflicts, arguing that what is needed first and foremost is multilateral scrutiny. The use of a procedure called 'specific trade concerns' by WTO members provides an alternative to dispute settlement that is more likely be productive in addressing associated trade conflicts. Chapter 8 discusses formation of clubs among WTO members and the potential benefits of anchoring clubs in a multilateral governance framework. Chapter 9 concludes.

CHAPTER 1

National security and other non-economic objectives

WTO members today confront an external environment in which there is not only contestation and differences in views regarding trade policy but there is a land war in Europe (involving a nuclear power) and a rising prospect of catastrophic environmental worsening. Security considerations had already become more prominent in trade relations before Russia invaded Ukraine. The Trump administration's invocation of national security to motivate a range of protectionist measures, and perceptions by many WTO members that contrary to expectations in 2001 when China acceded to the WTO, state intervention and control in the Chinese economy was increasing in several important respects, were the two key drivers.[14] The widespread perception that the Xi administration in China is reversing its market-oriented policies has raised concerns about its continued willingness to participate in good faith as a member of the liberal trading system (Lardy 2019, Mavroidis and Sapir 2021). China's positioning vis-à-vis Chinese Taipei, the treatment of Uyghurs in Xinjiang, repeated recourse to economic coercion as an instrument of foreign policy (including both formal and informal sanctions on trading partners),[15] and the 2022 'no limits' partnership with Russia has led many to reassess their views of China as a member of the liberal consensus on maintenance of peaceful international relations.

The potential to use trade as an instrument of policy to defend national interests, curry favour with, or punish other states explains why trade agreements, including the GATT/WTO, explicitly recognise that states may use trade restrictions to defend national security or pursue other non-economic objectives. Because claims to national security function like trumps in domestic politics, many participants in the political process seek to attach their core issues to national security. The question is what sorts of policies can harden economies against security risks and respond when a security shock materialises. This question overlaps to some extent with discussions about how to de-risk supply chains and enhance the robustness and resilience of GVCs (discussed further below).

14 Mavroidis and Sapir (2021) cite archival evidence suggesting that political actors on both sides of the Atlantic saw economic benefits resulting from China unilaterally reducing its protection. The anticipated transformation of China reduces the persuasiveness of views that obligations that are more stringent should have been included in the Protocol of Accession. Whether this was possible is an open question, given there is little room for WTO-plus and WTO-extra obligations in accession protocols (Williams 2008).

15 For example, against Korea (Lim and Ferguson 2022), Australia (Ferguson et al. 2022), and Lithuania (Blockmans 2021).

A major consequence of Russia's war against Ukraine has been to cause a reassessment of maintaining liberal trade and investment relations with potential adversaries and measures to safeguard national autonomy, including through enhancing resilience of GVCs to shocks and diversifying sourcing of critical goods and services. China was already a focal point for such reflection given rising geopolitical rivalry and competition concerns but has become a greater priority given China's explicit association with Russia's violation of Ukraine's territorial sovereignty, international law, and human rights. There is an increasing perception in many OECD countries that the presumption that China is a liberalising economy with a large stake in a rules-based global trading system needs to be rethought, reflecting the view that the Chinese Communist Party leadership has fundamentally different values than those of democratic nations. Because China has become so integrated in the world economy since the late 1980s, the reconsideration of China as a status-quo economic power increases national security concerns with respect to trade and investment relations.[16] In previous work, we like many others, argued that a key challenge for sustaining an open global trading system is to balance the gains from China's re-integration into the world economy against the need to assure competitive neutrality, defend core societal values, and maintain a principled opposition to expansionism abroad. This is a harder case to make following China's support of Russia's war against Ukraine.

Unilateral actions by high-income countries seeking to ensure competitive neutrality and preserve autonomy need not – and thus far do not – aim to decouple from China. Instead, the goal is to reduce high rates of dependence on China as a source of supply of essential/critical products that could be leveraged into a tool of economic coercion,[17] and to bolster the ability to offset effects of foreign subsidy programmes. The EU for example has unilaterally bridged gaps in WTO rules to address distorting subsidies paid by foreign countries to economic agents in its market,[18] respond to coercion by foreign countries[19] and enhance screening of foreign direct investment (FDI) in the EU market.[20] The question for the WTO membership is whether multilateral processes and rules can be agreed to guide national policy responses that seek to counteract the effects of 'system differences'. Such policies may have negative repercussions for the world trading system, especially for many developing economies that have extensive trade relationships with China. The challenge is determining where cooperation is feasible on

16 This pertains as much to firms and consumers as to states, reflected in investment location and sourcing decisions by multinational companies. These may be more important than shifts in foreign policy stances by OECD countries towards China.

17 The potential negative implications of high levels of concentration in trade relations has long been recognised in the academic literature. See e.g. Hirschman (1945) and Srinivasan (1988) for arguments that unfettered trade with (actual or potential) adversaries can entail unacceptable levels of dependence and associated risks to national autonomy and defence.

18 https://ec.europa.eu/competition-policy/international/foreign-subsidies_en

19 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6642

20 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02019R0452-20200919&from=EN

an issue-by-issue basis. This pertains to many NEOs, not only national security. As is clear from the data discussed in Chapter 3, in practice other NEOs are more important in terms of motivating national trade policies and domestic industrial policies that give rise to potential cross-border spillovers.

1.1 SPILLOVERS FROM PURSUIT OF NON-ECONOMIC OBJECTIVES

From the very beginning of the trade regime, negotiators of the International Trade Organization foresaw states playing an active role in the economy. This is precisely the logic underlying Ruggie's (1982) well-known analysis of embedded liberalism. There is a strong presumption in favour of intervention to realise NEOs. The difficulty is that the way policies emerge from domestic politics and thus the justifications for and modalities of intervention will differ in fundamental ways between countries. Since these policies are often central to the domestic policy goals of the state, those differences must be recognised in any stable international system of rules. This makes reform of WTO disciplines an important part of any effort to manage policy spillovers associated with national pursuit of both economic and non-economic goals.

While national security issues and geopolitical conflict have become more prominent, so have climate change and pandemics. As with national security, there will be a pole of existential threat in each of the other cases, increased proximity to which will increase the salience of the issue. Given the current instability caused by changes in salience in all these domains, it is essential to think about spillovers across domains and how the WTO handles these other non-geostrategic, but still deeply threatening, issues. The key international legal framework here is GATT Article XX (General Exceptions) (Mavroidis 2016, Ch. 9).

Article XX contains chapeau language stating that application of trade policy tools under the listed exceptions should be "[s]ubject 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." Thus, Article XX imposes constraints on WTO members, notably that measures be the least trade restrictive means necessary to achieve the domestic goal and that they apply on a non-discriminatory basis (i.e. apply equally to all foreign and domestic suppliers of the products concerned). On the other hand, Article XX mentions only a limited (closed) list of NEOs that reflect concerns prevailing in the 1940s. As is, Article XX provides a general framework for managing spillovers associated with broadly legitimate interests of states but does not explicitly mention many of the

NEOs that have come to be prominent in the design and implementation of trade-related policies. Because of the problem that is inherent in using closed lists to determine the coverage of disciplines, over time adjudicators have expanded the scope of Article XX through case law.[21]

A similar problem applies to WTO provisions dealing with subsidies, an instrument that often will be more efficient in realising NEOs than border barriers. There has been substantial increase in the use of subsidies motivated by NEOs, ranging from national security narrowly defined, to broader conceptions of economic security and global challenges such as combatting climate change by decarbonising the economy (Trujillo 2020). Examples include the 2022 US Inflation Reduction Act (IRA) and the US CHIPS Act. In part such programmes also reflect economic competitiveness objectives. Often the measures that are implemented will have multiple targets. As a result, interventions may be supported by domestic constituencies that have different goals. As discussed further below, this calls not only for domestic analysis, monitoring, and evaluation of the effects of policies and their incidence, but for multilateral scrutiny of the effectiveness of policies and their spillover impacts.

The WTO Agreement on Subsidies and Countervailing Measures (ASCM) does not recognise that in many situations subsidies may be a first best policy. Under the ASCM all subsidies are in principle either prohibited or actionable – it does not consider what the theory of economic policy suggests should be the focus of disciplines: the extent of spillovers created by subsidy measures. The agreement is also based on the erroneous assumption that national and corporate frontiers coincide. Because of the territorial scope of Article 1 ASCM, only subsidies granted by a host country to a firm can be countervailed.[22] The agreement addresses subsidies that are allocated by governments, leaving it to adjudication whether and when state-owned enterprises (SOEs) can be held to engage in subsidisation that damages competition. Several Appellate Body decisions regarding features of the ASCM, of doubtful consistency with the letter of WTO law, exacerbated perceptions in some quarters that the extant rules were not fit for purpose.[23]

Much of the recent public discussion of subsidies has emphasised the role of state-owned enterprises in China. It is, however, important to recall that two of the longest running subsidy disputes in the WTO relate to support for Boeing and Airbus, i.e. between the transatlantic partners, and not between China and any WTO member. More recently

21 In its 2014 report on *EC-Seal Products* the Appellate Body interpreted the term ‘public morals’ to cover standards of right and wrong, which appears to be rather all encompassing. Subsequent case law also interpreted the terms used in Article XX expansively. The reasoning of the 2019 panel in DS472: *Brazil –Certain Measures Concerning Taxation and Charges* implied that all public policy is associated with public morals. In DS543 (2020): *United States –Tariff Measures on Certain Goods from China*, the US invoked the public morals exceptions to defend import duties imposed on Chinese products further to a Section 301 investigation. The panel was somewhat less expansive but held that the scope of the term ‘public morals’ in Article XX(a) covers measures with an economic dimension used to attain this NEO. These cases have major potential implications for the utility of engaging in adjudication as a means of addressing disputes on trade measures used to attain NEOs. We will return to them in subsequent chapter of this study.

22 The EU has unilaterally bridged this gap to enable it to address distorting subsidies paid by foreign countries to economic agents in its market. https://ec.europa.eu/competition-policy/international/foreign-subsidies_en

23 Ahn (2021) and Mavroidis and Sapir (2021) discuss disputes brought to the WTO regarding the understanding of ‘public body’, incoherence across Appellate Body reports, and how the jurisprudence alienated the US.

the EU has expressed serious concerns regarding US consumer subsidies for purchases of electric vehicles in the Inflation Reduction Act, which are limited to vehicles assembled in North America and include sourcing requirements for batteries intended to reduce reliance on China and other 'foreign entities of concern'.[24] The complex mix of industrial policy, national security, and environmental policy motivations (greening the economy) embodied in the Inflation Reduction Act illustrate the need for international cooperation on subsidies to recognise they may be used for multiple purposes and that differences of modalities in and justifications for subsidies vary across members. The key is managing international spillovers from such policies. Many of these will be carried by trade without the implication that the trade effects are a hidden object of the policy. Others will reflect bootlegger-Baptist dynamics, where protectionist consequences are an unintended side effect of the way a non-economic objective is pursued. Yet others will constitute straightforward protectionism, this being the specific intent of policy.

24 www.congress.gov/117/plaws/publ169/PLAW-117publ169.pdf

CHAPTER 2

Economic and non-economic objectives

A greater focus on using trade to achieve a range of non-economic objectives combined with the high share of international trade that is associated with GVCs raises important policy design questions. The theory of economic policy developed by trade economists as an extension of basic Pigouvian welfare economics provides a convenient framework for characterising and evaluating the use of trade policy to achieve NEOs. Although the theory is developed at a high level of technical sophistication, the core intuition can be represented as a sequence of three questions:

- What is the problem or goal?
- What instruments are available to deal with the problem or attain the goal?
- Of those instruments, which politically feasible one(s) achieves the objective at lowest cost?

The theory is useful for the discussion in this study in making a distinction between economic objectives (EOs) and NEOs. Economic objectives refer to goals related to increasing the efficiency of the economy by 'fixing' a 'distortion'.[25] Economic objectives are relatively easy to understand, mostly uncontroversial, and have clear policy responses. The policy choice/evaluation problem is inherently an optimisation problem—i.e. what is the best policy from the perspective of a given policymaker? Answering this requires knowledge of the relevant parts of the national political economy that determine the constraints of the problem and of the decision-maker's objective function (i.e. that which is to be optimised).

In practice, the drivers for most policies are NEOs. The label 'non-economic' in NEO often leads to some confusion. Economic objectives relate only to distortions, while responding to NEOs often involves the *creation* of distortions. In practice, objectives may have either an economic or a non-economic dimension. The goal of economic security or de-risking supply chains, for example, which has become more central in the external strategy of the EU, is an economic objective insofar as the concern relates to addressing the potential exercise of market power by a trading partner that is a dominant source of supply and therefore raises the equivalent of competition policy concerns (predation, market foreclosure, abuse of a dominant position). Economic security is a NEO if the goal is to ensure that a certain share of production of a product is provided by local firms.

25 A 'distortion' in this context has a specific meaning. A perfectly competitive economy is characterised by the first-order conditions associated with the maximum policy choice problem. These are usually referred to as marginal conditions, and a 'distortion' refers to the failure of one or more of those marginal conditions.

Part of the potential confusion in distinguishing between economic and non-economic objectives is that some NEOs are directly about economic magnitudes. Consider income distribution. Most governments have income distribution objectives that are reflected in tax structures and subsidies for education, health care, etc. These goals have nothing to do with distortions. But many NEOs are not, proximately, about economic magnitudes. National security, public health, and environmental goals are all about social goals. However, policies adopted to pursue such objectives will generally have economic effects and economic policies will affect the pursuit of those objectives.

An important aspect of the 'what is the problem' question has to do with spillovers across issues. These are often ignored in analyses because, in stable policy environments, to a first order of approximation, different policy domains are independent of one another. As the world is complex, policy analysts would drown in the essentially infinite details of spillovers across policy domains. Furthermore, major policy domains tend to be institutionally organised independently of one another (distinct committees in the legislature, distinct executive bureaus, even distinct bodies of law). In an unstable environment such approximations become very poor. A good example is national security. Wolfers (1951) distinguishes between situations at 'the pole of power', when the sole concern of the state is self-preservation, and 'the pole of indifference', where the state has essentially no national security concern.[26] At most points in time, and for most issues, states will find themselves between these poles, with security traded off against other goals that also claim resources from the state and private uses. Close to the pole of power, national survival concerns subordinate all other goals, including trade goals. If the geostrategic environment is relatively stable, and the overall environment is not too close to the pole of power, other issues, like trade, can be treated as relatively independent from national security.[27] However, given the centrality of sovereignty/national security to all calculations in international relations, a change in the geostrategic environment will make spillovers a central concern of policy and produce changes in equilibrium policies across many policy domains.

26 The geostrategic environment is not the only source of potential existential threat confronting governments. Threats to the natural environment and to public health also fall in this category. For consistency with conventional usage, we refer to issues around the pole of power as 'national security issues'. There will be equivalent 'poles', and associated continua of similar structure, for other issues. Most of the time, except during open warfare, states find themselves somewhere between these two poles. Thus, as a first order approximation, it seems reasonable to treat this as a continuous variable.

27 Links between issues helps explain both how equilibrium policy can change even when the domain-specific environment of a policy does not change, and how domain-specific variables will still be statistically significant even if they do not determine the state of policy in that domain in a first-order way. Trade policy is a good example. The general liberalising trend is hard to explain without reference to state of policy outside the politics and institutions around trade, while the political economy of trade literature has demonstrated that standard economic variables predict well the dispersion of tariff rates, if not the average level.

All three of the above steps in the theory of policy design are important, but the first is too often ignored. We cannot think coherently about 'best-ness' of policy, nor about trade-offs between various policy objectives, if we do not have a clear notion of the relevant top-level objective function and the way it changes in response to changes in policy environment. The most obvious objective function is the Bergson-Samuelson social welfare function (SWF) (Bergson 1938, Samuelson, 1947):

> …a function of all economic magnitudes of a system which is supposed to characterize some ethical belief—that of a benevolent despot, or a complete egotist, or "all men of good will," a misanthrope, the state, race, or group mind, God, etc. (Samuelson, 1947, p. 221).

Specifically,

> …we may write this function of the form:
>
> $W = W(z_1, z_2, \ldots)$,
>
> Where the z's represent all possible variables, *many of them non-economic in character*. (pg. 221, our italics)

Samuelson goes on to note that:

> Between these z's there will be a number of "technological" relations limiting our freedom to vary the z's independently. Just what the content of these technological relations will be depends upon the level of abstraction at which the specifier of value judgments wishes to work. … In other words, the auxiliary constraints on the variables are not themselves the proper subject matter of welfare economics, but must be taken as given. (pp. 221-222)

An essential part of these 'technological relations' is the structure of the economy. That is, in choosing among policies, policymakers need to respect the constraints imposed by tastes, technology, and resource availability. In the full political-economic equilibrium, there will also be social and political constraints that policymakers must respect. The objective function identifies what the policymaker would like to accomplish, but the constraints identify the limits of policy in pursuing those goals.

We can be more explicit about the multiplicity of NEOs by assuming some form of separability in NEOs in the objective function, defining a social welfare function that has two sorts of variables, final consumption goods and NEOs:

$W = W(\mathbf{x}; \mathbf{n})$

Here **x** is a vector of final consumption goods and **n** is a vector of NEOs (e.g. national security, environmental quality, food self-sufficiency, etc.). As a place to start, we consider n to be relatively fixed over most policy-making situations. However, changes in the non-economic environment will have effects on the full general equilibrium. Suppose that n_1 is geopolitical security. If it is fixed, it is essentially embedded in the social

welfare function, affecting the equilibrium, but not changing. However, suppose that n_1 is a function of the geopolitical situation. If we measure the geopolitical situation (G) as lying on a continuum between Wolfer's (1951) pole of power and the pole of indifference, $n_1 = f^{n_1}(G)$.

While stable under normal situations, an event like a war that causes a shift toward the pole of power will cause a shift in the social welfare function (in particular, a shift in the relative weights on the various NEOs) which, in turn, affects the overall equilibrium. For example, this will cause shifts in policy affecting both allocation of domestic resources (e.g. an increase in military spending, shift towards alternative energy sources) and patterns of trade (embargoes, export controls, diversification of suppliers). We can carry out a similar exercise for any other NEO. Consider an environmental quality objective whose state is a function of current environmental conditions. The variable reflecting perceptions of those conditions might be changed in the direction of life-threatening catastrophe by a major environmental event (e.g. the Fukushima nuclear disaster in 2011 or a series of unusually hot summers).[28] Changes in one or more NEO variables will be evaluated (i.e. traded off) in the objective function with effects on the final equilibrium as a function of perceived relative seriousness of the changes and the costs of responding to the changed situation in the new equilibrium.

As indicated above, in normal/stable times, different NEOs are delegated to specialised parts of the state. Although different NEOs are linked via the full range of general equilibrium relations that define the constraint set of the optimisation problem, it is an attribute of a stable political economic equilibrium that these linkages are effectively internalised as part of the equilibrium. In the context of major changes, for example large shocks to the NEO environment, these sub-political economies need to be renegotiated, contributing to shifts in the overall objective function representing the interests of the state. Significant changes in the underlying political economy (the constraint set) will also affect the equilibrium and, thus, the equilibrium policy choices. As an example, take the emergence of GVCs as a mode of globalisation. It has been widely argued that the dramatic intensification of GVC production has changed the economic environment of many countries in fundamental ways. This change is closely related to the more general extension of ICT in ways that make causal connections unclear.[29] Such large-scale changes in the constraint set affect optimal policy choices by changing both the direct objectives of policy and the terms of trade-offs among objectives. In addition, these changes interact with a number of NEOs in complex ways (e.g. national security,

28 It should be clear that these changes can also affect the constraints.

29 As mentioned, GVC production is a response to ICT as a general-purpose technology ('GPT'). GPTs affect aggregate growth by inducing economy-wide transformations in production (Bresnahan 2010). ICT is generally considered a fundamental GPT in the current economy (Basu and Fernald 2007). An important attribute of GPTs in general, and ICT in particular, is that economic growth may decline as macro-reorganisation occurs (Liao et al. 2016, Brynjolfsson et al. 2021).

environmental sustainability, health). Another example is a change in the policy of a major trading partner. If we presume that the initial situation is some kind of generalised Nash equilibrium and something changes in the foreign political economy that causes it to adopt new policies, the domestic (Home) policy must change.[30]

Given clarity on the objective function, the next step is to characterise the policy space appropriate to a given objective. This will involve an instrument inventory and an evaluation of the costs and benefits associated with the use of each instrument. The idea of an instrument inventory is simple: this is just a list of all the possible ways the state might choose to approach a problem. The much harder part is to compare the instruments in terms of their costs and benefits with respect to the policy objective in question. The straightforward part of this exercise is to identify the direct impact of a given instrument on the objective in terms of the magnitude of the effect on the objective measured in terms of change in the objective function, less the costs of that policy also measured in terms of the objective function.[31] Especially for non-marginal changes of the sort that characterise most significant policy changes, the more difficult issue will be evaluating the opportunity costs of responding to a changed situation in one domain in terms of changed policy environment facing other domains. For example, the Russian invasion of Ukraine fundamentally changed costs associated with environmental policy in Europe. Some of this can be measured in dollar terms, but other costs in terms of rearranged political coalitions, terms of public discourse, etc. are much harder to measure, but are every bit as essential to the overall calculation.

As part of the evaluation of costs and benefits, it is useful to recognise any equivalences between instruments. For example, it is standard in trade policy analysis to recognise that an *ad valorem* tariff can be decomposed into a consumption tax combined with a production subsidy levied at the same *ad valorem* rate. Since each of the components implies costs that are additive, with clarity on the policy objective, it is possible to compare instruments in a straightforward way. Thus, for example, if the government has an industrial policy goal, a direct production subsidy will be welfare superior to a tariff (in the absence of some constraint on the use of the subsidy). The targeting principle of applying instruments that respond as directly as possible to the objective (Tinbergen 1956) will often prefer subsidies to trade measures. This creates a presumption against

30 Given that such change may well derive from politics unrelated to trade policy, negotiating a new equilibrium may involve difficult choices. This sort of situation requires construction of 'platforms' that permit discursive engagement among domestic actors, and, as will argue below, among states.

31 There are methods for evaluating the direct use of government resources, but these seem problematic for evaluating spillovers across policy domains in the case of non-marginal changes in the policy environment. For economic objectives, there is a natural measure in monetary terms. For the case of marginal change in certain types of NEOs, there is a literature in applied welfare economics that seeks to provide money metrics for policy interventions in terms of net social benefit (Feldstein 1964) or marginal value of public funds (Hendren and Sprung-Keyser 2020). It should be clear that we are not proposing an operational framework for measuring such policy changes, but rather proposing a framework for thinking about engagement over complex policy environments.

the use of border measures, but the subsidies will generally spill over to trading partners in ways that seem broadly inconsistent with the liberalising goals of the WTO. Conflicts between goals will need to be worked out in ways that recognise the political and economic constraints facing both (all) parties to changed spillovers.[32]

This last point suggests that international spillovers should be part of the evaluation of instrument costs and benefits in any significant policy (i.e. any policy with spillovers big enough to attract disputes with trading partners). As border barriers have been lowered and as governments face major shifts in policy environments calling for response, the relevant political subsystems will throw up policies with potentially large international spillovers on trade. This is not an argument against such policies in such domains, but it does suggest that prior to their adoption the international spillovers be explicitly considered and, even better, some form of systematic discussion with trading partners about the policies and the constraints under which the policies are adopted should be developed. This is most obviously true in domains where cooperative outcomes clearly dominate autarkic policies due to collective benefits (e.g. national security and environmental policies).

The final step in the theory of economic policy is instrument selection. Once the potential policy space has been characterised, this step is essentially trivial: select the instrument that achieves the optimal balance of degree of success in pursuit of the objective relative to the costs involved. As Samuelson (1947), in the discussion referred to above, makes clear, the optimal ('best') policy choice will be efficient in the sense that it satisfies a well-known set of marginal conditions. For economic objectives, efficiency enters all stages of the analysis; but for NEOs, the instrument selection step is the only point where efficiency enters directly.[33] Explicit recognition of this point is important given the tendency for uninformed critiques of the theory of policy to assert that efficiency is the beginning, end, and middle of the analysis. Hopefully it is clear at this point that this is not the case.

2.1 GLOBAL VALUE CHAINS, NON-ECONOMIC OBJECTIVES, AND THE THEORY OF ECONOMIC POLICY

Many of the concerns expressed by nationalist politicians and opponents of global economic integration (globalisation) centre on GVCs. The far-reaching changes in the extent and intensity of the division of labour associated with GVCs makes firms, rather than sectors, the central objects of concern for policymakers. What is involved in GVCs

32 This was more or less the GATT approach to subsidies. In the WTO the revealed preference was for an outright prohibition of some subsidies and/or unilateral decisions to countervail subsidies without multilateral deliberation at any stage.

33 This is essentially why welfare analysis tends to focus on economic objectives. The tight connection between the characterisation of the policy objective in terms of a failure of one or more of these marginal conditions leads directly to policies that offset these failures. The costs and benefits are easily understood in terms of the same directly economic (i.e. money metric) measures. This is also the attraction of the Bagwell and Staiger (2002) approach which embeds all issues in the marginal conditions associated with the terms-of-trade.

increasingly has little to do with a given industry, and more with what Grossman and Rossi-Hansberg (2008) call 'trade in tasks' and the trend towards servicification of manufacturing (Lanz and Maurer 2015) and bundling of products by firms engaged in international trade.[34] These changes make standard analytical frameworks that tend to evaluate policy through the lens of sectors and industry less suitable for thinking about NEOs.

An essential task as part of any programme of thinking about sustaining the liberal trading system is to understand how to accommodate GVC production in a world economy characterised by systemic differences between large economic powers. Like any enterprise, lead firms organising GVCs need an environment conducive to capitalist calculation (e.g. rule of law, enforcement of property rights, functional capital markets, etc.), but because this calculation occurs across multiple sovereign jurisdictions, the (re-)construction of such a regime must involve a focus on domestic policies that affect the functioning of firms in a GVC environment. In very broad terms, this is the same programme undertaken by the members of the WTO for border measures: liberalisation, transparency, and dispute resolution. However, because each of these will impinge on non-trade policy elites, institutions, and public discourses, it is not possible to constrain these politics in the technocratic framework that served global trade politics well through much of the post-WWII period. The relevant political and epistemic communities will extend far beyond trade ministries and trade practitioners, making trade policy more complex and much messier.[35]

Globalization implies not only increased opportunities for firms to take advantage of production in places which offer a discount for looking the other way when, say, human rights are violated; but it also makes the fact of such opportunism more obvious, leading to a more active civil society response. While firms will seek to internalise the consequences of such a response, there is no reason that the firm response will align perfectly with civil society or state objectives with respect to NEOs. As with national security, this may permit a more targeted response along a value chain (instead of the blunt response to a firm as a unified entity). Independently of which specific set of issues concern the policymaker, a key is the way that these large policy areas are related to each other. At the level of the economy, this is the full general equilibrium: how does a change in the economic or policy environment change the payoffs of concern to the policymaker? For example, new GVC opportunities will change incentive structures of firms, investors, and households. Some of those changes require no policy intervention, but sufficiently large changes are likely to set adjustment processes in motion that do require intervention.

34 What has been called 'carry-along' trade. See Bernard et al. (2019).

35 Haas (1992, p. 3) describes an epistemic community as 'a network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area. … they have (1) a shared set of normative and principled beliefs …; (2) shared causal beliefs …; (3) shared notions of validity …; and (4) a common policy enterprise'.

Appropriate policy intervention will support adjustment in directions implied by the decisionmaker's objective function. More fundamentally, large changes in the policy environment (e.g. ecological disasters, land wars in Europe, or the emergence of isolationist politics in the US) will change the structure of objective functions, affecting policy choices, and triggering spillovers across issue areas that must be explicitly incorporated in the policy optimisation problem. There is nothing about GVCs that should cause a change in the objectives of states (or civil society). The weights on various components of the objective function may change, and the instruments appropriate to respond to an economy characterised by GVCs may change, but the fundamental objectives are determined by factors other than the emergence of new technologies and new economic opportunities for firms.

Distortions in the global economic environment associated with heterogeneous and inconsistent domestic regimes make management of GVCs more difficult and riskier. The goal of domestic (national) economic objectives is to permit rationalisation of firm decision-making in the interest of increased efficiency across all jurisdictions. Unlike border distortions (e.g. tariffs, quotas, etc.), the relevant distortions here will be heterogeneous domestic policies.[36] The inventory of policies that might implement domain-specific policy reforms (e.g. competition law, incorporation, accounting rules, etc.) and assessing the efficiency implications of policy (changes) is in principle unproblematic, assuming clarity on the underlying objective. However, finding the politically feasible subset of such policy changes involves negotiation and is potentially difficult.

Concerns with respect to access of potential geopolitical competitors to sensitive parts of supply chains are like those arising for national security. The main issue is dependence on countries that may seek to exploit some level of economic dependence in a coercive way. A contemporary example in the tech sector are concerns with exposure of sensitive information. Although such concerns motivate talk about reducing dependence and 'de-risking' supply chains, there is nothing inherently different about this relative to the older literature about national security policy. If there is genuine increased exposure to geopolitical risk, there is a justification for policy. However, that justification rests on a demonstration of genuine risk.

In most cases, there are multiple sources of supply, including from reliable allies. This logic rendered the Trump administration claims about national security risks arising from imports of steel and aluminium obviously fallacious even ignoring the fact that the measures targeted allied nations. Similar considerations attend concern with the wide array of other NEOs. For example, GVCs do not appear to bring any essentially new issues to the consideration of environmental policies. While firms can and do

36 Unlike border measures, there is no 'zero' as an abstract target. 'Free trade' is not the goal. Firms require an appropriate institutional environment, but states with different histories and political economies will not be able to agree to uniform legal and regulatory environments, so the goal of 'openness' is some form of well-grounded mutual recognition.

shift pollution along value chains in ways that may increase total pollution (although the overall effect is empirically complicated, see Copeland et al. 2022), the fundamental policy issues in terms of the instrument inventory and the selection from that inventory are not really changed.

Assessing exposures when production involves GVCs is more complex than in a world where production is mostly national, but this does not change state preferences with respect to security. The appropriate response is securing better information so that risks can be better evaluated. If some specific links in the GVC are exposed to this sort of risk, and it can be shown that firms are unconcerned with that risk (and so do not, themselves, take actions to protect against that risk), policies targeting those weak links through some form of targeted subsidy to harden the link and/or resilience is appropriate. It may be the case that, by being able to target genuine national security problems more precisely than at the simple sector level, the cost of an appropriate national security policy could be lower. Overall, there is little justification for a general policy of 'friend-shoring' or the use of trade policy instruments to encourage re-shoring of value chains. Such policies at a minimum need to target products that are critical for security as opposed to situations where claims to this effect are essentially unsubstantiated and uncontested.

Applying the theory of economic policy and bolstering the core principles that underpin the GATT/WTO can help inform when and how to use trade to attain or safeguard non-economic objectives. This extends to existential threats (national security-related, environmental, global pandemic) that make large claims on resources, as choices in any one of these domains will affect opportunities and outcomes in the others and generate cross-border spillovers. The clearer the trade-offs involved, the better will be overall policy from the perspective of national pursuit of the underlying objective function. Much of the domestic politics around the use of trade policy to attain NEOs is about who gets to define the trade-offs, assuming the political process considers them at all. This calls for recognising potential interdependencies and spillovers across issues. An insistence on values (labour standards, rule of law) may come at cost of military security; energy security may require relaxing environmental policies that otherwise would preclude use of more polluting technologies. Insofar as specific goods are so essential to defence or economic security that there must be a larger domestic capacity than would result from the normal operation of the market, or more generally a reduction in concentration of sourcing of critical supplies, intervention may come at the cost of economic inefficiency. Analytical frameworks to help decision makers recognise and evaluate the inevitable trade-offs between efficiency and greater security are a critical input into informed and accountable decision making.

CHAPTER 3

The increasing use of trade policy for non-economic objectives

Companies engaging in international trade and investment are subject to a wide range of policies that reflect NEOs. These include health and safety-related product regulation (standards), production requirements (e.g. a prohibition on the use of child labour), and specific rules for exporting products and technologies that are military in nature or that are dual use. Responsible state agencies or bodies charged with the implementation of associated policies will determine whether trade and investment restrictions are an appropriate tool to use to realise the underlying NEOs. Such decisions will be informed to a greater or lesser extent by processes that embody elements of the theory of economic policy: defining the goal, assessing potential threats associated with trade or investment in specific technologies, and application of appropriate policy instruments.

In the case of national security, trade and investment restrictions are a core tool. They have been a feature of US external policy since the early Republic (e.g. Jefferson's embargo), featuring in the 1917 Trading with the Enemy Act (TWEA) and the 1977 International Emergency Economic Powers Act (IEEPA), two legal instruments under which economic sanctions can be imposed at the discretion of the US President (Coates 2018).[37] Many of the actions under these provisions concern trade restrictions taken during WWII (see Annex 1).[38] Many countries maintain export control regimes. These have been expanding to go beyond military products to cover digital technologies. An example is the US Export Control Reform Act (2018) which restricts exports of emerging and foundational technologies that can potentially be used for civilian and military purposes and that were not subject to export in the US Export Administration Regulations (De Bruin 2022). EU Regulation 2021/821, which replaced Reg. 428/2009 expands the scope of national security to include economic security and human rights concerns and provides a framework to control the export, transfer, transit, and brokering of dual-use items.[39] It specifically mentions AI, semi-conductors, business established in critical infrastructure, cybersecurity, quantum computing, and biotech as 'sensitive' areas.

37 The IEEPA, enacted in 1977 by President Carter, empowered the US President to declare an emergency occurring at least in substantial part outside the US.

38 Measures taken after the creation of the GATT (1947) mostly targeted countries that were not GATT members at the time actions were imposed – China, the USSR, East Germany, North Korea, Cambodia, North Vietnam (1964), and Vietnam (1975). Two exceptions are Cuba and Haiti.

39 European Union (2021).

Similar processes may apply to direct investment. In the US, the Committee on Foreign Investment in the United States (CFIUS) advises the President on national security with respect to both incoming, as well as outgoing investment. CFIUS is an inter-agency body, and it comprises individuals employed in the Departments of the Treasury (chair), Justice, Homeland Security, Commerce, Defense, State, Energy, and the US Trade Representative (USTR). The Committee spans officials with expertise in foreign relations, national security, economic policy, and trade.[40] In the EU, the Screening Regulation[41] provides a framework to coordinate policies of EU member states.

Trade and investment interventions reflecting national security considerations constitute only part of the constellation of trade-related measures taken by governments in the pursuit of NEOs. In some instances, this will primarily involve specialised regulatory agencies and their political oversight bodies and epistemic communities – e.g. the use of product-specific technical regulations pertaining to the health and safety of products. In others the trade community may have a voice. The degree of clarity on the NEOs to be pursued and the use of trade policy instruments to pursue them will vary across domains and across countries. The extent to which extant trade, industrial and regulatory policies are motivated by NEOs is unknown. The focus in the WTO is on trade policy as such, independent of the underlying goals a WTO member has. The WTO does not require reporting of the objective motivating a trade policy unless an exception is invoked. As already mentioned, there are two exceptions provisions in the WTO. One provides for measures taken to protect essential security (Article XXI GATT) and the other provides for general exceptions relating to a specified list of NEOs. These include protection of exhaustible natural resources, human, animal or plant life or health, regulating products produced with prison labour, restricting exports to ensure essential quantities to a domestic processing industry, and acquiring or distributing essential products in short supply (Article XX GATT).[42]

There is no notification requirement as such under Article XXI. However, the WTO does require notification of measures justified under Article XX. Moreover, all quantitative trade restrictions must be reported (under Article XI GATT). In practice, therefore, insofar as national security objectives or other NEOs give rise to quantitative trade restrictions their use should be reflected in notifications under Article XI. Both the

40 It was established in 1975, following an Executive Order that President Gerald Ford had adopted. The passage of the Exon-Florio amendment to the Defense Production Act in 1988 was transformative as far as CFIUS is concerned: it was no more a mere administrative body, but one with significant authority. The Byrd Amendment added to its powers by subjecting some categories of investment to compulsory notification to CFIUS, which eventually added to its expertise by including members of the US Department of Homeland Security, the Office of Management Budget, the Council for Economic Advisers, as well as the Director of National Intelligence.

41 Reg. (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union (it entered into force on 11 October 2020).

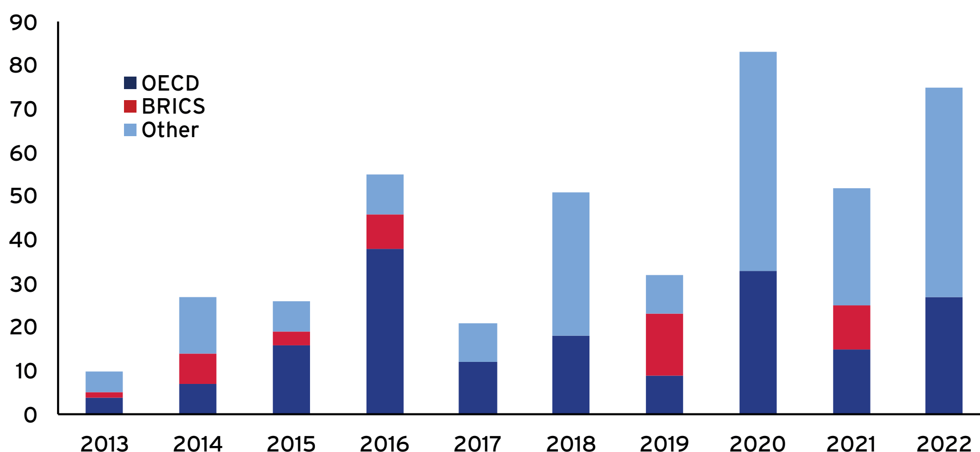
42 Both provisions are discussed further in Chapter 4 below.

Technical Barriers to Trade (TBT) and Sanitary and Phyto-Sanitary Measures (SPS) Agreements also require product-specific health and safety regulations affecting imports or exports to be reported. Given that many such measures will reflect NEOs, these notifications are another source of information on the use of policies motivated by NEOs.

3.1 COMMITTEE ON MARKET ACCESS NOTIFICATIONS

Many measures restricting trade to protect national security come under the GATT Committee on Market Access (CMA). The most recent publication issued by the CMA[43] reports that 50 notifications of quantitative restrictions were made that mention Article XXI in general terms, 130 notifications mentioned Article XXI(b), and another 59 invoked Article XXI(c).[44] Figure 1 plots the number of quantitative restrictions notified to the WTO that mention Article XXI explicitly or that justify restrictive trade measures as necessary to protect essential interests.[45] These data reveal that in 2013-2022 notified measures mentioning national security or essential national interests have been growing. Figure 1 also shows that BRICS countries (Brazil, Russia, India, China, and South Africa) are relatively infrequent notifiers of such trade measures; OECD member countries generally account for a larger share of notifications in any given year. Since 2018, the largest share of notifications have been made by non-OECD, non-BRICS countries.

FIGURE 1 **NOTIFICATIONS OF QUANTITATIVE RESTRICTIONS MENTIONING ESSENTIAL INTERESTS, 2013-2022**



Source: WTO quantitative restrictions database (https://qr.wto.org/en#/explore/wto_justifications)

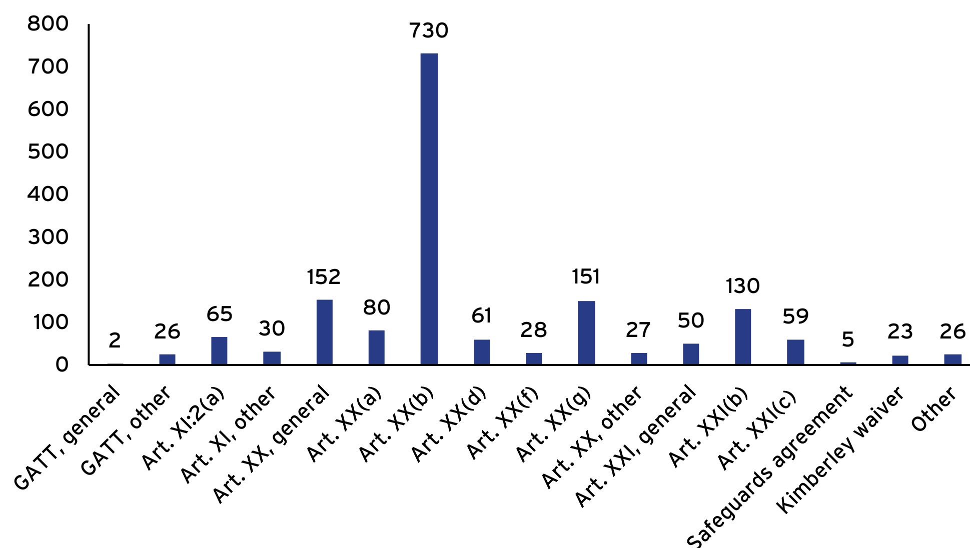
43 WTO Doc. G/MA/W/114 Rev.4 of 22 March 2022.

