

University of New South Wales Law Research Series

**Trade vs. Security: Recent
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Proactive**

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[2022] *UNSWLRS* 12
Forthcoming the *World Trade Review*

UNSW Law
UNSW Sydney NSW 2052 Australia

Trade vs. Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses From Defensive To Proactive

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Abstract

This paper provides the first systemic study of China's policy and legal responses to security-related actions and disputes in the international trade regime. It starts with a brief review of the law and practices relating to the security exceptions under the World Trade Organization to provide an important context for understanding the recent developments of China's approaches to national security. Based on a detailed discussion of China's approaches at international and domestic levels, we argue that China's security strategy has been shifting from being defensive to proactive: internationally by seeking to influence the development of trade rules and jurisprudence, and domestically by expanding national security to cover a wide spectrum of economic security interests and developing a comprehensive regulatory framework to facilitate the use of countermeasures to protect and pursue such interests. The way in which major trading nations are taking the law into their own hands, based on ever-expanding security interests, does not bode well for the future of the multilateral trading system. There is a pressing need for collective action by all governments involved to re-design security-related rules and exceptions to confine the use of security measures to agreed parameters.

1. Introduction

National security has been increasingly used to justify unilateral and confrontational actions in international economic activities, and its abuse poses a systemic and existential challenge to the rules-based international trade regime established by the World Trade Organization (WTO). For example, the United States (US), under the Trump administration, resorted to a range of non-cooperative actions on security grounds. Starting with the well-known tariffs on steel and

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aluminium imports worldwide,¹ the US actions increasingly targeted China including through tariffs on a massive list of Chinese products² and restrictions on economic activities with Chinese technology and telecommunication firms.³ A major driver behind these actions concerns the growing competition between the two economic superpowers in industry, trade, investment, technology and innovation, and other potential areas of strategic and economic importance.⁴ The US-China strategic rivalry continues under the Biden administration, which has labelled China as a top national security threat.⁵ The US's Trade Policy Agenda 2021 reinforced the commitment to tackle unfair trade practices, especially those of China, as a major way to enhance economic security.⁶ US allies, such as the European Union (EU), Japan and Australia, adopted similar strategies and approaches. Like the US, the EU's latest trade policy states that "building a fairer and rules-based economic relationship with China" is essential to its security interests.⁷ Japan joined a series of statements with the US and the EU pushing for WTO reform by strengthening multilateral disciplines over China's state capitalism.⁸ Australia banned Huawei's involvement in the rollout of its national 5G network, which became one of the catalysts for the ongoing

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- ¹ Chad P. Bown (2020), 'Trump's Steel and Aluminum Tariffs are Cascading Out of Control', PIIE (4 February 2020), www.piie.com/blogs/trade-and-investment-policy-watch/trumps-steel-and-aluminum-tariffs-are-cascading-out-control.
 - ² Office of the United States Trade Representative [USTR] (undated), 'China Section 301-Tariff Actions and Exclusion Process', undated, <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions>; also see Andres B. Schwarzenberg (2021), 'Section 301: Tariff Exclusions on U.S. Imports from China', FAS (9 September 2021), <https://fas.org/sgp/crs/row/IF11582.pdf>.
 - ³ See e.g., The Industry and Security Bureau (2020), 'Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule)', Federal Register (20 August 2020), www.federalregister.gov/documents/2020/08/20/2020-18213/addition-of-huawei-non-us-affiliates-to-the-entity-list-the-removal-of-temporary-general-license-and.
 - ⁴ See Office of the Secretary of State (2020), The Policy Planning Staff, 'The Elements of the China Challenge', United States Government (November 2020), www.state.gov/wp-content/uploads/2020/11/20-02832-Elements-of-China-Challenge-508.pdf; George Magnus (2021), 'Economics, National Security, and the Competition with China', War on the Rocks (3 March 2021), <https://warontherocks.com/2021/03/economics-national-security-and-the-competition-with-china/>; Marianne Schneider-Petsinger et al. (2019), 'US-China Strategic Competition: the Quest for Global Technological Leadership', Chatham House (November 2019), www.chathamhouse.org/sites/default/files/publications/research/CHHJ7480-US-China-Competition-RP-WEB.pdf; Anthea Roberts, Henrique Choer Moraes and Victor Ferguson (2019), 'Toward a Geoeconomic Order in International Trade and Investment', 22(4) *Journal of International Economic Law* 655.
 - ⁵ Greg Myre (2021), 'Biden's National Security Team Lists Leading Threats, With China At the Top', NPR (13 April 2021), www.npr.org/2021/04/13/986453250/bidens-national-security-team-lists-leading-threats-with-china-at-the-top.
 - ⁶ Office of the USTR (2021), '2021 Trade Policy Agenda and 2020 Annual Report of the President of the United States on the Trade Agreements Program', 1 March 2021, at 2 & 4, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/march/biden-administration-releases-2021-presidents-trade-agenda-and-2020-annual-report>.
 - ⁷ European Commission (2021), 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy', COM(2021) 66 Final (18 February 2021) at 8-9, <https://ec.europa.eu/transparency/regdoc/rep/1/2021/EN/COM-2021-66-F1-EN-MAIN-PART-1.PDF>.
 - ⁸ Office of the USTR (2018), 'Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union', 31 May 2018, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting>; Office of the USTR (2019), 'Joint Statement of the Trilateral Meeting of the Trade Ministers of the United States, European Union, and Japan', 23 May 2019, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/joint-statement-trilateral-meeting>; European Commission (2020), 'Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union', 14 January 2020, https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

Australia–China trade tensions.⁹ Through these actions, the scope of “national security”, which used to be largely confined to military-related security interests, is being expanded to cover increasingly broad activities and interests which are economic in nature. As some commentators have rightly observed, security and economic policy is becoming increasingly entangled,¹⁰ and “[n]ational security rhetoric is increasingly infiltrating global economic affairs.”¹¹

A growing body of scholarship has explored country-based security-related policies and practices and their relations with international law¹² and the approaches to balance trade and security interests under the WTO.¹³ Many have also examined the development of China’s national security regime in general.¹⁴ However, very few works have offered a systemic analysis of China’s policy and legal responses to security-related actions and disputes in the international trade regime.¹⁵ This paper seeks to fill this gap through a detailed analysis of China’s defensive and proactive approaches to overcome the trade vs. security challenge. Section 2 offers an overview of the evolution of the jurisprudence and practices relating to the security exceptions under the multilateral trading system. This is followed by a critical analysis of China’s policy and legal responses to the expansion of security interests and the abuse of trade and other economic instruments on security grounds by major trading nations particularly the US. Section 3 examines China’s responses at the international level with a focus on its engagement in WTO negotiations and dispute settlement, and regional economic affairs. Section 4 discusses China’s responses at the domestic level through the creation of an expansive and comprehensive regulatory framework for the protection of its national security with a growing emphasis on economic security. We argue

⁹ Weihuan Zhou and James Laurenceson (2022), ‘Demystifying Australia – China Trade Tensions’, 56(1) *Journal of World Trade* 51.

¹⁰ Harlan Grant Cohen (2020), ‘Nations and Markets’, 23(4) *Journal of International Economic Law* 793, 793.

¹¹ J. Benton Heath (2020), ‘The New National Security Challenge to the Economic Order’, 129 *The Yale Law Journal* 1020, 1020.

¹² See e.g., Cheng Bian (2020), *National Security Review of Foreign Investment: A Comparative Legal Analysis of China, the United States and the European Union* (London: Routledge); Bimal Patel (2020), *National Security of India and International Law* (Leiden | Boston: Brill).

¹³ See e.g., Geraldo Vidigal & Stephan W. Schill (2021), ‘International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception’, 48(2) *Legal Issues of Economic Integration* 109; Mona Pinchis-Paulsen (2020), ‘Trade Multilateralism and U.S. National Security: the Making of the GATT Security Exceptions’, 41(1) *Michigan Journal of International Law* 109; above n 11, Heath, ‘The New National Security Challenge to the Economic Order’; Wolfgang WEIB (2020), ‘Adjudicating Security Exceptions in WTO Law: Methodical and Procedural Preliminaries’, 54(6) *Journal of World Trade* 829; Simon Lester and Huan Zhu (2019), ‘A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions’, 42(5) *Fordham International Law Journal* 1451; Tania Voon (2019), ‘The Security Exception In WTO Law: Entering a New Era’, 113 *American Journal of International Law Unbound* 45.

