A PUBLIC INTERNATIONAL LAW PERSPECTIVE OF SECTION 232 OF THE U.S. TRADE EXPANSION ACT

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ABSTRACT

This article looks at the impact of U.S. national security concerns on imports of goods and services to the United States from an international perspective regarding Section 232 of the U.S. Trade Expansion Act. This international perspective involves elaborating on the impact of Section 232 concerning economic interests outside the United States. Much of the current focus on Section 232 has been in terms of its impact on U.S. concerns within the United States. Moreover, there is a need to bring to bear not just a World Trade Organization (WTO) analysis of Section 232 but also an analysis within the wider context of Public International Law and policy generally. In the analysis thus far, Section 232 has been the subject of much American "navel-gazing" from a scholarly U.S. perspective. However, other than the growing focus on Section 232 from a WTO perspective, given the recent challenges in the WTO with reference to steel and aluminum, there is little if any analysis that brings to bear the wider set of principles and concepts that exist in public international law.

I. INTRODUCTION

In international economic relations, the scope of what constitutes national security is being expanded as well as challenged. This phenomenon is magnified by the power and size of economies and exacerbated by fierce economic competition between countries. National security has both an internal and external focus with the potential of having significant negative consequences on the international economy, in particular important trading partners. The nature and scope of this focus, whilst being dynamically contingent upon political, technological and economic developments, is essentially rooted in state sovereignty.

The relationship between economic interests and national security concerns is of course not new and stretches over the historical annals of our times. National security, however, is the Achilles' heel that threatens the

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insulation of international economic relations from politics, and thus economic development. The national authority to intervene in international economic relations is found in disparate sources: in the inherent exercise of sovereign powers of a State at the international and domestic levels; in the discretion afforded to the executive of a State in the conduct of foreign affairs as set forth in domestic constitutions; in ad hoc pieces of legislation responding to particular national security occasions; and now, increasingly institutionalized in legislation specifically concerning international trade in goods and services and foreign investment.[1] Historically, the building blocks of national security have been deliberately formulated in an open-ended manner and reinforced by a general lack of accountability and transparency in the manner in which they are availed.[2] Moreover, the historical backdrop of national security was set with reference to conventional warfare of a different era. Generally, modern wars, whether in the form of a conventional or nuclear war, tend to be relatively more short-lived than conflicts in the past. In the same vein, foreign policy has historically been concentrated in the hands of the sovereign or executive.[3]

In the contemporary, democratic era—whilst this trend has been restrained of late through some legislative oversight of the executive in some constitutional practices—the integration of national economic concerns into the national security phenomenon is alarming. An absence of economic protection in the context of national security has been likened to "economic disarmament."[4] In sum, the normative ambiguity in the legislation and the concentration in the location of national security power with the executive is exacerbated by the duality in the functional nature of goods, services and technology. It is similarly affected by flexible interpretations of relevant timescales, which are precipitated by the inclusion of national economic concerns.

Despite the domestic practice, in the United States and globally, of using this sovereignty-based prism, an international perspective must bring to bear a normative focus that reduces its scope. This focus cannot take its cue from either a domestic or international legal system. Rather, this focus must incorporate considerations that facilitate a fair and efficient relationship between both systems. National security can operate at the interface between the national and international. Discourse therefore must be both at the *lex lata* and *lex feranda* levels—in particular, the latter given that the authority to manage national security has historically had few parameters.

Like all domestic laws, the authority to manage national security must

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[1] *See, e.g.*, Trade Expansion Act of 1962 § 232, 19 U.S.C.A. § 1862 (West).

[2] National security is a part of a State's foreign policy, which hitherto has been preserved by the sovereign/executive.

[3] *See, e.g.*, Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1, 25 (1998).

[4] Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109, 135 (2020) (looking at U.S. internal deliberations on the scope of national security).

conform to certain basic constitutional safeguards and expectations of good governance. Constitutional safeguards require adherence to the separation of powers doctrine, including the checks and balances of legislative or judicial oversight of the executive.[5] Unnecessary domestic obstacles to such oversight, for example, absolute judicial deference to executive determinations of national security must be removed such that legislative and judicial bodies can scrutinize executive decisions. This is now the case in the sphere of trade and investment in the international setting.[6] If a national security decision could be scrutinized at the international level, domestic legislative and judicial bodies would be in dereliction of their oversight responsibilities if they did not avert a justifiable international disapprobation. In addition, good governance[7] requires an up-to-date, consensus-based, clearly articulated national security mandate. However, this may not be in the national legislative priorities at the relevant time. Many national security mandates may be set in constitutions or legislation of a different era and are not appropriate for modern systems of governance and armed conflicts.