44 The G/MA/QR/N series published by the WTO provide detailed information in this respect. See e.g. WTO Doc. G/MA/M/67 of 27 September 2018 (US restricts access to telecommunications market for suppliers of Chine origin, pp. 23 et seq.); WTO Doc. G/MA/M/68 17 May 2019 (Australia decides that Huawei, a Chinese company, would not be allowed to supply 5G in Australia, pp. 10 et seq.); WTO Doc. G/MA/M/70 30 October 2019 (US includes Huawei in the list of entities to which export restrictions apply, pp. 37 et seq.).

45 The latter may include references to Art. XX or Art. XI. What matters for inclusion in Figure 1 is that the justification for the measures includes national or essential security interests.

The use of trade measures to achieve NEOs other than national security constitute – by far – the largest share of all quantitative restrictions. Notifications mentioning Article XX are five times greater (1,229) than the 239 measures referencing national security (Figure 2). This is not surprising given that Article XX covers a range of possible NEOs and the increasing frequency with which governments have recourse to trade measures to attain NEOs.

FIGURE 2 **NUMBER OF QUANTITATIVE RESTRICTIONS NOTIFIED TO THE WTO BY PROVISION INVOKED**



Note: Stock of all measures notified as of 2022.
Source: WTO (2022).

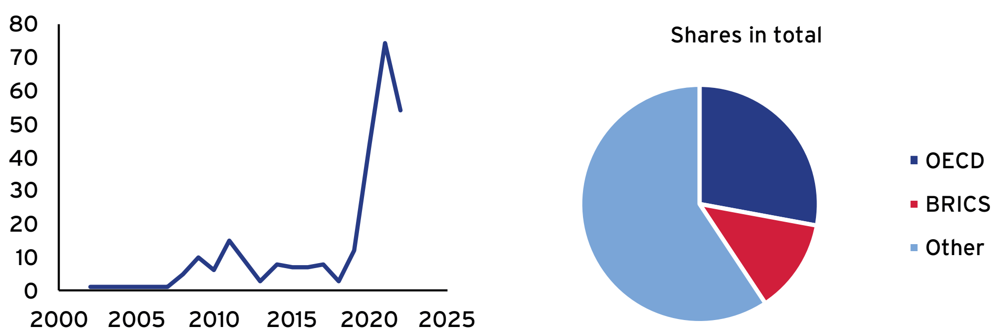
3.2 TECHNICAL BARRIERS TO TRADE NOTIFICATIONS

Article 2.2 of the Technical Barriers to Trade (TBT) agreement mentions security among the indicative list of legitimate objectives that WTO members can pursue. Annex 2 provides a summary list of notifications of national regulations made to the TBT Committee that mention or concern national security.[46] Figure 3 plots the annual number of WTO TBT measures notified to the WTO since 2002 that mention the term 'national security'. This reveals a very sharp increase in the number of security-related TBT measures adopted by WTO members in 2020 and 2021, with OECD countries accounting for less than one-third of the total. As of the end of October 2022, a total of 258 notifications mentioning national security in the body of the text describing the intervention were notified to the TBT Committee, of which 182 occurred between

46 This compilation is based on a keyword search for the terms 'national security', 'essential interest', or 'vital interest' in the cover note accompanying a notification and inspection of the text of these notifications.

2018 and 2022. Of these, 39 were notified by G2 (EU, US) countries, 33 were notified by other OECD countries, 36 were notified by the BRICS (Brazil, Russia, India, China, South Africa), 17 were notified by least developed countries (LDCs), and 128 were notified by other developing countries. The latest official WTO classification brings the number down to 192 as of the end of 2021, with 51 new notifications made through October 2022.[47] The overall numbers could be lower or higher depending on the criteria for coding/classification used. But it does provide a rough approximation of the rising incidence of national security issues in TBT measures.[48]

FIGURE 3 **NUMBER OF WTO TECHNICAL BARRIERS TO TRADE NOTIFICATIONS MENTIONING NATIONAL SECURITY, 2002-2022**



Source: Own calculations based on WTO documents. See Annex 2 for the underlying data.

Table 1 synthesises information collated in Annex 2 on the incidence of the term 'security' in TBT notifications. The data reveal that the scope of security invocations has been widening to include economic security, cybersecurity, and/or protection against hackers (private agents). Most notifications (70%) address matters relating to public health, safety, and the environment, i.e. NEOs other than national security (Table 1). China notifies very few measures that refer to national security, a pattern that applies to the BRICS as a group, accounting for 12% of the total in the last two decades. Non-OECD, non-BRIC WTO members dominate in terms of numbers, accounting for 60% of all security-related TBT notifications during the 2002-2022 period (Figure 3).

47 WTO Doc. G/TBT/47 of 2 March 2022, Chart 30.

48 Some of the notifications that are included have weak, if any, links to national security. In STC448 for example, China complained about discrimination in conformity assessment practiced by the EU. National security was mentioned only because the EU wanted to contrast voluntary certification for encryption (the issue in this STC), to compulsory certification for encryption (in case of national security concerns). Conversely, there are many notifications which deal with military material, public order and safety, enhanced public security, and public security that do not explicitly mention 'national security' (e.g. G/TBT/N/UGA/1091; G/TBT/N/POL/4; G/TBT/N/FIN/46, and 38; G/TBT/N/CAN/362; and G/TBT/N/SWE/46). There are also cases where notifications do not per se deal with national security but were prompted by national security concerns. In such cases, transparency obligations can be legitimately neglected.

TABLE 1 **NOTIFICATIONS UNDER THE TBT AGREEMENT MENTIONING NATIONAL SECURITY, 2002-2022**

Year	Total no. of notifications	No. of notifications by:			Type of issue/goal of measure notified (share; %)		
		OECD	BRICS	Other	Arms; explosives	Public health & safety; environment	ICT; cyber; telecom network
2002	1	1			0	100	0
2007	1			1	50	50	0
2008	5	0	1	4	10	90	0
2009	10	5	0	5	0	60	40
2010	6	1	1	4	0	85	15
2011	15	4	0	11	20	80	0
2013	3	3	0	0	0	100	0
2014	8	3	1	4	15	85	0
2015	7	1	4	2	15	85	0
2016	7	3	3	1	0	40	60
2017	8	6	2	0	0	40	60
2018	3	2	0	1	33	34	33
2019	12	7	4	1	20	40	40
2020	44	6	7	31	5	90	5
2021	74	18	7	49	11	69	20
2022	54	12	3	39	5	80	15
Total	258	72	33	153	12	70	18

Notes: One notification may cover many products. Notifications by Botswana skew totals in 2020 and 2022, with 18 and 29 separate notifications, respectively. Years without mention of national security not reported.

Source: Own calculations based on WTO documents. See Annex 2 for the underlying data.

3.3 A BROADER PERSPECTIVE ON THE USE OF TRADE MEASURES TO ATTAIN NON-ECONOMIC OBJECTIVES

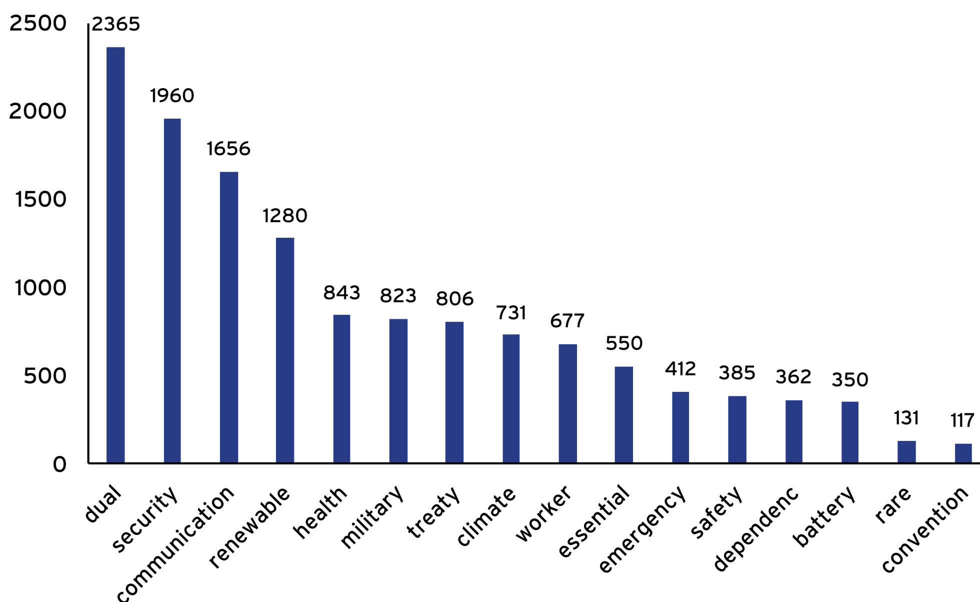
The Global Trade Alert (GTA), an independent trade policy monitoring initiative launched in 2009, provides detailed information on trade-related measures put in place by the G20 and other states. The GTA classifies such measures by type of intervention (i.e. the instrument used) and whether it is designed or expected to discriminate against foreign products or producers. The GTA does not follow the WTO legal definition of key terms such as ‘subsidy’ but casts a wider net, including measures that are not subject to WTO disciplines. As of early 2023 the number of trade-related measures collected by the GTA had surpassed 50,000. The underlying information on each new trade measure included in the GTA is obtained using web scraping tools and captures (announced)

changes in national legislation, regulation, decrees, etc. These indicate the purported goal or motivation underlying each measure. This information can be used to assess the frequency with which keywords or phrases are observed that reflect the intent of a measure.

Figure 4 plots the total number of times one of the keywords included in the legend is observed in the text describing (motivating) a measure included in the GTA dataset. The keywords are intended to capture measures that address national security concerns, e.g. dual use goods ('dual'), arms and weapons ('military') as distinct from other NEOs such as the environment ('climate', 'renewable') or public health ("health') and worker protection ('worker'). We also include terms that capture potentially sensitive products such as telecommunications equipment ('communications') and measures referencing international treaties ('treaty', 'convention').

'Dual', 'security', and 'communication' are the most frequently observed words in the set of measures that mention at least one of the keywords listed in Figure 4. There were 50,900 measures in the GTA database when the keyword search was implemented. Thus, the overall share of measures mentioning the keywords is relatively low: 'dual' accounts for 4.6% of total, and 'security' for 3.8% of all measures in GTA, illustrating that economic objectives dominate use of trade/related policy instruments.

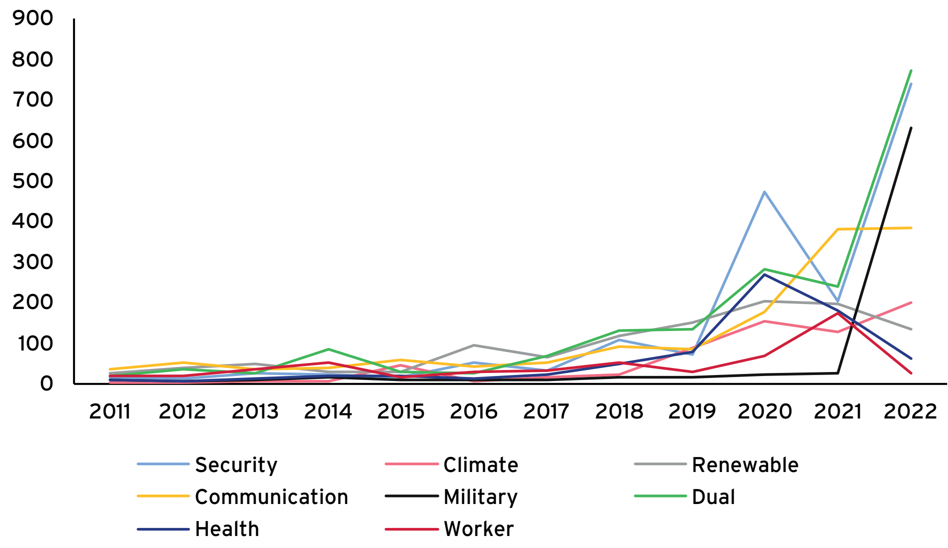
FIGURE 4 **TOTAL NUMBER OF TIMES A GIVEN KEYWORD APPEARS IN GTA MEASURES, 2009-2022**



Source: GTA.

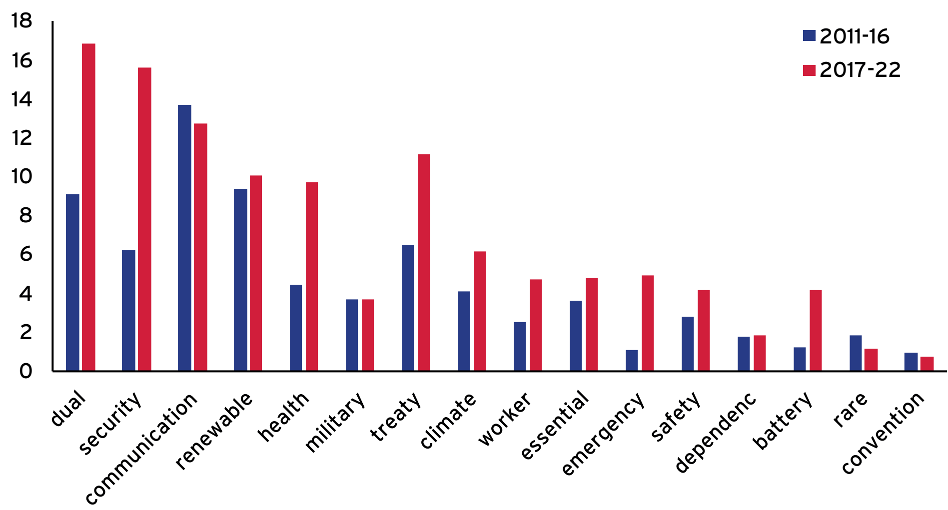
Figure 5 shows that the frequency of the use of keywords associated with national security concerns ('security', 'dual', 'military') greatly increased in 2021. Among other NEOs, the incidence of 'climate' has increased substantially since 2018, but other NEOs are clearly dominated by security-related measures in recent years. Figure 6 makes clear that the frequency of use of most keywords (i.e. NEOs) is greater in 2017-22 than it was in 2011-2016.

FIGURE 5 **TRENDS IN USE OF KEYWORDS IN GTA MEASURES, 2011-2022**



Source: GTA.

FIGURE 6 **SHARE OF MEASURES WITH SPECIFIED WORD**



Note: Figure shows percentage of all measures with ≥ one keyword.

Source: GTA.

Turning to the type of policy instrument used, Figure 7 indicates that subsidies of some type are by far the most frequently used instruments followed by controls on commercial transactions and investment by companies. The latter category includes investment restrictions. Traditional trade policies such as export or import bans and tariffs are dominated by these two types of instruments. Annex 5 provides breakdowns in the use of policy instruments by keyword. This makes clear that security-related interventions (i.e. those including one of the associated keywords) frequently take the form of controls on commercial transactions, whereas measures that include words associated with other NEOs such as climate and health overwhelmingly are associated with subsidies.

FIGURE 7 **FREQUENCY OF POLICY INSTRUMENTS USED, 2010-22**

Note: Observed > 100 times, seven keywords

Source: GTA.

CHAPTER 4

International disciplines on the use of trade for non-economic objectives

Intergovernmental cooperation through international organisations has been a staple of efforts by nation states to manage potential conflict, both military and economic. The League of Nations, established after WWI, was the first global institution intended to foster and support peaceful relations between nations. It required signatory states to "respect and preserve as against external aggression the territorial integrity of other members and existing political independence of all Members of the League" (Art. 10). In case of disputes likely to lead to a rupture, members were to submit the matter to arbitration or judicial settlement (Art. 12) or to the League Council (Art. 15). If a member resorted to war without engaging in these dispute settlement processes, it would be deemed to have committed an act of war against all other Members of the League, which were then to immediately to subject that nation

> "to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not (Art. 16).

Art. 16, reproduced in Annex 3, also included a commitment for mutual support to minimise the costs resulting from financial and economic sanctions to support one another "in resisting any special measures aimed at one of their number by the covenant-breaking State."[49]

The League of Nations made multilateral sanctions an integral part of the regime governing international relations of signatories, as an alternative – and a collective response to – the use of armed force. Following WWII, the United Nations Charter delegated decisions on measures to respond to any threat to the peace, breach of the peace, or act of aggression to the Security Council. Such measures included complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations (Articles 39, 41). Article 51 UN Charter specifies that the Charter does not impair the inherent right of individual or collective self-defence against an armed attack by another UN Member, that actions taken to exercise the right of self-defence must be immediately

49 https://avalon.law.yale.edu/20th_century/leagcov.asp. Article 16 was put into practice in 1935, when Italy attacked Ethiopia. Ristuccia (2000) discusses how the effectiveness of the associated sanctions were negatively affected by the US decision not to join the League.

reported to the Security Council, and that such measures do not affect the authority and responsibility of the Security Council to undertake actions it deems necessary to maintain or restore international peace and security.[50] Thus, sanctions continue to figure in the UN Charter – but are subject to consensus in the Security Council. If agreed, sanctions resolutions are binding on all members.

While the UN did not play a central role in addressing national security-related trade measures taken by Cold War protagonists, the GATT was seen as part of the national security policy of the US. Apart from Czechoslovakia, which had transited behind the Iron Curtain when the GATT was entering into force,[51] no member of the Soviet bloc participated in the GATT.[52] As a result, the nations that became GATT contracting parties incurred no obligations vis-à-vis the countries that became adversaries in the subsequent Cold War (McKenzie 2008, 2020). Trade measures motivated by national security concerns targeted countries that had not joined the GATT, implying that GATT disciplines did not have to be observed when taking discriminatory trade measures against Soviet bloc countries.

Over time, GATT membership expanded to include former enemies during WWII, Germany (1951) and Japan (1955), and then came to encompass several Soviet bloc countries: Yugoslavia (1966), Poland (1967), Romania (1971), and Hungary (1973). [53] When these countries acceded to the GATT, incumbent members could and sometimes did invoke the GATT non-application clause (Article XXXV). This permits a GATT party not to apply GATT provisions and commitments to a new member.[54] Article XXXV can only be invoked on accession of new member. Insofar as a GATT party desired to impose trade restrictions to safeguard national security after a new member had joined, it would need to invoke the national security exception embedded in the GATT (Article XXI). Because the initial set of Soviet bloc countries that joined the GATT were small players in world trade, and never objected to the export restrictions that Western states imposed under auspices of the Coordinating Committee for Multilateral Export Restrictions (COCOM), national security-motivated trade policies largely remained unaffected by the GATT.

50 Article 51 reads as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

51 Hudec (1975), Jackson (1969).

52 The Soviet Union received an invitation to avoid the criticism voiced during the Versailles Conference regarding the exclusion of Russia, but the core proponents of the GATT knew that the Soviet Union would refuse the invitation (Irwin et al. 2008).

53 Kostecki (1978, 1979) provides a comprehensive account of the terms of accession for these countries, which involved quantitative import expansion commitments by the acceding countries.

54 Article XXXV could be invoked for reasons that had nothing to do with national security. In fact, it could (and can) be invoked for any reason, as the intent for invoking it is not germane. This GATT-era provision is re-iterated in Article XIII of the Agreement Establishing the WTO.

The collapse of the Soviet economy and state structure in 1989 occurred at the time two trade negotiations were taking place in parallel: the Uruguay round (1986-93) and the accession of China to the GATT (starting in 1987). In the event, GATT members pursued their specific market access objectives vis-à-vis each other, including new subjects such as liberalising trade services and the protection of intellectual property.[55] Not only China (in 2001), but other former Cold War adversaries such as Russia (2012) also joined the WTO. Consequently, as geo-political tensions rose following Russia's 2014 annexation of the Crimea and growing perceptions in OECD countries that China's rapid growth was supported by practices that threatened economic and/or national security, the sources of concern involved members of the trading system, not outsiders. As a result, WTO provisions apply to invocations of national security to justify trade restrictions.

As discussed further below, the criteria (necessary conditions) that must be satisfied for WTO members to restrict trade in order to achieve other non-economic objectives are more extensive and intrusive than those under Article XXI for national security. Both the security and the general exception provisions in the WTO are similar in that they do not define the content or substance of the NEOs.[56] This is something that other international bodies do, notably the United Nations. Specialised UN bodies act as a locus of international efforts to define and attain globally shared NEOs. Examples include (i) the International Labor Organization (ILO), created in 1919, to promote worker rights, encourage decent employment opportunities, and enhance social protection, (ii) the United Nations Environment Programme (UNEP), (iii) the Food and Agriculture Organization (FAO), (iv) the World Health Organization (WHO), and (v) the United Nations Framework Convention on Climate Change (UNFCCC), tasked with supporting the global response to climate change. Some of these entities cooperate in setting international standards for products and/or production processes related to NEOs, such as health and safety regulations.

4.1 THE ESSENTIAL SECURITY EXCEPTION IN THE GATT AND WTO

The WTO separates the 'essential security' exception (Art. XXI) from 'general exceptions' for trade measures aimed at other NEOs: protecting public health, public morals, etc., which come under a different provision – Article XX.[57] Article XXI is an exception to the basic WTO non-discrimination rule, reflecting the fact that most-favoured nation

55 The latter was salient to the potential accession of China. Other subjects that could have established rules in policy areas that gave rise to trade tensions with China in the 2010s and thereafter – such as investment policy and competition policy – were removed from the Doha round agenda in 2003.

56 Apart from action under the TBT and SPS Agreements, where there is a form of conditional prejudging of the content of NEOs: if a WTO member decides to intervene in an area where international standards exist, it must use the relevant standards, unless if it can be shown that the existing standards are ill-suited to attain the objective sought.

57 Jackson (1969) suggests (pp. 742 et seq.) that the split between Articles XX and XXI followed the logic of separation that had been already adopted in the ITO (International Trade Organization). Separation suggests a legislative intent to treat milieu goals (like those mentioned in the body of Article XX) differently than national security. Practice of course might evolve against the original separation. An argument could be made that massive environmental pollution is a matter of national security. In this vein, see Deane (2012) who explores whether climate change could come under Article XXI.

(MFN) has no place in the realm of national security invocations.[58] The protection of national security is overwhelmingly linked to one particular situation, and the measures adopted aim to redress it. It is not about patterned behaviour (where most-favoured nation matters, like, for example, payment of customs duties on imports).

Article XXI GATT reads as follows:[59]

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

Article XXI, sub-paragraph (b) contains a 'necessity' requirement, but in contrast to the general exceptions provision (Article XX GATT), Article XXI does not include language requiring members to behave in even-handed manner. It also leaves open what constitutes 'essential security interests'. The presumption is that states are (must be) permitted to use trade policy for national security purposes, and that the latter are determined by the state that acts. Case law has addressed the appropriate/acceptable degree of discretion that WTO members enjoy in this regard.

GATT negotiators were careful when drafting Article XXI, as they sought to strike a balance that would give states latitude to act in a limited set of circumstances. The scope of national security is, for all practical purposes, a function of the term 'other emergency in international relations'. There was agreement that recourse to this provision was appropriate during wartime. When GATT was being negotiated (1940s) wartime meant armed conflict. It should be equally uncontroversial that the term 'other' means other than war (or war-like). The statement by John Leddy, the US negotiator who authored this provision, is illuminating:

58 This question has never been addressed in case law. There was an opportunity to do so in the dispute brought by Nicaragua against the US as one of the claims was that US measures were in violation of the MFN clause. The panel did not entertain this claim, as it held the view that its findings would not help the disputing parties to resolve their dispute, because the US had ex ante announced that it would not be implementing adverse findings.

59 Analogous provisions are found in the GATS and TRIPS agreements, which reproduce almost verbatim Article XXI. In similar vein, several WTO Annex 1A Agreements (in the realm of trade in goods) contain security clauses (e.g. Article 2.2 of the TBT Agreement; Article III of the Government Procurement Agreement).

… we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. With regard to sub-paragraph (e), the limitation, I think, is primarily in the time: first, "in time of war". I think 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. As to the second provision, "or other emergency in international relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on. I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose. We have given considerable thought to it and this is the best we could produce to preserve that proper balance.[60]

The focus of discussions was therefore more on 'when' action would be lawful rather than 'what' action should be acceptable. There is a marked difference in the resulting wording of provisions that dissociates Article XXI from Article XX. While both include a reference to the 'necessity' principle (the obligation to adopt the least trade restrictive measure available when pursuing a NEO), in Article XXI necessity is preceded by the term 'it', providing the GATT party that intervenes in trade for national security reasons with greater latitude.[61]

Officials were looking for disciplines that would help them distinguish between genuine and 'sham' invocations of the security exception – i.e. simple protectionism. During the negotiation, there was already uneasiness with the drafting, resulting in requests for additional clarifications:

60 E/PC/T/A/PV/33 of 24 July 1947 at pp. 20 et seq. See also US instigator Proposals for Expansion of World Trade and Employment Pub No 2411 (1945) at p. 45 p. 18.

61 This key difference has been acknowledged in panel practice, see for example, the report on DS512 *Russia-Traffic in Transit*.

> The Delegate for the Netherlands enquired whether the exceptions relating to emergencies in international relations and the essential security interests of Members could be worded in such a manner as to clarify their intended interpretation. The Delegate for the United States replied that these words had appeared in the original United States draft Charter as it was thought that some latitude must be granted for security as opposed to commercial purposes. The Chairman suggested that the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse.[62]

Similar passages abound throughout the negotiating record. Academic research on the negotiating record has failed to reach consensus on the intent of negotiators regarding the nature of Art. XXI. Some analysts maintain that the provision is self-judging, e.g. Bhala (1998) who argues to this effect based on wording of the provision (such as the term "it considers necessary ..."). On the other end of the spectrum, Boklan and Bahri (2020) conclude that the national security exception was never intended to be self-judging because the negotiating record does not indicate that the justiciability of this provision was excluded from consideration. Pinchis-Paulsen (2020), based on an analysis of the positions of US negotiators, the main architects of the national security clause, concludes that the US did not reject multilateral scrutiny of the invocation of national security but opposed an intrusive standard of review in case of disputes.[63]

4.2 GENERAL EXCEPTIONS: GATT ARTICLE XX

The general exceptions provisions in the GATT (Article XX), and their analogues in the GATS (Article XIV) and Art. 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), can be invoked to justify the use of trade measures to attain non-economic objectives that otherwise would violate negotiated market access commitments. Necessary conditions to do so include that measures apply on a non-discriminatory basis (contra Art. XXI) and can be argued to be necessary to attain a specific domestic policy objective. Thus, Article XX imposes more constraints on WTO members than Article XXI, notably that measures must (i) be the least trade restrictive means necessary to achieve one of the listed NEOs and (ii) apply equally to all foreign and domestic suppliers of the products concerned.[64] Article XX mentions a limited list of NEOs, comprising issues that reflect noneconomic concerns prevailing in the 1940s, but as already suggested, some of the terms have been interpreted quite widely in the case law. Although the list in Art. XX is exhaustive, there has never been a case where a GATT/WTO member invoked an NEO and could not fit it under one of the goals included in this provision. Subject to the requirement that measures are not applied in

62 E/PC/T/A/SR/33 of 24 July 1947.

63 As discussed further below, in the first dispute submitted to GATT scrutiny, Czechoslovakia (the complainant) was the only GATT party to insist that its dispute with US was justiciable.

64 Least trade restrictiveness is, at least in principle, a means to both reduce adverse spillover effects and potential efficiency costs of using trade policy.

a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail (an even-handedness requirement to avoid that WTO members serve one sauce to the goose and another to the gander), or a disguised restriction on international trade, it allows, inter alia, for measures to:

- Protect public morals (Art. XX:a);
- Protect human, animal, or plant life or health (XX:b));
- Regulate products produced with prison labour (Art. XX;e);
- Safeguard national treasures of artistic, historic, or archaeological value (Art. XX:f)
- Protect exhaustible natural resources (Art. XX:g);
- Restrict exports to ensure essential quantities to a domestic processing industry (Art. XX:h)
- Acquire or distribute essential products in general or local short supply (Art. XX:i)

In case of a dispute, the WTO Member invoking Art. XX must demonstrate that its policies satisfy the criteria laid out in the provision. The burden of persuasion varies across the various sub-paragraphs included in Art. XX. Some call for measures that simply 'relate to' the objective sought (their trade restrictiveness being irrelevant), whereas others require use of the least trade restrictive option to reach the objective sought. Once substantial conformity has been satisfied, WTO members must ensure that they apply their measure in a manner consistent with the 'chapeau' (the preambular text) of Art. XX GATT. As already noted, the chapeau has been interpreted as more or less requiring WTO members to apply their measures in an even-handed manner across economic actors where the same conditions prevail. An implication is that WTO members are free to pursue NEOs as long as policies are non-discriminatory. The basic principles are sovereignty, national treatment, and non-discrimination. That is, WTO members can define national NEOs and related requirements as long as these apply equally to domestic and foreign products.

A difference between Art. XX and the basic national treatment rule of GATT (Article III) is that under the latter 'likeness' of domestic and foreign goods, the key to assessing if discrimination occurs, has been interpreted in case law as largely determined by the substitutability of products in consumption (as reflected in consumer behaviour/ preferences). How a product is made is not relevant, whereas this is central for some of the NEOs listed in Art. XX. We return to this distinction below.

Both Article XX and Article XXI call on the WTO membership to adopt measures that are 'necessary' (the reasonably available least trade restrictive instrument, as the term has been consistently understood in WTO case law) to pursue the stated objective motivating the use of trade policy.[65] The wording of Article XXI differs from that in Article XX, in that it suggests measures adopted must be necessary in the view of the invoking member (and not a dispute settlement panel, as in Article XX). Recall that the term 'it considers necessary' appears only in Article XXI. Unlike Article XX the wording of Article XXI provides prima facie support for the view that it was meant to provide members invoking this provision with substantial discretion.

4.3 THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Pursuit of NEOs involving use of trade measures often takes the form of production requirements, i.e. technical regulations that apply to the processes used to produce goods or services. Insofar as goods are concerned, the TBT Agreement is the salient source of international discipline. The TBT agreement goes beyond the core WTO non-discrimination obligation, most-favoured nation (MFN), and national treatment (embodied in GATT Articles I and III) and the requirement that a trade restrictive measure must be necessary to attain a NEO that applies to invocations of the general exceptions provisions (GATT Art. XX or its analogues in the GATS and the TRIPS Agreement), by adding further consistency requirements for NEO-related trade regulation. Conformity assessment procedures (TBT Articles 5-10) are the institutional vehicle to guarantee that a given product satisfies a technical regulation, including production requirements. Conformity assessment, the vehicle through which technical regulations are enforced, in practice are a likely focus for allegations of discrimination or other violation of WTO disciplines.

Case law has clarified that the 'necessity requirement' in TBT comprises an obligation for a state to use the least trade restrictive option available to achieve the stated regulatory objective, the same standard that applies under GATT Art. XX.[66] It has also made clear that technical regulations, defined as a mandatory requirement specifying either product characteristics or their related processes and production methods (Annex 1§1 TBT Agreement) may apply to either incorporated or non-incorporated features of a product, e.g. a prohibition on the use of non-certified palm oil in products (incorporated) or a ban on the use of slave labour in the production process of a good (unincorporated). Thus, production requirements of the type that are frequently the means to pursue environmental and labour standards NEOs fall under the provisions of the TBT agreement, not Art. XX. The implication is that in principle unilateral imposition

65 Insofar as WTO members use international standards to pursue a health or safety goal there is a presumption that associated trade measures are necessary and not discriminatory.

66 *US-COOL* (country of origin labelling).

of production requirements relating to NEOs such as labour standards (values) or environmental protection for products entering the market can be used, if necessary to achieve a clearly defined regulatory objective, as long as they are applied transparently on a non-discriminatory basis.

While in principle the necessity and non-discrimination conditions are not problematic from a normative perspective, in practice designing and implementing mandatory production requirements that satisfy these core norms is challenging. For example, a country may rely on regulatory measures and provide fiscal incentives (tax subsidies, transfers) to firms in a sector to reduce carbon emissions, other states may explicitly price carbon through an emissions trading scheme or tax carbon. Such differences in policy regimes – and in principle, actual emissions generated during production – should be taken into account in the application of carbon border adjustment measures. Whether policies are equivalent in effect will play a role if a dispute is brought. A problem with the case law in this area is that panels and the Appellate Body in TBT cases have followed the reasoning of Art. III disputes and assessed the 'likeness' of goods on the basis of a 'market test', focusing on what consumers consider to be substitute products. This approach, already highly debatable product standards, clearly is inappropriate to assess the WTO consistency of mandatory production requirements imposed by governments. Disputes alleging violation of non-discrimination can also arise if use is made of recognition arrangements regarding production requirements implied by regulatory regimes in partner countries that are not based on fully transparent processes accessible on the same terms to all countries desiring to engage in recognition or regulatory equivalence arrangements.

From a WTO law perspective, the need to demonstrate the necessity of production requirements to attain a regulatory objective is paramount. This is made much easier if a jurisdiction uses international standards. From a policy perspective, this raises several issues. Are international standards available? If so, are they adequate/appropriate to achieve the regulatory goal? Will they be effective? If standards do not exist or are likely to be ineffective/inappropriate, how might the development of an international standard be supported? The WTO puts a premium on cooperation between states to define standards. It also privileges cooperation between jurisdictions in conformity assessment. An implication is that a state seeking to apply NEO production requirements to imports (and domestic production) is well advised to engage in dialogue and cooperate with trading partners to agree on standards in a collaborative manner rather than define idiosyncratic requirements that are implemented unilaterally. An example could be to use the Sustainability-related Financial Disclosures Standards that have been developed by International Sustainability Standards Board as a criterion for due diligence of supply chain activities by lead firms.[67] Aside from the presumption that international standards

67 https://www.ifrs.org/groups/international-sustainability-standards-board/ and https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/.

will be deemed necessary by WTO adjudicating bodies, cooperation in the design and application of standards has equity (all have a say) and efficiency (more information and scrutiny, learning) benefits, increasing the prospect of 'ownership' by all concerned of the use of production requirements. The same applies to mutual recognition agreements (MRAs) and equivalence arrangements for conformity assessment and certification systems.

CHAPTER 5

National security practice in the GATT period (1948-94)

During the Cold War, the Soviet Union and its satellites were the targets of trade restricting measures by GATT members. As GATT members incurred no obligations under the GATT vis-à-vis non-members, Article XXI was relevant only with respect to measures taken vis-à-vis Czechoslovakia, the only Soviet bloc country to be an original GATT contracting party. While practice regarding invocations of national security under the GATT is scarce, reviewing it is nonetheless of interest as practice has shaped the legitimate expectations of the membership regarding the usage of this clause.[68] Three questions dominated the relevant GATT practice: (i) what is the scope (ambit) of national security? (ii) was there an obligation to notify measures coming under the purview of this provision? and (iii) could Article XXI be invoked in formal disputes or should it be understood to be self-judging by the party taking action? All of these questions were tabled by Argentina during the Falklands war (1982), reflected in a request by the Argentine delegation for the GATT to clarify the meaning of Article XXI with a view to:

> firstly, to know whether Article XXI exempted contracting parties from any obligation regarding notification and surveillance procedures when measures taken under its provisions affected the trade of another contracting party; secondly, to determine the natural rights which could be inherent for contracting parties and had been invoked in relation to Article XXI in general; thirdly, to establish whether any contracting party, including one not involved in a problem between two other contracting parties, could interpret per se that there existed an emergency in international relations as referred to in Article XXI1b)(iii) and consequently take unilateral trade measures; fourthly, whether one or more contracting parties could take action under Article XXI(c) without the prior existence of a specific provision adopted by the United Nations authorizing the application of restrictive trade measures.[69]

In the event only one of these requests had an outcome: a decision on notification of Art. XXI measures. This is discussed further below.

68 Article XVI of the Agreement Establishing the WTO stipulates that the WTO will be 'guided' by GATT practice. There is no obligation to abide by GATT-era decisions, but the presumption is that past practice is pertinent.
69 GATT Doc. C/M/159 of 10 August 1982, at p. 16.

i) The scope of Article XXI

The ambit of Article XXI was debated when the United Arab Republic (UAR), comprising Egypt and Syria, which has since ceased to exist as single entity, requested accession to the GATT. When presenting its schedule of accession, the UAR stated that it would continue to boycott all imports from Israel, as well as from countries transacting with Israel, mentioning specific commercial transactions that it considered particularly nefarious. In doing so, it invoked Article XXI. The discussion that followed revealed that no party (other than Israel) objected to the primary embargo, but that views on the consistency with Article XXI of secondary embargoes differed. In any event, no one challenged secondary embargo before a panel, since, as a few delegates noted, past practice evidenced that it had been tolerated on other occasions. Israel objected only mildly to the UAR's accession request, and the GATT contracting parties (the highest organ of the GATT) opened the road for accession.[70] Israel invoked the Article XXXV non-application clause,[71] revoking it ten years later.[72]

ii) Notifications

Following the request by Argentina, the GATT adopted in a decision in 1982 requiring the membership to notify measures aiming to protect national security:

1. Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.
2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.
3. The Council may be requested to give further consideration to this matter in due course.[73]

This decision was not implemented by GATT contracting parties, perhaps reflecting the absence of a remedy for noncompliance with this transparency obligation.[74]

(iii) Disputes

The scope to contest national security-motivated trade measures depends on whether Article XXI is self-judging. This occupied the minds of GATT members on various occasions. In February 1948, roughly a month after the GATT entered into force, Czechoslovakia experienced a coup d'état and became part of the Soviet bloc. It remained, however, a GATT member. The US immediately imposed export restrictions on a series of products, which were challenged by Czechoslovakia, claiming that the US measures violated the MFN (most favoured nation) clause by according less favourable

70 GATT Doc. L/3362 of 25 February 1970 at pp. 5 et seq.
71 Portugal, Rhodesia (now Zimbabwe), and South Africa joined Israel, GATT Doc. L/3386 of 20 April 1970.
72 GATT Doc. L/4929 of 25 January 1980.
73 GATT Doc. L/5426 of 2 December 1982.
74 Mavroidis (2016) vol. 2 at pp. 655 et seq. discusses the relevant case law.

treatment than that granted to other GATT members. The US did not contest this and invoked Article XXI, arguing that its measures were necessary to protect its national security. When doing so, the US insisted that Art. XXI was self-judging. Shackle, the UK delegate, appeared to endorse this view:

> Mr. SHACKLE (United Kingdom) thought that since the question clearly concerned article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security. On the other hand, the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement.[75]

Czechoslovakia continued to contest the legality of the US export embargo and asked for a dispute settlement panel to address its complaint. The Chairman of the GATT Contracting Parties, Dana Wilgress, rebuffed the request, arguing that the US would invoke Article XXI as a defence, rendering the request superfluous.[76] Czechoslovakia requested a rollcall to decide whether the dispute should be submitted to adjudication. Almost all GATT members voted in favour of the US. Syria, Lebanon, and India abstained, and only Czechoslovakia voted against Wilgress' assessment. This incident illustrates that the prevailing view across the original GATT membership largely aligned with the views expressed by the UK and US delegates.[77] Western countries continued to maintain (discriminatory) export restrictions towards Soviet bloc countries, with challenges having no effect. For example, as late as 1985 Czechoslovakia complained about export restrictions regarding computer equipment imposed by Italy and the UK which were justified by claims that these were necessary to protect national security. In this case again Czechoslovakia stopped short from lodging a formal complaint.[78]

In 1961, when Portugal was acceding to the GATT, several African countries expressed their concerns regarding the accession considering Portugal's colonial past. Ghana went a step further, imposing an import ban on goods of Portuguese origin, claiming that this was necessary to protect its national security, while underlining that its invocation of Article XXI was not justiciable:

> His Government had, however, found it necessary to impose a ban on goods entering Ghana from Portugal, their justification resting on Article XXI which stated that nothing in the Agreement should be construed to prevent any contracting party from taking any action which it considered necessary for the protection of its essential security interests, taken in time of war or other emergency in international relations. It should be noted that under this Article each contracting party was the sole judge of what was necessary in its essential security

75 GATT Doc. GATT/CP.3/SR.22 of 8 June 1949, at p. 7. Pakistan during the same meeting argued that a diplomatic solution was appropriate, and opposed a judicial process, but eventually sided with the US.