¹⁴ See e.g., Camilla T. N. Sørensen (2019), ‘That Is Not Intervention; That Is Interference with Chinese Characteristics: New Concepts, Distinctions and Approaches Developing in the Chinese Debate and Foreign and Security Policy Practice’, 239 *The China Quarterly* 594; Congyan Cai (2017), ‘Enforcing a New National Security? China’s National Security Law and International Law’, 10(1) *Journal of East Asia and International Law* 65; You Ji (2016), ‘China’s National Security Commission: Theory, Evolution and Operations’, 25(98) *Journal of Contemporary China* 178; Chen Qu (2011), ‘The Characteristics of China’s National Security’, 4(1) *Journal of Politics and Law* 84; Baiyi Wu (2001), ‘The Chinese Security Concept and Its Historical Evolution’, 10(27) *Journal of Contemporary China* 275; H.L. Fu and Richard Cullen (1996), ‘National Security Law in China’, 34 *Columbia Journal of Transnational Law* 449.

¹⁵ For two recent studies on China’s position on national security in the field of international economic law in general and international investment law more specifically, see Chieh Huang (2021), ‘China’s Take on National Security and Its Implications for the Evolution of International Economic Law’, 48(2) *Legal Issues of Economic Integration* 119; Lizzie Knight and Tania Voon (2020), ‘The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: the Role of China’, 21(1) *The Journal of World Investment & Trade* 104. These studies do not focus on China’s position on national security in the international trade regime.

that at both international and domestic levels China has been shifting from a defensive strategy to an increasingly more proactive one by expanding the scope of national security and developing the regulatory basis for the application of a broad range of policy instruments in response to others' security-related policies and actions and in pursuit of its own economic security. These regulatory developments, along with similar developments by other key players, will intensify the challenges for the world trading system. Section 5 sets forth the conclusion.

2. An Overview of National Security under the Global Trade Regime

There is no common definition of “national security”, and its scope has evolved and expanded over time in light of the changing political and strategic interests of nations and the fast-developing international environment.¹⁶ When governments sought to reconstruct the world economic order after the Second World War in 1940s, “national security” was largely confined to military/defence-related security interests.¹⁷ As the key architect of the post-war order, the US played an influential role in the creation of the national security exceptions under the General Agreement on Tariffs and Trade (GATT) 1947, the predecessor of the WTO. Article XXI of the GATT, titled “Security Exceptions”, states:

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

This provision remained unchanged when the WTO was created in 1994. The security exceptions were designed to provide the flexibility for GATT/WTO Members to deviate from the global trade rules for security reasons. However, such flexibility was not intended to be boundless. While the GATT negotiators recognised that governments would need some latitude in applying the exceptions, they also saw the need to limit such application to “real security interests” so as to prevent protectionist measures motivated by “a commercial purpose ... under the guise of security”.¹⁸ Although the exact boundary was not delineated, even the US, the most frequent user of the security exceptions in recent years, held the position that Article XXI should not be purely

¹⁶ Peter Hanks (1988), ‘National Security – A Political Concept’, 14 *Monash University Law Review* 114; above n 14, Cai, ‘Enforcing a New National Security? China’s National Security Law and International Law’; above n 11, Heath, ‘The New National Security Challenge to the Economic Order’.

¹⁷ See above n 13, Pinchis-Paulsen, ‘Trade Multilateralism and U.S. National Security: the Making of the GATT Security Exceptions’.

¹⁸ WTO, GATT Analytical Index – Article XXI Security Exceptions, at 600, www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf.

self-judging and non-justiciable or create “an open-ended, unchecked power” that would undermine the multilateral trading system.¹⁹

Given the sensitivity of security interests and uncertainties about their exact scope, only a few disputes have been brought under the GATT/WTO, most of which were settled diplomatically without adjudication.²⁰ As Heath has observed, this shows a practice of “mutual self-restraint and [that] diplomatic settlement can keep opportunism within tolerable limits, while allowing states the flexibility to address security imperatives.”²¹ For instance, in the *Sweden – Import Restrictions on Certain Footwear* case of 1975, the Swedish government relied on GATT Article XXI to “introduce a global import quota system for leather shoes, plastic shoes and rubber boots”, arguing that “the constant downward trend of Swedish shoe production ... as a result of relatively high production costs ... had become a threat to the planning of Sweden’s economic defence in situations of emergency as an integral part of its security policy.”²² This policy, as the argument continued, was necessary to maintain “a minimum domestic production capacity in vital industries” and “secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.”²³ The quota was thereafter instituted but was not challenged via litigation, although many governments criticised it for lack of justification under Article XXI.²⁴ The measure lasted for over 1.5 years when Sweden terminated the import quota on leather and plastic shoes on 1 July 1977.²⁵ Despite Sweden’s attempt to link its measure to the security-related terms contemplated under Article XXI, the measure was arguably commercial in nature as it was aimed at isolating domestic shoe producers from import competition just because foreign producers had a comparative advantage in making shoes. This case foreshadowed how the security exceptions may be abused to afford protection to domestic industries, thereby expanding the limited scope of security interests to cover an almost unlimited scope of economic interests.

In the WTO era, the first dispute involving security interests concerned the European Communities’ (EC) challenge of “the extraterritorial application of the US embargo of trade with Cuba [which] restrict[ed] trade between the EC and Cuba or between the EC and the US.”²⁶ The US measures, which were adopted in response to its longstanding political and diplomatic tensions with Cuba (including Cuba’s attack of US civilian aircraft), were considered to be necessary “in the pursuit of essential US security interests”.²⁷ Compared with the Swedish import quota on shoes, the US measures had a clearer bearing on security concerns. However, many WTO Members were concerned about the measures’ extraterritorial implications affecting the trade interest of other

¹⁹ See above n 13, Pinchis-Paulsen, ‘Trade Multilateralism and U.S. National Security: the Making of the GATT Security Exceptions’, at 117-118.

²⁰ See generally above n 18, GATT Analytical Index. Also see above n 11, Heath, ‘The New National Security Challenge to the Economic Order’, at 1053-58.

²¹ See J. Benton Heath (2019), ‘National Security and Economic Globalization: Toward Collision or Reconciliation?’, 42(5) *Fordham International Law Journal* 1431, 1442-43.

²² GATT, Minutes of Meeting of the Council on 31 October 1975, C/M/109 (10 November 1975) 8-9.

²³ GATT, *Sweden – Import Restrictions on Certain Footwear*, Notification by the Swedish Delegation, L/4250 (17 November 1975) 3.

²⁴ See above n 22, Minutes of Meeting of the Council on 31 October 1975, at 9.

²⁵ GATT, *Sweden – Import Restrictions on Certain Footwear - Addendum*, L/4250/Add.1 (15 March 1977).

²⁶ WTO, *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for the Establishment of a Panel by the European Communities, WT/DS38/2 (8 October 1996).

²⁷ WTO, Dispute Settlement Body Minutes of Meeting Held on 16 October 1996, WT/DSB/M/24 (26 November 1996) at 6-7.

countries.²⁸ This dispute was subsequently resolved via a memorandum of understanding reached between the US and the EC on 11 April 1997.²⁹

It was not until the *Russia – Traffic in Transit* dispute that the WTO dispute settlement tribunal issued the very first decision³⁰ in 2019 on how the security exceptions should be interpreted and applied. In the dispute, Ukraine challenged Russia’s imposition of restrictions on transit by road and rail from Ukraine to third countries via Russia. Ukraine’s claims relied mainly on Article V of the GATT which essentially requires WTO Members to provide freedom of transit through their territory. Russia invoked Article XXI(b)(iii) arguing that the measures were introduced to safeguard its essential security interests given the deterioration of the bilateral relations which constituted an ongoing “emergency in international relations”. Russia also asserted that Article XXI(b)(iii) is “self-judging” and “non-justiciable”, so that it has the right to introduce any security measures “which it considers necessary”, and such measures are not subject to the scrutiny of WTO tribunals.³¹ The panel rejected this assertion and ruled that while “Members would have “some latitude” to determine what their essential security interests are, and the necessity of action to protect those interests”, whether the security measures fulfill the requirements under the relevant paragraphs of Article XXI(b) is justiciable.³² For the panel, this interpretative approach was how the drafters of the security exceptions intended to strike a balance by separating “military and serious security-related conflicts from economic and trade disputes” and genuine security measures from protectionism.³³ With this overarching approach in mind, the panel went on to rule in favour of Russia by finding that the bilateral tensions amounted to an emergency in international relations which “is very close to the “hard core” of war or armed conflict”, and that the measures were adopted “in good faith” to protect Russia’s essential security interests concerning the security of the Ukraine-Russia border.³⁴ The panel further held that the obligation of “good faith” entailed a minimum requirement of “plausibility” which the Russian measures satisfied as they were not “so remote from, or unrelated to” the emergency concerned.³⁵ It is evident that the panel sought to develop a balanced approach to the interpretation and application of the security exceptions. A proper balance was arguably achieved in this case by recognising Russia’s right to decide its security objectives and policies while at the same time imposing some minimum requirements to ensure the policies had at least some connection to the objectives.