Moreover, not only must there be transparency with respect to the mandate, but also in its operation—such that there is a paper trail of accountable, justifiable decision-making. In the case of goods, services and technology it must be evident to foreign entrepreneurs in advance of their international trade and investment decisions as to what falls within and outside a state's national security. The operation of the national security mandate must conform to certain qualitative standards such as the rule of law, efficiency, equity and proportionality. This means, for instance, that there has to be an objective rationale that is non-discriminatory in its operation and impact. In particular, market integrity and fair play must not be displaced without strong justification based squarely on the exigencies of national security.

Against this background, the following discussion is focused on U.S. national security legislation, Section 232 of the Trade Expansion Act of 1962, as it concerns international trade of goods and services (excluding petroleum imports). This particular legislation is the subject of the current trade war between the United States and China as it has unfolded in the World Trade Organization (WTO).[8] The legislation has also sparked scholarly discourse

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[5] *See* Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law*, *in* 8 NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 3, 8, 34 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993).

[6] *See* Panel Report, *Russia–Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter *Traffic in Transit*]; LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, (Oct. 3, 2006), 11 ICSID Rep. 411 (2007); Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, (Sept. 5, 2008), 18 ICSID Rep. 155 (2020).

[7] Good governance "is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law." U.N. Econ. & Soc. Comm. for Asia & the Pac., What is Good Governance? (July 10, 2009), https://www.unescap.org/sites/default/files/good-governance.pdf [https://perma.cc/3UQM-8TAC].

[8] *See* Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/11 (Feb. 8, 2021); Dispute Settlement, *United States–Certain Measures*

recently; consisting essentially of American "navel-gazing."[9]

II. LITERATURE REVIEW

This recent discourse entails a number of strands herein briefly summarized. First, the rationale and the historical antecedents of the legislation as described by scholars.[10] That legislation and its amendments were set mainly in the Cold War era, and thus somewhat outdated. Second, Section 232 has been analyzed in terms of the ambiguous definition of "national security," thus highlighting the possibilities of differing political interpretations.[11] Third, there has been a focus on the procedures involved in the invocation and implementation of Section 232, including the methodology to establish how a particular good is estimated to be in short supply, in times of war, with reference to specific investigations.[12]

Fourth, U.S. Constitutional doctrines—such as separation of powers and the constitutional balance between the executive and legislative branches, the non-delegation doctrine and the protections against the executive exceeding its authority—have been brought to bear on the operation of Section 232.[13] In the United States, the power to make national security decisions under Section 232 is primarily in the hands of the executive.[14] This power has historically been justified by the understanding that the executive branch can make decisions quicker and has a better understanding of international affairs than the

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on Steel and Aluminum products, WTO Doc. WT/DS550/R (July 11, 2019); Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/17 (Feb. 8, 2021); Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS547/11 (Feb. 8, 2021); Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS551/R (July 11, 2019); Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/13 (Feb. 8, 2021); Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS554/20 (Feb. 8, 2021); Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/18 (Feb. 8, 2021); Dispute Settlement, *United States–Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/18 (Feb. 8, 2021).

[9] *See* David D. Knoll, *Section 232 of the Trade Expansion Act of 1962: Industrial Fasteners, Machine Tools and Beyond*, 10 MD. J. INT'L L. 55, 59 (1986); Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1164 (2020); Kayla Scott, *Steel Standing: What's Next for Section 232?*, 30 DUKE J. COMP. & INT'L L. 379, 439–40 (2020); Pinchis-Paulsen, *supra* note 4, at 190–92; David Scott Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926, 985–86 (1990); Richard Levine, *Trade vs. National Security: Section 232 Cases*, 7 COMP. STRAT. 133, 141 (1998).

[10] *See* Levine, *supra* note 9, at 134–36; Nance & Wasserman, *supra* note 9, at 930–31.

[11] Nance & Wasserman, *supra* note 9, at 935.

[12] Levine, *supra* note 9, at 135–36.

[13] *See* Scott, *supra* note 9, at 392–410; Claussen, *supra* note 9, at 1162.