76 GATT Docs. GATT/CP.3/39, and Press Release no 42, both issued on 8 June 1949.

77 Subsequently, in 1951 the US halted trade relations with Czechoslovakia, GATT Doc. GATT/CP.6/5 of 10 August 1951, and GATT/CP.6/SR.13 of 28 September 1951. Peru did so as well for thirteen years (from 1954-1967). GATT Docs. L/235, of 4 October 1954, and L/2844 of 13 September 1967.

78 GATT Doc. NTM/INV/I-V/Add.10 of 2 May 1985.

> interests. There could therefore be no objection to Ghana regarding the boycott of goods as justified by its security interests. It might be observed that a count'y's security interests may be threatened by a potential as well as an actual danger. The Ghanaian Governme't's view was that the situation in Angola was a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana. There could be no doubt also that the policy adhered to by the Government of Portugal in the past year had led to an emergency in international relations between Portugal and African States.[79]

The 1982 Falklands (Malvinas) war between Argentina and the UK led to another invocation of Article XXI. As the UK was a member of the then European Economic Community (EEC), the EEC spoke for the UK before the GATT. The UK had imposed an embargo, which Argentina claimed was contravening the GATT rules. The EEC claimed the measure was necessary to protect national security, arguing that:

> The exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement. He said that in effect, this procedure showed that every contracting party was – in the last resort – the judge of its exercise of these rights.[80]

The EEC was supported by the US delegate, who stated:

> ...that GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise in the view of the United States, since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests.[81]

The ensuing discussions revealed a clear divide between Latin American states and some members of the Group of 77 (like Pakistan), which sided with Argentina, and the industrialised countries. Argentina did not push with a request to submit the dispute to a panel but put forward the request for clarification of Art. XXI mentioned previously.

There were two other cases where a small state protested against the invocation of national security by a large player without following up with its request for review. Cuba contested the US import embargo on sugar but left it that. While Latin American countries supported Cuba, it did not request submission of its dispute to a panel.[82] Similarly, Yugoslavia complained about measures adopted by the EEC but stopped short of requesting the establishment of a panel to adjudicate the dispute.[83]

79 GATT Doc. SR.19/12 of 21 December 1961, at p. 196.
80 Idem at p. 10. A few days later, same discussions called it 'natural right' GATT doc. C/M/159 of 10 August 1982 at p. 16.
81 GATT Doc. C/M/157, of 22 June 1982, at p. 8.
82 GATT Doc. C/M/198 of 12 June 1986 at pp. 33 et seq. Ten years later, Cuba was still complaining about the nefarious effects of the US ban on its economy, but never submitted the dispute to a panel. GATT Doc. L/7525 of 9 August 1994.
83 GATT Doc. C/M/264, of 14 July 1993 at pp. 3 et seq.

The only dispute ever submitted to a panel was a Nicaraguan complaint. With the advent of Sandinistas to power, the US imposed a two-way embargo: it would not export to, and would not import anything from, the country. Nicaragua challenged the measures but as before discussions in GATT bodies remained inconclusive. In this case Nicaragua requested the formation of a dispute settlement panel. While the US did not refuse its establishment, the terms of reference precluded the panel from examining the consistency of its practices with Article XXI. Thus, the panel was hamstrung from the start and did not address the matter.[84]

5.1 TAKEAWAYS FROM GATT PRACTICE

GATT practice reveals a mix of instances where Article XXI concerned long-standing measures against adversaries (actions against the Soviet bloc and the US embargo against Cuba), as well as one-off incidents (like the Falkland war between the UK and Argentina). There was disagreement regarding the means that could be lawfully used to safeguard essential security interests. Secondary embargos also divided the membership. The negotiating record suggests wide scope in terms of coverage in that national security measures could be lawfully adopted at times of war, as well as at times of peace, the latter falling under the term 'emergency'. The specific contours of Art. XXI continued to be elusive, as the GATT membership did not see eye to eye.

An Austrian 1970 import restriction on penicillin and related products is a case at point. Austria justified this measure as a matter of national security: it needed to have local supply in case of a future emergency. The likelihood that this contingency would occur, was not, in Austria's view, a matter for adjudication. Two issues arise with Austria's measure. First, it appears akin to an 'infant industry' argument, for which other provisions in GATT apply. Second, while one cannot a priori exclude that Austria might find itself in dire need to procure penicillin at some point in the future, this need not require local production insofar as imports could meet the increased demand. Austria's import restrictions could, in principle, have found legal refuge in Article XX(b) of GATT, which allows for exceptions from assumed obligations in order to protect human health. Austria would have to show why it was necessary to produce penicillin domestically in order to advance its public health objectives. Given this is not evident, invocation of Article XXI could be regarded as an easier route. Assuming this reading of the situation is correct, this dispute did not concern the scope of Article XXI (which is how it was discussed) but rather evidence that the consensus view of the membership was that a deferential standard of review was quite appropriate in cases involving Article XXI as

84 GATT Doc. L/6053, of 13 October 1986, at §§5.1 et seq.

long as it fitted a certain set of circumstances. Penicillin is of course, produced in many countries, significantly weakening the Austrian case for legitimate invocation of national security. The GATT membership did not think that Austria had a robust case in this instance.[85]

A case involving Sweden may qualify as the only genuine case of simple protectionist invocation of Art. XXI.[86] Sweden imposed import restricting measures on shoes, arguing that it had to preserve a minimum production in the country, as part of its national security policy.[87] This was difficult to defend given that shoes are available from a multitude of sources.[88] Another candidate for a sham invocation of Art. XXI is the 1951 US restrictions on dairy products. The US attempted to justify this measure stating that it was meant to protect its national security, but it also stated that it was an isolated incident uncharacteristic of the wider US trade policy and the manner in which it was being conducted.[89] In similar vein, in 1968 the US invoked Section 232 of the Trade Expansion Act of 1962 to justify restrictions on petroleum substances on national security grounds. Section 232 links economic welfare to national security in explicit terms, and requires the US President to:

> … recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.[90]

A host of GATT members argued that this was a sham invocation, requesting the US to rescind the measure. The measure eventually was withdrawn, but long after the discussions in various GATIra had failed to resolve the dispute.[91]

85 GATT Docs. COM.TD/W/170/Add.7 of 12 October 1972 at pp. 2 et seq.; L/3391 of 4 May 1970. This and many of the cases discussed here were brought under two GATT fora: the Joint Working Group on Import Restrictions (comprising members of three GATT committees, namely, Agriculture, Industrial Products, and Trade and Development), and the Group on Residual Restrictions. Both groups were established to implement Article XI of GATT, which bans quantitative restrictions. See Mavroidis (2016), vol. 1, at pp. 73 et seq.

86 Jackson (1969) mentions (pp. 752 et seq.) that the US oil quotas in the 1950s were widely believed to be protectionist, but no action against them was ever taken.

87 GATT Doc. L/4250, of 17 November 1975. See also GATT Doc. C/M/109 of 10 November 1975, pp. 8 et seq., and the discussion of this dispute in Hahn (1991).

88 Sweden eventually terminated the quota a few years later, GATT Doc. L/4250/Add.1 of 15 March 1977.

89 GATT/CP.6/28/Add.1 of 24 September 1951 at pp. 1 et seq.

90 19 USC § 1862 (d). Meyer and Tucker (2022) provide a succinct discussion of this law and urge the US to link it to climate change and environmental security instead.

91 GATT Docs. COM.IND/W/28 of 8 June 1970; COM.IND/W/28/Add.1 of 26 August 1970, at pp. 48 et seq.; NTM/W/2 of 24 February 1983 at §13. Until its revival by the Trump Administration Section 232 had been invoked only very infrequently.

CHAPTER 6

National security in the post-1995 WTO era

The GATT period suggests that non-litigious approaches outweighed requests to adjudicate when faced with national-security invocations. Even proponents of justiciability of Article XXI (a majority of GATT members) were unwilling to submit disputes to adjudication. Considering the divergence of views expressed during the GATT years, one might have expected some discussion and perhaps re-negotiation of this provision during the Uruguay round. There was some discussion, but nothing beyond that. The limited salience of Article XXI to GATT contracting parties may explain why the Uruguay Round negotiating group on GATT Articles devoted very little time to national security provisions. Perhaps the collapse of the Soviet Union created a presumption that recourse to this provision was likely to be limited in the future.

Only one document was issued during the Uruguay round.[92] The main elements can be summarised as follows:

- The drafting history of the provision was quite limited, and did not shed enough light to the terms employed, and especially the term 'emergency'.
- The negotiating history is not crystal clear on whether the framers intended the provision to be self-judging or not. At least for some negotiators it seems to be the case that Article XXI was a self-judging provision, but the majority seems to think otherwise.
- Economic measures falling under the purview of Article XXI are meant to pursue political goals, and for this reason should not be likened to other economic measures.
- Even though both Articles XX and XXI cover trade measures motivated by NEOs, there is a clear institutional distinction between the two provisions, reflected in the decision of the original GATT negotiators to agree to separate disciplines for national security.
- Measures adopted on national security grounds, could stay in place while attempts to resolve the associated conflicts took place in United Nations or Ir fora.

92 GATT Doc. MTN.GNG/NG7/W/16 of 18 August 1987.

Uruguay Round negotiators left GATT Article XXI unchanged. The absence of a perceived need to revisit GATT disciplines was echoed in the incorporation of a national security exception into the new General Agreement on Trade in Services (GATS Article 14) and TRIPS (Article 73), both of which are modelled very closely on GATT Article XXI.[93]

6.1 WTO DISPUTES

The much larger membership of the WTO relative to the GATT and the expanded coverage of the multilateral agreements included in the WTO should, other things equal, lead to more disputes. It is therefore not surprising that more national security disputes were litigated during the WTO-era than under the GATT. The first reported case during the early years of the WTO is DS38 *US-The Cuban Liberty and Democratic Solidarity Act*. US-Cuba political hostilities date from the end of the 1950s and trade relations were practically non-existent while Fidel Castro remained in power. Although Cuba never lodged a formal complaint against restrictive US trade measures, the EU did. In DS38, the EU complained against the US imposition of a secondary embargo under the Helms-Burton Act, restricting trade between the EU and US insofar as the former continued to trade with Cuba.[94] The US continued to invoke national security to justify restrictions imposed on Cuban trade, and to those trading with Cuba. Eventually the dispute subsided, with an EU request that the panel suspend its work.[95]

A dispute between Nicaragua and Colombia and Honduras on the other, was a harbinger of things to come. The 1999 ratification by Honduras of the 1986 Maritime Delimitation Treaty between Colombia and Honduras (the Ramirez-Lopez Treaty) which recognised Colombia's sovereign rights over the San Andreas and Providencia islands in the Caribbean led Nicaragua, which claimed 30,000 square kilometres of territorial sea, to impose taxes and refuse to award licenses to fishing vessels flying the flags of the two countries. Colombia and Honduras requested the establishment of a panel to consider

93 GATS Article 14 reads as follows:
1. 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; or (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to fissionable and fusionable materials or the materials from which they are derived; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

94 Lowenfeld (1996).

95 WTO Doc. WT/DS38/6 of 24 April 1998. The EU and the US reached a deal, which however, was not notified to the WTO, see https://edition.cnn.com/ALLPOLITICS/1997/04/11/helms.burton/

Nicaragua's actions (DS188). Nicaragua, a staunch defender of the justiciability of Article XXI when it had challenged the US embargo in the 1980s, now argued the exact opposite. A panel was established, but was never composed, and the dispute eventually was addressed by the International Court of Justice (ICJ).[96]

Subsequent years saw more extensive recourse to the national security clause under various WTO agreements. A recent illustration of national security invocation by stealth is a 2021 ban on imports of Australian lobster by Hong Kong, China, following increasing tensions between China and Australia.[97] While Hong Kong, China invoked national security to justify the ban, it did not abide by the 1982 GATT decision regarding transparency mentioned earlier. Aside from such examples of attempts to weaponise trade policy, the domain of the national security provision has been growing, reflecting technological developments (cyberwarfare, surveillance, artificial intelligence (AI) tools) and invocation of Art. XXI to address *economic* security concerns by the Trump administration.[98] The 2018 Section 232 restrictions on imports of steel pitched the US against a host of steel producing and exporting countries, from Canada to Sweden and Korea.[99] These examples and explicit focus of both the US and the EU on economic security as opposed to more narrow national security raise important questions regarding the scope of Art. XXI. For example, would it be legitimate for the EU or the US to impose a cyber-wall to protect its infrastructure from Russian hackers, even if their behaviour cannot be attributed to the state?[100]

Russia-Traffic in Transit (DS512)

The first panel report dealing with Article XXI during the WTO era concerned the 2019 dispute brought by Ukraine against Russia. The case was particularly salient both because it occurred in the period following the annexation of Crimea by Russia and the launch of armed conflict between Russia-supported separatists and Ukraine in the Donbass region, and because it took place in the shadow of the US Section 232 cases on steel and aluminium.[101] Ukraine challenged a number of Russia's practices that denied it the right to transit embedded in Article V of GATT. To justify its measures, Russia invoked the national security exception. The panel report includes a very comprehensive discussion of the scope and terms Article XXI.[102] The panel determined it had legal

96 WTO Docs. WT/ DSB/M/78 of 12 May 2000, at pp. 12 et seq., and more specifically at §54, and WT/DS/OV/34 of 26 January 2009, at p. 60. The ICJ decided on the delimitation of the maritime boundaries between these countries in definitive manner, see Bekker and Stanic (2007).

97 https://www.reuters.com/world/asia-pacific/australia-asks-why-hong-kong-considers-lobsters-national-security-risk-2021-10-22/ For other cases see Toohey et al. (2022) and https://www.govinfo.gov/content/pkg/CHRG-109hhrg32987/html/CHRG-109hhrg32987.htm

98 Nelson (2019) discusses this case and contextualises it by bringing in the key elements denoting the trade philosophy of the Trump Administration.

99 See for example, *US-Steel and Aluminum Products* (Canada), DS550.

100 The effectiveness of such measures is debatable, as is the adequacy of existing legal regimes both at the domestic as well as the international plane to deal with cybersecurity, see Fidler (2022) especially at pp. 81 et seq.

101 The US entered the Russia-Ukraine dispute as a third party arguing that Art. XXI cases are non-justiciable; the EU, China, Brazil, Australia, Japan, and other third parties disagreed with Russia and the US on the justiciability of national security cases.

102 Our brief discussion here draws on the clear and detailed analysis in Crivelli and Pinchis-Paulsen (2021).

jurisdiction to evaluate Article XXI claims and was tasked with determining the meaning of a WTO member's '*essential* security interests' and the 'necessity' of measures taken to ensure these interests. The panel argued that 'essential security interests' and 'time of war or other emergency in international relations' should be objective states of the world and thus subject to review by panels, and that 'essential security interests' refer 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 domestically" (Crivelli and Pinchis-Paulsen 2021, pp. 9-10). The panel also argued that Article XXI:b(iii) needed to be applied in good faith.[103]

The main points emerging from the report were that Article XXI is justiciable,[104] and that a two-tier test was appropriate to examine the validity of Russia's claim. The first part called for an examination if 'objectively' Russia was facing one of the situations listed in Article XXI, namely, whether Russia was at war with Ukraine or facing an emergency. Satisfying this first condition was a necessary but not sufficient condition for complying with Article XXI. Russia would still have to employ 'necessary' measures. The panel did not interpret the term as obliging Russia to have recourse to the least restrictive measure reasonably available to it. It recognised that Russia enjoyed substantial latitude to determine the 'essentiality' of its interests and how they should be protected (within a specific set of circumstances), but that Russia's defence must meet a 'minimum plausibility' requirement, a concept akin to the well-known 'appropriateness' test. This implied a need for the panel to assess whether the employed means could appropriately serve the intended purpose, irrespective of their restrictiveness and/or efficiency. To support its finding in favour of deference, the panel insisted on the wording of Article XXI, i.e. the fact that the term 'it considers' appears in Article XXI and not in the list of general exceptions in Art. XX (§7.82). Without explicitly stating as much, any measure which could appropriately serve the overarching objective, would be accepted as necessary (§§7.139 et seq.).

While war has a rather clear meaning (e.g. armed conflict), 'emergency' is not a self-interpreting term.[105] The panel first ruled that there was a threshold condition that should be met: political and/or economic differences were not sufficient to characterise a given situation an emergency. It then went on to provide an indicative list of 'emergencies',

103 This is a rather empty point. No panel has ever suggested that a WTO member has made recourse to Article XXI in bad faith, even when it has found that the party invoking it had not met the associated burden of persuasion.

104 §§7.54 et seq., and especially §§7.102-103.

105 In the context of trade, the word 'war' is used in a variety of ways, often without any connotation of national security. Examples include use of the term 'trade war' to denote a process of tit-for-tat trade retaliation between countries that need not have any military or national security aspect; the 'cod war', a series of disputes between the UK and Iceland on fishing rights; and the 'chicken war', in which the US imposed tariffs on imports of trucks from the EC in 1964 in retaliation for EC restrictions on imports of US chicken products. War in the context of Art. XXI comprises the usual meaning of the term.

namely, latent armed conflict, heightened tension, general instability (§§7.765 et seq.). The treatment of evidentiary elements to prove emergency is particularly interesting, as the panel was prepared to review discussions before the UN. In fact, the UN recognition of emergency in the region tilted the balance in the panel's view (§7.122).

This is how the ruling of this panel has been understood in subsequent WTO case law. We quote from the panel report in DS567 *Saudi Arabia–IPRs*, where the panel provided its understanding of the basic tenet of the report on *Russia-Traffic in Transit*:

> It held that a panel must determine for itself whether the invok'ng Member's act"ons were "taken in time of war or other emergency in international"relations" in subparagraph (iii) of Article XXI(b) of the GATT 1994. It further found th't a panel's review of whether the invok'ng Member's actions"are ones "which it considers necessary for the protection of its essential security"interests" under the chapeau of Article XXI(b) of the GATT 1994 requires an assessment of whether the invoking Member has articu"ated the "essential security"interests" that it considers the measures at issue are necessary to protect, along with a further assessment of whether the measures are so remote from, or unrelate" to, the "emergency in international"relations" as to make it implausible that the invoking Member implemented the measures for the protecti"n of its "essential security"interests" arising out of the emergency. According to the panel in Russia – Traffic in Transit, the obligation of a Member to interpret and apply Article XXI(b)(iii) of the GATT 1994 in "good faith" requires "that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these "nterests." (§7.230)

In its report on *Russia-Traffic in Transit*, the panel concluded that Russia met these burdens.[106]

US-Steel and Aluminium Products (DS550 etc.)

The 2018 Section 232 restrictions on imports of steel and aluminium products imposed by the US in the name of national security led to several dispute settlement cases by targeted states, including Canada, the EU, Japan, China, and Switzerland.[107] What follows summarises the findings of the report on the complaint where Switzerland acted as complainant, DS556.

106 While this panel could be interpreted as confounding 'war or other emergency' (since it requested a single evidentiary requirement for either), it was interpreting XXI(b) and not (a), which does not link discretion to relinquish information to a particular situation.

107 Fandl (2021) provides a comprehensive discussion of the dispute, as do Meyer and Tucker (2022). Reinsch (2019) had opined that the application of the standard of review privileged in Russia-Traffic in Transit could spell trouble for the US position in this dispute. He was proved right.

The panel could have reviewed the matter by asking one question: was an approach different from that in *Russia-Traffic in Transit* (DS512) warranted, and if so, why? It declined to do so, instead focusing on the legitimacy of US actions, as if this was the first time that a panel was dealing with a defence under Article XXI. The US argued that its measures restricting imports of steel and aluminium were justified under Article XXI because (§§7.151 et seq.):

- There was an emergency resulting from the excess capacity in these product markets, which had been acknowledged as such by the G20 Global Steel Reform Forum, the OECD, but also the EU Trade Commissioner (one of the plaintiffs in the present dispute).
- The unexpected change brought about by the production revolution with the advent of new products had contributed to the reigning climate of uncertainty.

The US held, as it always has done, that Article XXI was self-judging. The panel dismissed this claim, stating that nothing in the GATT and/or the dispute settlement understanding (DSU) warranted this view, as this provision had not been exempted from judicial review by previous panels.[108] Since the US invoked Article XXI(b), the panel first held that the list in Art. XXI was exhaustive. Consequently, the US had to explain under which of the three instances, its measures could be justified. Article XXI(b)(iii) states that nothing in the GATT should be construed:

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

(iii) Taken in time of war or other emergency in international relations.

The panel did not side with the US. It held that this provision clearly refers to an international emergency, that is, an event that transcends national frontiers (as opposed to a purely domestic issue) (§7.155) and that there must be a temporal link between the action taken and the occurrence of the emergency, in that the two must coincide in time (§7.158). Against this background, the panel proffered to review the US measure. The US had argued that the international emergency existed because of:

- The displacement of the domestic industry by imports.
- The adverse impact of imports on the profitability of the domestic industry.
- The excess capacity of steel and aluminium worldwide (§7.160).

The panel held that the grounds mentioned exhibited both a national as well as an international dimension (§7.163). Without adopting a clear line in this respect as to which of the three circumstances by the US constituted an international emergency (§§7.161 et seq.), the panel held that the failing of the US consisted in the absence of demonstration

108 §§7.141 et seq., culminating at §7.146.

that the situation of excess capacity was grave and/or serious enough (§7.166, and 7.167). What constitutes grave or serious enough was not discussed in detail. Nevertheless in §7.157 the panel had held that the term 'war' informs the term 'emergency in international relations'. A situation that is grave and/or serious enough is thus a war-like situation. The present case, in the panel's view, fell short of this standard, as cooperative efforts were being undertaken to redress the observed excess capacity (§7.166).

Saudi Arabia-Measures concerning the Protection of Intellectual Property Rights (DS567)

This dispute between Qatar and Saudi Arabia is the only case to date where a panel refuted a national security defence. The case concerned Saudi Arabia's alleged failure to provide adequate protection of intellectual property rights held by or applied for entities based in Qatar. Saudi Arabia argued it sought to break all links with Qatar in order to protect itself from the dangers of terrorism and extremism (§7.280). Saudi Arabia invoked TRIPS Article 73 (which echoes almost verbatim Article XXI) to justify its measures.

The panel applied the standard employed in *Russia-Traffic in Transit* (DS512) and, for the first time in GATT/WTO history, found that the invocation of national security did not meet the statutory requirements. To reach this conclusion, it first had to 'objectively' determine whether Saudi Arabia was facing an emergency in international relations. It decided that this indeed was the case, basing itself on two elements. First, that Saudi Arabia had severed diplomatic and consular relations with Qatar, and, consequently, trade and economic relations as well (§§7.258 et seq.). In its view, severance of diplomatic relations was the ultimate state expression of existence of emergency. Second, the panel took into account the context for the severance of diplomatic relations. Qatar had repudiated regional agreements aimed to protecting the neighbouring states against terrorism and extremism. The resulting security threat was thus, a legitimate cause of concern for Saudi Arabia (§§7.263 et seq.).

The panel then articulated its standard for evaluating the lawfulness of the Saudi defence in §7.281:

> ... the standard applied to the invoking Member was whether its articulation of its essential security interests was "minimally satisfactory" in the circumstances. The requirement that an invoking Member articulate its "essential security interests" sufficiently to enable an assessment of whether the challenged measures are related to those interests is not a particularly onerous one, and is appropriately subject to limited review by a panel.826 The reason is that this analytical step serves primarily to provide a benchmark against which to examine the "action" under the chapeau of Article 73(b).

The panel used this standard to evaluate whether preventing beIN[109] from obtaining Saudi legal counsel to enforce its intellectual property rights through civil enforcement procedures before Saudi courts and tribunals (anti-sympathy measures), could be justified under Article 73. The panel found that it was not implausible that similar measures were indeed promoting national security (§7.286). But this was not all. Among other things, Saudi Arabia had established a platform called 'beoutQ'.[110] beoutQ organised screenings in public with un-authorised broadcasts of World Cup 2018 football games, and eventually was selling the hardware to private citizens to enjoy similar broadcasting from home. Saudi Arabia did not refute the facts, and only stated that it did not "promote or authorize screenings of beoutQ broadcasts".[111] Saudi Arabia had not been applying criminal procedures and/or penalties against beoutQ, the actions of which were affecting other (besides beIN) suppliers as well. Unlike what it decided with respect to the anti-sympathy measures (§7.289) the panel concluded it was:

> ... unable to discern any basis for concluding that the application of criminal procedures or penalties to beoutQ would require any entity in Saudi Arabia to engage in any form of interaction with beIN or any other Qatari national.

This was insufficient in the panel's view, which nonetheless went on to check whether the measures could be justified through recourse to Article 73 TRIPS. The panel in fact, had proceeded to apply the standard of review that the panel on *Russia-Traffic in Transit* had originally adopted. Recall, that it had understood this standard (and the ensuing latitude in favour of the party invoking this provision) to be tantamount to: "... whether its articulation of its essential security interests was 'minimally satisfactory' in the circumstances." (§7.281). Saudi Arabia had not articulated why the absence of criminal procedures, which did not require any interaction with Qataris, was necessary to protect its national security. Unsurprisingly, it found that Saudi Arabia could not justify its choice not to prosecute beoutQ through recourse to Article 73 of TRIPS (§§7.290 et seq.). This finding might appear extreme, but Saudi Arabia did not defend its measures in this respect, e.g. advancing the obvious argument that by allowing for similar procedures it would be benefitting Qatar, arguably the threat to its national security. What matters most then, is the finding that even 'minimally satisfactory' defence suffices to pass muster in the panel's view.

US-Origin Marking (Hong Kong, China) (DS597)

US legislation obliging products originating in Hong Kong, China, to carry a label indicating that they are 'Made in China' led to a dispute with China, which argued, inter alia, that the US measure was discriminatory, as Hong Kong, China was a WTO member. The rationale for this law was that, in the US view, Hong Kong, China no longer enjoyed sufficient autonomy from China to justify a separate indication of origin. In

109 beIN is a Qatari media group comprising various TV channels (news, sports).
110 The name was chosen to mock the name of Qatari TV platform 'beIn': 'beoutQ' stands for 'be out Qatar'.
111 §7.160 of the panel report on *Saudi Arabia-IPRs*, DS567, issued on 16 June 2020.

its submission,[112] the US defended its measures by invoking Article XXI and that the measure was therefore self-judging. The panel rejected the US argument on the self-judging nature of Art. XXI (§§7.177-185) and went on to find that the US violated Article IX.1 of the GATT, which requires WTO members to be treated in non-discriminatory manner with respect to marking requirements as there was no correspondence between the determination of origin and the marking of origin of products (§7.234). As a result, Hong Kong, China had suffered damage since its exports could not benefit from the reputation of products originating in its territory (§§7.237-239).

The panel then went on to determine whether the US measure could be justified under Article XXI(b) of the GATT. It held that because there was no emergency in international relations (§7.281) and the term 'emergency' was informed by the meaning of the term 'war', the further a situation was removed from war, the more explanation was needed to qualify the situation as an emergency (§7.312). The case before the panel did not qualify as an emergency, because the US had taken measures against Hong Kong, China, and not against China, supposedly the target of the measures. Moreover, trade between the US and China showed no signs of breakdown unlike the *Russia-Traffic in Transit* and *Saudi Arabia-IPRs* disputes (DS512 and DS567) (§7.354). From there it was only a short step for the panel to find that the US measures did not meet the test of Article XXI as understood in DS512, i.e. measures taken outside a time of war or emergency do not come under the aegis of the GATT national security clause. The US appealed the panel report in January 2023. Given the absence of an operational Appellate Body the appeal into the void means that the dispute remains unresolved.

6.2 TAKEAWAYS FROM WTO NATIONAL SECURITY DISPUTES TO DATE

National security, as embodied in Article XXI, is a core sovereignty norm. As such it is part of the balance that any international agreement must find between protecting sovereignty and reaping the benefits of interdependence. Under the WTO, the recognition of the implications for trade and trade policy is not at all the same as an unconstrained right of protection. A fundamental question confronting WTO members concerns the circumstances under which a state is free to assert its right to national self-preservation over its commitments to liberal trade. What are the rights of the other members of that regime faced with such claims by one (or more) of its members? Institutionally, these questions manifest in terms of the role of the WTO's dispute settlement mechanism in evaluating invocations of Article XXI. How this balancing act is supposed to work has played out in the WTO dispute settlement process as a contest between the Appellate Body and leading WTO members, especially the US.

112 https://ustr.gov/sites/default/files/enforcement/DS/DS597/US.Sub1.fin.pdf

What can we infer from the case law to date? First, panels have left no doubt that this provision is justiciable. Four WTO panels (DS512, DS566,[113] DS567, DS597) have now rejected claims to the opposite. Clearly the WTO membership has been and continues to be divided on this issue. The US continues to call the invocation of national security self-judging.[114] Bahrain, Egypt, Saudi Arabia, United Arab Emirates,[115] and Russia[116] have also sided with this position. The EU has gone full circle, arguing XXI was self-judging when defending the UK measures against Argentina during the Falklands war, while today taking the position XXI is justiciable. Many WTO members are in the latter camp. In third-party submissions collected in Annex D of DS512 (Russia—Traffic in Transit), Brazil, Canada, China, the EU, and Japan all supported the view that Article XXI should be justiciable, arguing that otherwise the rules-based nature of dispute settlement would be in peril.[117]

Second, all panels care about is 'when' an action has been taken, not what course of action has been adopted. If action has been taken during war or a war-like context, then practically anything goes. The Saudi Arabia-Qatar dispute is an odd one. Indeed, we do not know what the answer could have been, had Saudi Arabia for example, claimed that its measures were justified by its resolve to avoid financing the military capacity of Qatar. But in combination with *Russia-Traffic in Transit* this case clarifies that there must be temporal coincidence between measures adopted and existence of an emergency which could constrain use of anticipatory and/or preventive measures.

Open questions remain. Case law to date privileges textual interpretation of terms that suffer from limited relevance for many prevailing national security concerns. When the GATT was drafted war was usually accompanied by a declaration and was expected to involve physical infringement of sovereign territory. The term 'emergency' was intimately linked to war or war-like situations. Today, less tangible means can be used, such as cyber warfare. States will have legitimate security interests in trade in goods other than 'fissionable materials' and 'arms, ammunition and implements of war'. It is possible that the clause 'for the purpose of supplying a military establishment' can be interpreted sufficiently broadly to cover these general applications (e.g. restrictions on trade in advanced semiconductor technology), but a textual reading may well find this not to be justified.

113 DS566 is one of four quasi-identical reports issued on this dispute (DS544, 552, 556, 564).
114 Claussen (2020) has examined the historical record, and has persuasively argued that, surprisingly, "security exceptionalism in US trade law is the product of misunderstood statutes that have been unmoored from their original purposes" (p. 1097).
115 WTO Doc. WT/DSB/M/403, 20 February 2017.
116 WTO Doc. WT/DSB/M/392, 20 February 2017.
117 WTO Doc. WT/DS512/Add.1, 5 April 2019, Annex D, pp. 84 et seq.

When dealing with other non-economic objectives such as environmental protection, panellists have applied the 'contemporaneity' principle and adapted statutory terms to current realities.[118] Fortunately, this has not occurred in the realm of Article XXI case law. Because many measures might be understood as addressing an emergency, whether because of geopolitical tensions or the need to combat climate change, pre-emptive actions mushroom.[119] Whether pre-emptive actions are consistent with Article XXI as drafted is an open question.

The key issue remains whether Article XXI should be justiciable at all. The first paragraph of this provision acknowledges that WTO members cannot be asked to divulge information that goes against their security interests. This could happen routinely. How then will panels decide in such instances? Panels cannot function without evidence. They can draw adverse inferences, but this makes little sense in the context of disputes involving national security. Furthermore, there has never been an Art. XXI case where a losing party has implemented an adverse report. Losing parties simply disregard the outcome. What is the purpose then of continuing with panel submissions? Maruyama and Wolff (2023) argue in favour of compensation of affected parties whenever recourse to Article XXI is made, but who would accept this solution? Those invoking it would rather be subjected to countermeasures, as admission to compensate ipso facto is admission of 'guilt'.

We conclude this discussion with a final observation. As indicated by the data presented in Chapter 3, national security has been invoked dozens of times in the realm of the TBT Agreement. No panel has been established so far. Similar invocations are run of the mill subject matter of discussions before the TBT Committee. This suggests that a deliberative model is probably better suited to address national security concerns. In fact, TBT is all about invoking non-economic objectives, with national security occupying a small percentage of the overall volume. And yet, the empirical record established by Horn et al. (2013) and Karttunen (2020) suggests that deliberation works. Very few cases that have previously been discussed in the TBT committee have ended up before a WTO panel (and none of them, as suggested, concerned national security). The proposal developed in the next chapter is largely inspired by TBT practice.

118 See the understanding of the term 'exhaustible natural resources' in the Appellate Body report in DS58 US-Shrimp.
119 It bears repetition that, although when the GATT was signed the world community had entered the original Cold War, Article XXI was not much of a concern as the Soviet Union had not adhered to the GATT.

CHAPTER 7

Potential WTO reforms

The WTO has three basic functions. It provides:

- A forum where 164 members meet and negotiate agreements on trade-related policies
- An elaborate system of disclosures, notifications, multilateral surveillance, and peer review to monitor implementation of negotiated commitments
- An adjudication process to address disputes between members.

It is widely perceived that these functions no longer operate as envisaged when the WTO was established in 1995. The membership proved unable to conclude the 2001 Doha round and generally confronted deadlock on new proposed agreements. There is widespread dissatisfaction regarding the notification performance of many members. The effectiveness of the dispute settlement system has been greatly eroded because of US action forcing the Appellate Body to cease operation in November 2019.[120] In principle a panel report can now be appealed 'into the void' and starting in 2020 this became frequent.[121] One result has been reticence of WTO members to submit new disputes.[122]

All three dimensions of the WTO are important for the relevance of the organisation as a forum for addressing the use of trade policy by members for national security and other non-economic objectives, as well as the traditional focus on the core business of the WTO: disciplines on the use of trade policy. The lack of effective dispute settlement (the absence of the Appellate Body) is less of a problem for national security than for other types of trade conflicts given the limited prospects that states will alter their behaviour in instances where states (claim to) act to defend national security. But invocation of essential security interests is a serious threat to the multilateral trade regime if this is used to circumvent WTO rules on the use of commercial policy. What is needed is a process for effective scrutiny by the WTO membership of such measures and a process to guide responses by negatively affected WTO members.

120 In response to the situation, a group of WTO members, led by the EU, created a MPIA (Multi-Party Interim Agreement). This provides signatories with a forum that serves as an appeals board. China participates in the MPIA as do some 25 other WTO members. Bilateral agreements between some WTO members have appeared as well: in some instances, these have led to parties agreeing to forego the right to appeal, in others, they have submitted their dispute to a facilitator. See, for example, WTO Doc. WT/DS371/46 of 5 July 2022.

121 A full list as of 2022 is provided in Mavroidis (2022).

122 The average number of submitted disputes fell from 24 per year before 2020, to seven since then (Mavroidis 2022).

The unwillingness of WTO members to engage in constructive negotiations to revisit and bolster trade policy disciplines is a major threat to the survival of the rules-based trade order. Conflicts over trade and industrial policies used to pursue NEOs call for negotiations to address possible negative spillover effects. Between 1995 and 2022 WTO members were only able to agree to put an end to export subsidies on farm goods and to add one new multilateral agreement, the 2013 Trade Facilitation Agreement (TFA), to the rulebook.[123] The limited success rate reflects the difficulty of obtaining consensus in the WTO. The decision to negotiate the Uruguay round (1986-94) as a single undertaking, and to do so as well in the Doha round, meant that agreement on a package deal was needed. The increasing share of global production and trade accounted for by developing countries and large emerging economies – China, India, and East Asian countries all grew consistently faster than OECD nations in the post-1995 period – led to demands by high-income countries that were strongly resisted by developing nations and led to protracted deadlock.[124] By the time of the failure to agree on the July 2008 Doha round package, the writing was on the wall.[125]

This does not imply agreement on new rules is not possible but that any new disciplines require all WTO members to perceive what is on the table to be in their interest, as opposed to a willingness to accept – as in the Uruguay Round – a package that is held to be a *net* improvement, i.e. where governments accepted that some elements of the package could have negative implications for their country but that these were offset by the positive features of other parts of the package. Confounding doomsayers, the 12th WTO Ministerial Conference (MC12) held in Geneva in June 2022 generated a new multilateral Agreement on Fishery Subsidies, the second agreement to be negotiated under WTO auspices and the first explicitly motivated by an NEO. At MC12 ministers also agreed to work together to identify reforms to address the crises confronting the organisation. Ministers instructed the WTO General Council and its subsidiary bodies to develop proposals on how to improve all functions of the organisation, including re-establishing a fully functioning dispute settlement system accessible to all members by 2024.

Whether MC12 will mark a revival of multilateral trade cooperation depends on whether the large trade powers will engage and put forward and/or support reform proposals. For the major players to walk the walk of multilateralism, they must perceive value in engaging with each other in the WTO. A necessary condition for this is 'fixing the machine': the institutional arrangements for ensuring policy transparency, to identify

123 https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm. The TFA calls for the adoption of a set of administrative processes pertaining to customs clearance and transit-related regulatory regimes that all WTO members regarded as good practice. It did not involve policy changes (liberalisation), facilitating the eventual successful conclusion of negotiations.

124 Whether the original GATT parties would have found it easier to agree on disciplines on domestic policies is an open question. The fact that the ITO was deemed unacceptable to the US Senate suggests agreement on behind-the-border policies among a more like-minded set of countries is also challenging.

125 The proposed package can be found at https://www.wto.org/english/tratop_e/dda_e/meet08_e.htm. See also the assessment by Ismail (2009), the Ambassador for South Africa at the time.

and quantify harmful policy spillovers and settle disputes efficiently. Progress on the institutional front is also critical to enhance prospects of negotiating disciplines on the broad range of issues that motivate unilateral action, including addressing competitive tensions caused by national industrial policies and subsidy support programmes and the use of trade policy instruments to attain NEOs.

In what follows we discuss potential reforms that would bolster the ability of WTO members to use the organisation as a forum to defuse trade-NEO-related disputes and prepare the ground for cooperation to pursue shared NEOs and attenuate negative spillovers from the unilateral or concerted (joint) use of NEO-driven trade policies. Much can be done to support cooperation that does not require changes in WTO rules but builds on existing WTO mechanisms and processes. But for the WTO to become more fit for purpose in a world characterised by geopolitical rivalry and active pursuit of NEOs through trade and industrial policy instruments, updated rules are needed. The discussion centres on four areas: (i) managing disputes on national security-related trade interventions, (ii) bolstering the scope for deliberation and dialogue among WTO members on NEO-related policies that affect trade and investment and the operation of global value chains, including policies that are not or only partly subject to multilateral disciplines, (iii) reforms to the formal dispute settlement process, and (iv) revisiting WTO provisions dealing with the trade-NEO nexus: general exceptions (Articles XX), essential security exceptions (Art. XXI), and the ASCM (use of subsidies to attain NEOs).

7.1 MULTILATERAL SCRUTINY OF NATIONAL SECURITY ACTIONS

While effective settlement of trade disputes is of critical importance for the WTO as an organisation, arguably there is little role for WTO dispute settlement in the near neighbourhood of one or more of the poles of existential threat. Instead, in our view what is called for is multilateral scrutiny. This can take various forms. WTO adjudication is of course, an extreme form of scrutiny, in the sense that the final decision is binding on the parties and must be implemented (abstracting from the obvious caveat that 'appeals in the void' are now possible for WTO members that have not joined the Multi-Party Interim Appeal Arbitration Arrangement).[126] But dispute settlement panel proceedings need not – and arguably should not – be the default. An alternative is to also scrutinise the use of trade policies that are claimed to be needed to achieve non-economic objectives through a deliberative process. This was in fact envisaged in Article 14 of the 1979 Tokyo Round Standards Code (reproduced in Annex 4 below). This was not carried over into

126 The MPIA was put in place following the demise of the Appellate Body. It operates under Article 25 of the WTO Dispute Settlement Understanding, providing signatories the opportunity to continue to appeal the findings of a dispute settlement panel using procedures that closely emulate those of the Appellate Body. The EU and 25 other WTO members, including China, have joined the MPIA.

the WTO TBT Agreement, perhaps in part because a core feature of the WTO was the establishment of a binding independent dispute settlement process. With the benefit of hindsight this was arguably a mistake, but one that can be rectified in a relatively straightforward manner.