The panel decision in *Russia – Traffic in Transit* was adopted by WTO Members and was applied in *Saudi Arabia – IPRs*, the second and latest decision of WTO tribunals on security exceptions. This dispute involved a range of measures adopted by the Saudi government denying the protection of intellectual property rights (IPRs) of Qatari nationals and the relevant enforcement in Saudi Arabia.³⁶ The security concerns came out of the deterioration of relations between Saudi Arabia, Qatar and certain other countries in the Middle East and North Africa (MENA) region

²⁸ Ibid., at 7-8.

²⁹ European Union – United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act (11 April 1997), 36 I.L.M 529 (1997).

³⁰ Panel Report, *Russia – Measures Concerning Traffic in Transit (Russia – Traffic in Transit)*, WT/DS512/R (adopted 26 April 2019).

³¹ Ibid., para. 7.57.

³² Ibid., para. 7.98.

³³ Ibid., para. 7.81.

³⁴ Ibid., paras. 7.114-137.

³⁵ Ibid., paras. 7.138-145.

³⁶ Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights (Saudi Arabia – IPRs)*, WT/DS567/R (circulated 16 June 2020), para. 2.46.

leading to Saudi Arabia's severance of all diplomatic and consular relations with, and imposition of economic sanctions against, Qatar.³⁷ Specifically, Saudi Arabia claimed that "Qatar continued to act against [its] essential security interests" by "harbour[ing] and support[ing] extremists and terrorists" amongst other activities.³⁸ For Qatar, the Saudi measures significantly impacted the commercial interest of multiple Qatari firms, particularly beIN Media Group (beIN) a global sports and entertainment company headquartered in Qatar having "the exclusive rights to broadcast, and to authorize others to broadcast, prime sporting competitions in the MENA region, including in Saudi Arabia".³⁹ Without the IPRs protection, beIN was deprived of the right to challenge and stop "the unauthorized distribution and streaming of media content that is created by or licensed to" it, particularly the expansive piracy activities by beoutQ which generated massive revenue.⁴⁰ The panel started by considering Saudi Arabia's request for the panel to "decline to exercise its jurisdiction" on the ground that the underlying dispute was not a real trade dispute but a political and essential security one which "cannot be resolved at the WTO".⁴¹ The panel rejected this request holding that the dispute was clearly trade-related involving potential breaches of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).⁴² In assessing Saudi Arabia's security defence under Article 73(b)(iii) of the TRIPs Agreement (which is identical to GATT Article XXI(b)(iii)), the panel applied the legal tests established in *Russia – Traffic in Transit* to which Saudi Arabia, Qatar and all the third parties involved largely agreed.⁴³ The panel had no difficulty finding that an emergency in international relations existed when the measures were adopted and that Saudi Arabia had satisfactorily articulated its essential security interests.⁴⁴ Here, the panel reiterated that the articulation of "essential security interests" only needs to be "minimally satisfactory" so long as it is sufficient to "enable an assessment of whether the challenged measures are related to those interests".⁴⁵ Turning to the final issue of "plausibility", the panel ruled in favour of Saudi Arabia on all but one measure which concerned Saudi "authorities' non-application of criminal procedures and penalties to beoutQ".⁴⁶ The panel failed to see how this measure could form "an aspect of Saudi Arabia's umbrella policy of ending or preventing any form of interaction with Qatari nationals" while it affected the commercial interests of "a range of third-party right holders" other than Qatari nationals.⁴⁷ Thus, the panel held that the measure did not "have any relationship to Saudi Arabia's policy of ending or preventing any form of interaction with Qatari nationals", thereby failing to meet the "minimum requirement of plausibility in relation to the proffered essential security interests".⁴⁸ The *Saudi Arabia – IPRs* decision did not advance the laws on security exceptions in substantive ways but merely confirmed that security measures are reviewable by WTO tribunals and such review is based on certain minimum requirements. As noted above, this approach ensures that judicial review maintains a

³⁷ Ibid., paras. 2.16-2.28.

³⁸ Ibid., para. 2.19.

³⁹ Ibid., paras. 2.18, 2.30-31.

⁴⁰ Ibid., paras. 2.40-45.

⁴¹ Ibid., para. 7.14.

⁴² Ibid., paras. 7.16-17.

⁴³ Ibid., paras. 7.229-255.

⁴⁴ Ibid., paras. 7.256-270.

⁴⁵ Ibid., paras. 7.279-280.

⁴⁶ Ibid., para. 7.289.

⁴⁷ Ibid., paras. 7.289-292.

⁴⁸ Ibid., para. 7.293.

proper balance and does not encroach on WTO Members' sovereignty in the highly sensitive field of national security.

The above recent developments of the global trade rules on security exceptions show that governments are increasingly resorting to not only economic instruments for security purposes but also the WTO dispute settlement system to challenge others' security measures that affect trade. With the *Russia – Traffic in Transit* and *Saudi Arabia – IPRs* rulings providing abundant room for the use of economic/trade sanctions to protect security interests resulting from armed conflict and diplomatic crises, measures adopted for similar security interests would likely be justifiable under the security exceptions as long as they have some connection with such interests. However, given the security interests involved in the two cases, the panels' decisions provide only limited guidance for disputes that fall within the expanding category of economic security interests. As governments increasingly add economic matters to the basket of national security, we are likely to see more disputes over measures adopted for economic security. In these disputes, at least two major issues need to be further addressed: (1) to what extent the limited scope of the security interests contemplated in Article XXI provides room for consideration of economic security interests; (2) where a measure involves a mix of security and economic or trade-related objectives, how the "good faith" principle may be applied to ensure that the measure is genuinely designed for security interests rather than economic or commercial objectives such as affording protection to domestic industries. Thus, the international trade community, in which China now plays an influential role, is likely to face growing challenges from the increasingly pervasive (ab)use of security measures for economic objectives, and yet the lack of clarity on the extent to which the WTO rules may provide room for such measures. These challenges and uncertainties provide an important context for understanding China's recent policy and regulatory strategies on national security.

3. China's Policy and Legal Responses: The International Dimension

China was a founding contracting party to the GATT under the Kuomintang government or the Republic of China. After losing the civil war, the Kuomintang government withdrew from the GATT in 1950. Thus, when China commenced the process of rejoining the multilateral trading system in 1986, China insisted that it was to resume its contracting party status rather than to join as a new member.⁴⁹ After a fifteen-year negotiating marathon, China eventually became a WTO Member on 11 December 2001. However, this long period of absence from the system meant that China was not involved in the discussions of GATT/WTO affairs including issues relating to the security exceptions. Nevertheless, the WTO accession had immense and far-reaching impacts on China's economic and security policies, leading to not only unprecedented market liberalisation and market-oriented reforms but also a remarkable expansion of security concerns to cover a wide spectrum of economic security interests. This expansion is seen to be a response to China's increasing involvement in global affairs, particularly after its entry into the WTO,⁵⁰ and more

⁴⁹ Henry Gao (2007), 'China's Participation in the WTO: A Lawyer's Perspective', 11 *Singapore Year Book of International Law* 1, 2-4.

⁵⁰ See e.g., above n 14, Wu, 'The Chinese Security Concept and Its Historical Evolution'; Zhengyi Wang (2004), 'Conceptualizing Economic Security and Governance: China Confronts Globalization', 17(4) *The Pacific Review* 523.

recently to the developments of security policies by its major trading partners and competitors.⁵¹ China's responses have presented a gradual shift from a defensive strategy to an increasingly more proactive one. This shift can be discussed from both an international perspective involving China's engagement in WTO negotiations and dispute settlement and regional economic affairs (discussed below) and a domestic perspective concerning China's security-related regulatory developments (discussed in Section 4).