[14] *See* Arim Jenny Kim, *The Untouchable Executive Authority: Trump and the Section 232 Tariffs on Steel and Aluminum*, 28 U. MIA. BUS. L. REV. 176, 185–88 (2019). *See, e.g.*, Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELS.: BACKGROUDER (Mar. 2, 2017), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president [https://perma.cc/DSV2-UW8B].

legislature.[15] Moreover, it is contended that the executive needs authority over the application of tariffs to be more credible in discourse with adversaries.[16] On the other hand, it has been suggested that because tariffs have an impact on the domestic economy the legislature is the better place for such discourse.[17] Equally, it has been pointed out that in practice the U.S. legislature has more scrutiny over trade liberalization policy than over the exercise of the national security exception.[18] The scholarship, however, does not delve into the need for foreigners to have similar constitutional safeguards extended to them.

Fifth, there has been some theoretical justification of Section 232 with reference to how it supports, rather than undermines, the ethos of liberal trade that the international trading system is based on.[19] International trade and national security are complementary, it is contended, rather than contradictory as assumed in received wisdom.[20] National security is a necessary condition for liberal trade. Economic sanctions forestall the use of armed conflict that could be more dangerous to the international trading system. Moreover, the national security exception serves to facilitate entering into international agreements as it embodies the assurance that if anything goes wrong the country is protected with this exception.[21]

Finally, of late there has been a growing focus on Section 232 from a WTO perspective given the recent challenges in the WTO with reference to steel and aluminum imports to the United States.[22]

III. EXPLANATIONS FOR THE LACK OF PUBLIC INTERNATIONAL LAW ANALYSIS OF SECTION 232

There has been little, if any, analysis of Section 232 within the context of public international law by which the United States is bound. Such an analysis brings to bear the wider set of principles and concepts that exist in public international law. There are many explanations for the lack of this analysis. One explanation is the belief, as asserted by one U.S. analyst, that "in classical international law . . . states have an unfettered discretion to determine their national security needs and to act in accordance with that determination . . . ."[23] This understanding, as it informs contemporary international law, is highly controversial. First, it is not consistent with state practice and *opinio juris* necessary for its normative claim.

Second, the assertion that there is "unfettered discretion" empowering the state to act in accordance with its determination, does not coincide with the

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[15] *Id.*
[16] Claussen, *supra* note 9, at 1133–34.
[17] Scott, *supra* note 9, at 404–05.
[18] *See* Claussen, *supra* note 9, at 1142–43.
[19] *See id.*; Knoll, *supra* note 9, at 58.
[20] *See, e.g.*, Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 264–65 (1998).
[21] Claussen, *supra* note 9, at 1134–35.
[22] Scott, *supra* note 9, at 381–82, 436; Pinchis-Paulsen, *supra* note 4, at 112–13.
[23] Knoll, *supra* note 9, at 83.

well-established international law principle of state sovereign equality. One state does not have unfettered discretion to shape the "equality" of another state, let alone the international community of states, through its own national security legislation. Finally, the history of the national security exception, as applied to international agreements, does not support this belief.[24] For example, interpretations of the national security exception in the WTO have not reinforced the belief that states have unfettered power.[25] Indeed, the influence of the U.S. in the negotiations of the national security exception in the General Agreement on Tariffs and Trade (GATT) of 1947 did not have such an understanding of national security under customary international law.[26]

Third, some scholars suggest that economic independence is included in any conception of national security.[27] This line of reasoning is supported by the international law principles of self-determination and state sovereignty. However, such a conception, couched in absolute terms, is somewhat flawed. Economic independence can certainly involve a sense of national security, but economic independence can also be secured and achieved by delegating national security concerns to external entities or engagements, for example, stockpiling.[28]

Such cursory allusions to general international law principles without further consideration could be attributed to the United States' parochial approach to U.S. standing in international relations. To be more generous, this approach could also be a consequence of the fact that the national security phenomenon is often considered solely from the very narrow perspective of international trade law.

A. Unexplored Dimensions of the National Security Exception

From an international law and policy perspective, there are four dimensions of the national security exception that are generally relatively unexplored. One dimension is the impact of the protective actions taken under the national security exception on foreign non-state actors. Such restrictions obviously have economic consequences for trading, including consumer concerns in other states. However, this point does need emphasizing since national security is often analyzed from an internal perspective alone. Thus, a cost-benefit analysis of economic sanctions on national security grounds is

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[24] *See, e.g.*, General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *as amended by* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1867 U.N.T.S. 190, 33 I.L.M. 1125 [hereinafter GATT].