A common feature of the work of some WTO committees is to consider trade concerns arising from measures notified (or cross-notified) in their respective area. The ensuing discussions shed light on the rationale for adopting a given regulatory measure and its necessity (and likely efficacy) in achieving the stated objective. Practice shows that discussions in WTO committees can lead to better understanding of the policies pursued, in the process defusing potential disputes. The committees overseeing the TBT and Sanitary and Phytosanitary Measures (SPS) agreements are distinct in that they have 'formalised' consultation processes called Specific Trade Concerns (STCs) (Horn et al. 2013). One reason for this is that Article 2.2 TBT requires that technical regulations not be more trade restrictive than necessary, a matter that is often not necessarily clear to potentially affected WTO members. This provides a rationale for posing questions regarding the objective motivating a proposed or adopted regulatory measure, and in the case of a national security-based motivation, how a regulation furthers realises that goal.[127] The SPS Committee also regularly discusses specific trade concerns arising from proposed or already adopted product regulations, with discussion often focusing on measures that differ from international standards.

The STC process used in the SPS and TBT committees is premised on notifications by WTO members of new (or changes to) technical product requirements. Notification performance in other committees is generally weaker than for TBT and SPS measures. While new notifications facilitate the process, they are not a necessary condition to raise STCs. There is no constraint on addressing questions to a member in a WTO committee on measures that have not been notified and/or that are already in force. In practice, STCs in the broad sense go well beyond SPS and TBT measures. Discussion of trade concerns also occurs in other WTO bodies and has been increasing over time. Since 1995, some 6,000 questions (much like a STC) have been raised in the Committee on Agriculture (CoA) review process; between mid-October 2014 and mid-October 2019, over 1,150 concerns were raised in 129 formal meetings of 17 WTO committees and councils, other than the SPS and TBT committees and the CoA (Wolfe 2020).[128]

127 Several STCs have been raised to address cybersecurity-related measures. National security has been invoked to ban imports of caviar and/or lobsters. See for example, WTO Doc. G/TBT/N/SAU/1214, of 6 October 2021, where the Kingdom of Saudi Arabia notified the WTO of its import restrictions on sturgeon caviar, invoking national security to this effect. In similar vein, Hong Kong, China banned imports of lobster from Australia, equally invoking national security as justification (https://www.reuters.com/world/asia-pacific/australia-asks-why-hong-kong-considers-lobsters-national-security-risk-2021-10-22/). Neither incident was notified as a STC.

128 A 2021 proposal to establish common procedural guidelines by the EU and 19 other WTO members sought to make better use of WTO bodies to discuss and resolve STCs (WTO 2021). It was met with considerable resistance by developing countries concerned about potentially burdensome additional obligations.

As discussed in Chapter 3, through 2022 approximately 500 national-security related notifications were made to the Committee on Market Access (CMA) and the TBT Committee, 239 before the CMA, and 253 before the TBT Committee. The most active notifying WTO members in this area include the EU and/or its member states, Brazil, the US, the UK, Viet Nam, Uganda, Japan, Chinese Taipei, China, and Uganda (Annex 2). Reflecting the expanding scope of 'national security' due to technological advancements, as of 2022 over 70 cybersecurity-related regulatory measures had been notified to the TBT Committee, some 70% of which during 2019-2022. These dealt with the cybersecurity dimensions of machine-to-machine communication (Internet of Things), 5G technology, telecommunication and radio equipment, software-enabled and network-connected goods.

Only four of these notified measures led to formal WTO disputes (discussed above). One reason for this is because of deliberation in the two committees. For example, many WTO members have raised questions regarding restrictions by Brazil on trade of dual-use goods.[129] The EU challenged the legitimacy of invoking national security for a TBT measure in several instances.[130] Of the 239 TBT notifications mentioning national security, 42 gave rise to STCs, 13 of which were raised after 2018 (Annex 5). To date, OECD countries have been the target of a national security-related STC 11 times, BRICS 23 times, and other developing countries eight times. Most cases against BRICs concerned China. Some 27 of these 42 STCs centrally concern national security; the remaining 15 either mention national security in passing or did not comply with WTO transparency obligations because of an urgent need to act.[131]

Most STCs are resolved as the result of interactions between officials with expertise on both the technical as well as the legal/economic aspects of a given policy.[132] The large number of STCs relative to formal dispute settlement cases for regulatory measures justified as being necessary for national security is particularly meaningful given the increasing invocation of national security to justify trade measures, and the broader scope of such measures. The STC process benefits all members, including those to which questions are directed, not just in defusing potential concerns and disputes but as a means of learning and enhancing knowledge and common understanding of regulatory goals and good practices.[133] This applies also to measures that have a national security motivation.

129 The Brazilian measures concerned trading of lithium compounds, WTO Doc. G/LIC/M/31 of 12 July 2010, at pp. 5 et seq.; WTO Doc. G/LIC/Q/BRA/20 of 22 November 2016; and WTO Doc. G/LIC/Q/BRA/21 of 17 July 2017.

130 E.g. STC152, STC183, and STC534.

131 The number could be higher. There are various separate STCs around the same, or related measure, as there are STCs where national security has been offered as justification for more than one separate measures (e.g. STC538, STC526). See https://eping.wto.org/en/Search/TradeConcerns.

132 Even if no formal settlement is notified, one can judge the success of STCs by comparing the content of a draft measure notified to the TBT Committee that triggers a STC, with the final measure eventually adopted.

133 Karttunen (2020) provides evidence that many thousands of notifications of new TBT or SPS measures gave rise to an order of magnitude fewer STCs that in turn resulted in only a handful of formal WTO disputes.

An advantage of using STC type processes in lieu of formal dispute settlement to address concerns regarding the justification of trade measures on national security grounds is that it provides an opportunity to apply elements of the theory of economic policy, discussed in Chapter 2 above: define the problem and identify the technically and/or politically feasible instrument that achieves the goal at lowest cost. A process that centres on a government (WTO member) clarifying to trade partners the objectives to be realised by adopting a specific policy measure or regulation can guide a discussion on the effectiveness and (opportunity) cost of alternative instruments that may be applied to realise the goal. In domestic policymaking settings little attention to the consequences of policy choices on foreign countries may be given, potentially leading to decisions that are unnecessarily costly for countries that are not a source of concern. Domestic decision-making may also be captured by interest groups or simply not consider trade spillovers. The opportunity to raise questions in a WTO committee can help trade officials of the country concerned to stimulate a domestic discussion on the trade effects of a regulation that may not have been included in the process that led to the adoption of a given measure. This is an example where the international epistemic community of trade officials that drive the work of WTO committees has a common goal – managing the operation of the rules-based trade order – that potentially may be leveraged to feed trade concerns into domestic policymaking processes.

WTO members could build on the experience with STCs associated with technical product regulations to use WTO fora to discuss underlying policy objectives motivating trade policy measures, including instances where essential security interests are claimed to be at stake. The experience in the TBT and SPS committees is proof that the often forgotten (and sometimes derided) first step of WTO adjudication, consultations, if taken seriously, can catalyse understanding and awareness, and remove disputes from the docket. An important benefit of the process that has evolved in the SPS and TBT Committees is to foster policy dialogue rather than a presumption that dispute settlement is the appropriate response to a trade concern. Such a presumption is particularly unconstructive in assessing national security arguments, given that invocation of formal dispute settlement procedures is highly unlikely to induce a WTO member to change course. An STC approach is less adversarial, offers the potential to promote greater mutual understanding, and is likely to be perceived to be a more legitimate process to assess whether the measures relate to national security in a compelling manner because it involves interaction between peers, not a small number of panellists tasked to judge on what invariably will be sensitive matters.

Article XXI differs from other WTO provisions and agreements in that there is no institutional body that is competent to engage in informed deliberation whether trade measures can be justified or to consider potential adverse impacts on third parties that could in principle be attenuated or avoided (Lester and Manak 2020).[134] Article XXI

134 Shaffer (2021), Bacchus (2022), and Pinchis-Paulsen (2022) offer complementary arguments in this regard.

related matters currently fall under the ambit of the WTO Committee on Market Access. The mandate of this Committee spans market access issues not covered by any other WTO body. In addition to supervising the implementation of commitments on tariffs and non-tariff measures and application of procedures for modification or withdrawal of concessions, it provides a forum for consultation on market access-related matters.[135] Although this Committee increasingly discusses trade concerns, the focus on market access implies that member country representatives participating in meetings are often customs officials, who are unlikely to be able to engage in a discussion of essential interests and the rationale for adopting specific measures that raise concerns for trading partners. National security motivated measures are often highly technical in nature, centring on specific technologies or features of products. Deliberation and discussion of such measures requires participation by those with the requisite technical expertise as well as those in government responsible for the design and implementation of security-motivated trade measures. That said, there is no constraint on the ability of WTO members to send representatives with the requisite expertise to WTO committees if national security issues are tabled for discussion.

An STC-type approach does not imply countries could no longer have recourse to dispute settlement. However, in our view such recourse should focus on determining appropriate remedies following the imposition of trade restrictions for national security purposes (Lester and Zhou 2019). Affected states can be expected to respond to significant adverse consequences caused by a WTO member's national security actions. From the perspective of sustaining a rules-based trade order, unilaterally determined 'retaliation' or rebalancing by affected members is undesirable. It would be preferable to have recourse to mechanisms that help to assess the appropriate level of countermeasures. This suggests that rather than invoking the DSU to contest a national security measure, WTO members should consider putting in place processes to guide what constitutes appropriate rebalancing. This could be part of the proposed STC discussion. Potential remedies can range from withdrawal of the STC request (when affected parties are persuaded by the explanation provided) to voluntary (non-discriminatory) compensation if the peer-to-peer discussion makes clear that the invocation of measures largely reflects industrial policy concerns. Absent such outcomes, there is the choice to engage in countermeasures as a remedy.

The magnitude of countermeasures should be informed by the outcome of a multilateral process. This can draw on the experience that has been obtained in WTO disputes that are not resolved, leading to authorisation to withdraw equivalent concessions. The process that has been developed under the WTO (DSU Art. 22:6 and 22.7) for an arbitrator to determine what constitutes an appropriate level of retaliation could be used as a model. Although the national security case differs from the standard situation in a WTO dispute where the cause for retaliation is non- or inadequate implementation

135 https://www.wto.org/english/tratop_e/markacc_e/markacc_e.htm

of a dispute settlement ruling, the process of determining equivalent/proportional countermeasures could guide responses by WTO members impacted by a national security trade action. While not occurring under the framework established by the DSU, the type of support provided by the Secretariat to arbitrators to quantify the amount of trade affected by a measure could be solicited as part of the proposed STC approach.

These suggestions differ from proposals that national security disputes should take the form of a non-violation complaint (NVC) under GATT Article XXIII:1(b) as opposed to violation complaints along the lines of all the disputes that have been brought to date. The NVC route permits members to argue that a measure that does not violate the WTO nonetheless nullifies or impairs a benefit (Lamp 2019). For NVCs to succeed it is necessary that (i) an initial concession (binding policy commitment) made by a WTO member is (ii) impaired by a subsequent action on national security grounds that (iii) could not have been reasonably anticipated. Given that states can be expected to protect their essential security interests, for a NVC to work parties must accept that invocation of Art. XXI could not have been reasonably anticipated – and thus the panel would have to judge this to be the case. As any such determination is very unlikely to be accepted by the WTO member that has restricted trade for national security reasons, the NVC route as conceived in the existing DSU will be ineffective in serving as a basis for obtaining multilateral guidance on the appropriate level of rebalancing (because this requires a determination that the measure at hand was unexpected).

7.2 POLICY DIALOGUE AND DELIBERATION

The increasing prominence of non-economic objectives in the design and implementation of trade and investment policies poses a major challenge for sustaining multilateral trade cooperation. When it comes to NEOs the approach taken in the WTO is analogous to that taken by Bhagwati and other trade theorists in the 1960s who considered NEOs as constraints that are given, not as goals that should be included explicitly into the objective function of the government and be part of the analysis of policy. The WTO does not question the autonomy of states to pursue domestic regulation of economic activity, nor does it pay much attention to the goals of members that motivate trade policies. The focus of multilateral disciplines is on disciplining the use of trade policies, whatever their motivation.

Insofar as NEOs figure more centrally in national trade and investment policy, with trade conditioned on the implementation of labour and environmental policies in partner countries, or on national, essential, or economic security considerations, this approach may no longer be appropriate. Determining whether and how to regulate NEO-motivated trade spillovers requires a common understanding and information on many dimensions of strategies to link trade or investment policy to NEOs. Many practical questions arise that are as pertinent for the states creating NEO-related spillovers as those that are affected. These questions include whether the objective or goal is clearly defined, whether

the policy is effective, how such effectiveness is measured or determined, the availability of potentially better and more efficient policy instruments, interdependencies across non-economic and economic objectives, and the magnitude of spillover effects on third countries and the trading system more broadly.

The theory of economic policy discussed in Chapter 2 provides a conceptual framework for such assessments that recognises the inherent interdependencies between the economic and non-economic objectives that are at stake. While this is first and foremost a matter for national governments and polities to determine, international cooperation can assist states pursue NEOs more efficiently. Establishing frameworks and processes for deliberation, independent analysis and mechanisms can guide and inform the use of trade measures to pursue economic and non-economic objectives. Policy dialogue and discussion of trade concerns, including existential threats (national security-related, environmental, global pandemics) that make large claims on resources, is also a necessary condition for cooperation to manage the negative spillovers of national NEO policies. Agreement on guardrails, let alone binding rules on contested policies, requires states to have a common understanding of the rationales for interventions and the sources and magnitude of policy-induced spillovers.

Elements of such deliberation already occur in the WTO (Lang and Scott, 2009; Shaffer, 2021; European Union, 2023). In addition to STCs, the SPS and TBT committees hold regular thematic sessions that bring in outside expertise, including regulators, other international organisations, practitioners, and industry representatives to discuss emerging issues that are pertinent to policy areas addressed in the respective agreements. Such sessions do not focus on implementation of the agreements as such but on sharing experiences and learning about new developments and opportunities for potential cooperation. This activity complements the regular work of committees. Thematic sessions provide a valuable window for officials to hear from groups directly affected by specific policies and their implementation, and to be made aware of policy areas that would benefit from international cooperation. The practice of thematic discussion has spread to other WTO bodies. By one count, the WTO held over 100 thematic sessions during 2017-2019 (Wolfe 2021a). There is substantial variance across WTO bodies in the extent to which such engagement with stakeholders occurs, and significant scope therefore for WTO members to leverage extant epistemic communities (and support such communities) to interact with each other and with responsible government officials.

Two types of deliberative processes appear to be particularly salient for the trade-NEO nexus. The first centres on the interface between NEO-related policies and the operation of GVCs. The second is the use of subsidies and regulatory policy instruments to achieve NEOs (Hoekman and Nelson, 2020).

7.2.1 Global value chains and non-economic objectives: Risk assessment and resilience

GVCs are a natural focus for policies seeking to enhance economic security. Moreover, as GVCs play a major role in the production of many goods and services that are consumed in most jurisdictions, they are also the target for a range of non-security NEOs such as labour standards, protecting human rights, and safeguarding the environment. Designing mechanisms for states to cooperate with each other and with lead firms and key stakeholders involved in (dependent on) GVCs can help provide WTO members with information on the operation of specific GVCs associated with products that governments deem critical. Public-private collaboration would help ascertain the sources, likelihood, and potential magnitude of possible risks of supply chain disruption, and help guide the design and implementation of policies motivated by de-risking and other NEOs.

Cooperation between states and stakeholders on the content of specific NEO-related standards to be applied to GVCs, how they can be operationalised and implemented, and agreeing on processes for monitoring compliance and enforcement can increase the effectiveness of policies and reduce uncertainty and adoption costs for firms. The Covid-19 pandemic revealed that governments were insufficiently aware of how GVCs for medical products work, their resilience to shocks, and what governments should do, both nationally and collaboratively, to develop new vaccines, therapies, and distribute medical supplies globally (World Bank and WTO 2022). Similarly, increasing concern about secure access to materials and inputs and the potential for trade partners to restrict access to markets or supplies of products that are deemed to be critical calls for improved understanding of existing supply chains and potential alternative sources of supply.

Miroudot (2020) makes a compelling case for investment by governments in better understanding different types of risks to global supply chains that produce essential goods and services as a precondition for considering policy interventions, as these otherwise may be ineffective or counterproductive in enhancing resilience.[136] Such risks include demand or supply shocks deriving from natural events or the use of trade for foreign policy reasons by dominant suppliers of critical products. Assessing such 'supply chain vulnerabilities' has been a major focus of governments following the value chain disruptions caused by the Covid-19 pandemic, increasing concern about weaponisation of trade as an instrument of foreign policy and the war against Ukraine by Russia.[137] Reducing risks associated with high rates of dependence on one or a few suppliers of critical materials and inputs has become a more prominent policy focus for many governments, reflected in explicit risk assessments of the GVCs that supply essentialgoods or services.

136 Hoekman (2013, 2014) has proposed the formation of supply chain councils as a mechanism to bring together the public and public sector to better understand the operation of value chains and address potential weaknesses and bottlenecks associated with government policies or their absence. See also Findlay and Hoekman (2020).

137 E.g. White House (2021), United States (2022), EC (2020).

The motivation for such initiatives often is economic security. A 2023 Joint Communication on a European Economic Security Strategy (European Commission 2023c) is an example. It develops an approach to assessing and managing risks associated with trade and investment flows that may undermine the Union's economic security. It does not define economic security but conceptualises it as securing supply chains and access to resources increasingly challenged by strategic competitors, ensuring resilience to shocks, whether political/policy induced or natural and managing (reducing) the risks arising from economic linkages and interdependence. It highlights risks associated with (i) resilience of supply chains, including energy security, (ii) physical and cyber security of critical infrastructure, (iii) technology security and technology leakage, and (iv) weaponisation of economic dependencies (economic coercion). To do this the EU will work with its member states, with input from private stakeholders, to analyse critical supply chains, stress test them, and establish the level of associated risk. The strategy highlights the need for a particular focus on dependencies that are more likely to be weaponised for geopolitical purposes.

Risk mitigation initiatives centre on improving EU competitiveness, using available instruments, and where needed developing new ones to retain policy autonomy.[138] The set of instruments mentioned in the Strategy include RepowerEU (to strengthen energy security of supply), the proposal for a Critical Raw Materials Act (to facilitate the extraction, processing, and recycling of critical raw materials in the EU), the European Chips Act (ensure a secure supply of semiconductors), a proposed Net-Zero Industry Act (to scale up manufacturing of net-zero technology in the EU), the Single Market Emergency Instrument (aiming at ensuring the availability and free circulation of critical products in case of emergencies, including through EU-level monitoring of strategic products and services, disruptions of supply chains and related shortages), and a proposal to establish a Strategic Technologies for Europe Platform (to support the development, manufacturing, or strengthening of EU value chains for digital and clean technologies). Similar initiatives are being implemented by many OECD member states and emerging economies.

These 'economic security' initiatives are complemented by a raft of instruments targeting other NEOs and that either centre directly on GVCs or will affect their operation. These include the EU Industrial Strategy (which inter alia aims to support industrial alliances to accelerate activities in clean tech, raw materials, processors and semiconductors, data, edge and cloud computing; the circular economy; enhancing green and digital skills; and

138 Specific measures include (i) establishing a list of technologies that are deemed critical to economic security, assessing their risks, and developing mitigating measures, (ii) engaging in a structured dialogue with the private sector to develop a collective understanding of economic security and encourage associated due diligence and risk management, (iii) further support for EU technological sovereignty and resilience of EU value chains, review the Foreign Direct Investment Screening Regulation, and examining with Member States what security risks can result from outbound investments to provide the basis for a proposed initiative by the end of 2023, and (iv) using the EU Single Intelligence Analysis Capacity (SIAC) to work specifically on the detection of possible threats to EU economic security. See https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3358

EU leadership in global standard-setting),[139] the European Green Deal, the Net Zero Industry Act (calling for 40% of EU cleantech deployment to be produced in the EU by 2030), the Carbon Border Adjustment Mechanism, conditioning trade and investment on protection of labour rights and environmental standards, a ban on imports of products produced with forced labour, and a draft directive mandating companies to exercise due diligence of their supply chains. Here again other OECD countries have or are putting in place similar initiatives. The US Inflation Reduction Act of 2022 seeks to increase national production and consumption of products deemed critical for combatting climate change and sustaining prosperity, with many of its provisions creating incentives for large companies to redesign their GVCs and produce inputs and final products in the US.

The impacts of these types of policies call for evaluation, both ex-ante to inform their design and ex-post to assess whether they support realisation of the underlying NEOs. While this is a matter that extends (far) beyond the narrower goal of enhancing understanding of how policies affect risks and resilience of GVCs that is at issue here,[140] insofar as policies target GVCs, international cooperation in undertaking assessments of supply chain vulnerabilities and addressing them more efficiently can both improve policy and reduce costs for firms, their suppliers and customers, and final consumers (Hoekman 2014).[141]

Mechanisms through which the public and private sector can work together to identify methods to measure and track NEO-related variables of public interest – such as the carbon content of GVC activities – could help both firms and governments by clarifying what should be monitored and how to do so in ways that satisfy regulatory objectives. The same is true for policies mandating supply chain due diligence, e.g. requiring that firms audit and monitor operations to ensure human rights are not violated. Cooperation on the processes and standards to be applied would reduce policy uncertainty for enterprises and help governments better identify intervention to ensure supply chains satisfy salient standards associated with NEOs.[142] Efforts to develop common approaches that can be adopted by multiple jurisdictions would reduce compliance costs for firms and the burden on governments (national regulators) of developing criteria to ascertain implementation by companies. Similarly, if the goal of governments is to reduce excessive dependence on key suppliers and ensure access to critical raw materials

139 See e.g. Szyszczak (2022), Tagliapietra and Veugelers (2023).

140 We turn to this in the next sub-section.

141 Assessing and addressing supply chain risks and vulnerabilities is a central focus of the May 2023 IPEF Supply Chain Agreement, which establishes a Supply Chain Council as a forum for cooperation to assess supply chain risks and develop sector-specific action plans to bolster the resilience of supply chains for critical products. See https://www.commerce.gov/news/press-releases/2023/05/press-statement-substantial-conclusion-ipef-supply-chain-agreement.

142 Baldwin and Freeman (2022) note that assessment of risk-reward trade-offs associated with GVCs may differ between the private and public sector, reflecting greater risk aversion by voters relative to managers and owners of companies.

through diversification and/or by allocating subsidies to boost additional supply of critical inputs and raw materials,[143] collaboration to generate and share information on extant production capacity, stocks and weak links in supply chains can help identify potential areas for joint action to bolster supplies.

Any mechanism to support policy dialogue and deliberation on the use of trade policies motivated by NEOs should be designed around the collection and analysis of information provided by the actors that are directly involved in the operation of international supply chains, i.e. representatives of the businesses that produce or source essential goods or services that are the focus of policy concerns. Such information is critical to understand the structure of supply chains, the location of production facilities and extant capacity, potential points of failure and sources of risks for the functioning of GVCs, alternative sources of supply of critical inputs, their substitutability, etc. Depending on the goal (NEO) this will involve different industries and stakeholders.

Data on supply chains with a view to assessing vulnerabilities and resilience to policy shocks must come from international businesses, industry experts, and logistics/transportation services providers. Firms are likely to be concerned that providing such information may assist competitors or give rise to retaliatory actions by governments of jurisdictions in which they have production facilities. Conversely, governments may not trust information provided by private sector operators. As discussed in Findlay and Hoekman (2020), what is needed is a trusted intermediary that acts as a depository of commercially sensitive information, anonymises relevant data on the operation of GVCs, and undertakes analysis that helps WTO members evaluate the effects and effectiveness of different instruments used to pursue NEOs.

This role could in principle be played by the WTO, supported by the secretariat, working with other international organisations.[144] It could be complemented by providing support for technical assistance and capacity building programmes by specialised organisations with expertise relevant to different NEOs, for example nongovernmental organisations that work on implementing sustainability standards for traded products.[145] International principles and standards such as the recently released Sustainability-related Financial Disclosures Standards developed by International Sustainability Standards Board[146] provide a potential focal point for such assistance as well as forming a basis for national regulation of GVC activities.

143 See e.g. Nakano (2021).

144 A step in this direction was taken during the Covid-19 pandemic through a Global Supply Chains Forum which met in May 2022 at the WTO for WTO members and stakeholders from every part of the supply chain to share perspectives on the causes of supply chain disruptions and measures to address them. See https://www.wto.org/english/news_e/events_e/gscforum2022_e.htm.

145 E.g. the epistemic community comprising the UN Forum on Sustainability Standards. See https://unfss.org/.

146 https://www.ifrs.org/groups/international-sustainability-standards-board/ and https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/

7.2.2 Non-economic objective-motivated subsidies and regulatory policies

As mentioned previously and discussed further in Section 7.4 below, WTO rules on subsidies and industrial policies make no distinction between interventions based on their underlying objectives. Whether this is appropriate given that subsidies may be an efficient instrument to address market failures that are associated with specific NEOs is an open question. Of course, many NEOs have nothing to do with market failures as such, instead reflecting social values and norms, but will nonetheless have economic implications. In the absence of substantive disciplines on the use of trade policies for NEOs, independent of views regarding the desirability of disciplines, there is a strong case for bolstering the institutional framework to support constructive evidence-based deliberation on the NEOs that are being pursued through subsidy programmes, the various instruments that are used, the magnitude and incidence of policy spillovers, and potential ways of reducing them. The latter should be core business for the WTO.

Given the challenge of agreeing to fundamental reform of the WTO and the evident importance of managing policy spillovers from NEO-related interventions, there is a strong case for establishing a platform for policy dialogue on the use of NEO-motivated subsidies and regulatory measures. Helping trade partners to understand both underlying concerns and intended objectives of (planned) interventions by major states (those whose policies will have significant repercussions on many WTO members' trade) requires collecting and sharing information on (proposed) policy measures to provide a basis for policy dialogue and peer review. What this calls for is a process to:

1. Compile information on major subsidies and regulatory measures targeting NEOs
2. Clarify the specific goals driving such interventions
3. Assess and discuss the economic consequences of (proposed) measures, both for the state(s) taking action and the potential magnitude and incidence of cross-border spillovers and repercussions for trade and investment in affected products
4. Support dialogue on alternative policy measures to realise the NEOs that motivate interventions and options for reducing negative cross-border spillovers.

A first area of focus should be to improve data on subsidies. Many WTO members have expressed their displeasure with the compliance record on notifications of subsidies.[147] Potential reasons for non-notification may include perceptions by states that they do not have an interest in providing self-incriminating information, do not see the value to themselves in collecting the required data, and/or because doing so confronts capacity constraints. The experience with notifications makes clear that efforts to improve

147 https://www.wto.org/english/news_e/news21_e/scm_27apr21_e.htm

compliance are unlikely to be effective. In any event, many subsidy programmes may not need to be notified under current rules, e.g. sub-central programmes such as local investment incentives. This suggests compilation of data on the extent and pattern of subsidies will need to rely on other sources.

One potential source is specialised international organisations such as the IMF, OECD, and World Bank. These three organisations have cooperated with the WTO to construct a website that pulls together information on subsidies that is collected as part of their activity, providing public access to data on subsidies that the organisations have compiled.[148] The site provides data on subsidies to agriculture (OECD and WTO notifications), fossil fuels (IMF and OECD), fisheries (OECD), industrial sectors (OECD), and cross-sectoral and economy-wide activities (from the IMF Government Finance Statistics database and WTO notifications). This initiative does not generate any new data but is a portal that guides users to the data maintained by the respective organisation. While it complements WTO notifications, its coverage illustrates the extent of gaps in what these organisations collect information on.

Governments and companies are another source of information. The Global Trade Alert (GTA) has demonstrated that a significant amount of data is reported by governments on public websites, in decrees and legislation, etc. and by corporations in annual reports, especially those that are listed on stock exchanges. In May 2023, the GTA released an inventory of 31,000 subsidies granted by 57 jurisdictions since 1 November 2008 (Evenett and Martín Espejo 2023).[149] The database includes information on whether a subsidy is firm-specific, the type of support provided, whether they are consumer or producer focused, target environmental goals or reducing carbon emissions or public health, and the HS and CPC codes for subsidies that are product- or sector-specific. These data are obtained from web scraping and searches of corporate reports. Many of the associated source text files will include statements indicating the goal(s) of the associated subsidies, the value (magnitude) of the subsidy, whether they are time-bound, and whether they are capped or open-ended with respect to the total amount of support that is made available. These are important elements that will determine whether a subsidy is significant and the impacts it may have.

In addition to subsidies a deliberative platform should include a focus on regulatory measures that relate to NEOs. These go beyond GVC-centred regulation and policies to reduce supply risks and include areas such as data protection and regulations affecting digital trade. Many such regulations are motivated by NEOs (privacy or consumer protection) and may involve use of economic instruments, e.g. local content requirements. Here also there are ongoing efforts by research institutes to compile information. A new Digital Trade Integration database (Ferracane 2023) provides information on a broad range of digital policies for over 100 countries that may affect trade. Complemented with

148 See https://www.subsidydata.org/en/subsidydata/home and IMF et al. (2022).
149 https://www.globaltradealert.org/reports/109

high-frequency information from the GTA on changes in digital trade related measures (through its companion Digital Policy Alert),[150] these sources provide a basis for analysis of the effects of national policy and changes in policies. The significant effort being invested by governments to strengthen regulation of digital activities is complemented by wide-ranging experimentation that aims to facilitate digital trade, including mutual recognition arrangements (such as EU data adequacy determinations – see Ferracane et al. 2023) and digital partnership agreements (Honey 2021).

A topic that could usefully be considered for deliberation in the suggested platform by governments and stakeholders is how to increase the transparency of the many different digital trade facilitation processes and initiatives that are being pursued and assess their effectiveness in achieving underlying NEOs. Greater efforts to monitor and evaluate the effects of digital regulation, the magnitude of the risks that motivate regulatory restrictions on digital trade, the extent to which those risks are reduced by specific measures that aim to do so, and learning from both own and others' experience from the implementation of national digital policies is a key input into identification of opportunities to expand cooperation to encompass more countries over time through plurilateral clubs or multilateral agreements.

Taken together, there is sufficient information available to permit cross-country analysis of NEOs and associated instrument choices for the post-2009 period. The Global Trade Alert data can be merged with notifications by WTO members of measures invoking general exceptions, security exceptions, and quantitative restrictions (e.g. export controls) (WTO 2022);[151] technical product regulations reported in the WTO e-Ping platform and information on associated specific trade concerns raised by WTO members,[152] and the datasets that have been compiled on specific sectoral and general subsidies by the IMF and OECD. The GTA source files can be searched and analysed using machine learning, text analysis, and AI tools to determine whether they report information on the objectives associated with a policy measure. Text analysis techniques applied to a compilation of keywords and word strings that are based on sampling of the documents underlying measures reported in WTO notifications and the GTA and are associated with different NEOs (e.g. national security, economic security, environment, public health, public morals, essential supplies, critical products, data privacy, labour and human rights, foreign policy sanctions) can be used to assess the prevalence of different NEOs that involve trade or investment measures. Mapping the stated goals

150 https://www.globaltradealert.org/digital. Data are reported commencing in January 2020. As of end May 2023, a total of 6,100 specific actions (activities) had been taken. The monitoring exercise covers the following policy areas: competition policy, taxation, content moderation, data governance, FDI, International trade, public procurement, registration and licensing, other operating conditions, subsidies, and industrial policy. As of June 2023, most of these concerned data governance (including data protection and privacy) (1,600 measures), other operating conditions (704), content moderation (424) and actions by competition authorities (422). See https://digitalpolicyalert.org/policy-area.

151 https://qr.wto.org/en#/home

152 https://eping.wto.org/; https://eping.wto.org/en/Search/TradeConcerns

of trade-related interventions with significant trade-carried spillovers will help WTO members to better understand the extent to which subsidies and regulatory measures reflect economic (commercial) objectives as opposed to NEOs and clarify the degree to which a given instrument is intended to pursue multiple objectives.

Analysis of which policies associated with NEOs overlap, considering that policy instruments may be complements or substitutes (Cadot et al. 2015) would provide insight into the need for cooperation to encompass multiple policies, i.e. a package of linked issues. It will also help shed light on the relationship between different NEOs and extant WTO policy disciplines. In principle, policy measures subject to WTO rules call for invocation of exceptions provisions, whereas policy instruments that are not or only partially covered by current agreements or commitments do not. The pattern of instrument use motivated by NEOs would also provide insight into the incentives to consider cooperation to address competitiveness spillover effects. The incentives to consider cooperation on a plurilateral basis may be greater than to seek to do so on a multilateral basis given the difficulty of renegotiating WTO rules. As discussed further in Chapter 8, the pursuit of NEOs through subsidies or regulatory instruments may have negative economic repercussions for the state doing so as well as for trading partners. Reducing such opportunity costs is one potential rationale for plurilateral cooperation: concerted action with like-minded states that share a specific NEO may reduce spillovers and potential for trade conflicts.[153]

Empirical assessments of the impact of specific (sets of) interventions that are associated with different (purported) goals, including spillover effects, using rigorous empirical methods would be important output of the envisaged process. There is very little robust empirical evidence on the size and pattern (incidence) of such spillovers, which is an important input into possible efforts by states to cooperate with a view to reducing them. Event study models can be used to assess the effect of specific subsidy programmes on domestic industries and estimate the associated trade spillovers using measures of trade exposure (imports as a share of total output in the subsidising jurisdiction; the share of subsidised exports in total imports of partner countries) (see e.g. Etzel et al. 2021).

An important contribution a platform can make is to provide independent objective empirical analyses of the likely economic impacts and incentive effects created by the policies pursued by a major state. This can be supplied by staff of multilateral organisations with subject matter expertise and the analytical capacity needed to produce rigorous quantitative as well as qualitative assessments of a given situation, and feasible alternatives that may be more effective in addressing concerns with fewer negative spillovers. Such policy analysis must be provided through a process that is trusted by the major players. Organisations such as the IMF, OECD, and World Bank

153 For example, the proposed platform for analysis-informed deliberation could serve as the basis for an eventual agreement between the major protagonists along similar lines as has occurred with export control regimes, which started as arrangements among allied nations but now include a more heterogeneous set of countries.

have the analytical capacity and necessary knowledge, and could be tasked to provide the requisite background material to inform discussion, working with the appropriate technical sectoral or regional bodies with expertise in a given issue areas as well as international business organisations with knowledge of the pertinent value chains.

Given that negotiation is deeply embedded in the 'DNA' of the WTO membership, this may constrain the ability of states to engage in an open substantive policy dialogue in a WTO setting. Organising a platform as a partnership with other salient international organisations with subject matter mandates and capacity should attenuate this constraint. For it to be effective, it must include the largest trading nations[154] While a G7+ dialogue, as is implicit in proposals that promote 'friend-shoring', may reduce political complexity and facilitate engagement, excluding China and other major emerging economies will have a significant opportunity cost both in terms of assessing spillover effects of trade and investment policies and in terms of perceived process legitimacy.

7.3 DISPUTE SETTLEMENT AND NON-ECONOMIC OBJECTIVES

While STCs arguably are more suitable mechanisms for multilateral scrutiny of trade interventions justified by national security considerations, and deliberative processes may serve to defuse conflicts regarding the use of trade-related policies to attain NEOs, WTO members cannot be precluded from invoking formal dispute settlement procedures. More generally, effective enforcement of trade agreements is critical to sustain cooperation and for states to engage in negotiations on rules for trade policy in the first place. Since November 2019, adjudication of disputes has been impeded because of the US decision to block requests for new appointments to the WTO Appellate Body. In his succinct account of WTO dispute settlement, Davey (2022) calls for taking a step back to analyse in dispassionate manner the good and bad of 25 years of multilateral adjudication. Fiorini et al. (2020) report survey information that indicates that some WTO members sympathise with views expressed by the US regarding some features of multilateral dispute settlement,[155] while not supporting the way the US dismantled the Appellate Body.[156]

The long-running Review of the dispute settlement understanding discussed some of the issues raised by the US, but not in a systematic way. McDougall's (2018) comprehensive discussion of the DSU Review experience suggests that WTO members engaged, for all practical purposes, in a dialogue of the deaf. Nothing was agreed in over 20 years of discussion, in part because of a presumption early in the process that some of the panel-

154 The three largest trading powers (China, EU, and US) account for 45% of world trade. Together with Japan, UK, Singapore, and South Korea, the top seven traders account for 60% of world trade.

155 One objection concerned rulings by the Appellate Body that went beyond the provisions negotiated by WTO members or rejected what the US understood to have been negotiated and incorporated in the text of specific WTO agreements. Mavroidis (2022) discusses instances where the Appellate Body behaved more as a legislator than an adjudicator.

156 Speaking for 123 members, Mexico called for the re-appointment of the Appellate Body members as recently as April 2022, https://www.wto.org/english/news_e/news22_e/dsb_27apr22_e.htm.

level issues raised could be addressed by the Appellate Body, and later in the process because the Doha round became deadlocked and any DSU reforms required consensus. The Biden Administration has committed to work with other WTO members towards rescuing dispute settlement from its current fate. To date, the US has not undone the decision by the Trump Administration to block Appellate Body appointments, nor has it rolled back much of Trump trade policy more broadly.[157] At the 12th Ministerial Conference of the WTO, ministers called for the issue to be resolved by 2024, but the process pursued to date risks emulating the misfortunes of the DSU Review. There is no point in reproducing yet another long list of grievances, given that the review already generated one. The priority issue to be determined is whether WTO adjudication will continue to operate on a compulsory third-party basis, and if so, whether the original two-instance design – a first stage panel and possibility of appeal to an Appellate Body – will be re-established.[158]

This is not the place for a general discussion and proposals for reform of the WTO dispute settlement mechanism. Our interest here is more limited: reforms that would assist WTO members address disputes that involve NEOs. In considering the type of system that best suits settlement of disputes related to the use of trade measures justified by NEOs, we focus on three issues:

1. Who participates in the process? The argument here is that expanding on expertise involved would benefit the quest for a solution, both for national security cases if these continue to be brought, and for general exceptions (Art. XX)
2. The incomplete nature of the existing legal framework regarding non-economic objectives
3. The standard of review that an adjudicative body will apply

7.3.1 Panellists

The first step in a dispute if consultations fail to resolve the matter is the formation of a panel. As part of the implementation of the DSU, all WTO members propose individuals for inclusion into a roster of potential panellists. In principle this provides a common pool of 'pre-approved' persons from which the Secretariat has the right to propose names to serve as a panellist in any given dispute. Mavroidis (2022) calculates that over two-thirds of all panels established since 1995 include at least one panellist who is not listed on the agree roster of potential panellists and therefore has not been endorsed by the WTO membership.[159] By virtue of Article 8 DSU, the WTO Secretariat has the right

157 Nelson (2019) and Mutz (2021a) discuss why trade has re-emerged in domestic US politics.
158 For most analysts, the re-establishment of the Appellate Body is necessary to resolve the WTO dispute settlement crisis. Hoekman and Mavroidis (2020) argue what matters is that dispute settlement continues to involve compulsory third-party adjudication. This need not involve an appeal mechanism.
159 pp. 419 et seq.

to appoint panellists, upon request by one member, when the disputing parties cannot agree on who to appoint within the specified statutory time. It is at best doubtful that the Secretariat has the right to appoint non-roster panellists, and a strong case can be made that the Secretariat has not always exercised its discretion appropriately.[160]

Much has been written about the expertise, or lack thereof, of WTO panellists and their reliance on the WTO Secretariat. Pauwelyn and Pelc (2022a; 2022b) have claimed that it is the Secretariat that drafts many of the reports, consistent with arguments that panellists lack the incentives to invest and produce the reports themselves (Nordström 2005). What matters is not who holds the pen but who controls it. If panellists are knowledgeable and have the required expertise it matters little who holds the pen as what gets written will reflect their views.[161] In practice, however, the expertise frequently is missing. Most lawyers are trained in privileging textualist interpretations of a treaty provision. In the case of national security measures this is the last thing we need. To get to the bottom of a discussion about national security, the adjudicator must combine knowledge that ranges from technological issues to economic policy, and view all of it through the lenses of the available legal text. Expertise in different fields is a prerequisite. In the case of the Committee on Foreign Investment in the US (CFIUS) scientists, economists, defence specialists, and technology experts sit side by side with lawyers who can understand the quintessence of the debates, and draft decisions accordingly. This diversity in expertise is missing in the WTO.