As widely known, the WTO's Doha round negotiations, launched in 2001, have made little progress as WTO Members are divided on a wide range of issues while the decisions must be made by consensus. Nevertheless, many Members have continued to engage in the negotiation process with key players such as the US, the EU, Canada, China, etc. putting forward a series of proposals for WTO reform.⁵² While the Trump administration vehemently criticised the utility of the WTO and deviated from WTO norms by resorting to unilateral measures particularly those against China which triggered the US-China trade war,⁵³ the US has remained one of the most active players in both WTO negotiations and dispute settlement.

China's position on WTO reform has been shaped largely as a response to the other key Members' proposals and unilateral actions that target it,⁵⁴ particularly those of the US, thereby presenting a defensive approach. As noted above, the US has taken a series of unilateral actions against China since 2018. The steel and aluminium tariffs, imposed on a number of countries including China in March 2018, were primarily aimed at addressing "global excess capacity for producing steel [and aluminium]" which as the US alleged, caused the shrinking of its "ability to meet national security production requirements in a national emergency."⁵⁵ These tariffs were followed by even heavier tariffs on a long list of Chinese goods (hereinafter Section 301 Tariffs) targeting China's policies and practices that force the transfer of American technology and intellectual property to Chinese entities.⁵⁶ For the US, forcing technology transfer forms an integral part of China's technology-driven industrial policy which is focused on promoting indigenous innovation, domestic dominance and global leadership in a wide range of technologies, especially

⁵¹ See e.g., above n 15, Huang, 'China's Take on National Security and Its Implications for the Evolution of International Economic Law'.

⁵² See e.g., European Commission (2018), 'WTO Modernisation: Introduction to Future EU Proposals', 18 September 2018, https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf; WTO, General Council, Strengthening and Modernizing the WTO: Discussion Paper – Communication from Canada, JOB/GC/201, 24 September 2018; WTO, General Council, Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro, WT/GC/W/752/Rev.2, 11 December 2018; WTO, General Council, An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance – Communication from the United States, WT/GC/W/757/REV.1, 14 February 2019.

⁵³ See generally Weihuan Zhou and Henry Gao (2020), 'US – China Trade War: A Way Out?', 19(4) *World Trade Review* 605.

⁵⁴ See Henry Gao (2021), 'WTO Reform and China: Defining or Defiling the Multilateral Trading System?', 65 *Harvard International Law Journal* 1.

⁵⁵ See Executive Office of the President (2018), 'Adjusting Imports of Steel Into the United States', Federal Register (15 March 2018), www.federalregister.gov/documents/2018/03/15/2018-05478/adjusting-imports-of-steel-into-the-united-states; Executive Office of the President (2018), 'Adjusting Imports of Aluminum Into the United States', Federal Register (15 March 2018), www.federalregister.gov/documents/2018/03/15/2018-05477/adjusting-imports-of-aluminum-into-the-united-states.

⁵⁶ See Office of the USTR (2018), 'Findings of the Investigation Into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974', USTR (22 March 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>; above n 2, Office of the USTR, 'China Section 301-Tariff Actions and Exclusion Process'.

in select strategic and emerging sectors, for economic and national security reasons.⁵⁷ These Chinese policies and practices have intensified the technological competition between the two global superpowers, driving “economic, security and political issues that are difficult to untangle.”⁵⁸ Underlying US concerns has been China’s state-led development model based on the pervasive use of state-owned enterprises (SOEs), industrial subsidies and other government support in the pursuit of ambitious economic and strategic goals. In response, the US worked with the EU and Japan to issue a series of joint statements pushing for tightening the WTO discipline on SOEs, industrial subsidies and forcing technology transfer.⁵⁹

Faced with the US unilateral tariffs, China has reacted through two major steps. First, China presented itself as a staunch defender of the multilateral trading system and strongly opposed unilateralism, and protectionism and the abuse of security exceptions.⁶⁰ China was concerned about the application of WTO-inconsistent measures, such as import tariffs and export controls, in the guise of national security and proposed three actions at the multilateral level: (1) strengthen notification requirements on security measures; (2) enhance multilateral reviews of such measures; and (3) provide flexibility for other Members to “take prompt and effective remedies, so as to maintain the balance of their rights and obligations under the WTO”.⁶¹ With these proposals, China sought to condemn the US abuse of national security to increase tariffs beyond WTO-permitted levels, strengthen the scrutiny of such security-related measures, and justify its retaliation which was China’s second step. Here, China took a defensive approach by imposing retaliatory tariffs on US goods but only to the extent that was equivalent to or less than the scale of the corresponding US tariffs.⁶² While the two sides reached a so-called Phase One Deal to prevent further escalation of the trade war, China was unable to push the US to lift all the tariffs and had to undertake significant obligations without receiving reciprocal commitments from the US.⁶³ However, China was successful in resisting any obligations on the more systemic and sensitive issues relating to SOEs and industrial subsidies. China’s defensive strategy can also be discerned from its response to the US-EU-Japan joint proposals for more rigorous disciplines on SOEs and industrial subsidies. In response to being targeted by these proposals, China put forward “non-discrimination” as a fundamental principle for any trade negotiations, suggesting that it will not accept any rules on SOEs and subsidies that are biased against it.⁶⁴

⁵⁷ Ibid., at 10-18.

⁵⁸ See Hilary McGeachy (2019), ‘US-China Technology Competition: Impacting a Rules-Based Order’, United States Studies Centre (1 May 2019), www.ussc.edu.au/analysis/us-china-technology-competition-impacting-a-rules-based-order; Ryan Hass et al. (2021), ‘U.S.-China Technology Competition: A Brookings Global China Interview’, Brookings (23 December 2021), www.brookings.edu/essay/u-s-china-technology-competition/.

⁵⁹ See above n 8.

⁶⁰ See generally the State Council of China (2018), ‘《中国与世界贸易组织》白皮书 [The China and the WTO White Paper]’, 28 June 2018, www.scio.gov.cn/zfbps/ndhf/37884/Document/1632379/1632379.htm [in Chinese]; WTO, General Council, ‘China’s Proposal on WTO Reform – Communication from China’, WT/GC/W/773, 13 May 2019, at 3-4.

⁶¹ See above n 60, ‘China’s Proposal on WTO Reform – Communication from China’, at 4.

⁶² See Chad P. Bown and Melina Kolb (2022), ‘Trump’s Trade War Timeline: An Up-to-Date Guide’, PIIE (8 February 2022), www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf.

⁶³ See Office of the USTR (2020), ‘Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China’, 15 January 2020, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text>. For an overview of the deal, see Weihuan Zhou and Henry Gao (2020), ‘US – China Phase One Deal: A Brief Account’, *Regulating for Globalization Blog*, Wolters Kluwer (22 January 2020), <http://regulatingforglobalization.com/2020/01/22/us-china-phase-one-deal-a-brief-account/>.

⁶⁴ See above n 60, ‘China’s Proposal on WTO Reform – Communication from China’, at 7-8.

As far as dispute settlement is concerned, China's strategy has been more proactive. China joined the *Russia – Traffic in Transit* and *Saudi Arabia – IPRs* disputes as a third party seeking to influence the development of the jurisprudence on the security exceptions. In both disputes, China elaborated on its views as to how the security exceptions should be applied through third party submissions. In essence, China took the position that security measures are reviewable under the WTO dispute settlement system based on the requirements and conditions contemplated in the relevant sections of GATT Article XXI. However, at the same time, it stressed that such a review must be conducted with "extreme caution" to maintain a proper balance between preventing Members from evading WTO obligations in bad faith and respecting their rights to protect essential security interests.⁶⁵ Apparently, China's position impacted on the panels' decisions in the two disputes discussed above. Moreover, this balanced approach would provide room for China to develop its own security measures at the domestic level, which will be discussed later.