[25] *Traffic in Transit*, *supra* note 6, ¶¶ 7.102–7.104.

[26] *See* Pinchis-Paulsen, *supra* note 4, at 116, 148; *Traffic in Transit*, *supra* note 6, ¶ 7.100.

[27] *See* Claussen, *supra* note 9, at 1140–41 (citing John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393–98 (1982)).

[28] Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1, 17 (2008) (illustrating delegation of peacekeeping duties to NATO); *see also* Karl Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 845 (2003).

typically considered, if at all, in terms of the domestic impact on domestic industry and consumers, not its external economic consequences.

Yet, the impact can be directly on the exports of foreign domestic industries. In particular, the impact can be serious for long-established, export-oriented concerns having built a comparative advantage in the exports. The impact of resorting to the national security exception can be abrupt and unpredictable given that the apparatus for resorting to the national security exception within a state is often non-transparent and without adequate checks and balances. The mechanisms for an *a priori* (let alone a *post facto*) input for those foreign interests negatively affected in domestic proceedings are not foreign-friendly, to say the least. In addition, there can be indirect consequences on the exports of third-party countries in another market, which could be displaced by the diversion of exports from the sanctioned exporter. In the same vein, an exporter taking advantage of economies of scale would, with the export restrictions, need to downscale, and therefore the cost of production may increase for the supply in the domestic market of the exporter.

In sum, there are serious external consequences of economic nature for exporters on the receiving end of a national security-based import restriction. These economic consequences call for reflection on the choice of responses based on national security. They are relevant in evaluating whether the choice of response is appropriate, proportionate and causally connected with the threat. A conception of national security that encapsulates the viability of the national economy, regardless of the external economic consequences empowering itself for "coercive," albeit economic responses, harken back to an era of imperialism and national self-aggrandizement. International law has, in many respects, cut the wings of such imperialistic practices but by no means all.

The second dimension is whether one nation's national security has normative consequences on the behavior of foreign concerns. A national security restriction can result in the characterization of an entity by its foreign activity, process, or good—be it of an economic, political or other nature—could be cast in a negative light, and thus compel behavioral and locational changes or identity transformations extraterritorially. Even when the foreign activity, process, or good has an innocent connotation, its characterization as a threat can introduce changes in economic behavior. Moreover, given the nature of the national security justification, the presumption of association with another state, especially in a planned economy can be difficult to rebut for the foreign enterprise. In sum, national security has an extraterritorial reach with "chilling" consequences inducing a change in non-state behavior externally. Such extraterritorial reach may or may not be justifiable in terms of national security under international law. It may be justifiable under the protective base of extraterritorial exercise of jurisdiction. However, the protective base for the exercise of extraterritorial jurisdiction has hitherto been confined to matters that are an existential threat to a state. Thus, national security that is concerned with the welfare and development of the national economy may not be a proper basis for the exercise of jurisdiction where the temporal connection with the

threat to the state is distant.

In the same vein, reliance on the effects doctrine[29] may not necessarily be that easy given that resort to it must conform to a "reasonableness test."[30] Under this "reasonableness test," a state may exercise prescriptive jurisdiction if the exercise is not unreasonable.[31] Reasonableness factors include, among others, considerations such as whether there is a substantial, direct, and foreseeable effect; the innocence of the character of the activity; whether a justifiable expectation exists that is protected under the WTO; and whether the activity could have a detrimental effect on the regulation of the international political, legal, or economic system.[32] There is some controversy in international law as to the limits of a state's legislative jurisdiction. Leaving that discourse aside for the moment, is there a conflict between the international law on the exercise of legislative jurisdiction and the defense of national security? Could the exercise of state jurisdiction, contrary to international law, in such circumstances, be justified under the defense of necessity? Perhaps, but only if it conforms to the parameters set under international law for the invocation of such a defense.[33]

A third dimension is that there is much ado in national security discourse that "national security's" definition and scope is essentially in the domain of the state. This may well be the case from the internal, domestic perspective. Here, it is important to note that national security has a purely domestic dimension with an international focus. In so far as national security in the

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[29] *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 409 cmt. a (AM. L. INST. 2018) (explaining the effects doctrine is when "[a] state may exercise prescriptive jurisdiction with respect to conduct occurring outside its territory that has an effect within its territory that creates a genuine connection between the conduct and the prescribing state").