7.3.2 Standard of review in Article XXI cases

Current practice of panels is characterised by substantial deference to claims that a threat to national security exists. Panels have rightly interpreted 'necessity' in Article XXI differently from the manner it has been understood in the realm of Article XX case law. In the latter case, they inquire into the question whether the measure privileged is the reasonably available, least restrictive option. In Art. XXI cases, they have understood 'necessity' more like 'appropriateness' and hev asked only to what extent a measure can appropriately serve the intended purpose, namely, essential security interests. Panel practice deserves plaudits here, especially given that International Court of Justice (ICJ) and Investor-state dispute settlement (ISDS) practice has not followed a similar path. Necessity is a proxy to detect intent. Another proxy is the costliness of the measures to the country imposing them. A country limiting its exports suffers economically, and not only in terms of (immediate) income. A recent decision by the US Commerce Department of Industry and Security is illustrative: the ruling relaxed the scope of an

160 For a discussion of instances where members have complained about the selection see Mavroidis (2022) at pp. 436 et seq.

161 Of course, panellists may be subjected to political pressure and may decide to take the politics of a matter into consideration. Our point here is limited to expertise.

export control, to allow US companies to effectively participate in the development of a new cryptography standard. The fear was that precluding US industry participation would give an advantage to adversaries insofar as it would increase the prospects that standards would be agreed that did not reflect US interests.[162]

In both Article XX and Article XXI cases, WTO panellists are asked to examine a claim seeking to limit a member's ability to use a specific instrument without putting into question the right to pursue a non-economic objective. The chapeau of Article XX requires that 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." Both 'arbitrary or unjustifiable discrimination' and 'disguised restriction on trade' were discussed in one of the first WTO disputes (DS2, *US-Gasoline*) and again in DS332 (*Brazil-Retreaded Tyres*). In both instances, the Appellate Body understood the terms to be closely related, limited to the application of a specific measure, and, for all practical purposes amounting to an even-handedness requirement, that is, a requirement to apply a law or regulation motivated by a NEO in the same manner to both domestic and imported goods. If panels refrain from questioning goals in the realm of Article XX, the case for doing so for Art. XXI claims is even stronger.

What qualifies as an 'emergency' short of military conflict is not obvious. It is a matter where adjudicators arguably should err on the side of caution given significant uncertainty regarding the future behaviour of actors – e.g. how a buyer in country X will use a dual-use good or how an inward investor from country Y will act after acquiring sensitive facilities? Decisions to authorise export or a direct investment are decisions under uncertainty. A threat- or risk-based assessment is commonly used in national determinations in cases where essential security interests are in play. Eichensehr and Hwang (2023), for example, explain how the threat posed by a transaction can justify a refusal to approve a foreign investment by the US Committee on Foreign Investment. Panels are not well placed to second guess such assessments and should not.

This does not mean an inquiry into the means used to attain a national security goal cannot lead to a finding that Article XXI has not been observed. Recall from our earlier discussion that in DS567, *Saudi Arabia-IPRs*, the panel found that Saudi Arabia had used an inappropriate means to pursue national security, and, consequently, that it had not acted in a manner consistent with the requirements of Art. XXI. The standard of review employed matters, even if 'necessity' is reduced to 'appropriateness'.[163] Conceptually, the standard of review is different from the de facto equation of these two terms in the realm

162 https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3127-2022-09-08-bis-press-release-standards-rule/file

163 What follows is not a critique of the panel approach in DS567. As discussed previously, Saudi Arabia did not defend its measures, and the panel was left with little choice but to find that Saudi Arabia had behaved inconsistently with Article XXI.

of case law under Article XXI and pre-supposes the definition of the term 'necessity'. Panellists should adopt a 'reasonableness' standard that recognises the uncertainty that inherently will be a factor in cases where security is at play. This is done in the SPS agreement.[164] Article 5.7 SPS as follows:

> 7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

No equivalent language features in Art. XXI. One reason may be that the SPS agreement (and the TFA) is more recent than Article XXI, which dates to 1947. Because of the importance of what is at stake (public health), panels have adopted a deferential standard in SPS-related disputes, instead requiring regulators to observe simple procedural requirements, e.g. revisit periodically the need to keep the measure adopted in place.[165] A standard along these lines applies in other parts of the WTO as well, enabling governments to act in instances where the extent of injury that may eventually be caused cannot be properly assessed ex-ante. In *Argentina-Financial Services* (DS453), the Appellate Body adopted a similar standard of review when evaluating the consistency of actions adopted by Argentina, ostensibly in order to avert crisis. Argentina had invoked the prudential carve out to justify its actions, a provision that allows the membership to adopt measures deviating from assumed obligations in order to preserve the integrity of their financial system. The Appellate Body did not require from Argentina to identify all measures taken to serve this higher purpose and characterise them as 'domestic regulation'.[166]

Importantly, in the same decision the Appellate Body entertained an appeal by Panama regarding the time-horizon within which Argentina could have lawfully adopted prudential measures. Because of the interest of the matter, and because the Appellate Body condoned it, we cite the key paragraphs of the panel report that Panama appealed against (7.877-7.879)

> We do not see in the text of paragraph 2(a) of the Annex on Financial Services any indication that the only prudential reasons envisaged are those which, as Panama argues, involve avoiding "a risk whose materialization is imminent if the adoption of the measure is delayed". In fact, the indicative nature of the list of prudential reasons in paragraph 2(a) of the Annex on

164 A similar call for risk-based approaches can be found in the Trade Facilitation Agreement, e.g. Article 5 TFA permitting authorities to enhance the level of controls or inspections at the border based on risk, endeavour to adopt or maintain a risk management system for customs control (Art. 4), and use of risk-based criteria to accord a trader authorised economic operator status (Art. 7.2).

165 DS76 Japan-Varietals, Appellate Body report at pp. 23 et seq.

166 DS453 Argentina-Financial Services, §§6.242 et seq. Cantore (2018) provides an excellent account of the prudential carve out in the Agreement on Financial Services. See Delimatsis and Hoekman (2018) for a discussion of the dispute.

> Financial Services on the one hand reflects the difficulty of having an exhaustive list of reasons capable of underpinning specific measures in the financial sector, and on the other denotes a desire to allow Members to adapt their measures in the financial sector to the changing and unpredictable nature of the risks that might arise. Therefore, taking into account the ordinary meaning of the words "prudential reasons" and the illustrative list of these reasons, there is nothing in the text of paragraph 2(a) to suggest this idea of "imminence".
>
> In our view, it is important to understand that "systemic" problems may be incubating or gestating over the course of time and erupt rapidly; hence the importance of being prepared for them in advance. For example, in the particular case of the insurance sector, a situation of failure – and, ultimately, the possibility of contagion and financial instability, together with a threat to the protection of the consumers of these services – might be slow to emerge. In the light of the foregoing, we conclude that the expression "motivos cautelares" (prudential reasons) refers to those "causes" or "reasons" that motivate financial sector regulators to act to prevent a risk, injury or danger that does not necessarily have to be imminent.

The Appellate Body therefore expanded the time-horizon of risks that can be addressed through the prudential carve out beyond imminent threats. This makes sense. And if it makes sense for the banking sector, it must make sense for instances where essential security interests are at issue. In the 1923 Wimbledon case before the Permanent Court of International Justice, the predecessor of the ICJ, Judges Anzilotti and Huber, dissenting from the majority, concluded that:

> The right of a state to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it.[167]

This view, to which we adhere, should set the tone for the standard of review that should be applied in case of scrutiny of invocations of national security to justify trade-restrictive measures, irrespective whether the current regime (justiciability of XXI disputes) continues to prevail, or a decision is taken to scrutinize XXI cases through a deliberative process. Summarising, if Article XXI cases are brought:

- All types of measures suitable to protect national security should be allowed.
- Both imminent, but also potential future situations can be addressed.
- Those entrusted with scrutinising invocations of national security should limit themselves to a consideration of the appropriateness of measures adopted.

167 17 August 1923 [1923] PCIJ 35 (ser. A) No 1 at 37§3.

7.3.3 Other non-economic objective-related disputes

Problems are not confined to national security related disputes. Case law under TBT leaves a lot to be desired. A concatenation of panels has found it quite difficult to properly assess regulatory intent and its impact on the understanding of the key obligations.[168] TBT is a combination of Articles III and XX: it deals with behind-the-border measures adopted ostensibly in pursuance of an NEO. To understand non-discrimination without paying sufficient attention to the NEO pursued would routinely lead panels to false positives. The tuna disputes between Mexico and the US (DS381) illustrate the problem. 'Likeness', one of the two pillars of non-discrimination, in TBT can by definition not be equated to 'likeness' in HS classifications. The TBT is predicated on the idea that the regulator wants to drive a wedge between two goods that consumers would otherwise regard as substitutes, because one of them is not congruous with the social preferences of the regulating state. Thus, a legal test must be performed that considers the existence of a technical regulation pertaining to the process used to produce a good (in this case requiring that tuna consumed in the US use technologies that reduce by-catch of dolphins) as otherwise the ability of regulators to regulate imports to achieve NEOs would be undercut. This is where panels have failed, even when they ended up somehow with the right result. Indeed, in DS381, the US eventually prevailed, but the legal benchmark that was established is indecipherable.

Dozens of similar disputes are routinely resolved in the TBT Committee, where members have more of an opportunity to bring in outside (non-legal) expertise, debate the rationale for the measure, the objectives sought, and better understand the context surrounding the adopted measures. This does not mean adjudication is not useful. It serves an important purpose as trade agreements must be enforceable. But successful adjudication presupposes many elements, from clear text to competent judges, which cannot be taken for granted. Unlike national law, coercion in international law is decentralised, and the most appropriate way to secure implementation is persuasion. Bolstering the deliberative process will reduce the need for adjudication in cases where asymmetric information regarding the objectives pursued plays an important role.

7.4 REFORMING WTO RULES GOVERNING THE TRADE/NON-ECONOMIC OBJECTIVE NEXUS

The challenge of agreeing on rules to guide the use of trade policy instruments to attain NEOs is two-fold. First, to determine where there are significant NEO-related policy spillovers that could be addressed through negotiation of new rules among the major protagonists that generate them. Second, insofar as multilateral agreement cannot be realised, whether to cooperate with like-minded countries through deep PTAs or domain- or issue-specific clubs.

168 For an in-depth discussion, see Mavroidis (2019).

There is no prima facie case that large economies cannot agree on disciplines on policies in a range of areas that give rise to large spillovers. The scope for such cooperation, even among states with very different governance and economic systems, is substantial. The fact that China acceded to the WTO and accepted the many conditions and requirements that were associated with membership, and arguably has implemented what it agreed to – and largely complied with dispute settlement rulings – illustrates the point. Many emerging economies perceive that the state has an important role to play in the economy. It is important to recognise in this regard that the differences are not as stark as often presented. In OECD member countries the State often plays an important role that goes beyond regulation of economic activity, including use of state-owned enterprises (SOEs). The common agricultural policy of the EU and similarly extensive support provided to farmers in the US are examples that at the sector level government intervention in market-based economies can be extensive. Aerospace provides another example, as do recent programmes to support the semiconductor industry on both sides of the Atlantic.

7.4.1 Article XXI

Respondents in a national security dispute will be called to justify their choices and will be judged on a standard loosely called 'preponderance of evidence' by non-professional WTO adjudicators.[169] Think of the paradigmatic case laid out above (Section 7.3.2), where a WTO member subjects a dual-use good to export controls. What is the legal framework for entertaining a dispute along the lines presented above? Article XXI is an exception to obligations assumed, but which obligation exactly is the country imposing the export restriction, violating? Article XI of GATT (Elimination of Quantitative Restrictions) bans both imports and export quantitative restrictions and has been further elaborated for restrictions on imports in the Agreement on Import Licensing.

If an import licensing scheme is introduced to ensure that a dual-use good does not end up in the wrong hands at home, the Import Licensing Agreement provides a 'buffer' for the regulating state. It lays out concrete steps that WTO members must undertake when imposing a licensing regime that regulates imports. Unlike the case when a plaintiff claims that Article XI has been violated (where all it has to do is to show that a measure can have a quota-like effect, even if only potentially), a plaintiff claiming that the Import Licensing Agreement has been violated must demonstrate that it has not properly undertaken one of the specified steps required by the agreement. WTO case law reflects an extreme reticence to interpret the Import Licensing Agreement: all disputes submitted to date by plaintiffs challenging the consistency of a measure with the agreement have been handled under Article XI of GATT, with the 'automatic' shift in the burden of proof

169 The WTO case law regarding treatment of scientific evidence leaves a lot to be desired, both in terms of selecting the right expert, as well as in terms of addressing conflicting scientific evidence, see Mavroidis (2016) vol. 2, pp. 476ff.

that this provision entails.[170] The road to Article XXI is then straightforward, given that panels have refused to entertain claims under the Import Licensing Agreement. Why they have not is a mystery. This is the only instance in WTO practice where panels have refused to start their exercise from the more detailed subsequent agreement.

There is no equivalent Agreement on Export Licensing. This means that the burden of proof will be (almost) automatically allocated to the country imposing the restriction, as it will be straightforward for the plaintiff to demonstrate the existence of a quantitative restriction that violates Article XI GATT. Everything discussed above regarding the 'incompleteness' of Article XI, and the ensuing danger of judicial activism manifested by WTO panellists applies here as well. There are compelling arguments for negotiating an Export Licensing agreement. Absent an agreement to this effect, all export licensing schemes are viewed with suspicion. WTO members with such schemes (and there are many) will be called to justify their measures, since all complainants will need to show is that the scheme may restrict exports. Surprisingly, when practicing import licensing, it is complainants that carry the associated burden of proof. Symmetry needs to be established across import and export licensing because WTO members might be adopting one or the other or both instruments.

Article XXI has nothing to say on the relative merits of different types of trade policy from either a national or multilateral (spillover) perspective. From a national perspective, policy choices will (should) be a function of the underlying goal(s). Basic economic theory, for example, generally suggests use of subsidies if the goal is to expand output or the capacity to produce a given set of goods and services that are deemed vital to national security (Bhagwati and Srinivasan 1969). An import tariff or ban would also support domestic production but incur a potentially avoidable consumption cost. This efficiency cost may be desirable if the goal is to reduce foreign exchange revenues of an adversary and increase the economic costs of aggression. Subsidies also come at a cost—there will be trade-offs with other objectives.

Most significant policy choice contexts are characterised by significant uncertainty. If conflict breaks out, how easily can domestic production be repurposed for national defence production? Are there alternative sources of the products? What is the level of supply risk? What is the additional output necessitated by the presence of geopolitical risk, given the opportunity cost in terms of domestic production and consumption? All these questions should feature in assessing the resilience and robustness of GVCs to large shocks and the potential exercise of market power to restrict trade in key products.

170 Mavroidis (2016), vol. 2, pp. 5 et seq.

All this suggests again the importance of establishing frameworks and processes for deliberation, independent analysis, and STC-type mechanisms that can function as guardrails to guide and inform the use trade measures. Greater use of deliberative mechanisms in the WTO is a means of avoiding litigation on complex matters, instead leaving it to the principals, supported by independent analysis and Secretariat support to identify possible solutions that are not bounded by a legal text.

Experience under the Committee on Foreign Investment in the United States (CFIUS), the inter-agency body charged with scrutinising inward foreign investment into the US investments and providing ex-ante approval for investment illustrates how due process rules could be useful. Ralls, a Chinese-owned company, purchased windfarms in the proximity of facilities belonging to the Department of Defense. CFIUS concluded the investment gave rise to national security concerns. The President ordered Ralls to divest but failed to provide Ralls with an opportunity to rebut even un-classified, non-privileged documents. Ralls eventually contested the decision to the US Court of Appeals for the District of Columbia. In its decision,[171] the court reversed the court of first instance, and held that Ralls should have had the opportunity to rebut unclassified information. Importantly, the Court did not question the privilege of the US President ordering Ralls to divest, as it did not want to question the national security grounds for the decision.[172] Thus, the US domestic legal order provides for some scrutiny of the process through which national security decisions are taken.[173]

There are two other issues we would point to. First, the need to understand 'national security' to include issues like cybersecurity or protection of critical infrastructure such as telecom networks, pipelines, or data networks. As the term 'essential interests' is broad, an amendment to Article XXI is not needed to do this. An Interpretation of the term (Article IX.2 of the Agreement Establishing the WTO) may suffice. One could imagine, for example, the addition of an indicative list, mentioning cybersecurity, environmental security etc., helping those tasked with interpreting this provision when confronted with trade measures taken to achieve cybersecurity or other goals included in the list.

The second, more contentious, issue concerns the fact that threats to national security may originate in activities of nonstate actors. The relationship between states and such nonstate actors often will be obscure and attributing behaviour of nonstate actors to a state difficult to prove. Rather than seeking to revise Article XXI to encompass non-state actors, which requires consensus that will undoubtedly be lacking, it may be easier to persuade the membership to put in place the type of forum suggested above. The success of the STC process in defusing potential disputes in the TBT/SPS-context provides the

171 Decided 15 July 2014, No 13-5315.
172 Eventually, the parties reached an out-of-court settlement.
173 Eichensehr and Hwang (2023) provide an overview of this dispute and the standard of review that applies to similar disputes.

membership with experience that may support a willingness to experiment with STCs in other contexts as well. In our view, national security should top the list of candidates for the reasons mentioned previously. As noted, STCs have already been used to address national security and cybersecurity concerns.[174]

The potential for abuses is higher in areas of new claims of national security (like cybersecurity and/or economic security), pointing to the need to come up with a workable standard (Heath 2020). WTO (2022, p. 40) notes that

> … should geoeconomics policies become prevalent as the impact of climate change on trade worsens, countries may eventually equate the protection of their essential economic interests with national security. Given that such measures may not be amenable to justification under the WTO "General Exceptions", such as those found in Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS) because of their strategic or geopolitical dimension, WTO Members may invoke the "Security Exceptions" of Article XXI of the GATT, XIVbis of the GATS or Article 73 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). These exceptions on national security would nonetheless continue to provide a multilateral framework with which unilateral geoeconomics measures would have to comply. Improved transparency and monitoring of these measures could also contribute to limiting their impact on the multilateral trading system.

A legislative amendment to introduce an indicative list that would disaggregate the term 'emergency' might look like a pie in the sky in today's world. Still, this seems such an obvious area where consensus should not be hard to reach. Indeed, practice before the TBT/CMA committees that we have already referred to, supports the view that disaggregation of the terms currently featuring in Article XXI, should be possible. If this were not to be the case, leading trading nations should contemplate an agreement of their own aiming to 'beef up' the content of Article XXI. We return to this in Chapter 8.

7.4.2 Article XX

Rising pressures to use trade policy instruments to attain a range of non-economic objectives suggests WTO reform deliberations should consider re-visiting Article XX to provide clearer guidance on the use of trade policy to pursue NEOs. The direction of travel is towards linking market access (trade) to NEOs, which is compatible with the WTO if it can be shown that policies are necessary to protect a societal value mentioned in Article XX and apply in a non-discriminatory fashion. There is some uncertainty here as even if production requirements are based on international agreements and commitments to pursue NEOs (ILO Conventions, national commitments under the Paris Agreement, etc.), they will only benefit from a presumption of legality if they are

174 Some 70 notifications on cybersecurity-related matters have been made, of which 70% in the last two years and 253 notifications regarding national security measures under TBT. There were 21 STCs on cybersecurity, and another 42 STCs on national security issues. For an example, see WTO, G/TBT/N/EU/823, 23 July 2021.

regarded to be 'international standards'. WTO case law has not yet addressed this issue. Although we would expect an affirmation to this effect in case of challenge, clarifying the matter through redrafting of Art. XX, however desirable, is likely to be precluded by the need for consensus.

Much can be achieved without amending Art. XX, as the question of what needs updating depends on how 'discrimination' in GATT Article III (national treatment) is understood and whether one is comfortable with a broad interpretation of the list of NEOs that is included in Article XX. This GATT provision is a general exception, and thus also an exception to the national treatment rule embodied in GATT Article III. But both Article III (paragraphs 1, 2, and 4) and the chapeau of Article XX require WTO members to apply measures, including domestic regulation, in a non-discriminatory manner. This implies that for Article XX to be an exception to Article III, non-discrimination must be understood in different ways when applying the two provisions. An important question in this regard is whether regulatory standards should be considered when defining the term 'like products', the key concept determining whether discrimination has been afforded by a contested policy measure.

GATT/WTO case law has engaged with this question (Hudec 1998, Grossman et al. 2013). The case law favours an understanding of 'discrimination' that is not informed by regulatory (i.e. NEO) concerns. Hence Article XX (where regulatory intent matters – the general exceptions are for the specified list of NEOs) is the only vehicle for a WTO member to defend the use of trade policy motivated by NEOs. Article III understands national treatment from the perspective of a consumer who is uninformed and/or uninterested how a good has been produced. Whether an imported product has been produced in a manner that would not be permitted in the importing jurisdiction – e.g. using child labour, destroying habitats or fish stocks – does not influence the determination of likeness to a similar (competing) domestic product. Article XX takes a different perspective: that of a state actor interested in pursuing a NEO. If WTO members could agree that 'non-discrimination' has one meaning across all WTO agreements when it comes to regulatory concerns relating to NEOs, Article XX would no longer be an exception to Article III.[175]

Even if the current understanding of the term 'non-discrimination' persists, the need to redraft Article XX also depends on the understanding of the term 'public morals'.[176] The Appellate Body (see for example, *EC-Seal and Seal Products*) has held this comprises 'standards of right and wrong' and can justify the use of economic instruments. This

175 Even more so considering the WTO covers trade in services as well as goods. Services often are experience- or credence-goods, calling for regulation to address ensuing asymmetric information problems. The relevance of regulatory intent when addressing claims that a services regulation measure is discriminatory was discussed in the *Argentina-Financial Services* dispute. The panel concluded that regulatory standards that apply to both domestic and foreign providers did not constitute discrimination. The Appellate Body did not address the matter. See Mavroidis (2020, pp. 349 et seq.).

176 Mavroidis (2016, vol. 1, pp. 425 et seq.). The Article III/XX divide does not arise in 'modern' agreements dealing with behind-the-border policies, like the TBT/SPS Agreements.

was the view taken by the recent panel on DS543: *US-Tariff Measures* (China). This dispute concerned the unilateral increase in tariffs on goods of Chinese origin, following the lack of implementation by China of Phase One of a bilateral agreement in which China had promised to provide the US with preferential treatment. China challenged these measures. The panel found that the US had violated both GATT Article I (MFN) and the obligation not to unilaterally increase bound levels of customs duties. The US argued its measures were necessary to protect its public morals, invoking GATT Article XX(a). Specifically, the US argued that its measures were necessary to address Chinese practices which ran counter to US standards of 'right and wrong' (the standing case law understanding of the term 'public morals'), referencing the prohibition of theft, cyber-attacks, hacking, anti-competitive practices etc.

The panel first clarified that the challenged measures did not have to expressly mention the objective they were pursuing. The US could legitimately raise the 'moral standards' defence at a later stage (§7.125).[177] It then went on to argue that public morals are member-specific, that differences of opinion across members can legitimately exist (§7.130), and that public morals can have an economic dimension as do other NEOs mentioned in Article XX (§§7.135-136). The panel therefore accepted the US public moral concerns and found that an increase in tariffs could in principle protect public morals (§7.140). It still found against the US because its tariffs were indiscriminate, not distinguishing between goods on the basis of whether they involved practices offending the US public morals (§§7.236-238).

The implication is that virtually all domestic legislation can be justified under the public morals exception, providing a very broad basis for WTO members to use trade policy as long as they observe the even-handedness requirement discussed above (and the test of legal consistency embedded in each sub-paragraph of Article XX). This leaves the question whether there should be a presumption of consistency for measures enacted to implement multilateral obligations promoting NEOs, like the climate change conventions, for example, despite not necessarily qualifying as standards in the TBT/SPS sense of the term.

If the current understanding of 'public morals' is maintained, there is no need to re-negotiate the scope of Article XX, although in our view it would nonetheless be beneficial to clarify explicitly that because the GATT is a negative integration contract, WTO members are free to pursue domestic regulatory objectives as long as this does not entail discriminating in favour of their domestic goods. There are three other areas where improvements can be made. First, requiring recourse to scientific evidence and risk assessment processes to underpin pre-emptive regulation. Second, adoption of

177 This construction is at odds with the holding in the panel report on Japan-Alcoholic Beverages II, where the panel had rejected an ex-post facto argument by Japan that its measures were intended to protect traditional production of sochu. The only way it seems to reconcile the two, is by accepting a certain notoriety for 'public morals' which should not be taken for granted for any regulatory intervention. But this construction runs counter Brazil-Taxation that equated public policy with public morals.

a 'consistency' requirement as in Article 5.5 SPS as a proxy for detecting protectionist intent. Third, a stronger focus on the use of international standards. All three are elements of the TBT and SPS agreements. As noted in Section 4.3 above, the TBT agreement explicitly addresses the use of trade policies motivated by NEOs. We discuss desirable reforms to this agreement in the next sub-section.

7.4.3 Technical barriers to trade reforms

As discussed previously, the costs of operating GVCs can be reduced through 'coordination' across partners regarding behind-the-border measures. Such measures often address the production process, regulating either the substances that are physically incorporated in a product or characteristics of how a good is produced that are not physically incorporated, e.g. fair labour standards. This is the domain of the TBT agreement. From the perspective of governing the pursuit of NEOs through trade-related measures this agreement could be improved by clarifying what constitutes an international standard and associated standards-development organisations (SDOs).

What should be accepted as an international standard is a function of two key factors: (i) the characteristics (types) of entities that can issue them and (ii) the properties an international standard must have. The latter is discussed in the 2000 TBT Committee decision, which is consistently overlooked. For example, one of the six criteria mentioned in this decision is that access to a SDO should be uninhibited for all WTO members. China has blocked access by Taiwan to an SDO on several occasions, a matter that no panel has paid heed to.[178] It would be desirable to clarify the criteria and to identify both the SDOs that WTO members consider to be (sufficiently) international, and the conditions that need to be met to recognise their output in the WTO. For example, should there be a quorum requirement in the working practice of an SDO? Is a consensus decision needed to adopt a standard or is a qualified or simple majority sufficient? More importantly, should WTO members be allowed to deviate from international standards while still benefiting from a presumption of conformity and thus 'necessity'? Should the burden of proof switch in cases of deviation (as it arguably should) or should panels continue with the non-sensical ruling of the Appellate Body in *EC-Sardines*, which required Peru (the complainant) to imagine the reasons why the EU deviation from an existing international standard should be rejected, as opposed to requiring the EU to defend its decision?

International standards in areas associated with NEOs will represent acceptable compromises among participating countries but can nonetheless be demanding (and arguably need to be in order to make a difference and be credible) and thus may entail important adjustment costs. Developing countries will be called to either comply or pay the price of market exclusion. Support for addressing implementation costs will encourage adoption of international standards. This could comprise transfers

178 See Mavroidis (2019).

and technical assistance for implementation and support to developing countries to participate more actively in the preparation of standards. Enhanced participation of developing countries could tilt the balance towards 'reasonable' standardisation that will deliver progress on an NEO without running roughshod over the concerns of those lagging behind.

The WTO has gradually adopted systems to compile and make publicly available information on TBT and SPS measures, as well as specific trade concerns, notably the introduction of the E-ping data portal.[179] This has greatly improved the dissemination of information. The WTO can build on this initiative to work with members to ensure information on NEO-related technical regulation is up-to-date and accurate, bringing all requisite information under the multilateral roof making the WTO a 'one-stop-shop' for all behind-the-border measures targeting NEOs.

7.4.4 Governing subsidies in an era of industrial policy

Faced with rapidly changing geostrategic, environmental, and epidemiological environments, the governments of the (mostly democratic) core trading nations of the international economy must find ways to respond to, and be seen to respond to, these challenges. At the same time, these nations have committed to policies of low to zero border measures. This commitment is consistent with the logic of the theory of economic policy which generally finds trade policy to be an inefficient way of pursuing the sorts of objectives associated with those challenges. The other side of this coin is that these governments will use other, more efficient, instruments to respond to those challenges. We have already noted several times that the preferred instrument will often be a subsidy of some kind. Policies of a scale appropriate to major policy challenges will have sizable spillovers to other countries, both negative and positive, and some of these spillovers will affect the trade of the policy-active country's trading partners. Unfortunately, because they were established to respond to the possibility that subsidies could be used to explicitly interfere with trade, the rules on subsidies as embodied in the WTO Agreement of Subsidies and Countervailing Measures (ASCM), do not recognise this logic.

Before we consider the WTO regime itself, it is useful to briefly discuss why developing rules for subsidies (and industrial policy generally) is generally more difficult than dealing with border measures.[180] Differences in economic structure may mean that similar policies mean different things in different economies, making negotiation of simple rules difficult. This problem is augmented by differences in the preferences of citizens and political structures that will yield very different objectives across countries seeking to manage policy spillovers even with the best of intentions. Democratic legitimation involves responsiveness to public demands for policy to attain NEOs. One of the most difficult aspects of the domestic politics of subsidies, from the perspective of designing

179 https://www.wto.org/english/tratop_e/dtt_e/dtt-tbt_e.htm
180 What follows draws on Hoekman and Nelson (2020).

international rules, is that actionable subsidies emerge from a domestic political process that is not linked to the institutions of international trade regulation in any meaningful way. Specifically, the technocrats, politicians, and lobbyists with a primary focus on domestic subsidies do not share common legal, political, or economic knowledge with the domestic or international agencies concerned with managing international trade relations. Instead, subsidy policies will be related to, often very politicised, domestic issues (e.g. energy, environment, employment, income distribution, etc.).

An additional source of complexity is that the political and economic structures motivating and constraining subsidy policy vary significantly across countries. Not only may a given subsidy policy be understood very differently across polities, the process generating those policies may also be quite different, so that the stakes and the patterns of conflict may also differ. A potentially intractable problem may be that the domestically anchored understandings of a given subsidy are sufficiently different across countries to inhibit rulemaking defined primarily in terms of modalities of intervention that can be relatively straightforwardly traded-off. Differing political/economic structures mean that the modalities of intervention will generally differ, rendering agreement on the political-economic interpretation of those subsidies, essential to effective negotiation, very difficult.

Subsidies will often be a preferred instrument for achieving non-economic objectives, but this observation only scratches the surface of appropriate analysis. Subsidising industry output is unlikely to be the first-best policy in many complex situations. Consider the case of an environmental policy objective: reducing the carbon content of economic activity (this, of course, is not the ultimate objective, but it will do for an example). The government could: (i) subsidise clean sectors and tax polluting sectors, (ii) subsidise the adoption of green technologies (targeting polluting sectors or more generally), (iii) subsidise the development of green technologies. In addition to selecting the best policy instrument, the government also must select the appropriate level of intervention with that instrument. As we noted in our discussion of the theory of economic policy, 'bestness' needs to take into account limited governmental resources on which there are many legitimate claims. In addition, of particular interest for us here, the government should also be aware of international spillovers (positive and negative). This is a complex task under the best of circumstances, and it becomes even more complex when the policy involves response in an environment of crisis. It becomes yet more complex when there are multiple crises, e.g. environmental, economic (recession, public debt), epidemiological, and national security related. Governments that fail to act, and be seen to act, in all of these areas will face decreasing legitimacy and increasing risk of replacement (through peaceful or violent means).

The job of the WTO is not to manage such enormously complex policy problems. That is the job of the individual nation-states. It is, however, the job of the WTO to help manage trade-carried spillovers from the policies adopted by those individual nation-states. Unfortunately, the WTO institution for doing so (the ASCM) is no longer fit for

purpose. The central problem is that the attempt to define the subsidy issue in terms of subsidies that are explicitly trade-related (export subsidies and local content rules) and, thus, forbidden, and everything else ('actionable'), is not useful. On the one hand, there is certainly a presumption that export subsidies and local content rules are inconsistent with WTO norms, but it is also the case that at least local content rules might play a role in supporting policies that are on balance conducive to policy outcomes that are broadly supported globally (Meyer 2015, Nelson and Puccio 2021). On the other hand, treating all other subsidy actions as equivalent, and equivalently suspicious if there are trade-related spillovers, seems blind to the facts that while subsidies will often have significant trade-related spillovers, subsidies are appropriate instruments for pursuing many essential objectives.

The first of these facts suggests that such subsidies are within the domain of the WTO, but the second suggests that the ASCM, and the management of disputes under the ASCM, are insufficiently sensitive to the needs of the policy-active state.[181] This suggests a reorientation of subsidy jurisprudence away from attempts to define clear red lines between legitimate and illegitimate subsidies. At the same time, it should be a goal not to revert into a system of 'diplomatic' resolution of conflicts (i.e. to the Hobbesian war of all-against-all where the most powerful simply set the terms of resolution of any conflict). In much the same way as we suggest (in Section 7.2.2 above) that the WTO might support the development of deliberative mechanisms that explicitly embody the logic of the theory of economic policy in the deliberations, the disciplines around subsidies (and industrial policy more generally) needs to focus on justifications for a given instrument and magnitudes of spillover generated by application of that instrument.

With respect to justifications for policy, Nelson and Puccio (2021) suggest a greater focus on emphasising presumptions instead of red lines. That is, consistent with current practice, there should be a presumption that export subsidies and local content policies violate WTO commitments. However, this is only a presumption which can be overturned by the government applying the policy justifying the policy in terms of generally accepted policy goals and constraints. Similarly, the general notion of nonactionable subsidies can be reinstituted as a presumption that certain objectives create a presumption in favour of the application of appropriately constructed subsidy policies. Again, this is just a presumption, but here the case against the policy must be made by the complainant state and such a case should be made in terms consistent with the theory of economic policy. That is, that there are better instruments, or more appropriate levels, for achieving the stated objective of the policy (where 'betterness' and 'appropriatenenss' should be defined in terms of the effect on trade-carried spillovers). Between these two, there will be a range of objectives for which no presumption is implied, and both parties need to make cases for and against the given policy.

181 Of course, subsidies can be used, in the first instance, to undermine previously agreed concessions and, more generally, to violate the fundamental norms of the WTO as a system. This could well be true even of subsidies in a re-introduced green box (i.e. permitted subsidies).

Defending such presumptions will be inherently difficult. Not only may governments seek to pursue multiple objectives with a given instrument, but for domestically significant (i.e. public) policy objectives the sources of such policy will often be various. Consider a policy like the Inflation Reduction Act (IRA) of the US or the Carbon Border Adjustment Mechanism (CBAM) of the EU. Straightforward economic objectives, like responding to environmental externalities, can be easily accommodated in such discourses, but when the objectives become more closely associated with NEOs (like public claims about responding to uncertain outcomes), greater subtlety will be necessary. In the case of both the IRA and CBAM the objective is clearly environmental, but there will be economic actors, as well as social and political actors, that may be pursuing explicitly protectionist goals.[182] Evaluating such cases calls for a larger role for technical expertise and, in particular, an advisory role for the secretariat. The relevant expertise for such significant policy areas will extend beyond evaluation of trade spillovers to justifications in terms of, say, national security or environmental science.

An additional problem for both national industrial policy and multilateral rules dealing with spillovers from such policy is that national and corporate frontiers are decreasingly overlapping. As a result, subsidies along a global value chain may have very different implications for nation states and global firms. If we think of the goal of the WTO as balancing the gains from liberalisation of the world economy against the requirements of national sovereignty, the increasing disjuncture between global firms and national states is a problem for both states and the WTO. When firms and states were broadly coterminous, we could expect national policy to play the fundamental role in legitimating capitalist economic relations while the WTO dealt with trade-carried spillovers. Unfortunately, the needs of the global firms extend well beyond border measures and the regulatory needs of national governments with respect to those firms will be difficult to accomplish without policy coordination among the major trading nations.[183]

Finally, in a world of increasingly active industrial policy aimed at non-economic objectives, the meaning of 'public body' will be increasingly fraught.[184] This issue, which has come up in a number of cases before the Dispute Settlement Body (DSB), is currently raised with most vigour in the case of China. While it is certainly true that state-owned enterprises (SOEs) play a major role in the Chinese political economy (Wu 2016) and that the form of these enterprises make it difficult to characterise them as public bodies, it is also the case that the US and the EU have many state-owned enterprises (in education, health, etc.) and it can be argued that both Airbus and Boeing have the attributes of public bodies. These complexities are only going to increase in the central NEO policy areas. Pragmatic analysis of the relationship of states to economies along the lines we have already sketched above, would seem to be a step in the right direction.

182 See Nordström (2023).
183 The fact that the major trading nations now includes China renders this problem even more difficult.
184 See Mavroidis (2016, pp.203-207) for a discussion of the main issues.

7.4.5 Good practices and economic policy principles

A stable, effective subsidy regime will require reliance on relatively simple, robust rules of thumb relating to both the domestic content of subsidies and the nature and magnitude of spillovers. Aside from the existing consensus reflected in the WTO on prohibiting export subsidies,[185] a prohibition also found in many preferential trade agreements (PTAs), rules of thumb can help to recognise the complex ways domestic and international political economies are interrelated. The theory of economic policy is very useful in doing so. Given any underlying economy and government objective function, the optimal (or constrained optimal) policy for dealing with, say, an environmental externality will differ significantly from a policy intended to distort trade. Rules of thumb such as a presumption that price-based measures are more efficient than quantity-based measures (such as domestic content requirements), non-discrimination and incorporating some broad measure of consumer welfare in evaluation of national gains and spillovers, provide a more robust basis for policy evaluation.[186] Equally important, the theory suggests the importance of taking seriously the presumption that subsidies may be the most appropriate instrument to deal with market failures as they can target either production or consumption. Agreement on 'best practice' that links accepted policy goals to instrument choice rooted in the theory of economic policy could identify approaches that create a rebuttable presumption against anti-subsidy responses.

'Rules of thumb' support good faith discourse on domestically relevant subsidies and possible international spillovers in ways that permit technocratic cooperation. This sort of approach forms a substantial part of competition policy analysis, where current thinking emphasises a goal of ensuring the efficiency of the market and proceeds from a presumption that market outcomes are likely to be relatively efficient. However, that is only a presumption. A variety of factors related to market structure, barriers to entry, and upstream and downstream effects can enter into a rejection of that presumption (Bolton et al. 1999). Similarly, the WTO has a general goal of liberalisation, but recognises that safeguards are essential to the legitimate functioning of the system. Thus, there is a presumption that, if a national administrative process is consistent with WTO law, that state has a right to impose some sort of protection. While disagreements can and do arise, as illustrated by many WTO disputes related to 'trade defence' actions, those cases relate to essentially technical questions. A functional subsidy regime will recognise the right of nation states to engage in a wide range of domestically warranted subsidy policies, but

185 While WTO prohibitions on both export subsidies and domestic content are relatively clear, the US permits states to discriminate on the local content subsidies. In some policy areas such as public procurement discrimination is permitted by the WTO unless members have signed the Government Procurement Agreement.

186 It is attractive to consider a role for global welfare (leaving aside obvious problems defining what this might mean as a practical matter), especially when the relevant issues are global in nature (e.g. environmental policies). However, if we take seriously that legitimation occurs at the nation state level, it is hard to conceive of how to incorporate such a notion. What can be done is to assess the extent and incidence (distribution) of the impacts on *shared* noneconomic objectives, i.e. areas where goals are common.

also that conflicts will emerge over modalities and levels of acceptable competitiveness spillovers. Making such conflicts the subject of technical discourses focused on relatively well-specified questions may deflect much of the political heat associated with conflicts over inherently domestic issues.

The multi-jurisdictional regimes briefly considered above, together with heuristics drawn from the theory of economic policy suggest several elements of a revised subsidy regime.