Another major Chinese action was to bring a series of WTO disputes challenging the US tariffs, i.e. one case on the steel and aluminium tariffs and three on the Section 301 Tariffs.⁶⁶ Since the tariffs are discriminatory and exceed the WTO-permitted levels (in breach of GATT Article I.1 and Article II.1 respectively), the central issue is whether they are justifiable under GATT exceptions. As of this writing, the WTO tribunal has issued a decision on the first Section 301 Tariffs case⁶⁷ while the other disputes are still ongoing. It is interesting to note that in this dispute, the US defence was not based on the security exceptions but on the "public morals" exception contemplated in GATT Article XX(a). The US contended that "China's acts, policies, and practices ... amount to state-sanctioned theft and misappropriation of U.S. technology, intellectual property, and commercial secrets which violates the public morals prevailing in the US."⁶⁸ The "public morals" objectives involved consideration of cyber-enabled theft and cyber-hacking, economic espionage etc.⁶⁹ which may also raise security issues. The US also sought to include the issue of anti-competitive behaviour or unfair competitive practices which in its view, is not merely detrimental to business and innovation but also "a threat to the preservation of its domestic political and social institutions."⁷⁰ The panel accepted the US claims holding that to the extent that these objectives reflected the US standards of right and wrong, they could be covered by the term "public morals".⁷¹ However, the panel found that the US failed to demonstrate that the tariffs had a sufficient and genuine relationship with, or contributed to the achievements of, the chosen objectives, thereby failing to ensure that the tariffs are "necessary" for the pursuit of the objectives.⁷² This dispute offers another good illustration of how economic and security objectives

⁶⁵ See above n 30, Panel Report, *Russia – Traffic in Transit*, Annex D-4 Executive Summary of the Arguments of China, at 81-82; above n 36, Panel Report, *Saudi Arabia – IPRs*, Annex C-5 Integrated Executive Summary of the Arguments of China, at 60-61.

⁶⁶ WTO, *United States – Tariff Measures on Certain Goods from China*, Request for Consultations by China, WT/DS543/1, G/L/1219, 5 April 2018; WTO, *United States – Certain Measures on Steel and Aluminium Products*, Request for Consultations by China, WT/DS544/1, G/L/1222, G/SG/D50/1, 9 April 2018; WTO, *United States – Tariff Measures on Certain Goods from China II*, Request for Consultations by China, WT/DS565/1, G/L/1260, 27 August 2018; WTO, *United States – Tariff Measures on Certain Goods from China III*, Request for Consultations by China, WT/DS587/1, G/L/1322, 4 September 2019.

⁶⁷ WTO Panel Report, *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R, circulated 15 September 2020.

⁶⁸ *Ibid.*, para. 7.100.

⁶⁹ *Ibid.*, para. 7.127.

⁷⁰ *Ibid.*, para. 7.128.

⁷¹ *Ibid.*, para. 7.140.

⁷² *Ibid.*, paras. 7.182-7.238.

can be entangled and how governments may invoke other WTO-permitted exceptions to justify security-related measures. The US decision to rely on the “public morals” exception is interesting. While this exception apparently covers a wider range of policy objectives than the security exceptions, it imposes a higher requirement of means-ends relationship via the “necessity” test⁷³ which can be considerably more difficult to fulfill compared with the minimum requirement of “plausibility” under GATT Article XXI. The US’s invocation of the “public moral” exception can be seen as an attempt to explore the flexibilities of WTO exceptions other than the security exceptions for justifying security-related measures. While the panel was flexible on the scope of “public morals”, it was not prepared to relax the rigidity of the “necessity” test. This would discourage governments from abusing other WTO exceptions in their pursuit of expansive economic security interests. Overall, China’s recourse to the WTO dispute settlement system to challenge the US security-related measures is evidence of its increasingly proactive approach to confronting the trade vs security challenge.

In addition, China’s evolving attitude and approach to regionalism, particularly the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP), also demonstrates a shift from a defensive to a proactive strategy based on security concerns. The US, under the Obama administration, led the negotiation of the Trans-Pacific Partnership (TPP), the predecessor of the CPTPP, before it withdrew from the TPP under the Trump administration. Under Obama’s “pivot to Asia” strategy, the TPP was seen as one of the key tools that could be used to maintain the US leadership in the Asia-Pacific on economic, security and other fronts and at least to some extent to confront the rise of China.⁷⁴ By excluding China from the TPP negotiations, the US aimed to strengthen and expand its bilateral and multilateral economic cooperation with the other major players in the region and to shape “the rules of trade to benefit” Americans and prevent China from “step[ping] in to fill that void”.⁷⁵ In fact, some major TPP rules were designed to target China, such as the rules on SOEs, so that China would have to meet the norms and standards created by its global and regional competitors if it were to join the trade bloc. Initially, China’s reaction was largely defensive by criticising the US policy as anti-China or a “containment” of China and maintaining a wait-and-see attitude.⁷⁶ However, China was quick to adopt a more proactive approach by actively promoting its own free trade agreement (FTA) strategy in the region, leading to its strong push for the negotiation of the ASEAN-led RCEP to counter-balance the potential

⁷³ There is a significant body of literature on the necessity test, see e.g., Ming Du (2016), ‘The Necessity Test in World Trade Law: What Now?’, 15(4) *Chinese Journal of International Law* 817; Gisele Kapterian (2010), ‘A Critique of WTO Jurisprudence on “Necessity”’, 59(1) *International & Comparative Law Quarterly* 89.

⁷⁴ See Robert G. Sutter et al. (2013), ‘Balancing Acts: The U.S. Rebalance and Asia-Pacific Stability’, The George Washington University (August 2013), www2.gwu.edu/~sigur/assets/docs/BalancingActs_Compiled1.pdf; Kenneth G. Lieberthal (2011), ‘The American Pivot to Asia’, Brookings (21 December 2011), www.brookings.edu/articles/the-american-pivot-to-asia/.

⁷⁵ See ‘The Trans-Pacific Partnership: What You Need to Know about President Obama’s Trade Agreement’, undated, <https://obamawhitehouse.archives.gov/issues/economy/trade>; above n 74, Sutter et al., ‘Balancing Acts: The U.S. Rebalance and Asia-Pacific Stability’, at 2.

⁷⁶ See Cary Huang, (2011) ‘Beijing Suspicious Over U.S. Regional Trade Bloc’, South China Morning Post (14 November 2011), www.scmp.com/article/984758/beijing-suspicious-over-us-regional-trade-bloc; Duncan Hewitt (2015), ‘China Responds Cautiously to TPP Deal, Which Analysts Say Will Bring Pressure For Faster Reforms’, International Business Times (6 October 2015), www.ibtimes.com/china-responds-cautiously-tpp-deal-which-analysts-say-will-bring-pressure-faster-2128302.

impact of the TPP.⁷⁷ The RCEP entered into force on 1 January 2022 and is now the world's largest trading bloc including all key players in the region except India.⁷⁸ For China, the RCEP provides much needed assurance for its external trade and investment, which is crucial for its economic security given the ongoing pandemic and the growing tensions with the US.⁷⁹ US commentators also believe that the RCEP will help China to strengthen its economic ties and influence the development of trade norms and standards in the region, precisely what the US intended to achieve with the TPP;⁸⁰ and in this sense, China has filled an economic void the US left.⁸¹ Moreover, China's proactive approach has extended beyond the Asia-Pacific in three major steps. The first concerns China's signature Belt and Road Initiative (BRI) whereby China seeks not only to secure and expand global markets for trade and investment but also to build a Sino-centric model for international economic legal order.⁸² The second step is the conclusion of a Comprehensive Agreement on Investment⁸³ (CAI) with the EU, which was driven more by geopolitical and strategic goals to overcome the US influence than potential economic gains from cooperation.⁸⁴ The third step is China's recent request for entry into the CPTPP,⁸⁵ again a strategic move of China seeking to exercise more influence on the future development of the international economic legal order. These actions are strong evidence of China's increasingly more proactive strategy to foster and expand its regional and global economic security interests.

In short, at the international level, there is a clear shift in China's approach to security-related matters from defensive to increasingly proactive, as evidenced by China's engagement in multilateral and regional affairs. This shift has also witnessed China's adoption of an expansive concept of national security that covers economic security interests in parallel with a similar expansion of national security worldwide.

4. China's Policy and Legal Responses: The Domestic Dimension

⁷⁷ See Ming Du (2015), 'Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement', 18(2) *Journal of International Economic Law* 407, 424-25.

⁷⁸ See UNCTAD (2021), 'A New Centre of Gravity: The Regional Comprehensive Economic Partnership and Its Trade Effects', 15 December 2021, https://unctad.org/system/files/official-document/ditcinf2021d5_en_0.pdf.

⁷⁹ See Orange Wang (2021), 'RCEP: China Says World's Largest Trade Pact Gives It "Powerful Leverage" to Cope with 2022 Challenges', US-China Relations (31 December 2021), www.scmp.com/economy/china-economy/article/3161601/rcep-china-says-worlds-largest-trade-pact-gives-it-powerful.