[30] RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 403 (AM. L. INST. 1987) ("(1) Even when one of the bases for jurisdiction under s 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable; (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.").

[31] *Id.*

[32] *Id.*

[33] *See Report of the International Law Commission on the work of its fifty-third session*, 56 U.N. GAOR Supp. No. 10, at 193, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

international context is concerned, it touches on the very question of the continued existence of statehood. In a sense, it involves the very notion of statehood in international law—indeed, an assertion of statehood. In international law, the criteria for statehood are set out in terms of objective conditions, as well as external perceptions of the fact of statehood *viz.*, recognition.[34] The objective conditions are fundamental but basic. The aspect of statehood that is informed by external perceptions is a feature of international law that plays a similar role in other respects as well. Thus, whilst international law leaves it to the state to determine the criteria for nationality, its external recognition is based on a genuine link.

Two inferences can be drawn from the international law criteria for statehood and diplomatic protection on behalf of nationals. First, national security is defined with reference to a state, defined as a "permanent population"; territorial integrity of the state; governance of the state; and the capacity of the state to enter into legal relations.[35] Its scope, in fact, is informed by these criteria which focus on the existence of the state, *qua* state in an existential sense. Second, given the conceptual affinity of statehood with national security, the scope of national security is in some measure a function of the legitimacy it commands in international relations, and generally the corpus of the international legal system as a whole. In short, the national security basis for protectionist measures, if it is to command legitimacy in its extraterritorial impact, must remain within the parameters of the considerations that go into defining statehood under international law.

Recent jurisprudence in the WTO[36] and investment arbitration,[37] albeit in the context of the security exception, set out in international agreements, affirm the justiciability of the national security exception. Also, the introduction of subjective-objective criteria informing the notion of essential national security interests of a state reinforces the point being made here, namely that the scope of the national security exception has to command legitimacy in international relations.

The fourth dimension is that there has to be some correlation between the regulation of a state's use of force under international law and a state's use of economic sanctions to respond to national security exigencies. Both are responses to national security threats, unilateral measures, and are considered legitimate under international law. Both the national rationale and the international objectives of regulation are the same. Moreover, in some circumstances, the impact of economic sanctions can arguably have the same effect as the use of force. In the same vein, economic wars can lead to armed conflicts. The underlying rationale for confining the use of force to self-defense and restricting actions to anticipatory defense is to ensure international

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[34] *See* Montevideo Convention on the Rights and Duties of States arts. 1, 3, 6, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.
[35] *Id.* art. 1.
[36] *See, e.g.*, *Traffic in Transit*, *supra* note 6.
[37] *See, e.g.*, LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, (Oct. 3, 2006), 11 ICSID Rep. 411 (2007).

peace and security and encourage resort to peaceful and proportionate methods for resolving disputes. The same considerations underpin much of the international economic order. Importantly, both the International Monetary Fund and WTO regimes eschew unilateralism.

B. Connection Between the National Security Exception and a Nation's Use of Armed Conflict

The national security exception's association with armed conflict begs a number of questions. First, can the international regulation on the use of force be thwarted in legal analysis through economic measures? For example, international law prohibits an armed attack (unless in self-defense), let alone a pre-emptive strike on another state.[38] But, what about economic measures that effectively cripple the other state's economy and have the same impact as an armed attack? The Law of Armed Conflict, which in some respects predates international economic law and parallels it, would not prohibit such economic measures. And in so far as the received wisdom is concerned, international economic law at a general level is underpinned by the freedom of the state to determine its foreign, economic relations, including the right to self-determine its economic system and its sovereignty over its natural resources.[39] However, as is well understood now, normative regimes in international law do not exist in "clinical isolation from public international law."[40] Therefore, constraints on a state's use of force under international law are relevant in informing what the nature of the disciplines is in the use of national economic measures to impact a foreign state, if any.

Second, can the principles underpinning international law on the use of force fill gaps in the regulation of economic sanctions? For example, offensive (contra defensive) economic measures to harm another state invites the question of whether the underlying principles of the prohibition on the use of force, *viz.*, the obligation to peacefully settle disputes and not to cause unwanted harm to another state, have a bearing on the circumstances. They may also have a bearing on the interpretation of treaty-based trade and monetary disciplines.