(i) Identify shared objectives and mutual gains
For traditional trade liberalisation, the essentially mercantilist logic of exchanging 'concessions' on market access leads to both sides reaping the gains from less discrimination. Analogously, in the subsidy setting, cooperation must deliver benefits to all participants by reducing discrimination.[187] In the US, this is the point of the commerce clause. Free trade among the states created a continental market that permitted, and permits, rationalisation and growth among major trading partners (i.e. the states) with essentially no risk that those markets unexpectedly are blocked. The core rules of the EU are similar, reflected in the four freedoms (free movement of goods, services, labour, and capital), although, as noted above, the EU goes further than the US in terms of subsidy disciplines. The WTO does not have free trade as an objective but pursues reciprocal liberalisation of access to product markets as an instrument to achieve common development goals specified in its preamble. Deep PTAs seek to expand on the WTO in terms of fully liberalising access to product markets and adopting policies to support competitive neutrality.

Determining shared goals for subsidies is more difficult than for tariffs and other border policies because the set of possible underlying policy objectives is larger. That said, while the modalities (instrument choice) may differ, many goals pursued by national governments are similar across jurisdictions, implying there may be positive spillovers as well as negative competitive effects. In the case of green taxes/subsidies, for example, in addition to whatever costs/benefits there may be for national firms from a policy targeting adoption of green technologies, to the extent that the environmental externality is global in nature, that public good needs to be recognised. Specifically, if provision of a private benefit makes the policy more politically sustainable, that is a plus for all participants. With that as a starting point, cooperation on the general goal seems less out of reach. Such cooperation exists in some policy areas, e.g. global reporting and information sharing through which countries report events that may constitute a potential public health emergency of international concern, organised through an Event Information Site Platform maintained by the World Health Organization, as well as less dramatic areas such as macroeconomic policy coordination.

187 While the most used metric of benefits is economic (efficiency, growth), there is also a hard to measure but widely recognised benefit that runs through a functionalist argument that greater commerce underwrites more cosmopolitan attitudes and more peaceful relations in general. This was explicitly a goal of both the framers of the US constitution and the founders of the EU.

An agreement to make consumer/citizen welfare an essential part of any discussion of effects is an effective way of introducing these issues.[188] An implication of this is that attention should focus on agreeing to distinguish between rationales for subsidisation. The competitive spillovers associated with efforts to address collective action problems and market failures should be differentiated from those where the underlying objective is industrial policy-driven (competitive). Measures associated with what is agreed to be a legitimate collective action problem may have competitive effects, but in principle these should treated differently from spillovers arising from subsidies that are not motivated by market failures.

This is not new ground for the WTO. As discussed previously, Art. XX GATT and Art. XIV GATS provide for exceptions to trade policy commitments made in WTO agreements if necessary to protect public morals, human, animal, or plant life or health, or conserve exhaustible natural resources. The so-called green box approach used in the Agreement on Agriculture exempts subsidies deemed to not distort trade, or at most cause minimal distortion. These include direct income support for farmers decoupled from production levels or prices, environmental protection, and regional development programmes. The Agreement also allows developing countries additional flexibilities in providing domestic support,[189] in part reflecting a presumption that these are less likely to create significant cross-border spillovers. A step towards incorporating a 'green box' in the ASCM was made in the Uruguay round, reflected in the now defunct Art. 8. This was limited and narrow in scope. It did not encompass an explicit recognition that some subsidies are much less of a concern than others, and that one of the tasks of governments is to address market failures – including problems global in nature (Cosbey and Mavroidis 2014). Disciplines need to consider (be conditioned on) what governments are aiming to do, implying asking what the underlying problem or objective is, and differentiating economic from noneconomic goals. Countries need to know what a government's goal is to assess if measures are fit for purpose, engage in joint evaluation of alternative instruments, and consider the feasibility of using potentially more efficient ones.

(ii) Competitive neutrality and non-discrimination

Non-discrimination norms are deeply embedded in liberal political economies. In US constitutional law, the privileges and immunities clause (Article IV, section 2, clause 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States") prevents one state from treating the citizens of another state differently than its own citizens. Similarly, Article 18 of the Treaty on the Functioning of the European Union prohibits discrimination based on nationality. In the WTO, the combination of most favoured nation and national treatment serve to underwrite similar

188 As noted previously, while it is attractive to emphasise global welfare, there is no entity responsible for global welfare and no global civil society to claim the benefit. There is, however, a collective benefit to the members of the subsidy regime: insofar as certain noneconomic objectives are common – e.g. reducing greenhouse gas emissions – their pursuit will have global positive spillover benefits.

189 https://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm

norms of non-discrimination in international commerce. However, even in the US, it is widely accepted that state governments will have different goals, presumably reflecting (at least in part) differing preferences of citizens and will pursue common goals with different strategies. The massive literature on federalism stresses both the democratic and efficiency (via experimentation) gains from the coexistence of multiple regulatory/political economic regimes (Burgess 2006, Rodden 2006, Bednar 2009). For such policy experiments to be sustainable, local taxation must produce local public goods for local citizens and thus may require restricting access to such public goods, and to fiscal resources, to local citizens. This is one of the main justifications for the permissiveness toward locally targeted subsidies in the general context of the dormant commerce clause principle (Coenen 1998).

Consider again the case of green subsidies. Because these pursue a widely accepted goal, policies (i.e. subsidies) pursuing such a goal should be non-actionable. However, there will be policy spillovers. If policy discriminates in favour of domestic firms, the associated competitive distortion will lead to conflict. A rule of thumb creating a presumption in favour of national treatment can narrow the range of conflict. Indeed, basic economic policy principles suggest non-discrimination will be more efficient in attaining the non-economic objective. This is politically challenging. Strong pressure to reserve at least some of the subsidy benefits for local firms is likely – after all, the revenues supporting the subsidy presumably derive from local taxes.

It makes sense in this context to treat non-discrimination as a rebuttable presumption. That is, the provider of a subsidy that targets an agreed 'good' goal (e.g. greening the economy) should be allowed to present a case for violation of non-discrimination in terms of political constraints and economic goals that are understood by all members of the regime. One way of doing so is to put in place collaborative processes to consider such effects and assess if they can be attenuated. What matters here is whether the measure used is efficient (in the sense used in the theory of economic policy). If so, competitive effects are likely to be desirable, needed to change behaviour, and attain (non)economic objectives that all parties have agreed ex-ante are legitimate. Conversely, in the case where a subsidy cannot be justified as dealing with a collective action/market failure problem reciprocity is appropriate – countries should be able to use countervailing duties (CVDs) or bring disputes alleging adverse effects, as permitted by the ASCM.[190]

(iii) Evidence and evaluation

One input into narrowing the range of potential conflict is to ensure national subsidy regimes are transparent. It is precisely because national political economies are sufficiently different to render clarity of purpose obscure, that clarity on both the modalities of intervention and the processes that produce those interventions are particularly important. A central need here is to both measure and analyse the prevalence

190 Similar tensions arise in the public procurement context where strict reciprocity is central to the plurilateral Government Procurement Agreement (Hoekman 2018).

and effects of subsidies using comprehensively documented methodologies that consider the purported goals of the policy instruments used. Agreeing on comparable measures of subsidy is important to create a basis for ongoing consultation. This should include any subsidies that benefit from a presumption that they are beneficial in pursuing a NEO that is of global significance – such as combatting climate change. It is important to assess whether and to what extent such subsidies make a difference in helping to attain the specified NEO.

The approach taken in the WTO to fostering policy transparency is to rely on notifications by WTO members complemented by periodic peer reviews of national trade policies informed by reports prepared by the secretariat. Many WTO members do not live up to the notification commitments they have made. Proposals to remedy this deficiency, such as imposing penalties for late or incomplete reporting as has been proposed by the US, EU, and other countries is unlikely to do much to improve matters.[191] Creating positive incentives for greater transparency by demonstrating the value of compiling information on domestic policies to governments for the design and evaluation of programmes and providing assistance to adopt good national practices is likely to be more effective. The theory of economic policy discussed earlier suggests a cooperative as opposed to adversarial approach is called for, centred on joint engagement, consultation, and deliberation informed by agreed measures of policy interventions and analysis of their economic effects and cross-border spillovers.

A necessary condition for this to be feasible is delegation of both measurement and analysis to a trusted, neutral, and technically capable body that acts as an agent for the principals (governments, legislatures, private sector stakeholders). The OECD has played this role for decades in producing comparable analyses of subsidy regimes in agriculture (Legg and Blandford 2019), and more recently, fisheries, biofuels, and fossil fuel subsidies (OECD 2017, 2019b) as well as studies of subsidies in specific sectors, e.g. aluminium (OECD 2019a) and semiconductors (OECD 2019b) that explicitly incorporate value chains into the analysis.[192] The OECD experience illustrates the importance of conceptualising transparency as going beyond documenting policies – as done by the WTO Trade Policy Review Mechanism (TPRM) – to measure the magnitude of interventions using well-defined indicators such as the producer support estimate (PSE) in agriculture, and using these as inputs into assessments of the economic incidence and effects of the policies of interest. It also reveals the need to go beyond a mechanical reliance on 'notifications' and working closely with governments to build 'ownership' of the process.

191 See "Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements," JOB/GC/204/Rev.2 (27 June 2019). This revised proposal contains several positive elements, including a recognition that developing countries may need assistance to compile information. The EU, Japan, and US have proposed that non-notified subsidies that identified by trading partners automatically should be deemed to be prohibited, See https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

192 Work on fossil fuel subsidies has been spearheaded by the Global Subsidies Initiative. See e.g. Koplow et al. (2010) and https://www.iisd.org/projects/iisd-global-subsidies-initiative.

Wolfe (2021b) discusses the factors that allowed the OECD to calculate and report PSEs for agriculture in the 1980s, noting that key factors were demand by finance ministers seeking to control agricultural support levels and strong leadership by the US, which wanted to reduce European agricultural protection. Given that subsidies are costly to the budget a similar dynamic might emerge today, especially in light of the massive subsidy programmes that have been put in place in response to the Covid-19 pandemic. The necessary interest was demonstrated for steel (reflected in the creation of Global Forum on Steel Excess Capacity) and the EU-Japan-US trilateral process – both Ministerial-level bodies – suggesting that at least for some of the large players subsidies are a major concern and that an analogous dynamic might be orchestrated.

What is needed is a law and economics informed approach that includes a focus on establishing facts (baselines) and developing a common understanding of the welfare effects of subsidies. There is much sound and fury around Chinese industrial subsidies, but very little focus on the many subsidy measures implemented by other G20 countries documented by the Global Trade Alert. The fact is that we do not know enough about the effects of different types of subsidies, their motivation, and their cross-border spillover effects to make a compelling case for specific new rules. Moreover, even if rules could be agreed, it is important to put in place processes that allow an effects-based approach to be used (e.g. the type of balancing test applied in the EU context). Such a competition policy approach also allows the flexibility needed to assess the magnitude of subsidies and their effects in different contexts and market structures. In the current multilateral context such an approach will of course not be able to focus on enforcement, but the methods and conceptual framework can be applied to build a better understanding of the effects of subsidies.

CHAPTER 8

Clubs

To this point, we have argued for more-or-less marginal 'reforms' of the regime organised around the WTO, given that far-reaching institutional change is very unlikely to be feasible. Given the manifest success of the trade regime, we find this pragmatic reformism an attractive prospect. However, we are doubtful that the route is open at this point in time for even relatively unambitious reforms of the type we have suggested. For reasons that are too complex to pursue here, the current national and international political economies seem unlikely to deliver anything like these marginal changes in the existing regime.

The foundation of the post-war political economy in most of the countries that were founding members of the GATT was widespread acceptance of market allocation in the economy and liberal democracy in politics. This awkward combination was underwritten by the state's commitment to some form of Keynesian welfare state. This is what Ruggie (1982), following Polanyi (1944), called 'embedded liberalism'.[193] In Ruggie's analysis, broadly liberal international economic relations explicitly recognised the central role of embedded liberalism in the legitimation of markets and democratic politics. Along with the commitment to liberalisation and non-discrimination, the commitment took the form of various escape clauses in the institutions of global liberalism. In the case of the trade regime, these were formal commitments, to be explicitly recognised as sovereign rights by the dispute settlement process that served as the judicial branch of that regime. As long as the states that were members of the GATT/WTO regime accepted the structures of embedded liberalism, the system was stable.

Unfortunately, virtually all the elements of the compromise of embedded liberalism are under threat in many if not most of the core members of the multilateral system. With the end of the post-war golden age,[194] and consistent with Polanyi's analysis of the 'double movement' between liberalisation and protection (Polanyi 1944, pp. 138-9), the extended period of deregulation ('neoliberalism') resulted in a significant weakening of the core institutions of embedded liberalism. When the most serious macroeconomic crisis since the Great Depression hit the world economy in 2008, a systematic critique of that system began to be accepted as a central part of the public discourse of democratic politics. Essential elements of this critique include a rejection of the legitimacy of market

193 As the literature on varieties of capitalism suggests, the specific institutional forms taken by Keynesian welfare states varies quite substantially across countries (Hall and Soskice, 2001, Thelen 2014). It seems to be the case that, as long as the embedded liberalism functioned in the core trading nations, these differences did not call the institutions supporting international liberalism into question.

194 See e.g. Marglin and Schor (1991) and Crafts and Toniolo (1996).

allocation and the core norms that support it (sanctity of property rights, shareholder value maximisation as the only legitimate goal of firms, etc.). At the same time, there is also a critique of liberal democracy and its essential normative foundation (e.g. freedom of expression, regular free and fair elections, and responsibility of the state apparatus to elected representatives).

This rejection became a central part of the rhetoric of the populist (mostly green) left and the (mostly neo-fascist) right and led to an increasing delegitimation not only of the political economic institutions, but of the parties (centre right and left) that had been built on those institutions. Both the economic and political foundations are criticised as being too cosmopolitan. Since this cosmopolitanism is a fundamental support to embedded liberalism, these new politics have made support for the international institutions of embedded liberalism increasingly toxic for both right and left and, perhaps more importantly, have encouraged political entrepreneurs across the political spectrum to pursue policies that are inconsistent with the norms that supported the functioning of those institutions. Brexit is probably the most obvious consequence of these new politics, but the increasing success of anti-globalist/anti-EU politics in many members of the EU reflects the same pressures. Similarly, in addition to arguing that the US should withdraw from the WTO, the Trump administration deployed arguments in disputes that were patently inconsistent with the norms necessary to continued functioning of the central dispute process of that system (e.g. national security arguments that had previously been generally avoided because they short-circuit to normal operation of that system).

Recourse to public morals arguments to justify trade intervention illustrates that these dynamics are not specific to the US, with potentially major implications for the prospects of sustaining a multilateral rule-based trading order. In DS472/479 *Brazil-Taxation*, the EU and Japan complained about Brazil's decision to exempt domestic companies producing television equipment from paying taxes. To defend its violation of the national treatment obligation, Brazil claimed that it was aiming to bridge the 'digital divide', as some citizens did not have access to information technologies. Brazil argued it was pursuing 'social inclusion'. The EU did not agree. In its view, if objectives such as access to information and education were protected under Article XX, then any governmental action in the public interest could justify protectionist measures.

The panel (§§7.558 et seq.) acknowledged the wiggle room that members have but cautioned that they still had to establish that the alleged public policy objective is indeed a public moral objective. The panel held that promoting a Brazilian industry was an intermediate objective to an overarching social objective (social inclusion by bridging the digital divide) and deferred to Brazil. Although it noted that this finding did not constitute carte blanche, given that conditions vary across WTO members (§§7.565-567), social inclusion is a public policy objective as opposed to one of public morals. The WTO

panel de facto equated public policy (law) with public morals, without even asking the question whether a minimum condition should be imposed. As discussed, the panel on *US-Tariff Measures* (China) extended the scope of Article XX(a) to permit broad-based tariffs to protect US public morals.

In this situation, it is hard to have much confidence that the sorts of proposals we discuss above have much chance of finding traction. While our hope is that the suggested reforms could play a role in stabilising the trading institutions of embedded liberalism (which we see as a necessary condition for continued democratic capitalism), we also recognise that the prospects for them in the immediate future are limited at best. In this section we therefore turn to an alternative approach based on clubs of like-minded nations, one that offers the prospect of sustaining a degree of international cooperation on pursuit of non-economic objectives and addressing associated trade spillovers and potentially pathways towards multilateralisation over time.

Military alliances have long been a central feature of national security-motivated cooperation. These may be complemented by clubs in which countries cooperate in determining standards and defining measures to pursue shared national security-related interests. An example during the Cold War was the initiative by Western countries to define (identify) and restrict exports of sensitive material to the Communist world through the Coordinating Committee for Multilateral Export Controls (COCOM). Cooperation between states on export control regimes for weapons and dual use technologies is long-standing.

The Wassenaar Arrangement on export control of dual use technologies is an example. This promotes information sharing on export licensing regimes for trade in dual-use good and technologies and conventional arms. The Arrangement spans 42 countries. It is a voluntary, 'soft law' regime that has expanded over time to include a focus on threats from non-state actors, cybersecurity, and technologies that may be used to violate human rights – e.g. trade in cyber-surveillance technologies (De Bruin 2022).[195] States decide for themselves whether to deny another state or group of states access to specific technologies but may decide to act jointly in this regard. This is the case for the EU.[196] Calls have been made for like-minded nations to do more to act in a concerted manner,

195 In 2022, signatories included (original signatories of COCOM in boldface): Argentina, Australia, Austria, **Belgium**, Bulgaria, **Canada**, Croatia, Czech Republic, **Denmark**, Estonia, Finland, **France, Germany, Greece**, Hungary, India, Ireland, **Italy, Japan**, Latvia, Lithuania, **Luxembourg**, Malta, Mexico, **Netherlands**, New Zealand, **Norway**, Poland, **Portugal**, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, **Türkiye**, Ukraine, **United Kingdom**, and **United States**.

196 An EU regulation aims to ensure that in the area of dual-use items, Member States fully take into account international commitments, obligations under relevant sanctions, considerations of national foreign and security policy including human rights, and intended end-use and the risk of diversion of dual-use items, including those identified by the Australia Group (https://www.australiagroup.net/), the Missile Technology Control Regime (http://mtcr.info/), the Nuclear Suppliers Group (http://www.nuclearsuppliersgroup.org/), the Wassenaar Arrangement (http://www.wassenaar.org/), and the Chemical Weapons Convention (https://www.opcw.org/chemical-weapons-convention). See EU (2021).

e.g. Barker and Hagebölling (2022) have suggested the establishment of a multilateral technology access and control club through which members would collectively determine whether to restrict access to specific technologies. The G7 has called for cooperation among like-minded states to achieve security goals.[197]

Beyond alliances and national security-motivated cooperation, clubs are likely to figure more in the future as vehicles to support regulatory cooperation and deeper economic integration of participating countries. Recent examples of nascent clubs include the EU-US Trade and Technology Council[198] and the US-led Indo-Pacific Economic Framework (IPEF) for Prosperity[199] and proposals for Strategic Partnerships on raw materials with source countries, a Critical Raw Materials club and joint purchasing of critical supplies (a possible 'buyers club').[200] These types of initiatives complement PTAs, which have seen a steady increase in the extent to which they address domestic 'behind-the-border' regulation.[201] Borders between PTA partners have become 'thinner' relative to those prevailing between nations trading on most favoured nation (MFN) terms not just because of the preferential removal of tariffs but because of regulatory harmonisation and cooperation (Limão 2016). Agreements pertaining to domestic regulatory instruments affecting trade and investment are more likely to be feasible in the small-numbers context of PTAs than in the WTO-wide context.

While PTAs offer a mechanism to agree on trade policy disciplines that go beyond the WTO, by construction they apply only to signatories. Many developing countries do not participate in deep PTAs, something that applies especially in the case of the largest emerging economies. Addressing NEO policy spillovers either requires PTAs that encompass many emerging economies or domain-specific agreements. The latter offer better prospects for broad membership insofar as they do not entail substantial liberalisation of all trade between members, as a PTA will do.

In a multi-polar world dominated by large economies with dissimilar political systems and governance frameworks the WTO must be able to accommodate variable geometry.[202] One reason is the high likelihood that WTO members increasingly will turn to PTAs and issue- or domain-specific cooperation outside the WTO. Alternatively, a group of WTO members that use trade policy to pursue NEOs – e.g. conditioning

197 E.g. the G7 Trade Ministers (2022) call "to enhance cooperation and explore coordinated approaches to address economic coercion both within and beyond the G7…" (p. 4)

198 https://www.state.gov/u-s-eu-trade-and-technology-council-ttc/

199 https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/indo-pacific-economic-framework-prosperity-biden-harris-administrations-negotiating-goals-connected

200 See e.g. European Commission (2020; 2023a) and Hendrix (2023). The stated aim of a possible Critical Raw Materials Club is to bring together consuming countries and resource-rich countries to foster sustainable investment in producing countries and support moving up the respective value chains, including through EU investment in source countries (European Commission 2023b).

201 Mattoo et al. (2020) and Horn et al. (2010) discuss the evolution of modern-era PTAs towards increasingly comprising WTO+ and WTO-X provisions. WTO+ refers to policy areas covered by the WTO where PTA partners go beyond WTO commitments. WTO-x refers to areas not covered in the WTO.

202 Even the EU, a much more homogenous group of countries than the WTO, provides for variable geometry. It does so by providing for 'enhanced cooperation' (Article 20 Treaty on European Union), a procedure through which a minimum of nine EU Member States may implement deeper integration in an area where the EU27 cannot do so within a reasonable period.

access to the market on satisfying specific production requirements[203] – can do so on a concerted basis, i.e. act jointly in a coordinated manner. Club-based cooperation on NEOs outside the WTO will have potentially significant implications for the trading system, with non-participants left to themselves to determine what clubs are doing and if and how it affects them. Putting in place a framework that allows for WTO members to cooperate in clubs is in all members' interest. Greater scrutiny and discussion of the rationale and analysis of the operation of clubs would benefit both participating jurisdictions and those that do not. Bringing clubs into the WTO will have important transparency benefits and the potential for engagement and learning about the costs and benefits of cooperation in the policy areas covered.

Many WTO members recognise this. Starting in 2017 groups of WTO members turned to so-called joint statement initiatives (JSIs), in which interested countries negotiate on a specific issue. Insofar as resulting agreements apply on an MFN basis, JSIs are akin to vehicles to pursue coordinated scheduling of new commitments, and as such, should not raise doubts regarding their WTO consistency. To date, two JSI negotiations have been concluded successfully, reflected in a new Services Domestic Regulation agreement (2021) and an agreed text for a new agreement on Investment Facilitation for Development (July 2023). Since launching four JSIs at the 11th WTO Ministerial Conference in Buenos Aires in 2017, members have expanded plurilateral discussions on topics salient to climate change and protection of the environment – e.g. reducing plastics pollution and fossil fuel subsidies – as well as other NEOs such as trade and gender.

Plurilateral cooperation is nothing new for the trading system (Hoekman and Mavroidis 2015). GATT contracting parties successfully negotiated the first plurilateral agreements dealing with behind-the-border instruments (nontariff barriers) in the Tokyo round (1973-79). These involved a sub-set of the membership, mostly OECD member countries led by the two Trans-Atlantic partners.[204] WTO negotiators left the door open to variable geometry, providing a framework for inclusion of discriminatory plurilateral agreements in Annex 4 of the WTO. As is well known, however, the legal hurdles for inclusion of new Annex 4 agreements are very high, as they require consensus – i.e. non-participants must agree to the inclusion of new agreement that is proposed by proponents and that will only apply to them. This has meant that clubs inside the WTO require a critical mass of WTO members to participate in order to overcome potential free riding concerns. The salience of such concerns will depend importantly on the subject matter being considered. If it is market access liberalisation free riding will be a concern; if it is establishing good policy or regulatory practices, free riding is less of an issue.[205]

203 The September 2022 G7 Trade Ministers statement makes clear all G7 members support such measures.
204 Winham (1986) provides an excellent account of the Tokyo round negotiation.
205 The Information Technology Agreement is an example of a critical mass market access agreement (Mann and Liu 2009, Gnutzmann-Mkrtchyan and Henn 2018). Obtaining critical mass when market access is at stake is non-trivial, as illustrated by the failure of negotiations on an Environmental Goods Agreement (De Melo and Solleder 2020) and a Trade in Services Agreement (Kelsey 2016).

Work on possible areas for WTO reform has pointed to the possibility (and desirability) of creating a framework that accommodates open plurilateral agreements (OPAs) that are applied on a non-discriminatory basis by signatories,[206] and to facilitate new Annex 4 agreements that may entail discrimination. Agreements (commitments) on non-tariff policies can be added to GATT schedules if details of the covered products and the type of concessions are included (Hoekman and Mavroidis 2017) but this may involve some contortions if the subject matter of an OPA does not easily 'fit' under an existing WTO agreement.[207] Many developing countries do not support efforts to negotiate OPAs, reflecting concerns about potential discrimination and exclusion, legitimacy (e.g. arguments that this is a means for powerful states to set rules of interest to them while excluding issues of importance to non-participants), government capacity constraints and asymmetries, and the potential for pressure being exerted on non-parties to join in the future without being to alter what was agreed by the incumbents.

Accommodating more plurilateral agreements in the WTO would be facilitated by a strong governance framework to address such concerns and ensure they are consistent with the rules-based trading system. In related work (Hoekman and Mavroidis 2015, Hoekman and Sabel 2021) we have proposed possible criteria for OPAs, including that any OPA be open to any WTO member, provide for technical and financial assistance to countries seeking to accede, and that participants report regularly to the WTO membership on the implementation of the agreement. Annex 7 presents one set of what we regard as desirable governance principles for OPAs.

A multilateral governance framework to guide the use of trade policy motivated by non-economic objectives by groups of like-minded economies would benefit members of potential clubs in designing and implementing policies that are effective and efficient, and benefit non-members by enhancing transparency and providing opportunities to engage with club members with a view to reducing potential negative spillovers of measures adopted by the club, as well as a pathway for gradual multilateralisation of cooperation to achieve shared NEOs. Club-based cooperation under the WTO umbrella as opposed to (continue doing so) outside the WTO would also be of value to signatories of OPAs by providing access to WTO dispute settlement procedures insofar as enforcement is needed to permit/sustain cooperation.

In thinking about clubs, it is useful to distinguish between security arrangements and clubs that involve other NEOs. A security club among like-minded states can facilitate coordination, e.g. determining the products and technologies that can give rise to national security concerns, threats from non-state actors (terrorist organisations), cybersecurity, and technologies that may be used to violate human rights – e.g. trade in cyber-surveillance technologies. Whether security clubs can be open and non-

206 In the case of services matters are greatly facilitated by the fact that the GATS provides for additional commitments to be added to national schedules if a WTO members desires to do so.

207 A possible solution is to create a new category of WTO agreements that could be added as another Annex to the WTO, complementing the existing provision for discriminatory plurilateral agreements in Annex 4 (Mamdouh 2021).

discriminatory will depend on the issues they address. Security-related clubs of countries joining together to safeguard their autonomy or respond to potential economic coercion or national security threats from non-member states will by nature be discriminatory in the sense that trade in certain types of products deemed to be sensitive will be restricted by club members. Thus, a security club may have less scope for heterogeneous membership that spans both high-income and developing nations. Many developing countries have preferred to stay neutral in the conflict between Russia and Ukraine. Most have little incentive to become embroiled in geopolitical or geoeconomic competition, let alone more serious forms of conflict between major powers.

Managing the politics and political economy of defining acceptable trade-offs across different public policy goals – military security, national autonomy, human rights, economic security, greening the economy – not only calls for clarity in the objective function of states but also determination whether it is necessary to discriminate against countries that are not in the club. Such discrimination can be justified under Article XXI GATT in the case of a security club. Formation of a such a club is a signal to potential belligerents that members will respond to threats jointly as opposed to unilaterally. Agreeing to a set of agreed disciplines that reduce adverse effects for the trading system and constrain the scope for protectionism that cannot be justified on national security grounds would make such clubs less disruptive to the multilateral trading system.

Similar arguments pertain to clubs that address other NEOs. The main rationale for such clubs is to provide a framework to guide what might otherwise be pursued through unilateral action. Clubs that are not narrowly focused on national security can be more heterogenous in terms of membership. Many developing nations are sources of supply for natural resource-based products and materials that are salient for economic security objectives, but also may require more in the way of side payments to induce participation.[208] These may be financial or involve technology transfer, but could also encompass a need for countries seeking to ensure supply to accept trade-offs across NEOs – e.g. acceptance that supplying states are assisted or granted leeway in compliance with trade-NEO conditionality.

Examples of such potential participation linkages (Maggi 2016) could include treatment of club members under the Carbon Border Adjustment Mechanism (CBAM) or the treatment of imported goods that use material sourced from club members – e.g. eligibility for consumer subsidies for solar products, batteries, etc. in a programme like the US Inflation Reduction Act (IRA). This may give rise to trade tensions that would need to be managed, but could be argued to be consistent with the realisation of an NEO. Given that past and current practice makes clear dispute settlement panels will apply a deferential standard when judging the necessity of trade measures to attain NEOs, the prospects of formal disputes being brought against actions by a club are low.

208 This was an important element in international relations during the Cold War.

WTO members have yet to agree on multilateral rules on the use of trade policy to pursue specific NEOs – e.g. to support implementation of international conventions on labour-, environmental-, and/or public health standards. In the absence of agreement to develop such rules multilaterally, like-minded countries may negotiate plurilateral agreements on such matters, ensuring non-discriminatory implementation of whatever is agreed. The greatest potential for open, non-discriminatory clubs is likely to exist for NEOs other than national security. Many if not most of the NEOs pursued by states – human rights, labour standards, reducing carbon footprints, and environmental degradation – are shared by other states. Many are also foci for international standardisation, treaties, and national commitments. Cooperation and coordination among like-minded nations in developing and adopting international standards that are pertinent for pursing NEOs is a means to enhance the impact of domestic policies in realising a given NEO.

In practice, effective cooperation on NEOs calls for a deep understanding of how GVCs work, as policies will need to affect the behaviour of the actors involved in GVCs to help achieve societal NEOs in ways that are effective and efficient and reduce negative spillover effects. There may (will) be overlaps across NEOs and thus potential synergies (complementarities) that can be realised through club-based cooperation. The need to shift to renewable energy as part of reducing carbon emissions is an example. Solar-generated energy, expected to account for the greatest share of the energy mix in the future, will be associated with a large increase in global demand for critical raw materials.

Given long lead times for expanding and developing mineral supply chains, socio-environmental regulation, geographical concentration of the associated natural resources, political risk, and great power rivalry in pursuit of supplies, there is a significant prospect for instability and supply shocks that affect the renewables value chain and energy network (Nijsse et al. 2022). Clubs that cooperate on mitigating these risks along the value chains – through joint investment in expanding and diversifying upstream supply, bolstering processing capacity, and recycling – could help address these challenges. More generally, clubs that provide a framework to guide action to pursue shared objectives, or to reduce the compliance and implementation costs for business of regulation aiming to influence the design and operation of supply chains (e.g. due diligence requirements), can help clarify objectives and reduce uncertainty for firms.

8.1 CLUB DESIGN ISSUES

Insofar as WTO members decide on trade/supply chain initiatives that involve, for example, concerted action and cooperation to diversify sourcing of critical inputs, collaboration on measures to control trade and foreign investment in a jointly agreed dual-use technologies, etc. it is desirable that these be pursued in a transparent manner – with processes, reasoning, and decisions that are shared with all WTO members. The WTO membership could approach this discussion by accepting that some NEOs

must be observed by all. Labour-, environmental-, and/or public health standards are natural candidates given there already are international standards on these subjects. If such agreement cannot be obtained, like-minded WTO members may negotiate OPAs in which they agree on a set of NEOs and the use of trade measures to pursue them, ensuring non-discriminatory implementation of whatever is agreed. Such agreements are likely to pass muster under Article XX, and arguably also under GATT Article III, as discussed previously.

Many club-based initiatives tend to be of a 'soft law' nature in that they lack binding dispute settlement mechanisms. These are a central feature of trade agreements. While it is often argued that soft law arrangements are less effective, they can and do produce tangible results. There is an important outstanding research agenda concerning the feasibility of 'NEO clubs' and the design of international cooperation motivated by NEOs. The increasing prominence of NEOs implies a need to consider both economic objectives (the basic assumption in modelling of trade agreements) and NEOs in the analyses of trade cooperation. Trade agreements are designed to achieve economic objectives and the analytical literature focuses on this dimension. They encompass substantially all trade between signatories and constitute package deals in which issues are linked to each other, with negotiations involving both within and cross-issue trade-offs. The standard rationale for including many issues in a trade agreement is to expand the bargaining set and thus the potential net gain from an agreement to parties.[209]

What is needed are analytical frameworks that consider the feasibility and design of issue-specific plurilateral cooperation that is not accompanied by market access commitments, includes domestic interest groups (as opposed to a unitary state assumption), and considers factors such as transaction costs, uncertain payoffs, and alternative enforcement mechanisms. We currently do not have robust models that help to understand non-trade agreement-based cooperation and can inform the design of initiatives such as the IPEF and, more generally, OPAs. If technical interdependencies across issues (complementarity or substitutability of policy instruments) call for issue linkage, states confront a choice between negotiating a package or pursuing multiple issue-specific plurilateral agreements. Multiple issue-specific clubs are likely to have non-overlapping memberships, a factor that does not arise in a trade agreement setting where a package of linked commitments applies to all members. Multiple domain-specific clubs allow for flexibility (variable geometry) to reflect differences in preferences, which is more difficult to accommodate in a trade agreement (although exceptions may

209 Maggi (2016) distinguishes between enforcement, negotiation, and participation linkage and their implications for the design of international cooperation. This framework is relevant because of its focus on linkages between trade policy and non-economic policies, but the focus remains on contexts where countries make binding market access commitments.

be negotiated) but differentiated memberships of clubs will limit benefits of cooperation if issues are complements and may constrain cooperation if issues are substitutes. Participation linkage strategies across different plurilateral initiatives give rise to similar challenges as those arising in negotiating a multilateral package deal.

The IPEF,[210] the Americas Partnership for Economic Prosperity (APEP), [211] and the Global Cross-Border Privacy Rules Forum[212] are examples of (US-led) initiatives that aim to define cooperation to achieve different types of objectives, both economic and noneconomic, on a club basis. They illustrate the pertinence of the design questions just mentioned. They have in common that they do not involve reciprocal negotiations on binding market access liberalisation commitments and are not expected to include dispute settlement mechanisms. Thus, they require either that the benefits of participation are large enough to sustain cooperation and/or that a decision by a member not to fulfil what it agreed to is separable – i.e. does not affect the incentives of other parties to continue to cooperate.

IPEF focuses on four policy areas ('pillars'): (i) trade (with an emphasis on digital economy and e-commerce-related regulation, and labour, environment, and corporate accountability standards for traded products), (ii) enhancing supply chain resilience through cooperation on early warning systems, mapping, and enhancing traceability in key sectors, (iii) measures to green the economy (renewable energy and decarbonisation), and (iv) commitments to implement effective tax, anti-money laundering, and anti-bribery regimes. The approach is modular in that not all countries need to participate in all four pillars—e.g. India is an observer in the trade-related talks. A first agreement was reached in May 2023 on an IPEF Supply Chain Agreement.[213] This commits IPEF members to coordinate efforts to build a collective understanding of significant supply chain risks, based on identification and monitoring of critical sectors and key goods by each participant while protecting business confidential information; identify and work to address (potential) disruptions (where possible, collectively); improve supply chain logistics and infrastructure; identify opportunities for technical assistance to strengthen supply chains; and to respect labour rights, market principles, minimise market distortions, including unnecessary restrictions and impediments to trade.

To support these efforts, three bodies are envisaged: (i) a Supply Chain Council (in which parties will develop sector-specific action plans for critical sectors and key goods to enhance the resilience of supply chains), (ii) a Supply Chain Crisis Response Network (an emergency communications channel for participating economies to seek support during

210 https://ustr.gov/ipef
211 https://www.state.gov/americas-partnership-for-economic-prosperity/;
212 This aims to establish a certification regime to facilitate trade and data flows by helping firms demonstrate compliance with internationally recognised data privacy standards, while accepting differences in domestic preferences and regulation. https://www.commerce.gov/global-cross-border-privacy-rules-declaration.
213 https://www.commerce.gov/news/press-releases/2023/05/press-statement-substantial-conclusion-ipef-supply-chain-agreement

a supply chain disruption and to facilitate information sharing and collaboration during a crisis), and (iii) a Labour Rights Advisory Board (comprising government, worker, and employer representatives to promote labour rights in supply chains, sustainable trade and investment, and facilitate investment in businesses that respect labour rights).

Many observers question whether these types of approaches can work because they exclude China (Lovely 2022) and do not span traditional trade liberalisation, i.e. enforceable market access commitments (Reinsch and Goodman 2022). Neither IPEF nor APEP is enforceable in the sense that tariffs are not an instrument that will be used to respond to instances where a member does not comply with agreed provisions. Instead, these frameworks assume participants will benefit from associated implementation mechanisms, such as access to a supply chain council that will act as a focal point for members to share data and evaluate and address supply chain weaknesses. Non-compliance with agreed membership requirements will involve ceasing to have access to the associated mechanisms and their benefits.

As noted by Lester (2023), sustaining cooperation implies a need to agree on processes to identify when a signatory ceases to satisfy the terms of participation, a matter that has yet to be determined by IPEF participants. Each party is expected to follow their respective domestic processes for signature, ratification, acceptance, or approval of the agreement. In the case of the US, this will likely take the form of an Executive Order. As noted by Goodman (2023), this creates significant uncertainty regarding the credibility and durability of US engagement in IPEF agreements and participation in whatever institutional mechanisms that are proposed. Goodman suggests putting IPEF under the umbrella of APEC to help address this issue. Alternatively, IPEF and more generally clubs that address issues that are of broad interest could be designed as OPAs that operate under WTO auspices, thereby providing access to a multilateral institutional framework that can support implementation of agreements over time.

CHAPTER 9

Conclusion

Noneconomic objectives have moved centre-stage in world trade. The boundary between national security and other NEOs such as sustainable development, protection of the environment, and combatting climate change has become fuzzier. The scope of national security has expanded because of technological developments and accompanying threats that go beyond traditional military considerations such as regulation of arms or exports of dual use technologies. Increasingly, other NEOs – notably combatting climate change through reductions in carbon and other greenhouse gasses and safeguarding human rights – overlap with national and economic security goals. The ability of the world to shift to renewable energy sources depends in part on access to critical raw materials and the development of new technologies and in part on the incentives for industries and consumers to switch to less carbon-intensive economic activity.

The pursuit of unilateral measures to attain or protect NEOs, reflected in increasingly demanding requirements relating to production processes pertaining to factor and intermediate input use and 'embedded' carbon, rising political risk, and increasing policy uncertainty is forcing lead firms that operate GVCs to re-think their international investment and commercial partnership strategies. The main focus for international cooperation on trade matters used to be GATT/WTO. In the early 2000s, attention shifted more to PTAs. Today, there is an increasing focus on de-risking trade and investment through reshoring, near-shoring, and friend-shoring value chains. In part this involves states that have concluded PTAs, but in many cases efforts to cooperate to attain NEOs are not embedded in PTAs but involve either unilateral action or some form of club.

The open rules-based trading system and the global integration that this system has helped support, including the negotiation of an extensive network of PTAs, is under significant threat. Unilateral action, whether for economic or noneconomic reasons, is likely to be costly, both to the countries acting and those that are affected, even if not directly targeted. Many, mostly lower income, developing nations that depend on the ability to engage in trade and participate in GVCs are likely to be adversely impacted by the unilateral pursuit of the NEOs that increasingly drive trade policies in the major trade powers. States have the freedom to regulate their economies as they deem appropriate to attain domestic objectives, and to respond to foreign interventions that adversely affect their commercial interests but can also cooperate to increase both the effectiveness and efficiency of trade measures. International cooperation can help inform and guide

national policies aimed at NEOs to reduce negative spillovers. Here, we are particularly interested in spillovers carried through trade. The costs of not doing so are likely to be significant, both for developing nations and for firms, consumers, and workers in the high-income and large emerging economies that are the main protagonists.