⁸⁰ See Peter A. Petri and Michael Plummer (2020), 'RCEP: A New Trade Agreement That Will Shape Global Economics and Politics', Brookings (16 November 2020), www.brookings.edu/blog/order-from-chaos/2020/11/16/rcep-a-new-trade-agreement-that-will-shape-global-economics-and-politics/.

⁸¹ See Editorial Board (2022), 'Opinion: In Asia, China Fills an Economic Void the United States Left', The Washington Post (4 January 2022), www.washingtonpost.com/opinions/2022/01/04/rcep-trade-agreement-china/.

⁸² See generally Gregory Shaffer and Henry Gao (2020), 'A New Chinese Economic Order?', 23(3) *Journal of International Economic Law* 607.

⁸³ EU – China Comprehensive Agreement on Investment (CAI), Agreement in Principle, concluded on 30 December 2020, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>.

⁸⁴ See Henry Gao (2021), 'The EU-China Comprehensive Agreement on Investment: Strategic Opportunity Meets Strategic Autonomy', Singapore Management University School of Law Research Paper (1 May 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3843434.

⁸⁵ See Ministry of Commerce of China, 'China officially applies to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)', 18 September 2021, <http://english.mofcom.gov.cn/article/newsrelease/significantnews/202109/20210903201113.shtml>.

China's approach to security-related matters at the international level, as discussed above, has foreshadowed, and has been reinforced by, its approach at the domestic level. That is, China has been broadening its security interests and proactively developing a domestic regulatory framework for the protection of such interests. In the years after China's civil war, its security concerns were predominantly focused on combatting foreign interference and subversion and protecting sovereignty, territorial integrity and political stability.⁸⁶ This was evidenced in China's first National Security Law 1993 which targeted external interference, acts of subversion, espionage and the revelation of State secrets.⁸⁷ Over time, China's rapid economic growth and integration into the world economy entailed a gradual reconceptualisation of "national security", placing a growing emphasis on economic security. For example, China's Peaceful Development White Paper, issued by the State Council in 2011, treated economic development as a core element of security interests by labelling financial crises, climate change, security of energy and resources etc. as "common security issues" that "have a major impact on human survival and sustainable economic and social development".⁸⁸ In the first session of China's National Security Commission established in 2013, President Xi Jinping – the chair of the Commission – mapped out the ever-expanding scope of security interests, treating economic security as the foundation of national security.⁸⁹ This was followed by the promulgation of the new National Security Law in July 2015⁹⁰ which sets out an umbrella framework for the regulation of security-related matters.⁹¹ The law lists a wide range of security interests and treats all harms or threats to China's fundamental economic principles and system, the development of major industries and economic sectors etc. as matters of economic security (Article 19). In addition, national security goes far beyond the defined economic security to cover financial security, food security, energy security, cyber security, and security interests relating to the advancement of technological and innovative capability, sustainable development, the public health system, etc. (Articles 20-33). This broad list of security interests is not exhaustive and can be further refined and expanded according to China's changing needs and goals for economic development (Article 34). The law mandates the creation of legislation in all related areas to establish a comprehensive regulatory framework for the protection of national security (Article 70). Since its drafting stage, the law has been criticised for being overly broad and ambiguous, thereby leaving too much discretion for the Chinese government to abuse security measures to

⁸⁶ See above n 50, Wang, 'Conceptualizing Economic Security and Governance: China Confronts Globalization', at 524; above n 15, Huang, 'China's Take on National Security and Its Implications for the Evolution of International Economic Law', at 121; above n 14, Sørensen, 'That Is Not Intervention; That Is Interference with Chinese Characteristics: New Concepts, Distinctions and Approaches Developing in the Chinese Debate and Foreign and Security Policy Practice'.

⁸⁷ 《中华人民共和国国家安全法》 [State Security Law of the People's Republic of China] (Expired), Order No. 6 of the President, issued on 22 February 1993, effective on the same date. This law has been replaced by the Counter-espionage Law of the People's Republic of China on 1 November 2014.

⁸⁸ See the State Council Information Office of China (2011), "'China's Peaceful Development' White Paper", September 2011, www.scio.gov.cn/zxbd/nd/2011/Document/1006416/1006416.htm.

⁸⁹ See '习近平：坚持总体国家安全观 走中国特色国家安全道路 [Xi Jinping: Adhere to the Overall National Security Concept and Take the Road of National Security with Chinese Characteristics]', Xinhua Net (14 April 2014), www.xinhuanet.com/politics/2014-04/15/c_1110253910.htm [in Chinese]. For a detailed discussion of the National Security Commission, see above n 14, Ji, 'China's National Security Commission: Theory, Evolution and Operations'.

⁹⁰ 《中华人民共和国国家安全法》 [National Security Law of the People's Republic of China], Order No. 29 of the President, issued on 1 July 2015, effective on the same date.

⁹¹ For a detailed discussion of the law, see above n 14, Cai, 'Enforcing a New National Security? China's National Security Law and International Law'.

impede commerce and other economic activities at the cost of its trading partners.⁹² China's subsequent legislative work and practices have shown an ongoing trend of expanding and reinforcing the regulatory framework in response to the changing external environment and in pursuit of its own security and economic development goals. To see this trend, we briefly discuss China's recent regulatory developments triggered by the US-China trade war and their intensified strategic competition below.

As mentioned earlier, US trade war sanctions against China have not been limited to tariffs but involve restrictions on economic activities with select Chinese firms. One major component of the US's complex regulatory framework that authorises the use of economic sanctions concerns the application of export restrictions on businesses, institutions, governments, individuals and other types of entities that are on an Entity List administered and regularly updated by the Bureau of Industry and Security (BIS) of the US Department of Commerce.⁹³ In 2019, the BIS added Huawei and its international affiliates in a wide range of jurisdictions to the Entity List on the ground that their activities posed a significant threat to US technological leadership and national security.⁹⁴ This has effectively prohibited any companies, within or outside of the US, from supplying certain sensitive technologies and components of US origin to the Huawei entities unless they are granted a licence to do so.⁹⁵ As a result, Huawei reportedly suffered supply chain disruptions due to a significant shortage of semiconductors.⁹⁶ The Biden administration has continued to add Chinese technology companies to the Entity List based on security concerns related to the US-China technological competition.⁹⁷ In addition, the Trump administration also banned the commercial activities of China's telecommunication firms WeChat and TikTok on security grounds so as to block the Chinese government's access to "Americans' personal and proprietary information".⁹⁸

⁹² Ibid., at 82-83.

⁹³ See U.S. Department of Commerce, Bureau of Industry and Security, 'Entity List', undated, www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list.

⁹⁴ See Industry and Security Bureau (2019), 'Addition of Certain Entities to the Entity List and Revision of Entries on the Entity List', Federal Register (21 August 2019), www.federalregister.gov/documents/2019/08/21/2019-17921/addition-of-certain-entities-to-the-entity-list-and-revision-of-entries-on-the-entity-list; U.S. – China Economic and Security Review Commission (2019), '2019 Report to Congress', November 2019, at 48, www.uscc.gov/sites/default/files/2019-11/2019%20Annual%20Report%20to%20Congress.pdf.

⁹⁵ For a discussion of the extraterritorial reach of the US export control law, see Joop Voetelink (2021), 'Limits on the Extraterritoriality of United States Export Control and Sanctions Legislation', in Robert Beeres et al. (eds), *NL ARMS Netherlands Annual Review of Military Studies 2021* (The Hague: T.M.C. Asser Press), https://link.springer.com/chapter/10.1007/978-94-6265-471-6_11.

⁹⁶ See U.S. – China Economic and Security Review Commission (2021), '2021 Report to Congress', November 2021, at 44, www.uscc.gov/sites/default/files/2021-11/2021_Annual_Report_to_Congress.pdf.

⁹⁷ See BIS (2021), 'Addition of Certain Entities to the Entity List and Revision of an Entry on the Entity List', Federal Register (17 December 2021), www.federalregister.gov/documents/2021/12/17/2021-27406/addition-of-certain-entities-to-the-entity-list-and-revision-of-an-entry-on-the-entity-list.