Third, are there lessons to be drawn from international law on the use of force (including international humanitarian law) when considering international regulation of economic responses on grounds of national security? Certainly, there are.[41] International law concerning the use of force

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[38] U.N. Charter art. 2, ¶ 4; *id.* art. 51. Leaving aside, for the moment, any discourse on the legality of a pre-emptive strike.

[39] G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974).

[40] *See, e.g.*, Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, 17, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996); *Report of the International Law Commission to the General Assembly*, 61 U.N. GAOR Supp. No. 10, at 406, U.N. Doc. A/61/10 (2006), *reprinted in* [2006] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc. A/CN.4/SER.A/2006/Add.1.

[41] *See generally* Asif H. Qureshi, *The Americanization of the International Economic Order and Its*

prohibits offensive use of force and prescribes a proportionate use of force in self-defense only. Also, under international humanitarian law, the use of certain types of weapons is prohibited and a distinction is made between civilians and combatants.[42]

In the same vein, economic responses to national security threats, as well as conceptions of national security, must in some measure be informed by the time and proportionality requirements set for responses similar to those required for self-defense in international law. Responses must also be set qualitatively in "good faith," which is already an expectation where treaty obligations are concerned.[43] National security should be conceived as being threatened or affected in the same manner as an "armed attack." The same conception should also exist in circumstances where "the territorial integrity or political independence of" a "State, or in any other manner inconsistent with the Purposes of the United Nations" is implicated.[44] In customary international law, national security is understood as involving "an essential interest against a grave and imminent peril" and which "does not seriously impair an essential interest of the State or States toward which the obligation exists or of the international community as a whole."[45] The impact of economic sanctions can be circumscribed and the use of certain types of sanctions should be prohibited. In short, there are normative possibilities that set parameters for what a state can conceive of as national security and the type of economic sanctions at a state's disposal for responding to national security threats, including which individuals and entities are targeted.

C. Practice in International Agreements and Domestic Practice

Does the very fact that national security exceptions have to be negotiated in international agreements evidence the non-existence of unfettered discretion in defining national security under customary international law? The answer depends on the interpretation. The first interpretation is that unfettered discretion does exist but that states endeavor to preserve the integrity of the agreement by putting some limitations in place. This is to some extent borne out by the record of the negotiations of what eventually became Article XXI of GATT 1994.[46] The record shows, within the United States, on the one hand, the desire to have an expansive or subjectively interpreted national security provision, and on the other hand the desire to preserve the integrity of the

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Normative Boundaries, 15 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 319 (2020).

[42] *See generally* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Protocols I, III, IV) Oct. 10, 1980, 1342 U.N.T.S. 137 (as amended Dec. 21, 2001).

[43] *See* Vienna Convention on the Law of the Treaties pmbl., arts. 26, 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

[44] U.N. Charter art. 2, ¶ 4.

[45] G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 25 (Dec. 12, 2001) [hereinafter Responsibility of States for Internationally Wrongful Acts].

[46] *See* Pinchis-Paulsen, *supra* note 4, at 189–90.

negotiated charter of the International Trade Organization.[47] Interestingly, though, according to an account of this record given by Mona Pinchis-Paulsen, there is no evidence of reliance on customary international law by those advocating a subjective interpretation of national security.[48]

The second interpretation is that discretion is limited but states are expanding their scope in international agreements. This is borne out by Article 25 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, wherein the defense of "necessity" is understood, *inter alia*, to refer to national security and does not have an open-ended meaning. Indeed, it is a defense to state responsibility available only by exception.[49]

Are the limitations on the discretion to define national security borne out by internal state practices in the field? Within a state there are several reasons why the executive's discretion to determine what a threat to a state's national security is—although granted there may be constitutional checks and balances depending on the constitution of the country in question. The internal threats are different from the ones directly emanating from abroad even if later the two have become intertwined in some respects.[50] There are more security threats internally that create a need to react more expeditiously. The threats may be purely domestic or have some external connection, but in any event, the threats are territorial and concern national security. The response apparatus for such threats essentially involves use of force. In these circumstances, the design of domestic national security should not be conflated with arrangements to respond to external security threats.