For some analysts, the extent of differences with respect to the existing core members of the international liberal economic order mean that China cannot be incorporated as a member in good standing of the system. The idea is that there can be no agreement on common purpose between countries with very different economic and political systems. This reasoning is fallacious insofar as the common purpose relates to the international regime. There is no reason why the core members of the WTO cannot find an understanding on common purpose. This is not to say doing so will be straightforward.[214] The system differences make clear that such a regime will not be a marginal adjustment in the current rules.

Looking back, the framers of the post-war order were dealing with radically new domestic political-economic environments that differed quite widely across GATT contracting parties. Part of the story is the US, as hegemon, pushing for the new order for geo-strategic reasons. But this would not have succeeded without a broadly common sense of purpose, beyond agreement on Cold War geopolitical goals. In addition to liberal norms like liberalisation and non-discrimination, sovereignty norms were built into the system via the right to pursue safeguards (broadly construed), and the use of a principal supplier rule and reciprocity in negotiations. Notwithstanding the end of the Cold War and the decline in hegemonic capacity of the US, the foundational commitment to national sovereignty, with wide variance in domestic economic structures, continued more-or-less unbroken until 2016.

Many of policy areas that generate trade tensions and conflicts among the large trade powers are associated with non-economic, as opposed to economic, objectives. In many cases the underlying NEOs are likely to be shared by many WTO members, providing scope for dialogue and discussion about the policy instruments used to pursue them. There is clearly much to be gained from cooperating on NEOs of broadly common interest, such as national security. However, as we argue throughout, such cooperation must be rooted in an understanding of the objectives of the participants in that discourse and the way those interests are related to the domestic and international commitments of the states involved. WTO reforms are not needed for such discussions to take place but there must be political willingness to go beyond the 'bread-and-butter' of the WTO: negotiating disciplines on trade policy without consideration of the rationale for using specific trade instruments. Members need to consider the use of trade policy in the realm of national security and pursuit of other NEOs. WTO members that condition access to

214 Discussions on this subject in the G20 context have made clear there is not necessarily a commonality of views. See Trade and Investment Ministerial Meeting Communiqué, 22 September 2020, Annex I: Riyadh Initiative on the Future of the WTO. See http://www.g20.utoronto.ca/2020/2020-g20-trade-0922.html#:~:text=The%20Riyadh%20Initiative%20on%20the%20Future%20of%20the%20WTO%20(the,necessary%20reform%20of%20the%20WTO.

their market on satisfying specific production requirements have an interest in others doing so as well. This can take the form of agreements to act in a concerted manner, but it is arguably better to put in place a framework that encourages WTO members to use WTO-sanctioned clubs. This is in all WTO members' interest. Greater scrutiny, transparency and discussion of the rationale, and analysis of the effects of trade-nontrade issue linkages that are pursued by groups of countries would both benefit the jurisdictions pursuing such policies as well as those that do not join them but may be affected.

Labour and environmental standards are now routinely included in PTAs involving high-income countries. Despite many, if not most, WTO members having signed many if not all ILO conventions and international environmental agreements that establish national performance targets, there is no unanimity across the membership that such norms should be incorporated into the WTO. Silence speaks volumes. Providing the opportunity for OPAs among like-minded nations that are eager to bring similar covenants under the WTO umbrella would increase the relevance of the trading system. However, it is important not to oversell what is possible with deliberation (even more so for adjudication) among states. Sovereignty is a hard constraint that gets harder the closer to poles of existential threat. That is, in the near neighbourhood of a pole of existential threat, cooperation must be premised on some fundamental agreement on objectives.

Away from the limit of existential threat, the need for agreement on common purpose does not disappear but there is greater scope to permit a wider range of difference in interpretation of that purpose, to agree on more explicit rules and rely more on adjudication. China appears to remain committed to a rule-based trade order. As long as that remains the case, there is no reason China should not remain a key member of the WTO regime. In particular, it is in China's interest to participate actively in developing new rules, for example, on subsidies that reflect the political realities in China.[215]

Arguably a greater threat to the liberal trade order is the increasing rejection of the basic values of that regime in the original core members. The emergence of anti-liberal political movements of the left and right in many high-income countries is spilling over to a critique of the multilateral trading system. An essential part of both the left and right critiques of democratic capitalism is an explicit rejection of global liberal policies and institutions. GATT Articles XX and XXI were adopted as pragmatic commitments to the sovereignty needs of its members, but if they are used in ways that undermine the functioning of the trading system, i.e. are used in bad faith, this is actively destructive of the multilateral trade regime. Any system of rules of any complexity is going to be

215 Wu (2016) provides a clear discussion of the problems with China as a member of the WTO under current rules. We have argued above that those rules are no longer fit for purpose for the capitalist democracies that are the other core members of the WTO, so there should be a basis for good faith negotiation on reform of the subsidy rules. This argument is developed further in Hoekman and Nelson (2020).

incomplete because they must be able to respond to both the static and dynamic complexity of their domain of application. Thus, for those rules to function there must be general acceptance of norms of good behaviour. When countries use Article XXI as a cover for simple protectionist policy, they are violating those norms.

Creating avenues through which actions motivated by national security and other NEO-related concerns can be raised at the multilateral level, through the type of deliberation that has become a focal point of the TBT and SPS committees, would provide for the possibility to discuss and scrutinise specific measures. There are several reasons for differentiating between national security and other NEO-related issues. WTO members' revealed preferences suggest that, while they may be willing to discuss security-related concerns in an informal setting, they are reticent to submit disputes to formal adjudication. In any event, the standard of review adopted by panels in the realm of disputes concerning national security has been very deferential, no doubt in part in recognition that it is very unlikely that WTO members will implement adverse rulings. This suggests national security-based actions should be raised exclusively through policy dialogue and deliberation among peers in the WTO setting through a STC-type process. One should not downplay that national security is a divisive issue across the membership. In the present predicament the WTO membership is well-advised to engage in more deliberation rather than persist with adjudication.

Disputes on measures motivated by NEOs that do not constitute an existential threat (are not at the pole of power) lend themselves to traditional formal dispute settlement procedures. But even here it has become clear in recent case law (panel decisions) that deliberation may be a more effective route forward. Indeed, if public policy is equated to public morals, as happened in the report on *Brazil-Taxation*, and to a large extent in *US-Tariffs* (China), what is left to adjudicate? WTO members might find it more rewarding to negotiate regulatory divergence relating to NEOs, rather than adjudicate it. Less adjudication and more club participation should go hand in hand for the WTO to retain policy relevance. Continuing down the path of unilateralism and engaging in ineffective dispute settlement will contribute to what we already observe: the gradual decline of the WTO as a forum for cooperation on trade-related policies.

In cases of less widespread acceptance of non-economic objectives and underlying norms, clubs will probably be necessary, whether associated with (or motivated by) national security, economic security concerns, or to promote fundamental values. Clubs dealing with NEOs other than national security may attract broad membership over time and eventually become (effectively) multilateral, but in some domains this will not be possible or, indeed, desirable. It may be that clubs in which participation is premised on explicitly stated fundamental values and a minimum set of agreed normative criteria that must be met for membership to be feasible, starting from credible enforcement of non-enforcement as suggested by Tucker (2022), will never be able to grow to encompass all current WTO members. If this is the direction of travel, it remains vital that the type of deliberative, peer-to-peer dialogue and assessment mechanisms suggested in this study

be put in place and be open to all WTO members, including those that are not parties to a club. Over time this may serve to gradually expand participation and adapt and update agreements as experience is obtained on the effectiveness of policy instruments that are used to to attain NEOs. In this way the WTO as an organisation can continue to support the multilateral cooperation on trade that helped to deliver three-quarters of a century of peace and prosperity.

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Annexes

ANNEX 1: US export restrictions under the Trading with the Enemy Act and the International Emergency Economic Powers Act

G2: US AND EVENTUAL EU MEMBER STATES[216]

Target country	Year of sanction	WTO/GATT accession	GATT/WTO member	GATT/WTO notification	GATT Deliberation or dispute	Act invoked
US[a]	1933	1948	No	No		TWEA
Austria	1941	1951	No	No		TWEA
Austro-Hungarian Empire	1917	n/a	No	No		TWEA
Belgium	1914; 1940	1948	No	No		TWEA
Bulgaria	1914; 1941	1996	No	No		TWEA
Czechoslovakia	1941	1948	No	No	Complaint dismissed[b]	TWEA
Denmark	1940	1950	No	No		TWEA
Estonia	1940	1999	No	No		TWEA
Finland	1941	1950	No	No		TWEA
France	1914; 1940	1948	No	No		TWEA
Germany	1917; 1941	1951	No	No		TWEA
Greece	1941	1950	No	No		TWEA
Hungary	1941	1973	No	No		TWEA
Italy	1941	1950	No	No		TWEA
Latvia	1940	1999	No	No		TWEA
Liechtenstein	1941	1994	No	No		TWEA
Lithuania	1940	2001	No	No		TWEA
Luxembourg	1940	1948	No	No		TWEA
Monaco	1940	n/a	No	No		TWEA
The Netherlands	1940	1948	No	No		TWEA
Poland	1941	1967	No	No		TWEA
Portugal	1941	1962	No	No		TWEA
Spain	1941	1963	No	No		TWEA
Sweden	1941	1950	No	No		TWEA

Notes: a Reflects actions taken by the US government against US firms or nationals.b Press Release Annecy/42: Dismissal of Czechoslovak Complaint regarding US Export Licensing System.

216 G2 captures US, and EU; IND all remaining OECD (Organization of Economic Cooperation and Development) countries; BRICS (Brazil, Russia, India, China, South Africa); LDCs (the 46 countries mentioned in the WTO webpage www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm), and all rest are DEV (developing countries).

OTHER INDUSTRIALISED NATIONS

Target country	Year of sanction	WTO/GATT accession	GATT/WTO member	GATT/WTO notification	GATT Deliberation or dispute	Act invoked
Japan	1940	1948	No	No		ECA[a]
	1941			No		TWEA
Norway	1940	1948	No	No		TWEA
Switzerland	1941	1966	No	No		TWEA

Note: a The Export Control Act (ECA) was enacted in 1940 by President Franklin D. Roosevelt to accomplish two objectives: avoid scarcity of critical commodities and restrict exports of materials to imperial Japan.

BRICS

Target country	Year of sanction	WTO/GATT accession	GATT/WTO member	GATT/WTO notification	GATT Deliberation or dispute	Act invoked
Russia	1914	2012	No	No		TWEA
China	1941; 1950	2001	No	No	No	TWEA
USSR	1941; 1972-1976	n/a	No	No		TWEA

OTHER DEVELOPING COUNTRIES

Target country	Year of sanction	WTO/GATT accession	GATT/WTO member	GATT/WTO notification	GATT Deliberation or dispute	Act invoked
Albania	1914; 1941	2000	No	No		TWEA
Andorra	1941	Accession ongoing	No	No		TWEA
Cambodia	1975	2004	No	No		TWEA
Cuba	1963	1948	Yes	No	Committee discussions	TWEA
Danzig	1941	n/a	No	No		TWEA
East Germany	1949	n/a	No	No		TWEA
Hong Kong	1941	1986	No	No		TWEA
Haiti	1991-1994	1950	Yes	No		IEEPA
Montenegro	1916	2012	No	No		TWEA
North Korea	1950	n/a	No	No	No	TWEA; IEEPA
North Vietnam	1964	n/a	No	No	No	TWEA
Ottoman Empire	1917	n/a	No	No	No	TWEA
Romania	1917; 1940	1971	No	No	No	TWEA
San Marino	1941	N/a	No	No	No	TWEA
Serbia	1915	N/a	No	No	No	TWEA
Thailand	1941	1982	No	No	No	TWEA
Vietnam	1975	2007	No	No	No	TWEA
Yugoslavia	1941	1966	No	No		TWEA

ANNEX 2: Notifications under the Technical Barriers to Trade (TBT) Agreement mentioning 'security'

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/MEX/15	Mexico	Forestry raw materials			27/02/02
G/TBT/N/MNG/3	Mongolia	Various products	HS: 0403.10, 1101.00, 2501.00, 2710.00, 3002.20, 3002.30, 3303.00, 3401.11, 3401.19, 3402.20, 3404.20, 3601.00, 3602.00, 3603.00, 4803.00, 6806.10, 6806.10, 7303.00[a]		21/12/07
G/TBT/N/CHN/399	China	Products relating to safeguarding national security, preventing deceptive practices, protecting human life or safety, animal or plant life or health, and the environment		03.120.20 - Product and company certification. Conformity assessment	24/06/08
G/TBT/N/CHL/83	Chile	Gas-fired condensing boilers with a nominal heat input not exceeding 70kW		27.060 - Burners. Boilers	06/11/08
G/TBT/N/ALB/33	Albania	Essential requirement and conformity assessment of elevator.		91.140.90 - Lifts. Escalators	06/11/08
G/TBT/N/CHL/82	Chile	Transportable fully wrapped composite liquefied petroleum gas (LPG) cylinders with a non-metallic liner		23.020.30 - Gas pressure vessels, gas cylinders	06/11/08
G/TBT/N/PRY/20	Paraguay	Naturally hard, hot-rolled, shaped steel bars			19/11/08

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/CHL/83/Add.1	Chile	Gas-fired condensing boilers with a nominal heat input not exceeding 70kW		27.060 - Burners. Boilers	09/01/09
G/TBT/N/MEX/167	Mexico	Establishments engaged in the manufacture and/or importation of medicines marketed in Mexico, and warehouses which package, store and distribute medicines and the raw materials required for their manufacture			10/02/09
G/TBT/N/CHL/90	Chile	Portable kerosene and diesel containers for domestic use			11/05/09
G/TBT/N/CHL/91	Chile	Portable gasoline containers for domestic use			11/05/09
G/TBT/N/CHL/92	Chile	Luminaires for road and street lighting			28/05/09
G/TBT/N/CAN/274	Canada	Radiocommunications Equipment		33.060 - Radiocommunications	25/06/09
G/TBT/N/CAN/273	Canada	Radiocommunications Equipment		33.060 - Radiocommunications	25/06/09
G/TBT/N/CAN/272	Canada	Radiocommunications Equipment		33.060 - Radiocommunications	25/06/09
G/TBT/N/CAN/276	Canada	Radiocommunications Equipment (ICS: 33.060)		33.060 - Radiocommunications	03/07/09
G/TBT/N/CHL/82/Add.1	Chile	Transportable fully wrapped composite liquefied petroleum gas (LPG) cylinders with a non-metallic liner		23.020.30 - Gas pressure vessels, gas cylinders	03/12/09
G/TBT/N/CHN/726	China	Powered support for coal mine		73.100 - Mining equipment	10/02/10
G/TBT/N/JOR/8	Jordan	Automobiles			04/05/10
G/TBT/N/SAU/198	Saudi Arabia	Toys covered by gulf technical regulation on toys No.BD07070502 - 1st dated 27/11/2007			02/07/10
G/TBT/N/VCT/8	Saint Vincent/ Grenadines	Carbonated Beverages		67.160.20 - Non-alcoholic beverages	02/07/10
G/TBT/N/CAN/319	Canada	Radiocommunications Equipment		33.060 - Radiocommunications	16/07/10

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/PER/27	Peru	Different types of inorganic chemicals, acids, esters, human blood, alcohol	281119; 292090; 292213; 293100; 300290; 292119; 293339; 292219; 281210; 292390; 290490; 292990; 290519	71 - CHEMICAL TECHNOLOGY	21/09/10
G/TBT/N/EEC/358	European Union	Certain chemical substances and mixtures that can serve as precursors to explosives (covered chemicals listed in Annexes I and II in the relevant regulation)			10/01/11
G/TBT/N/FRA/121	France	Produits, éléments de construction et d'ouvrages			28/01/11
G/TBT/N/COL/158	Colombia	Liquefied petroleum gas (LPG)			07/02/11
G/TBT/N/SAU/233	Saudi Arabia	ICS 29.060.20		29.060.20 - Cables	21/02/11
G/TBT/N/SAU/224	Saudi Arabia	ICS 29.140.30		29.140.30 - Fluorescent lamps. Discharge lamps	21/02/11
G/TBT/N/SAU/227	Saudi Arabia	ICS 11.040		11.040 - Medical equipment	21/02/11
G/TBT/N/SAU/226	Saudi Arabia	ICS 29.140.10		29.140.10 - Lamp caps and holders	21/02/11
G/TBT/N/SAU/229	Saudi Arabia	ICS 11.040		11.040 - Medical equipment	21/02/11
G/TBT/N/SAU/230	Saudi Arabia	ICS 29.140.30		29.140.30 - Fluorescent lamps. Discharge lamps	21/02/11

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/SAU/232	Saudi Arabia	ICS 29.140.30		29.140.30 - Fluorescent lamps. Discharge lamps	21/02/11
G/TBT/N/SAU/228	Saudi Arabia	ICS 11.040		11.040 - Medical equipment	21/02/11
G/TBT/N/SAU/231	Saudi Arabia	ICS 29.140.99		29.140.99 - Other standards related to lamps	21/02/11
G/TBT/N/FIN/45	Finland	(firearms, bombs, missiles, military weapons and associated products)	CN 9301-9303 and CN 9305-9306		25/03/11
G/TBT/N/FIN/46	Finland		CN 9301-9303 and CN 9305-9306		25/03/11
G/TBT/N/GEO/38	Georgia	Oil products		75.080 - Petroleum products in general	11/11/11
G/TBT/N/BRA/529	Brazil	Low pressure regulators			30/04/13
G/TBT/N/BRA/527	Brazil	A public-key infrastructure (PKI)			30/04/13
G/TBT/N/BRA/528	Brazil	Low pressure regulators			30/04/13
G/TBT/N/COL/201	Colombia	Not applicable ;			07/02/14
G/TBT/N/CAN/409	Canada	Commercial Goods			12/03/14
G/TBT/N/KEN/410	Kenya	Mixtures of urea and ammonium nitrate in aqueous or ammoniacal solution (excl. those in packages with a gross weight of	310280	65.080 - Fertilizers	04/04/14
G/TBT/N/MEX/275	Mexico	Road transport vehicles			28/07/14
G/TBT/N/BRA/599	Brazil	Fire extinguishing powder		13.220.20 - Fire protection	30/07/14
G/TBT/N/MEX/275/Add.2	Mexico	Road transport vehicles			27/11/14
G/TBT/N/MEX/275/Add.1	Mexico	Road transport vehicles			27/11/14
G/TBT/N/MEX/275/Add.3	Mexico	Road transport vehicles (ICS 43.020) ;			03/12/14
G/TBT/N/BRA/599/Rev.1	Brazil	Fire extinguishing powder		13.220.20 - Fire protection	29/01/15
G/TBT/N/THA/447	Thailand	Volatile alkyl nitrate	292090.90)		23/02/15

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/BRA/631	Brazil	Car body shell for road vehicles	8707		27/03/15
G/TBT/N/MEX/275/Add.4	Mexico	Road transport vehicles			05/05/15
G/TBT/N/GAB/1	Gabon	Produits, processus et services			25/06/15
G/TBT/N/BRA/527/Add.1	Brazil	Public-key infrastructure			17/08/15
G/TBT/N/BRA/599/Add.1	Brazil	Fire extinguishing powder		13.220.20 - Fire protection; 13.220.20 - Fire protection	16/09/15
G/TBT/N/BRA/631/Add.1	Brazil	Car body shell for road vehicles (HS: 8707)	8707	43.040 - Road vehicle systems	20/01/16
G/TBT/N/CHE/211	Switzerland	Telecommunication equipment, radio equipment and telecommunication terminal equipment			05/04/16
G/TBT/N/CHN/1172	China	Products related to information security in the insurance industry			19/04/16
G/TBT/N/LTU/28	Lithuania	Alcoholic beverages			09/05/16
G/TBT/N/MEX/275/Add.5	Mexico	Road transport vehicles (ICS 43.020) ;			29/06/16
G/TBT/N/ARE/323	United Arab Emirates	Radio receiver specifications ;		33.060.20 - Receiving and transmitting equipment	30/06/16
G/TBT/N/BRA/527/Add.2	Brazil	A public-key infrastructure (PKI)			30/11/16
G/TBT/N/MEX/345	Mexico	Jamming equipment to block mobile phone, radio and data transmissions	8517		19/01/17
G/TBT/N/CZE/201	Czech Republic	Biological agents, toxins, handling of high-risk biological agents and toxins, handling of risky biological agents and toxins, transport of biological agents and toxins		71.080 - Organic chemicals; 95.020 - Military engineering. Military affairs. Weapons	19/01/17
G/TBT/N/USA/1271	USA	Methylene chloride and N-Methylpyrrolidone	290312	13.020 - Environmental protection; 71.100 - Products of the chemical industry	01/02/17
G/TBT/N/MEX/351	Mexico	Digital interfaces for telecommunications	851762		10/02/17
G/TBT/N/ZAF/215	South Africa	Bananas		65 - AGRICULTURE	16/02/17
G/TBT/N/MEX/345/Add.1	Mexico	Jamming equipment to block mobile phone, radio and data transmissions	8517		17/08/17

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/MEX/374	Mexico	Metrological instruments used in electrical power measurement systems		91.140.50 - Electricity supply systems	28/09/17
G/TBT/N/IND/66	India	Digital line telecommunications equipment	8517	33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING	06/12/17
G/TBT/N/EST/13	Estonia	Military weapons, military ammunition, munition		95 - MILITARY ENGINEERING; 95.020 - Military engineering. Military affairs. Weapons	06/03/18
G/TBT/N/VNM/116	Viet Nam	Car, Truck, Bus		43.040 - Road vehicle systems; 43.080 - Commercial vehicles; 43.100 - Passenger cars. Caravans and light trailers	07/03/18
G/TBT/N/EU/562	European Union	Information and communications technology (ICT) products		35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	21/03/18
G/TBT/N/USA/1457	USA	Small unmanned aircraft systems	8802	49.020 - Aircraft and space vehicles in general	03/04/19
G/TBT/N/BRA/631/Add.2	Brazil	Car body shell for road vehicles (HS: 8707)	8707	43.040 - Road vehicle systems	10/04/19
G/TBT/N/NZL/87	New Zealand	(Semi-) automatic firearms and components	930320	95.020 - Military engineering. Military affairs. Weapons	16/04/19
G/TBT/N/BRA/884	Brazil	Measuring instruments covered by legal metrology used in model evaluations		17.40 Measuring instruments	28/06/19
G/TBT/N/USA/1507	USA	Automatic dependent surveillance-broadcast (ADS-B) out equipment		33.060 - Radiocommunications; 33.070 - Mobile services; 49.090 - On-board equipment and instruments	19/07/19
G/TBT/N/FRA/191	France	Active radio equipment for 5G mobile networks		13.220 - Protection against fire; 33.070 - Mobile services; 71.100 - Products of the chemical industry	23/08/19
G/TBT/N/ITA/35	Italy	ICT products and services		35 - INFORMATION TECHNOLOGY. OFFICE MACHINES; 43.040.80 - Crash protection and restraint systems	23/08/19

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/FRA/192	France	Active radio equipment for 5G mobile networks		33.070 - Mobile services	28/08/19
G/TBT/N/FRA/193	France	Active radio equipment for 5G mobile networks		33.070 - Mobile services	28/08/19
G/TBT/N/MNG/8	Mongolia	The list of covered products classified by HS code is attached (in Mongolian)			04/11/19
G/TBT/N/BRA/631/Add.3	Brazil	Car body shell for road vehicles	8707	43.040 - Road vehicle systems	14/11/19
G/TBT/N/IND/116	India	IS 5158: Phthalic Anhydride	291735	71.080 - Organic chemicals	25/11/19
G/TBT/N/USA/1558	USA	Unmanned aircraft systems, incl. satellites, and suborbital and spacecraft launch vehicles	8802	49.020 - Aircraft and space vehicles in general; 49.090 - On-board equipment and instruments	09/01/20
G/TBT/N/IND/123	India	IS 14709 n- Butyl Acrylate; Esters of acrylic acid	29161210	71.080 - Organic chemicals	03/02/20
G/TBT/N/IND/125	India	IS 537	290230	71.080 - Organic chemicals	03/02/20
G/TBT/N/IND/121	India	IS 5295 Ethylene Glycol	290531	71.100 - Products of the chemical industry	03/02/20
G/TBT/N/IND/122	India	IS 15623 Melamine	293361	71.080 - Organic chemicals	03/02/20
G/TBT/N/IND/126	India	IS 336 Ether	39072010	71.080 - Organic chemicals	03/02/20
G/TBT/N/IND/124	India	IS15030 Terephthalic Acid	291736	71.080 - Organic chemicals	03/02/20
G/TBT/N/USA/1571	USA	Small unmanned aircraft systems	8802	49.020 - Aircraft and space vehicles in general	05/02/20
G/TBT/N/EGY/246	Egypt	Syringes, needles and catheters		11.040.25 - Syringes, needles and catheters	06/02/20
G/TBT/N/EGY/241	Egypt	Respiratory protective devices		13.340.30 - Respiratory protective devices	06/02/20
G/TBT/N/EGY/243	Egypt	Protection against excessive pressure		13.240 - Protection against excessive pressure	06/02/20
G/TBT/N/EGY/242	Egypt	Commercial refrigerating appliances		97.130.20 - Commercial refrigerating appliances	06/02/20
G/TBT/N/KEN/999	Kenya	Clothes and Footwear		61.020 - Clothes; 61.060 - Footwear	08/04/20

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/NAM/2	Namibia	Alcohol-based hand sanitizers		01.040.13 - Environment. Health protection. Safety (Vocabularies); 01.040.17 - Metrology and measurement. Physical phenomena (Vocabularies)	23/04/20
G/TBT/N/EGY/246/Add.1	Egypt	Syringes, needles and catheters		11.040.25 - Syringes, needles and catheters; 11.040.25 - Syringes, needles and catheters	04/06/20
G/TBT/N/EGY/241/Add.1	Egypt	Respiratory protective devices		13.340.30 - Respiratory protective devices; 13.340.30 - Respiratory protective devices	04/06/20
G/TBT/N/EGY/242/Add.1	Egypt	Commercial refrigerating appliances		97.130.20 - Commercial refrigerating appliances; 97.130.20 - Commercial refrigerating appliances	04/06/20
G/TBT/N/UKR/167	Ukraine	Medical devices, in vitro diagnostic medical devices, active implantable medical devices		11.040 - Medical equipment; 11.100.10 - In vitro diagnostic test systems	24/07/20
G/TBT/N/BRA/884/Add.1	Brazil	Measuring instruments covered by legal metrology used in model evaluations		17.040.30 - Measuring instruments; 17.040.30 - Measuring instruments	31/08/20
G/TBT/N/KEN/999/Add.1	Kenya	Clothes (ICS code(s): 61.020); Footwear (ICS code(s): 61.060)		61.020 - Clothes; 61.020 - Clothes; 61.060 - Footwear; 61.060 - Footwear	01/09/20
G/TBT/N/DNK/101	Denmark	Pesticides and biocides		65.100 - Pesticides and other agrochemicals	07/09/20
G/TBT/N/DNK/100	Denmark	Wind powered generators	850231	27.180 - Wind turbine energy systems	07/09/20
G/TBT/N/KEN/999/Add.2	Kenya	Clothes (ICS code(s): 61.020); Footwear (ICS code(s): 61.060)		61.020 - Clothes; 61.020 - Clothes; 61.060 - Footwear; 61.060 - Footwear	28/09/20

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/CHE/250	Switzerland	Miscellaneous chemicals & compounds, rare earths and radioactive isotopes	38; 28 ; 29	71 - CHEMICAL TECHNOLOGY	30/09/20
G/TBT/N/USA/1648	USA	Smart grid		13.120 - Domestic safety; 17.220.99 - Other standards related to electricity and magnetism; 29.240.01 - Power transmission and distribution networks; 35.020 - Information technology	06/10/20
G/TBT/N/BWA/113	Botswana	Burglar-and vandal-resistant glazing materials	70	81 - GLASS AND CERAMICS INDUSTRIES	28/10/20
G/TBT/N/BWA/115	Botswana	Glass & glassware	70	81 - GLASS AND CERAMICS INDUSTRIES	28/10/20
G/TBT/N/BWA/117	Botswana	ENVIRONMENT. HEALTH PROTECTION. SAFETY			28/10/20
G/TBT/N/BWA/116	Botswana	ENVIRONMENT. HEALTH PROTECTION. SAFETY		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY	28/10/20
G/TBT/N/BWA/112	Botswana	Milk	04	67 - FOOD TECHNOLOGY	28/10/20
G/TBT/N/BWA/119	Botswana	ENVIRONMENT. HEALTH PROTECTION. SAFETY		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY	29/10/20
G/TBT/N/BWA/118	Botswana	ENVIRONMENT. HEALTH PROTECTION. SAFETY		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY	29/10/20
G/TBT/N/BWA/120	Botswana	ENVIRONMENT. HEALTH PROTECTION. SAFETY		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY	29/10/20
G/TBT/N/BWA/129	Botswana	Fluorescent lamps. Discharge lamps		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY	02/11/20
G/TBT/N/BWA/122	Botswana	Domestic, commercial and industrial heating appliances		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 97.100 - Domestic, commercial and industrial heating appliances	02/11/20

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/BWA/127	Botswana	Luminaires		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 29.140.40 - Luminaires	02/11/20
G/TBT/N/BWA/125	Botswana	Ventilators. Fans. Air-conditioners		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 23.120 - Ventilators. Fans. Air-conditioners	02/11/20
G/TBT/N/BWA/126	Botswana	Flexible drives and transmissions		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 21.220 - Flexible drives and transmissions	02/11/20
G/TBT/N/BWA/130	Botswana	Lamps and related equipment		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 29.140 - Lamps and related equipment	02/11/20
G/TBT/N/BWA/124	Botswana	Laundry appliances		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 97.060 Laundry Appliances	02/11/20
G/TBT/N/BWA/121	Botswana	Miscellaneous domestic and commercial equipment		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 97.180	02/11/20
G/TBT/N/BWA/128	Botswana	Luminaires		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 29.140.40	02/11/20
G/TBT/N/BWA/123	Botswana	Body care equipment		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 97.170	02/11/20
G/TBT/N/UKR/176	Ukraine	All chemicals			21/12/20
G/TBT/N/BDI/86	Burundi	Cocoa beans	1801	67.140.30 - Cocoa	06/01/21
G/TBT/N/BDI/88	Burundi	Cocoa butter, fat and oil	1804	67.100.20 - butter	06/01/21
G/TBT/N/BDI/87	Burundi	Cocoa		67.140.30 - Cocoa	06/01/21
G/TBT/N/BDI/89	Burundi	Chocolate and other food preparations containing cocoa	1806	67.190 - Chocolate	06/01/21
G/TBT/N/USA/1558/Add.1	USA	Unmanned aircraft systems	8802	49.020 - Aircraft and space vehicles in general; 49.090 - On-board equipment and instruments	20/01/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/USA/1695	USA	Motor vehicles; cybersecurity		43.040.15 - Car informatics. On board computer systems	22/01/21
G/TBT/N/RUS/110	Russian Federation	Chemical substances and mixtures		71.100 - Products of the chemical industry	19/02/21
G/TBT/N/RWA/451	Rwanda	Law. Administration		03.160 - Law. Administration	08/03/21
G/TBT/N/USA/1558/ Add.2	USA	Unmanned aircraft systems	8802	49.020 - Aircraft and space vehicles in general; 49.090 - On-board equipment and instruments;	11/03/21
G/TBT/N/BRA/527/Add.3	Brazil	A public-key infrastructure		35.020 - Information technology	25/03/21
G/TBT/N/ZAF/246	South Africa	TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING		33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING	12/04/21
G/TBT/N/MWI/47	Malawi	Road signs; Retro-reflective sheeting material	8310	01.080.30 - Graphical symbols for use on mechanical engineering and construction drawings and technical product documentation	19/04/21
G/TBT/N/BRA/884/Add.2	Brazil	All measuring instruments covered by the legal metrology that are subject to administrative acts, procedures and requirements that should be used in the model evaluation process.		17.040.30 - Measuring instruments	21/04/21
G/TBT/N/UGA/1320	Uganda	Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network	85176	35.020 - Information technology (IT) in general	27/04/21
G/TBT/N/UGA/1321	Uganda	Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network	85176 :	35.020 - Information technology (IT) in general	27/04/21
G/TBT/N/ZAF/246/Add.1	South Africa	TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING		33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING	29/04/21
G/TBT/N/BDI/102	Burundi	Prepackaged and prepared foods (ICS code(s): 67.230)		67.230 - Prepackaged and prepared foods	30/04/21
G/TBT/N/BDI/103	Burundi	Prepackaged and prepared foods (ICS code(s): 67.230)		67.230 - Prepackaged and prepared foods	30/04/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/BDI/93	Burundi	Plant growing (ICS code(s): 65.020.20)		65.020.20 - Plant growing	30/04/21
G/TBT/N/BDI/101	Burundi	Prepackaged and prepared foods		67.230 - Prepackaged and prepared foods	30/04/21
G/TBT/N/BDI/104	Burundi	Prepackaged and prepared foods		67.230 - Prepackaged and prepared foods	30/04/21
G/TBT/N/BDI/92	Burundi	Plant growing		65.020.20 - Plant growing	30/04/21
G/TBT/N/UKR/176/Add.1	Ukraine	All chemicals			06/05/21
G/TBT/N/BDI/107	Burundi	Environmental protection; Air quality		13.020 - Environmental protection; 13.040 - Air quality	17/05/21
G/TBT/N/BDI/113	Burundi	Environmental protection; Wastes ; Air quality; Transport exhaust emissions		13.020 - Environmental protection; 13.030 - Wastes; 13.040 - Air quality; 13.040.50 - Transport exhaust emissions	17/05/21
G/TBT/N/SAU/1192	Saudi Arabia	Electric heaters (ICS code(s): 97.100.10)		97.100.10 - Electric heaters	25/05/21
G/TBT/N/BRA/527/Add.4	Brazil	A public-key infrastructure			26/05/21
G/TBT/N/USA/1733	USA	Firearms		01.040.95 - Military engineering (Vocabularies); 13.120 - Domestic safety; 95 - MILITARY ENGINEERING	26/05/21
G/TBT/N/DOM/232	Dominican Republic	Alcoholic beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes	22; 24	65 - AGRICULTURE; 65.160 - Tobacco, tobacco products and related equipment; 67 - FOOD TECHNOLOGY; 67.160.10 - Alcoholic beverages	31/05/21
G/TBT/N/CHE/257	Switzerland	Miscellaneous chemicals—tannins, dyes, waxes, solid and liquid fuels for lighters, explosives; isotopes	32; 34; 3602; 38; 3601; 31; 29; 3606; 30; 28	71.100.30 - Explosives. Pyrotechnics and fireworks	17/06/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/CHE/260	Switzerland	Different kinds of chemicals	38 ; 28; 29	13.300 - Protection against dangerous goods; 71 - CHEMICAL TECHNOLOGY	01/07/21
G/TBT/N/USA/1749	USA	Infrared laser countermeasure system		49.090 - On-board equipment and instruments	16/07/21
G/TBT/N/BEL/44	Belgium	ELECTRONICS (ICS code(s): 31); TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING (ICS code(s): 33); INFORMATION TECHNOLOGY. OFFICE MACHINES (ICS code(s): 35)		31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	23/07/21
G/TBT/N/BEL/45	Belgium	ELECTRONICS (ICS code(s): 31); TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING (ICS code(s): 33); INFORMATION TECHNOLOGY. OFFICE MACHINES		31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	23/07/21
G/TBT/N/MNG/14	Mongolia	SPIRITS AND VINEGAR; FOOD TECHNOLOGY (ICS code: 67)	22	67 - FOOD TECHNOLOGY	12/08/21
G/TBT/N/BWA/132	Botswana	Requirement for major components of two types of hydrant assemblies		13 - ENVIRONMENT. HEALTH PROTECTION. SAFETY; 29.140.30 - Fluorescent lamps. Discharge lamps	16/08/21
G/TBT/N/BRA/884/Add.3	Brazil	All measuring instruments covered by the legal metrology that are subject to administrative acts, procedures and requirements that should be used in the model evaluation process.		17.040.30 - Measuring instruments	25/08/21
G/TBT/N/GBR/42	United Kingdom	Various machinery goods and electronic devices for recreational craft, lifts, pressure equipment, personal protective equipment and other product types covered by the European conformity marking	36, 39, 42, 63, 64, 65, 70, 73, 76, 84, 85, 86, 87, 88, 89, 90, 91, 94, 95, 96.	13.340 - Protective equipment; 31 - ELECTRONICS; 91.140.90 - Lifts. Escalators; 97.200 - Equipment for entertainment	25/08/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/USA/1749/Add.1	USA	Infrared laser countermeasure system		49.090 - On-board equipment and instruments; 49.090 - On-board equipment and instruments	25/08/21
G/TBT/N/BEL/44/Add.1	Belgium	ELECTRONICS (ICS code(s): 31); TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING (ICS code(s): 33); INFORMATION TECHNOLOGY. OFFICE MACHINES (ICS code(s): 35)		31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	02/09/21
G/TBT/N/BEL/45/Add.1	Belgium	ELECTRONICS (ICS code(s): 31); TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING (ICS code(s): 33); INFORMATION TECHNOLOGY. OFFICE MACHINES		31 - ELECTRONICS; 31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	02/09/21
G/TBT/N/USA/1771	USA	Equipment authorization processes		33.060 - Radiocommunications	03/09/21
G/TBT/N/CHE/262	Switzerland	Telecommunication equipment, radio equipment and telecommunication terminal equipment		33.050 - Telecommunication terminal equipment	14/09/21
G/TBT/N/BDI/153, G/TBT/N/RWA/532, G/TBT/N/TZA/642, G/TBT/N/UGA/1442	Tanzania	Lighting in general		91.160.01 - Lighting in general	30/09/21
G/TBT/N/BDI/154, G/TBT/N/RWA/533, G/TBT/N/TZA/643, G/TBT/N/UGA/1443	Uganda	Lighting in general		91.160.01 - Lighting in general	30/09/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/BDI/154, G/TBT/N/RWA/533, G/TBT/N/TZA/643, G/TBT/N/UGA/1443	Tanzania	Lighting in general		91.160.01 - Lighting in general	30/09/21
G/TBT/N/BDI/154, G/TBT/N/RWA/533, G/TBT/N/TZA/643, G/TBT/N/UGA/1443	Rwanda	Lighting in general		91.160.01 - Lighting in general	30/09/21
G/TBT/N/BDI/153, G/TBT/N/RWA/532, G/TBT/N/TZA/642, G/TBT/N/UGA/1442	Rwanda	Lighting in general		91.160.01 - Lighting in general	30/09/21
G/TBT/N/BDI/154, G/TBT/N/RWA/533, G/TBT/N/TZA/643, G/TBT/N/UGA/1443	Burundi	Lighting in general		91.160.01 - Lighting in general	30/09/21
G/TBT/N/BDI/153, G/TBT/N/RWA/532, G/TBT/N/TZA/642, G/TBT/N/UGA/1442	Uganda	Lighting in general		91.160.01 - Lighting in general	30/09/21
G/TBT/N/BDI/153, G/TBT/N/RWA/532, G/TBT/N/TZA/642, G/TBT/N/UGA/1442	Burundi	Lighting in general		91.160.01 - Lighting in general	30/09/21
G/TBT/N/ARE/509, G/TBT/N/BHR/610, G/TBT/N/KWT/578, G/TBT/N/OMN/445, G/TBT/N/QAT/599, G/TBT/N/SAU/1215, G/TBT/N/YEM/206	Kuwait	Cheese	040630; 040690	67 - FOOD TECHNOLOGY	06/10/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/ARE/509, G/TBT/N/BHR/610, G/TBT/N/KWT/578, G/TBT/N/OMN/445, G/TBT/N/QAT/599, G/TBT/N/SAU/1215, G/TBT/N/YEM/206	Oman	Cheese	040630; 040690	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/509, G/TBT/N/BHR/610, G/TBT/N/KWT/578, G/TBT/N/OMN/445, G/TBT/N/QAT/599, G/TBT/N/SAU/1215, G/TBT/N/YEM/206	Yemen	Cheese	040630; 040690	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/508, G/TBT/N/BHR/609, G/TBT/N/KWT/577, G/TBT/N/OMN/444, G/TBT/N/QAT/598, G/TBT/N/SAU/1214, G/TBT/N/YEM/205	Qatar	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	1604	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/509, G/TBT/N/BHR/610, G/TBT/N/KWT/578, G/TBT/N/OMN/445, G/TBT/N/QAT/599, G/TBT/N/SAU/1215, G/TBT/N/YEM/206	Saudi Arabia	Cheese	040630; 040690	67 - FOOD TECHNOLOGY	06/10/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/ARE/509, G/TBT/N/BHR/610, G/TBT/N/KWT/578, G/TBT/N/OMN/445, G/TBT/N/QAT/599, G/TBT/N/SAU/1215, G/TBT/N/YEM/206	United Arab Emirates	Processed cheese	040630; 040690	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/508, G/TBT/N/BHR/609, G/TBT/N/KWT/577, G/TBT/N/OMN/444, G/TBT/N/QAT/598, G/TBT/N/SAU/1214, G/TBT/N/YEM/205	United Arab Emirates	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	1604	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/508, G/TBT/N/BHR/609, G/TBT/N/KWT/577, G/TBT/N/OMN/444, G/TBT/N/QAT/598, G/TBT/N/SAU/1214, G/TBT/N/YEM/205	Yemen	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	1604	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/509, G/TBT/N/BHR/610, G/TBT/N/KWT/578, G/TBT/N/OMN/445, G/TBT/N/QAT/599, G/TBT/N/SAU/1215, G/TBT/N/YEM/206	Qatar	Processed cheese	040630; 040690	67 - FOOD TECHNOLOGY	06/10/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/ARE/508, G/TBT/N/BHR/609, G/TBT/N/KWT/577, G/TBT/N/OMN/444, G/TBT/N/QAT/598, G/TBT/N/SAU/1214, G/TBT/N/YEM/205	Saudi Arabia	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	1604	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/508, G/TBT/N/BHR/609, G/TBT/N/KWT/577, G/TBT/N/OMN/444, G/TBT/N/QAT/598, G/TBT/N/SAU/1214, G/TBT/N/YEM/205	Bahrain	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	1604	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/508, G/TBT/N/BHR/609, G/TBT/N/KWT/577, G/TBT/N/OMN/444, G/TBT/N/QAT/598, G/TBT/N/SAU/1214, G/TBT/N/YEM/205	Kuwait	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	1604	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/509, G/TBT/N/BHR/610, G/TBT/N/KWT/578, G/TBT/N/OMN/445, G/TBT/N/QAT/599, G/TBT/N/SAU/1215, G/TBT/N/YEM/206	Bahrain	Cheese	040630	67 - FOOD TECHNOLOGY	06/10/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/ARE/508, G/TBT/N/BHR/609, G/TBT/N/KWT/577, G/TBT/N/OMN/444, G/TBT/N/QAT/598, G/TBT/N/SAU/1214, G/TBT/N/YEM/205	Oman	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	1604	67 - FOOD TECHNOLOGY	06/10/21
G/TBT/N/ARE/520	United Arab Emirates	National System of Measurement		17.020 - Metrology and measurement in general	18/10/21
G/TBT/N/BDI/176, G/TBT/N/RWA/567, G/TBT/N/TZA/664, G/TBT/N/UGA/1498	Tanzania	Cotton ear buds	300590	11.020 - Medical sciences and health care facilities in general	04/11/21
G/TBT/N/BDI/176, G/TBT/N/RWA/567, G/TBT/N/TZA/664, G/TBT/N/UGA/1498	Rwanda	Cotton ear buds	300590	11.020 - Medical sciences and health care facilities in general	04/11/21
G/TBT/N/BDI/176, G/TBT/N/RWA/567, G/TBT/N/TZA/664, G/TBT/N/UGA/1498	Uganda	Cotton ear buds	300590	11.020 - Medical sciences and health care facilities in general	04/11/21
G/TBT/N/BDI/176, G/TBT/N/RWA/567, G/TBT/N/TZA/664, G/TBT/N/UGA/1498	Burundi	Cotton ear buds	300590	11.020 - Medical sciences and health care facilities in general	04/11/21
G/TBT/N/KEN/1152	Kenya	Wadding, gauze, bandages and the like	300590	11.020 - Medical sciences and health care facilities in general	17/11/21