⁹⁸ See Executive Office of the President (2020), 'Addressing the Threat Posed by TikTok, and Taking Additional Steps to Address the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain', Federal Register (11 August 2020), www.federalregister.gov/documents/2020/08/11/2020-17699/addressing-the-threat-posed-by-tiktok-and-taking-additional-steps-to-address-the-national-emergency; Executive Office of the President, (2020) 'Addressing the Threat Posed by WeChat, and Taking Additional Steps to Address the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain', Federal Register (11 August 2020), www.federalregister.gov/documents/2020/08/11/2020-17700/addressing-the-threat-posed-by-wechat-and-taking-additional-steps-to-address-the-national-emergency. The Biden administration removed these restrictions. See 'Executive Order on Protecting Americans' Sensitive Data from Foreign Adversaries', The White House (9 June 2021), www.whitehouse.gov/briefing-room/presidential-actions/2021/06/09/executive-order-on-protecting-americans-sensitive-data-from-foreign-adversaries/.

Faced with these US sanctions, China took a series of actions shifting quickly from being defensive to proactive. The first regulatory response was the issuance of a tit-for-tat Unreliable Entity List (UEL) immediately after the US restrictions on WeChat and TikTok.⁹⁹ The Chinese measure aims to prevent foreign entities from seriously impacting the legitimate interests of Chinese entities, national security, and economic development. It does this by targeting foreign entities which discriminate against or stop carrying out normal commercial activities with Chinese entities based on non-commercial considerations. While the birth of the UEL was clearly triggered by the US sanctions, it can be invoked in response to any such unilateral and discriminatory measures. However, the Ministry of Commerce (MOFCOM) has stressed that China remains a firm defender of multilateral cooperation,¹⁰⁰ suggesting that the UEL is most likely to be used as a defensive instrument.

Around the same time that it issued the UEL measure, China published a revised Catalogue of Technologies Prohibited and Restricted from Export 2020¹⁰¹ (Catalogue) and the Export Control Law 2020¹⁰² (ECL). The Catalogue is issued and revised based on the Foreign Trade Law 1994 (FTL), as amended¹⁰³ and the relevant implementing regulation.¹⁰⁴ Under the FTL, import and export controls can be imposed on any goods, services and technologies for the protection of national security, public interests or public morals amongst other reasons (Articles 16 and 26). The FTL also allows the application of remedial measures if China's interests are affected by the actions of other members under an international treaty to which China is also a party (Article 47). The 2020 revision of the Catalogue refined the existing items and added new ones under the export control list targeting emerging and new generation technologies related to data analysis, artificial intelligence, 3D printing, cyber defence, encryption, cryptographic security, etc.¹⁰⁵ A primary goal

⁹⁹ 《不可靠实体清单规定》 [Provisions on the Unreliable Entities List], Order No. 4 [2020] of the Ministry of Commerce of the People's Republic of China, issued on 19 September 2020, effective on the same date. For a detailed discussion of the entity lists introduced by the US and China, see Qingxiu Bu (2020), 'China's Blocking Mechanism: the Unreliable Entity List', 19(3) *Journal of International Trade Law and Policy* 159.

¹⁰⁰ See 《商务部就<不可靠实体清单规定>答问》 [The Ministry of Commerce Answers Questions on the Provisions on the Unreliable Entities List] (2020), The State Council Information Office of the People's Republic of China (20 September 2020), www.scio.gov.cn/xwfbh/gbwxwfbh/xwfbh/swb/Document/1688083/1688083.htm [in Chinese].

¹⁰¹ 《关于调整发布<中国禁止出口限制出口技术目录>的公告》 [Announcement on the Amendment of Catalogue of Technologies Prohibited and Restricted from Export], Announcement No. 38 [2020] of the Ministry of Commerce and Ministry of Science and Technology of the People's Republic of China, issued on 28 August 2020, effective on the same date.

¹⁰² 《中华人民共和国出口管制法》 [Export Control Law of the People's Republic of China], Order No. 58 of the President of the People's Republic of China, issued on 17 October 2020, effective on 1 December 2020.

¹⁰³ 《中华人民共和国对外贸易法》 [Foreign Trade Law of the People's Republic of China], Order No. 22 of the President of the People's Republic of China, issued on 12 May 1994, effective on 1 July 1994, revised by Order No. 15 of the President of the People's Republic of China on 6 April 2004 and Order No. 57 of the President of the People's Republic of China on 7 November 2016.

¹⁰⁴ 《中华人民共和国技术进出口管理条例》 [Regulations of the People's Republic of China on Administration of Import and Export of Technologies], Order No. 331 of the State Council of the People's Republic of China, issued on 10 December 2001, effective on 1 January 2002, revised by Order No. 588 of the State Council of the People's Republic of China on 8 January 2011, Order No. 709 of the State Council of the People's Republic of China on 2 March 2019, and Order No. 732 of the State Council of the People's Republic of China on 29 November 2020.

¹⁰⁵ For discussions of the revision, see Jing Yunfen et al (2020), 'Revision of the Catalogue of Technologies Prohibited or Restricted from Export of the PRC', *China Law Insight* (Blog Post, 15 October 2020), www.chinalawinsight.com/2020/10/articles/customs-business/revision-of-the-catalogue-of-technologies-prohibited-or-restricted-from-export-of-the-prc/; Jon Cowley, Alison Tsang and Di Wu (2020), 'China Amends Catalogue of Technologies Prohibited or Restricted from Export', Baker McKenzie (Blog Post, 1 September 2020),

of the revision, as stated by MOFCOM, is to protect China's economic security.¹⁰⁶ The revision of the Catalogue was followed by the promulgation of the ECL which expands China's existing export regulatory regime. The ECL imposes an approval and licensing mechanism for the export of goods, technologies and services, targeting dual-use items, military or nuclear items and any other items related to "the maintenance of national security and national interests" (Articles 1 and 2). The law authorises the use of countermeasures in cases where other countries' recourse to export controls affect China's national security and interests (Article 48). These provisions are not entirely new but reflect China's existing position in the FTL. The ECL may be seen as a *lex specialis* which applies to the covered items while the FTL applies to the export control of other goods, services and technologies. Despite this apparent division of labour, neither the FTL nor the ECL defines the term "national security" which now needs to be understood and interpreted in accordance with the term's expanding scope under the National Security Law 2015. Precisely because of the expansion of national security to include economic security, potential regulatory overlaps may arise between the two pieces of legislation in terms of the covered items. For example, as part of its response to US trade war sanctions, China considered instituting restrictions on the export of certain defence-related raw materials and rare earths refining technology to countries or companies that it considers to be a national security threat.¹⁰⁷ However, given the importance of the raw materials and rare earths industry to China's economic development, such items can also be treated as essential to China's economic security. In practice, China did impose export restrictions on raw materials and rare earths, based on the FTL, to prevent the depletion of the exhaustible natural resources and protect the environment, which triggered four consecutive WTO disputes between 2009 and 2016.¹⁰⁸ The revised Catalogue offers another good illustration of the potential issue of regulatory overlaps between the FTL and the ECL. As shown above, some of the technologies on the export control list of the Catalogue may well fall within the ambit of the ECL as dual-use items. Overall, these examples demonstrate the expansion of China's national security concerns and the potential regulatory issues that may arise from such expansion. While both the ECL and the Catalogue came out of China's defensive strategy in response to US trade war sanctions, the ECL constitutes "part of a broader legislative ramping-up" in China¹⁰⁹ that represents an increasingly proactive regulatory refinement and expansion that is intended to better protect China's national security with economic security as an embedded element.

<https://sanctionsnews.bakermckenzie.com/china-amends-catalogue-of-technologies-prohibited-or-restricted-from-export/>.

¹⁰⁶ See 《商务部就调整发布的<中国禁止出口限制出口技术目录>答问》 [The Ministry of Commerce Answers Questions on the Amendment of the Catalogue of Technologies Prohibited and Restricted from Export] (2020), The State Council Information Office of the People's Republic of China (28 August 2020), www.scio.gov.cn/xwfbh/gbwxfbh/xwfbh/swb/Document/1686252/1686252.htm [in Chinese].

¹⁰⁷ See Sun Yu and Demetri Sevastopulo, 'China Targets Rare Earth Export Curbs to Hobble US Defence Industry', *Financial Times* (16 February 2021), www.ft.com/content/d3ed83f4-19bc-4d16-b510-415749c032c1; John Liu, Annie Lee and Joe Deaux, 'China May Ban Rare Earth Tech Exports on Security Concerns', *Bloomberg* (19 February 2021), www.bloomberg.com/news/articles/2021-02-19/china-may-ban-rare-earth-technology-exports-on-security-concerns.