The domestic response may, at any rate, have been historically premised on the state having unlimited discretion to conceive the nature of the threat and respond to it. Modern-day constitutional practices founded in democracy doubtless have had a part in changing this as a matter of appropriate internal governance. On the other hand, leaving aside threats arising from armed conflicts, modern-day external "security" threats generally are more specific and accompanied by relatively more time for deliberation. Although historically, domestic and external threats may well have been intertwined in their origins. Therefore, internal constitutional and legislative practices with

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[47] *See generally id.*

[48] *Id.*

[49] Responsibility of States for Internationally Wrongful Acts, *supra* note 45 ("Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.").

[50] *See, e.g.*, Margriet Drent, Rosa Dinnissen, Bibi van Ginkel, Hans Hogeboom & Kees Homan, *The Relationship Between External and Internal Security*, CLINGENDAEL STRATEGIC MONITOR PROJECT (2014), https://www.clingendael.org/sites/default/files/pdfs/The%20relationship%20between%20external%20and%20internal%20security.pdf [https://perma.cc/7SBC-DT83].

broad-based discretion to define a state's national security are not relevant to state practices in shedding light on normativity at the general level of international law in contemporary times. Modern-day conditions have, in a sense, brought about a decoupling of the two—domestic and external—national security threats. Unfortunately, the legacy of these historical origins is sometimes forgotten.

However, the constitutional checks and balances that protect democratic values, inculcated in the domestic apparatus of national security, do have a bearing on the establishment of a conception of national security at the international level. "Foreign people" who are affected have a similar entitlement to the checks and balances introduced in modern constitutional practices that protect the domestic constituency from possible excesses inherent in the engagement of domestic national security concerns.

In conclusion, at the international level, conceptions of national security and responses to national security threats, as well as measures to enhance national security, are the subject of international law. If this was not the case, the very fabric of the international community under the international legal system would be undermined. In the same manner, if there were no checks and balances at the domestic level, fundamental democratic values could be eroded. In the case of armed conflict, international law has clearly made important inroads.[51] In the economic sphere, allowing external scrutiny of the invocation of national security cannot be considered an act of "economic disarmament." A state's economic sphere has never—especially since the establishment of the Bretton Woods institutions—been allowed to be on a trajectory for armament, albeit economic armament.[52] Instead, the Bretton Woods' conception of the international economic system emphasizes the market, levels playing fields and opens borders.[53] Competition is not to be equated with dominance. In sum, the domestic, sovereignty-based conception of national security no longer has any place in the international arena where the conception has to be based on international law.

IV. SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (19 U.S.C. § 1862)[54]

There has been much ado lately with respect to the Trump administration's use of national security as a justification for steel and aluminum import restrictions even though the legislation existed and was relied on during previous U.S. administrations. As of June 2020, there were a total of eight investigations initiated under the Trump administration—five of

[51] *See, e.g.*, U.N. Charter art. 2, ¶ 4; *id.* art. 51. One example is restricting use of force to self-defense only.
[52] *See* John W. Pehle, *The Bretton Woods Institutions*, 55 YALE L.J. 1127, 1127–28 (1946).
[53] *See id.* at 1128.
[54] Trade Expansion Act of 1962 § 232, 19 U.S.C.A. § 1862 (Westlaw through Pub. L. No. 116-259).

which were acted upon.[55] Prior to this, since 1963 there had been some twenty-six investigations.[56] A significant number of the total investigations prior to the Trump administration, however, resulted in negative findings.[57] The last time, prior to the Trump administration, Section 232 was actually used to impose tariffs was in 1986.[58] These statistics do not imply that Section 232 is a passing phenomenon of no concern. As long as it is on the statute book, it can be availed with devastating consequences. Indeed, this is recognized in the United States where the following question has been raised: "Should Congress consider amending current delegated authorities under Section 232, such as by requiring an economic impact study, congressional consultation or approval, or by specifying further guidance?"[59]

The extent of the authority to take action under Section 232 to safeguard national security was initially limited and couched negatively. The president was prohibited from decreasing or eliminating duties or enacting other import restrictions if "such reduction or elimination would threaten to impair the national security."[60] In short, the safeguard action called for the maintenance of import restrictions on national security grounds. Authority to add restrictions to existing restrictions was excluded.[61] Notably, insofar as petroleum or petroleum products are concerned, the authority of the president under Section 232 is subject to congressional disapproval of presidential import adjustments by a joint resolution of either House of Congress.[62]