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/USA/1558/ Add.3	USA	Unmanned aircraft systems	8802	49.020 - Aircraft and space vehicles in general; 49.020 - Aircraft and space vehicles in general; 49.090 - On-board equipment and instruments; 49.090 - On-board equipment and instruments	23/11/21
G/TBT/N/CHE/264	Switzerland	Miscellaneous chemicals & compounds, rare earths and radioactive isotopes	38; 29; 28	71 - CHEMICAL TECHNOLOGY	23/11/21
G/TBT/N/COL/253	Colombia	Petroleum, biodiesel etc.	220710; 220720; 382600; 271012; 271019	75.160.20 - Liquid fuels	27/01/22
G/TBT/N/UKR/176/Add.2	Ukraine	All chemicals			23/02/22
G/TBT/N/BEL/44/Add.2	Belgium	ELECTRONICS; TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING (ICS code(s): 33); INFORMATION TECHNOLOGY. OFFICE MACHINES		31 - ELECTRONICS; 31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	14/03/22
G/TBT/N/MWI/56	Malawi	Unglazed ceramic tiles	690710	01.040 - Vocabularies	17/03/22
G/TBT/N/BRA/529/Add.1	Brazil	Low pressure regulators		23.060.40 - Pressure regulators	04/04/22
G/TBT/N/BWA/134	Botswana	Fire-resistance of building materials and elements		13.220.50 - Fire-resistance of building materials and elements	21/04/22
G/TBT/N/BWA/135	Botswana	Fire-fighting		13.220.10 - Fire-fighting	21/04/22
G/TBT/N/BWA/133	Botswana	Fire-fighting		13.220.10 - Fire-fighting	21/04/22

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/CHE/268	Switzerland	Refrigerator-freezers, with separate external doors; Upright freezers; water heaters; washing machines; electric ovens	841810; 84182; 841840; 84221; 851610; 85162; 84512; 851660; 841981	97.040.30 - Domestic refrigerating appliances; 97.040.40 - Dishwashers; 97.060 - Laundry appliances; 97.100 - Domestic, commercial and industrial heating appliances; 97.130.20 - Commercial refrigerating appliances	22/04/22
G/TBT/N/MNG/15	Mongolia	FOOD TECHNOLOGY		67 - FOOD TECHNOLOGY; 67.230 - Prepackaged and prepared foods	22/04/22
G/TBT/N/MEX/510	Mexico	Measuring instruments - System for measuring and dispensing petrol and other liquid fuels		17.120 - Measurement of fluid flow	12/05/22
G/TBT/N/MEX/511	Mexico	Systems for measuring and dispensing liquefied petroleum gas (LPG)		17.120 - Measurement of fluid flow	13/05/22
G/TBT/N/BWA/136	Botswana	Elements of buildings		91.060 - Elements of buildings	19/05/22
G/TBT/N/ZAF/246/Add.2	South Africa	TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING		33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING	19/05/22
G/TBT/N/BWA/137	Botswana	ICS 31.060.50		31.060 - Capacitors; 91.060.50 - doors and windows	20/05/22
G/TBT/N/BWA/138	Botswana	Doors and windows		91.060.50 - Doors and windows	23/05/22
G/TBT/N/BWA/147	Botswana	Surface active agents		71.100.40 - Surface active agents	24/05/22
G/TBT/N/BWA/140	Botswana	Glass in building		81.040.20 - Glass in building	24/05/22
G/TBT/N/BWA/139	Botswana	Glass in building		81.040.20 - Glass in building	24/05/22
G/TBT/N/RUS/133	Russian Federation	Medicinal products		11.120 - Pharmaceutics	24/05/22
G/TBT/N/BWA/144	Botswana	Surface active agents		71.100.40 - Surface active agents	24/05/22
G/TBT/N/BWA/146	Botswana	Materials and articles in contact with foodstuffs		67.250 - Materials and articles in contact with foodstuffs	24/05/22
G/TBT/N/BWA/143	Botswana	Glass in building		81.040.20 - Glass in building	24/05/22

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/BWA/141	Botswana	Surface active agents		71.100.40 - Surface active agents	24/05/22
G/TBT/N/BWA/142	Botswana	ICS 71.100.40		71.100.40 - Surface active agents	24/05/22
G/TBT/N/BWA/155	Botswana	Animal feeding stuffs (ICS code(s): 65.120)		65.120 - Animal feeding stuffs	25/05/22
G/TBT/N/BWA/156	Botswana	Lighting, signalling and warning devices		43.040.20 - Lighting, signalling and warning devices	25/05/22
G/TBT/N/BWA/149	Botswana	Surface active agents		71.100.40 - Surface active agents	25/05/22
G/TBT/N/BWA/157	Botswana	Vegetables and derived products		67.080.20 - Vegetables and derived products	25/05/22
G/TBT/N/BWA/152	Botswana	Animal feeding stuffs		65.120 - Animal feeding stuffs	25/05/22
G/TBT/N/BWA/153	Botswana	Welding consumables		25.160.20 - Welding consumables	25/05/22
G/TBT/N/BWA/150	Botswana	Fruits and derived products		67.080.10 - Fruits and derived products	25/05/22
G/TBT/N/BWA/151	Botswana	Medicaments		11.120.10 - Medicaments	25/05/22
G/TBT/N/BWA/148	Botswana	Films and sheets		83.140.10 - Films and sheets	25/05/22
G/TBT/N/BWA/154	Botswana	Spring steels		77.140.25 - Spring steels	25/05/22
G/TBT/N/BWA/158	Botswana	Lighting, signalling and warning devices		43.040.20 - Lighting, signalling and warning devices	01/06/22
G/TBT/N/BWA/159	Botswana	Surface active agents		71.100.40 - Surface active agents	01/06/22
G/TBT/N/BWA/160	Botswana	Fire protection ; Doors and windows		13.220.20 - Fire protection; 91.060.50 - Doors and windows	01/06/22
G/TBT/N/BWA/161	Botswana	Cereals, pulses and derived products	1005 - Maize or corn	67.060 - Cereals, pulses and derived products	02/06/22
G/TBT/N/KWT/600	Kuwait	FOOD TECHNOLOGY		67 - FOOD TECHNOLOGY	20/06/22
G/TBT/N/GBR/49	United Kingdom	Products in scope can range from machinery goods and electronics devices to recreational craft, lifts, pressure equipment, and personal protective equipment among other product types			23/06/22
G/TBT/N/UGA/1320/Add.1	Uganda	Information and Communication Technology Hardware and Software	85176:; 85176	35.020 - Information technology (IT)	08/08/22

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/UGA/1321/Add.1	Uganda	Information and Communication Technology Hardware and Software	85176:; 85176	35.020 - Information technology (IT) in general; 35.020 - Information technology (IT) in general	08/08/22
G/TBT/N/USA/1558/ Add.4	USA	Unmanned aircraft systems	8802	49.020 - Aircraft and space vehicles in general; 49.020 - Aircraft and space vehicles in general; 49.090 - On-board equipment and instruments; 49.090 - On-board equipment and instruments	15/08/22
G/TBT/N/USA/1558/ Add.5	USA	Unmanned aircraft systems	8802	49.020 - Aircraft and space vehicles in general; 49.020 - Aircraft and space vehicles in general; 49.090 - On-board equipment and instruments; 49.090 - On-board equipment and instruments	13/09/22
G/TBT/N/USA/1695/Add.1	USA	Motor vehicles; cybersecurity		43.040.15 - Car informatics. On board computer systems; 43.040.15 - Car informatics. On board computer systems	13/09/22
G/TBT/N/ARE/549	United Arab Emirates	Aircraft and space vehicles in general		49.020 - Aircraft and space vehicles in general	16/09/22
G/TBT/N/BEL/47	Belgium	ELECTRONICS; TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; INFORMATION TECHNOLOGY. OFFICE MACHINES		31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	28/09/22

Document symbol	Notifying Member	Subject matter covered	HS code(s)	ICS code(s)	Distribution date
G/TBT/N/BEL/46	Belgium	ELECTRONICS (ICS code(s): 31); TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING (ICS code(s): 33); INFORMATION TECHNOLOGY. OFFICE MACHINES		31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	28/09/22
G/TBT/N/BEL/45/Add.2	Belgium	ELECTRONICS; TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; INFORMATION TECHNOLOGY. OFFICE MACHINES		31 - ELECTRONICS; 31 - ELECTRONICS; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 33 - TELECOMMUNICATIONS. AUDIO AND VIDEO ENGINEERING; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES; 35 - INFORMATION TECHNOLOGY. OFFICE MACHINES	30/09/22
G/TBT/N/MNG/16	Mongolia	Nicotine containing products		65.160 - Tobacco, tobacco products and related equipment	24/10/22
G/TBT/N/BWA/163	Botswana	BOS 26:2022 Cereals — Whole and dehulled sorghum grains for human consumption	1007	67.060 - Cereals, pulses and derived products	27/10/22
G/TBT/N/UKR/233	Ukraine	Liquified gas for roar transport; household and industrial use			27/10/22
G/TBT/N/BWA/162	Botswana	Grain, sorghum, cereal, pulses	1007	67.060 - Cereals, pulses and derived products	27/10/22

Note: a 3002 - Vaccines; 3003 - Medicaments consisting of two or more constituents mixed together for therapeutic or prophylactic uses, not in measured doses or for retail sale; 3601 - Propellent powders; 3303 - Perfumes and toilet waters; 340420 - Poly"oxyethylene" [polyethylene glycol] waxes; 3603 – fuses; percussion or detonating caps; ignitors; electric detonators; 1101 - Wheat or meslin flour; 2710 - Petroleum oils; 3602 - Prepared explosives; 4803 - Toilet or facial tissue stock, towel or napkin paper for household or sanitary purposes; 7303 - Tubes, pipes and hollow profiles, of cast iron; 040310 - Yogurt; 2501 – Salts; 3401 - Soap or detergent; 340220 - Surface-active washing and cleaning preparations for retail sale; 680610 - Slag wool, rock wool and similar mineral wools.

ANNEX 3: Article 16 League of Nations[217]

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nations and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval, or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

217 https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1

ANNEX 4: Specific Trade Concerns (STCs)

IMS ID	Member(s) Responding to Trade Concern	Member(s) raising Trade Concern	Title	First date raised
11	Canada	Norway	Canadian Ship Inspectorate Directorate	14/02/97
90	United States	Argentina; Australia; Brazil; China; Ecuador; European Union; Indonesia; Malaysia; Mexico; Switzerland	Bioterrorism	20/03/03
97	Kuwait	European Union; United States	Conformity Certification Programme	02/07/03
103	China	Canada; European Union; Japan; Mexico; United States	LAN	23/03/04
152	China	European Union; Japan; Switzerland; United States	Compulsory Certification	09/11/06
183	China	Canada; European Union; Japan; Republic of Korea; United States	Information security	20/03/08
192	United States	Chile; Israel	Chemical Facility Anti-Terrorist Regulation	20/03/08
180	Brazil	China; European Union; Malaysia; Thailand; United States	Toys	20/03/08
224	India	China; European Union; Japan; Republic of Korea; Mexico; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Steel Products)	18/03/09
249	Canada	Argentina; Brazil; Burundi; Chile; Colombia; Croatia; Cuba; Dominican Republic; Ecuador; Egypt; European Union; Guatemala; Honduras; Indonesia; Japan; Jordan; Kenya; Malawi; Mexico; Mozambique; North Macedonia; Philippines; Switzerland; Tanzania; Türkiye; Uganda; United States; Zambia; Zimbabwe	Tobacco	05/11/09
270	China	United States	Certification and Accreditation	23/06/10
274	India	Canada; China; European Union; Japan; United States	Telecom	03/11/10

IMS ID	Member(s) Responding to Trade Concern	Member(s) raising Trade Concern	Title	First date raised
294	China	Australia; Brazil; Canada; European Union; Japan; Republic of Korea; United States; Chairman	Information security	24/03/11
388	Indonesia	Canada; European Union; United States	Cell phones, handheld and tablet computers (ID 388)	17/06/13
386	China	European Union; Switzerland; United States	Medical instruments	17/06/13
414	Ecuador	Brazil; Canada; Chile; Costa Rica; European Union; United States	Ecuador - Systematic failure to publish notices at an early appropriate stage (ID 414)	19/03/14
411	Ecuador	Brazil; Canada; Chile; Colombia; Costa Rica; European Union; Guatemala; Mexico; Peru; Switzerland; United States	Processed and packaged food products	19/03/14
432	Colombia	Canada; European Union; Japan; Mexico; United States	Colombia - Draft Ministry of Commerce, Industry and Tourism Decree "Restructuring the National Quality Subsystem and amending Decree No. 2269 of 1993" (ID 432)	18/06/14
448	European Union	China	IT Security Evaluation	05/11/14
457	China	Australia; Canada; European Union; Japan; United States; Chairman	Banking IT Equipment Security Regulation	18/03/15
464	European Union	Argentina; Brazil; Canada; Chile; Paraguay; South Africa; United States	GMOs	17/06/15
489	China	Australia; Canada; European Union; Japan; Mexico; United States; Chairman	Information and Communication Technology Regulation	04/11/15
526	China	Australia; Canada; European Union; Japan; Republic of Korea; New Zealand; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; United States	Cybersecurity	29/03/17
533	China	Australia; Canada; European Union; Japan; Republic of Korea; United States	Cyberspace	14/06/17
534	China	Canada; European Union; Japan; Republic of Korea; United States	Encryption law	14/06/17
538	China	Canada; European Union; United States	Civil Aviation Network	14/06/17
537	China	United States	Internet of Vehicles Cybersecurity Protection	14/06/17

IMS ID	Member(s) Responding to Trade Concern	Member(s) raising Trade Concern	Title	First date raised
544	Viet Nam	Australia; Canada; European Union; Japan; New Zealand; United States	Cybersecurity	08/11/17
546	India	Canada; China; European Union; Hong Kong, China; Mexico; United States	Toys	08/11/17
558	India	Republic of Korea; United States	Telegraph	20/06/18
580	European Union	Brazil; Canada; Colombia; Costa Rica; Dominican Republic; Ecuador; Egypt; El Salvador; Guatemala; Indonesia; Panama; Paraguay; United States; Uruguay	MRLs	06/03/19
576	China	Australia; European Union; Japan; Republic of Korea; United States	Cosmetics	06/03/19
618	Peru	Brazil; Chile; Colombia; Costa Rica; Ecuador; European Union; Guatemala; United States	Advertising warnings	26/02/20
630	India	Canada; European Union; Republic of Korea; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; USA	Chemical and Petrochemical Substances	13/05/20
632	India	Canada; China; European Union; United States	Toys	13/05/20
644	China	European Union; United States	Commercial Cryptography Administrative Regulations	28/10/20
651	India	Brazil; European Union; United States	Non-GM food	28/10/20
679	Nigeria	India	Machinery	24/02/21
714	United States	China	Communications Supply Chain	10/11/21
713	Belgium; European Union	China	Mobile 5G services	10/11/21
730	Mongolia	Mexico	Alcohol	09/03/22
737	United States	China	Secure equipment	09/03/22

ANNEX 5: Tokyo Round Agreement on Technical Barriers to Trade ("Standards Code")

Article 14: Consultation and dispute settlement[218]

Consultation

14.1 Each Party shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by other Parties with respect to any matter affecting the operation of this Agreement.

14.2 If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded, by another Party or Parties, and that its trade interests are significantly affected, the Party may make written representations or proposals to the other Party or Parties which it considers to be concerned. Any Party shall give sympathetic consideration to the representations or proposals made to it, with a view to reaching a satisfactory resolution of the matter.

Dispute settlement

14.3 It is the firm intention of Parties that all disputes under this Agreement shall be promptly and expeditiously settled, particularly in the case of perishable products.

14.4 If no solution has been reached after consultations under Article 14, paragraphs 1 and 2, the Committee shall meet at the request of any Party to the dispute within thirty days of receipt of such a request, to investigate the matter with a view to facilitating a mutually satisfactory solution.

14.5 In investigating the matter and in selecting, subject, inter alia, to the provisions of Article 14, paragraphs 9 and 14, the appropriate procedures the Committee shall take into account whether the issues in dispute relate to commercial policy considerations and/or to questions of a technical nature requiring detailed consideration by experts.

14.6 In the case of perishable products the Committee shall, in keeping with Article 14, paragraph 3, consider the matter in the most expeditious manner possible with a view to facilitating a mutually satisfactory solution within three months of the request for the Committee investigation.

14.7 It is understood that where disputes arise affecting products with a definite crop cycle of twelve months, every effort would be made by the Committee to deal with these disputes within a period of twelve months.

218 Document code LT/TR/A/5. At https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm

14.8 During any phase of a dispute settlement procedure including the earliest phase, competent bodies and experts in matters under consideration may be consulted and invited to attend the meetings of the Committee; appropriate information and assistance may be requested from such bodies and experts.

Technical issues

14.9 If no mutually satisfactory solution has been reached under the procedures of Article 14, paragraph 4 within three months of the request for the Committee investigation, upon the request of any Party to the dispute who considers the issues to relate to questions of a technical nature the Committee shall establish a technical expert group and direct it to: examine the matter; consult with the Parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution; make a statement concerning the facts of the matter; and make such findings as will assist the Committee in making recommendations or giving rulings on the matter, including inter alia, and if appropriate, findings concerning the detailed scientific judgments involved, whether the measure was necessary for the protection of human, animal or plant life or health, and whether a legitimate scientific judgment is involved.

14.10 Technical expert groups shall be governed by the procedures of Annex 2.1

14.11 The time required by the technical expert group considering questions of a technical nature will vary with the particular case. The technical expert group should aim to deliver its findings to the Committee within six months from the date the technical issue was referred to it, unless extended by mutual agreement between the Parties to the dispute.

14.12 Reports should set out the rationale behind any findings that they make.

14.13 If no mutually satisfactory solution has been reached after completion of the procedures in this Article, and any Party to the dispute requests a panel, the Committee shall establish a panel which shall operate under the provisions of Article 14, paragraphs 15 to 18.

Panel proceedings

14.14 If no mutually satisfactory solution has been reached under the procedures of Article 14, paragraph 4 within three months of the request for the Committee investigation and the procedures of Article 14, paragraphs 9 to 13 have not been invoked, the Committee shall, upon request of any Party to the dispute, establish a panel.

14.15 When a panel is established, the Committee shall direct it to: examine the matter; consult with Parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution; make a statement concerning the facts of the matter as they relate to the application of provisions of this Agreement and make such findings as will assist the Committee in making recommendations or giving rulings on the matter.

14.16 Panels shall be governed by the procedures in Annex 3.1

14.17 Panels shall use the report of any technical expert group established under Article 14, paragraph 9 as the basis for its consideration of issues that involve questions of a technical nature.

14.18 The time required by panels will vary with the particular case. They should aim to deliver their findings, and where appropriate, recommendations to the Committee without undue delay, normally within a period of four months from the date that the panel was established.

Enforcement

14.19 After the investigation is complete or after the report of a technical expert group, working group, panel or other body is presented to the Committee, the Committee shall give the matter prompt consideration. With respect to panel reports, the Committee shall take appropriate action normally within thirty days of receipt of the report, unless extended by the Committee, including: a statement concerning the facts of the matter; or recommendations to one or more Parties; or any other ruling which it deems appropriate.

14.20 If a Party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the Committee. In that event the Committee shall consider what further action may be appropriate.

14.21 If the Committee considers that the circumstances are serious enough to justify such action, it may authorize one or more Parties to suspend, in respect of any other Party, the application of such obligations under this Agreement as it determines to be appropriate in the circumstances. In this respect, the Committee may, inter alia, authorize the suspension of the application of obligations, including those in Articles 5 to 9, in order to restore mutual economic advantage and balance of rights and obligations.

14.22 The Committee shall keep under surveillance any matter on which it has made recommendations or given rulings.

Other provisions relating to dispute settlement

Procedures

14.23 If disputes arise between Parties relating to rights and obligations of this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT. Parties recognize that, in any case so referred to the CONTRACTING PARTIES, any finding, recommendation or ruling pursuant to Article 14, paragraphs 9 to 18 may be taken into account by the CONTRACTING PARTIES, to the extent they relate to matters involving equivalent rights and obligations under the General Agreement. When Parties resort to GATT Article XXIII, a determination under that Article shall be based on GATT provisions only.

Levels of obligation

14.24 The dispute settlement provisions set out above can be invoked in cases where a Party considers that another Party has not achieved satisfactory results under Articles 3, 4, 6, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those envisaged in Articles 2, 5 and 7 as if the body in question were a Party.

Processes and production methods

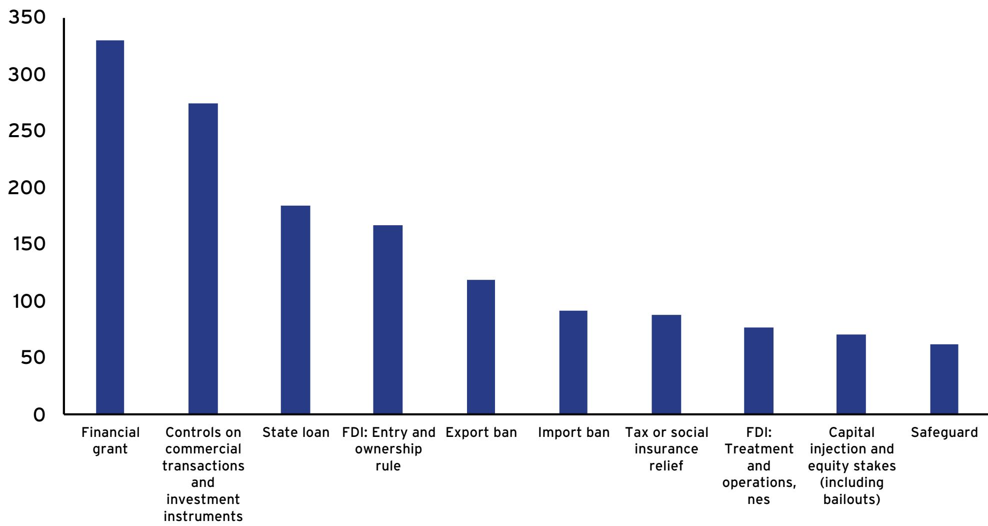
14.25 The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products.

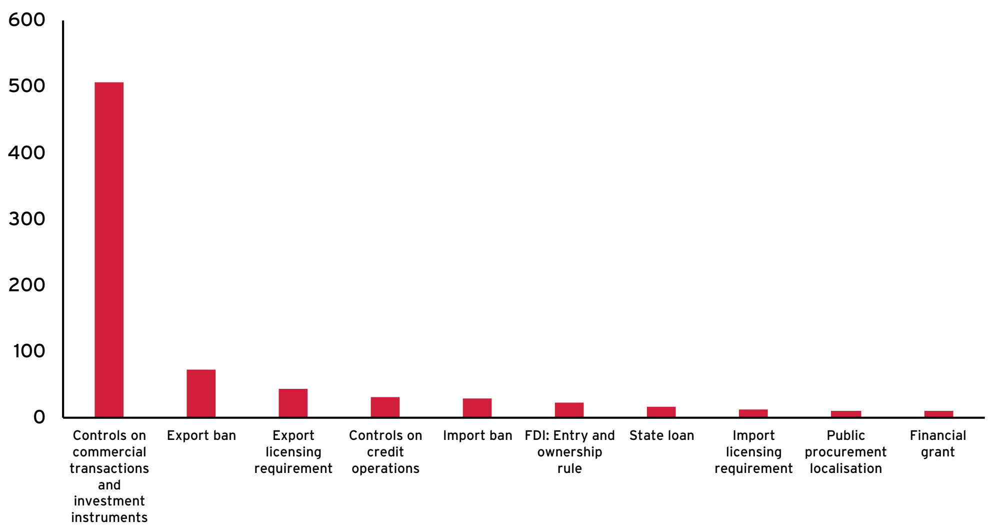
Retroactivity

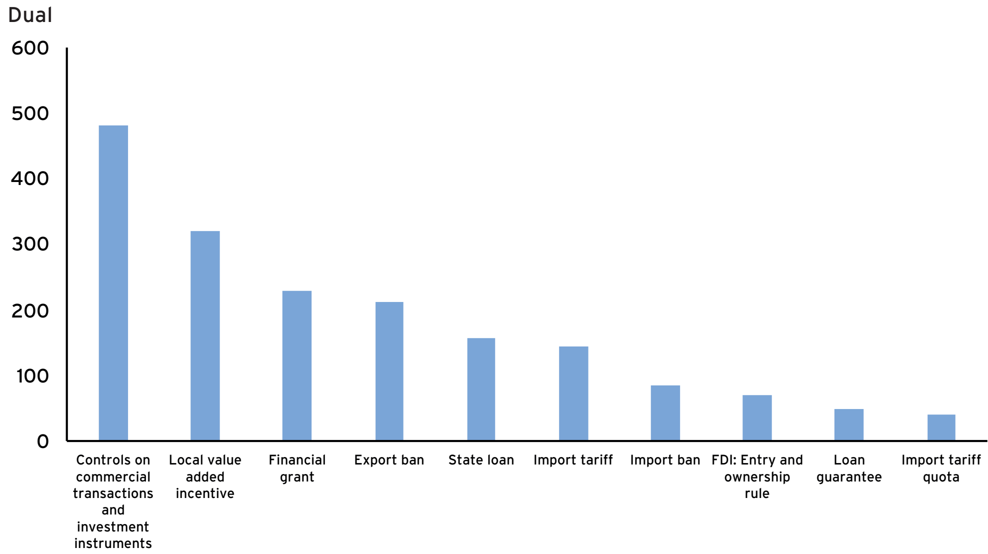
14.26 To the extent that a Party considers that technical regulations, standards, methods for assuring conformity with technical regulations or standards, or certification systems which exist at the time of entry into force of this Agreement are not consistent with the provisions of this Agreement, such regulations, standards, methods and systems shall be subject to the provisions in Articles 13 and 14 of this Agreement, in so far as they are applicable.

ANNEX 6: Frequency of instruments by keyword

(Global Trade Alert, all types of measures, red, amber, and green, 2009-2022)






Dual
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500
400
300
200
100
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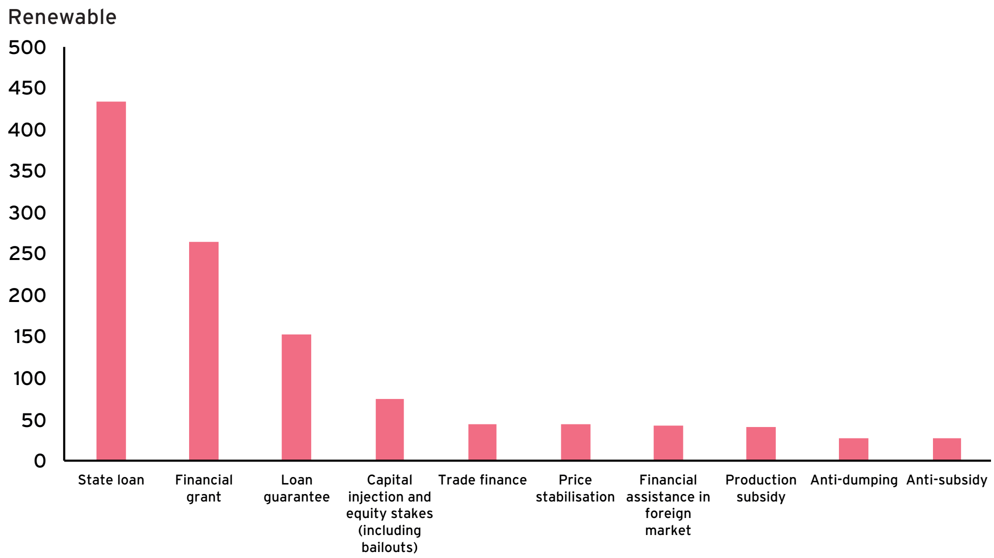
Controls on commercial transactions and investment instruments
Local value added incentive
Financial grant
Export ban
State loan
Import tariff
Import ban
FDI: Entry and ownership rule
Loan guarantee
Import tariff quota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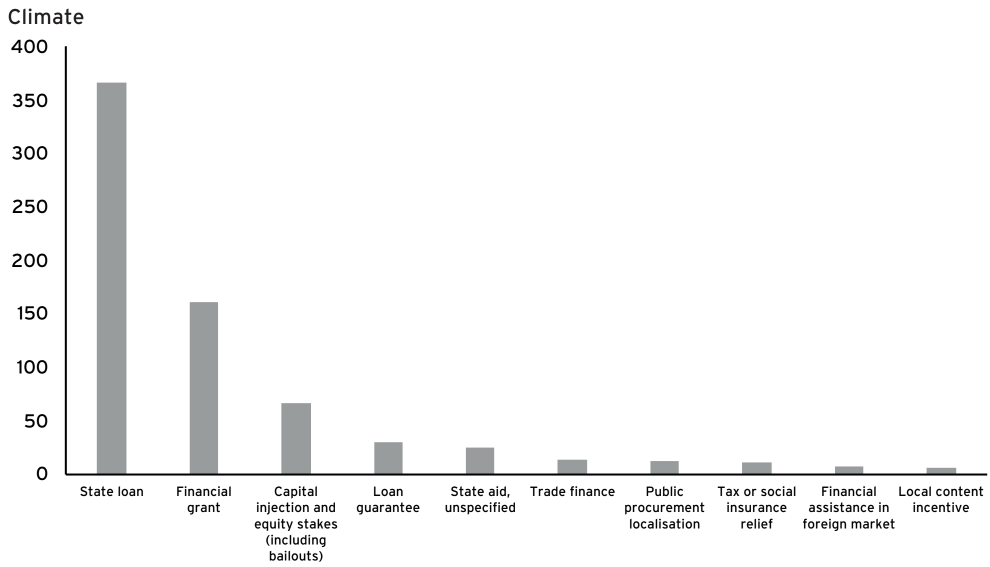
450
400
350
300
250
200
150
100
50
0
State loan
Financial grant
Loan guarantee
Capital injection and equity stakes (including bailouts)
Trade finance
Price stabilisation
Financial assistance in foreign market
Production subsidy
Anti-dumping
Anti-subsidy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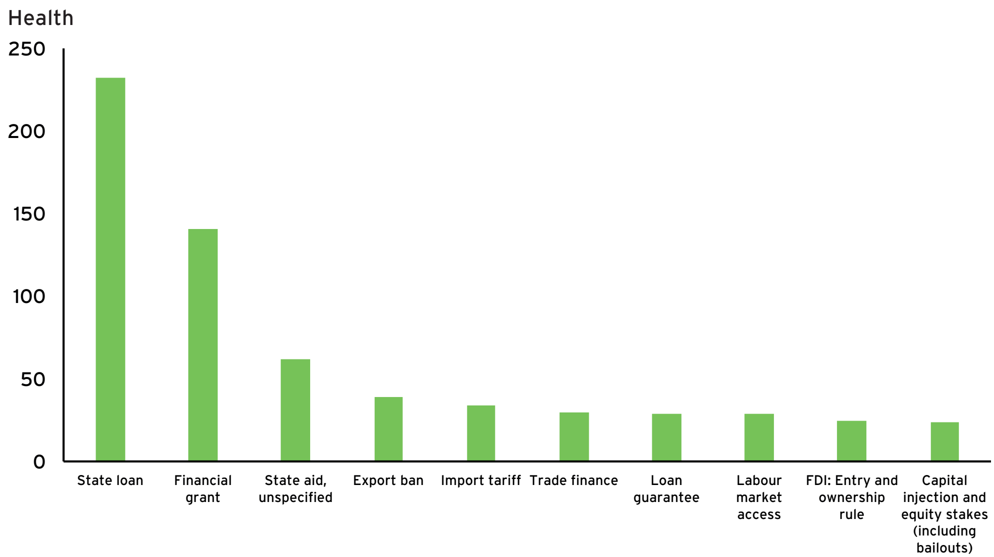
300
250
200
150
100
50
0
State loan
Financial grant
Capital injection and equity stakes (including bailouts)
Loan guarantee
State aid, unspecified
Trade finance
Public procurement localisation
Tax or social insurance relief
Financial assistance in foreign market
Local content incentive


Health
250
200
150
100
50
0
State loan
Financial grant
State aid, unspecified
Export ban
Import tariff
Trade finance
Loan guarantee
Labour market access
FDI: Entry and ownership rule
Capital injection and equity stakes (including bailouts)

ANNEX 7: Potential elements of a code of conduct governing plurilateral agreements

1. Membership is voluntary; WTO Members that decide not to participate initially will not be pressured to join subsequently.
2. Openness to subsequent accession by WTO Members that did not join when an OPA was first agreed, and inclusion of a section laying out the requirements and procedures to be followed for accession by aspiring members.
3. Language stating that accession to an OPA cannot be on terms that are more stringent than those that applied to the incumbent parties, adjusted for any changes in substantive disciplines adopted by signatories over time.
4. An obligation to provide reasons to accession-seeking countries for decisions to reject membership applications.
5. The agreement must be implemented on a non-discriminatory basis, with benefits extending to non-signatories. Insofar as benefits are conditional on satisfying requirements pertaining to standards of regulation and regulatory enforcement in a jurisdiction these should be clearly specified.
6. A provision committing signatories to assist WTO Members that are not yet able to satisfy the institutional/regulatory preconditions for membership in terms of applying specific substantive provisions of the agreement but desire to do so.
7. Wherever it is appropriate and in instances where capacities must be built for a country to meet OPA requirements, consideration be given to establish a stepwise schedule of compliance. Wherever possible, designing agreements to permit 'incremental' accession – adoption of specific disciplines that can implemented on a separable basis, as is the case under the TFA and foreseen in the modular approach taken in recent digital partnership agreement (see below) – can help to encourage participation.
8. Provisions ensuring that non-participants have full information on the implementation and operation of the agreement. These transparency-related requirements should include:
    a. Compliance with WTO requirements pertaining to publication of information on measures covered by the OPA (along lines of Art. X GATT).
    b. Simple, robust notification requirements for OPA members regarding the implementation of the agreement, which could draw on recent proposals to develop augmented procedural guidelines for the operation of WTO bodies.

c. Creation of a body to oversee implementation of the OPA that is open to observation by non-signatories, including mechanisms to engage stakeholders in an ongoing conversation about how the agreement is working and future needs.
d. Annual reporting to the WTO General Council by the OPA on its activities.
e. A mandate for the WTO Secretariat to assess the effects of implementing OPAs on the functioning of the trading system as part of the Director-General's annual monitoring report of developments in the trading system.

9. Inclusion of consultation and conflict resolution procedures for non-signatories of OPAs in cases where they perceive that incumbents do not live up to the code of conduct adopted by signatories.

10. Provisions indicating whether the OPA envisages recourse to WTO dispute settlement mechanisms to enforce the agreement, and if so, specifying the standard of review as well as the criteria that will apply in the selection of arbitrators – e.g., to assure arbitrators have the expertise required in the subject matter addressed by the agreement.

Source: Drawn from Hoekman and Sabel (2021).

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States increasingly use trade policies to pursue essential security interests and other non-economic goals in addition to the pursuit of traditional commercial objectives. Many of the associated interventions in international commerce target the supply chains that have been a driver of globalisation. Examples include making imports conditional on production requirements, such as banning the use of inputs deemed harmful to biodiversity, minimum standards of protection of workers in source countries, and restrictions on exports deemed important for national or economic security. A common feature of such interventions is that they are largely unilateral in nature. In principle, the World Trade Organization (WTO) provides an international forum where states can agree on disciplines to govern the use of trade policies for non-economic objectives. It has not been playing this role because of geopolitical conflicts and substantive disagreements among major members.

This study summarises extant WTO disciplines on trade policies motivated by non-economic objectives and documents the rising use of such measures. It provides pragmatic suggestions to bolster and sustain multilateral trade cooperation in a world economy characterised by geoeconomic rivalry and existential threats. It argues for moving away from litigation and adjudication towards greater multilateral scrutiny of unilateral measures, their effectiveness and spillover effects to guide the design of appropriate countermeasures by impacted states and to inform potential WTO reforms that would help members realise non-economic objectives more efficiently while continuing to benefit from value chain specialisation and trade. Cooperation on a plurilateral basis to attain shared non-economic goals is an inevitable corollary of a multipolar world economy. An important challenge – and opportunity – for the WTO membership looking forward is to provide a platform that accommodates clubs of like-minded states within a multilateral rules-based trade order.

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