¹⁰⁸ The four disputes are (1) DS394, DS395, DS398; (2) DS431, DS432, DS433; (3) DS508; (4) DS509. An official summary of each dispute is available on the WTO website: www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm; www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm; www.wto.org/english/tratop_e/dispu_e/cases_e/ds508_e.htm; www.wto.org/english/tratop_e/dispu_e/cases_e/ds509_e.htm.

¹⁰⁹ Dominic Köstner and Marcus Nonn (2021), 'The 2020 Chinese Export Control Law: A New Compliance Nightmare on the Foreign Trade Law Horizon?', *China-EU Law Journal* 1.

China's proactive regulatory activities are further evidenced by the promulgation of the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures 2021 (Extra-Territorial Rules)¹¹⁰ and most recently the Anti-Foreign Sanctions Law 2021 (AFSL).¹¹¹ The Extra-Territorial Rules targets the extraterritorial application of foreign laws and other policy instruments that prohibit or restrict commercial activities between Chinese entities and entities of a third country (Article 2). It requires affected Chinese entities to report such extraterritorial applications and restrictions for MOFCOM's review and authorises MOFCOM to issue an injunction to prohibit Chinese entities from complying with or implementing the relevant foreign measures and to consider the use of countermeasures (Articles 5-7, 12). It complements the UEL measure, which targets foreign entities, by focusing on protecting the interests of Chinese entities through the creation of an official channel for them to report foreign measures, to obtain support from the Chinese government where a MOFCOM-issued injunction causes them a significant loss (Article 11), and possibly to contribute to the contemplation of countermeasures. Accordingly, the Extra-Territorial Rules further complements China's regulatory regime that counteracts unilateralism and extraterritorial effects of foreign laws.¹¹² The AFSL builds on and expands the UEL measure and the Extra-Territorial Rules and is an important legislative step which elevates China's regulatory efforts to the statutory level. It seeks to combat foreign sanctions, unilateralism and discrimination, and any measures that interfere with China's internal affairs and adversely affect China's national security and economic interests (Articles 1-3). It mandates the creation of a list of entities subject to China's countermeasures and extends such entities to cover spouses and relatives, senior executives and actual controlling entities, and any other entities directly or indirectly involved in the formulation and implementation of foreign sanctions (Articles 4-5). It sets out a broad range of countermeasures such as restrictions on visa and entry into China, deportation, seizing or freezing property within the territory of China, banning or restricting activities with Chinese entities, and any other measures that the Chinese government considers necessary (Article 6). It is believed that the AFSL serves to complete China's regulatory toolbox to overcome the mounting challenges posed by foreign sanctions and extraterritorial legislation that increasingly impacts on China's security interests.¹¹³

The regulatory developments discussed above have shown China's deep concerns about the uncertainties and anti-China actions in the global trading system and its strong desire to develop sufficient regulatory tools to discourage these actions and potentially to push other key players back to the negotiating table to restore cooperation and stability. China's strengthened regulatory framework treats economic security as equally important to traditional security concerns. It leaves the scope of economic security unfettered with the flexibility for further expansion in response to

¹¹⁰ 《阻断外国法律与措施不当域外适用办法》 [Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures], Order No. 1 [2021] of the Ministry of Commerce of the People's Republic of China, issued on 9 January 2021, effective on the same date.

¹¹¹ 《中华人民共和国反外国制裁法》 [Anti-Foreign Sanctions Law of the People's Republic of China], Order No. 90 of the President of the People's Republic of China, issued on 10 June 2021, effective on the same date.

¹¹² See 《商务部就〈阻断外国法律与措施不当域外适用办法〉答问》 [The Ministry of Commerce Answers Questions on the Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures] (2021), The State Council Information Office of the People's Republic of China (10 January 2021), www.scio.gov.cn/xwfbh/gbwxwfbh/xwfbh/swb/Document/1696695/1696695.htm [in Chinese].

¹¹³ 《全国人大常委会法工委负责人就反外国制裁法答记者问》 [Head of the Legal Work Committee of the Standing Committee of the National People's Congress Answers Reports' Questions on the Anti-foreign Sanctions Law] (2021), State Council (11 June 2021), www.gov.cn/zhengce/2021-06/11/content_5616932.htm [in Chinese].

developments of policies and practices in other countries and according to China's own economic needs. It also leaves wide latitude for China to take any measures or countermeasures for security-related goals. Indeed, China may choose to use measures that are less likely to create issues of WTO-consistency such as visa policies. However, when needed, China would not be reluctant to use measures that would be more problematic according to WTO standards, just like its recourse to retaliatory tariffs during the US-China trade war. With economic security becoming a core element of national security, China now faces a thorny question as to how to ensure that the pursuit of security interests can be reconciled with its continuous support for the WTO. While China remains a proponent of the rules-based trading system, its approaches to national security suggest that it has been prioritising its own security interests, imitating the approaches of other major players. In addition to the US, the EU has long maintained a blocking mechanism that seeks to counteract the extraterritorial effects of US sanction laws.¹¹⁴ China has borrowed the EU's experience in developing its own blocking laws discussed above. Currently, the EU is also contemplating a new regulation to facilitate the application of countermeasures to deter and counteract economic coercion associated with other countries' use of trade-and-investment-related instruments to force policy changes in the EU.¹¹⁵ It remains to be seen how these regulatory developments and their implementation and enforcement will eventuate and what issues of WTO-consistency may arise. Nevertheless, with all the three key players resorting to countermeasures on security grounds, these actions are likely to pose growing and unprecedented challenges for the WTO. The flexibilities left in the current case law on security exceptions would not provide sufficient room for consideration of an unlimited range of economic interests. An overly broad interpretation of the general exceptions such as the "public morals" exception may encourage tit-for-tat abuse of unilateral measures. Even if governments exercise self-restraints by not cross-litigating each other as they face a typical "glasshouse" dilemma and may prefer a diplomatic solution, taking the law into their own hands by recourse to unilateral measures and countermeasures will further damage the credibility and integrity of the rules-based system and the faith of governments in multilateral cooperation. These challenges can only be resolved by negotiations via a collective effort of the governments involved to re-design the current rules on national security in ways that provide sufficient room for the legitimate use of policy instruments for economic security interests while confining such interests, the impact of security measures and the use of countermeasures to agreed parameters.

5. Conclusion

The rules-based international trade regime is facing mounting challenges as economic security becomes an embedded element of national security and unilateral measures proliferate based on economic security grounds. The world trade rules are designed to strike a balance between preserving the policy space for governments to use policy instruments for security reasons and

¹¹⁴ See Burt Braverman and Dsu-Wei Yuen (2019), 'EU Companies Face Tough Choice: Violate U.S. Secondary Sanctions on Iran or Amended EU Blocking Regulations', Davis Wright Tremaine LLP (8 August 2019), www.dwt.com/insights/2019/01/eu-companies-face-tough-choice-violate-us-secondar

¹¹⁵ See European Commission (2021), 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and Its Member States from Economic Coercion by Third Countries', COM(2021) 775 Final (8 December 2021), https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159958.pdf.

preventing the abuse of security measures for protectionism and similar economic goals that unduly restrict trade. Yet, the current law on security exceptions does not seem to provide adequate solutions to these challenges given its limited coverage of security interests and the difficulties in disentangling security and economic policies. Faced with a range of security-based sanctions imposed by the US, China has taken a series of actions to defend and pursue its own security interests at international and domestic levels. Internationally, China has actively engaged in WTO negotiations and dispute settlement seeking to influence the development of trade rules and jurisprudence and push the US to change behaviour and practice. At the same time, China has been seeking to strengthen and expand its influence regionally through the BRI and the conclusion of major trade and investment treaties. Domestically, China has been developing a comprehensive regulatory framework to counteract US sanctions and similar unilateral measures by any other country. China's policy and legal responses internationally and domestically have shown a clear shift from a defensive strategy to a more proactive one. While the Chinese actions were triggered primarily by US sanctions and the changing external environment more broadly, they have become part of China's overarching strategy to influence the development of the international economic legal order and to develop sufficient domestic regulatory tools in pursuit of its own security and economic interests. The way in which major trading nations are taking the law into their own hands, based on ever-expanding security interests, does not bode well for the future of the multilateral trading system. There is a pressing need for collective action by all governments involved to re-design security-related rules and exceptions to confine the use of security measures to agreed parameters.