Currently, however, as U.S. law stands, the actions that can be taken under Section 232 have been expanded to allow the president to "take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security,"[63] but subject to congressional disapproval with respect to petroleum or petroleum products. Ultimately, it is the president who determines whether: an article is "being imported into the United States in such quantities or under such circumstances as to threaten or to impair the national security";[64] and "the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[65]

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[55] *See* RACHEL F. FEFER, CONG. RSCH. SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2020), https://fas.org/sgp/crs/misc/IF10667.pdf [https://perma.cc/TWE8-LGH4].
[56] *See id.*; *but see* Trade Policy Review Body, *Report by the Secretariat: Trade Policy Review*, WTO Doc. WT/TPR/S/382/Rev.1 (Mar. 27, 2019) (noting only sixteen investigations have been recorded since 1980).
[57] FEFER, *supra* note 55.
[58] *See id.*
[59] *See id.*
[60] 19 U.S.C.A. § 1862(a) (West).
[61] *See id.*
[62] *See id.* § 1862(f).
[63] *Id.* § 1862(c)(3)(A)(ii).
[64] *Id.* § 1862(c)(1)(A) (noting the imports have to be of a certain "quantity" or in "such circumstances"; neither criterion is further defined in the legislation).
[65] *Id.* § 1862(c)(1)(A)(ii).

Briefly, the procedure for such an action can be initiated by the "head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce."[66] Upon such an initiation, the Secretary of Commerce is to engage in an investigation "to determine the effects on the national security of" the imports in question.[67] The investigation is to involve consultation with the Secretary of Defense and, if appropriate, allow interested parties to provide input.[68] A report of the investigation has to be submitted to the President with the Secretary of Commerce's recommendations by a set date.[69] Upon receipt of the report, within a set timeframe, the President determines whether they concur with the report.[70] If the President does concur, the President must determine what action to take. The President is to negotiate an agreement to safeguard national security and impose such restrictions as the President deems appropriate.[71] By a set time, the President is to give a reasoned report to the U.S. Congress of the action or inaction taken.[72]

Section 232 does not contain a definition of national security, although it contains a list of factors to be taken into account in its determination.[73] Nor is there a definition in its implementing regulation, 15 C.F.R. § 705.4, which reflects the Section 232 list.[74] Section 232 is also the subject of statutory

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[66] *Id.* § 1862(b)(1)(A).
[67] *Id.*
[68] *Id.* § 1862(b)(2)(A).
[69] *Id.* § 1862(b)(3)(A).
[70] *Id.* § 1862(c)(1)(A)(i).
[71] *Id.* § 1862(c)(1)(A)(ii).
[72] *Id.* § 1862(c)(2).
[73] *Id.* § 1862(d) ("For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further 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.").
[74] 15 C.F.R. § 705.4 (2020) (clarifying how the Department of Commerce should carry out its Section 232 investigations with respect to the impact of imports on national security in the Code of Federal Regulations) ("(a) To determine the effect on the national security of the imports of the article under investigation, the Department shall consider the quantity of the article in question or other circumstances related to its import. With regard for the requirements of national security, the Department shall also consider the following: (1) Domestic production needed for projected national defense requirements; (2) The capacity of domestic industries to meet projected national defense requirements; (3) The existing and anticipated availabilities of human resources,

interpretation—two notable ones being reports on the impact of the import of iron ore and semifinished steel on national security under Section 232.[75] It seems, however, that interpretations of Section 232 are not binding and can be diverted by subsequent administrations.[76] The list of considerations to be taken into account in Section 232 is not exhaustive.[77] The list has been interpreted as consisting of two distinct subsets of what comprise "national security" considerations—one focusing on national defense and the other on the economic welfare of the nation.[78] National defense has been interpreted not only as encompassing the defense of the United States but also as "the ability to project military capabilities globally."[79] National defense thus includes both defensive and offensive capabilities. It includes harm to national security as well as threats to it.

The economic welfare of the nation embraces a variety of concerns *viz.*, "the impact of foreign competition on the economic welfare of domestic industry"[80] and the "economic welfare of individual domestic industries,"[81] including "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 . . . ."[82] More specifically, economic welfare has been interpreted to include the "general

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products, raw materials, production equipment and facilities, and other supplies and services essential to the national defense; (4) The growth requirements of domestic industries to meet national defense requirements and the supplies and services including the investment, exploration and development necessary to assure such growth; and (5) Any other relevant factors. (b) In recognition of the close relation between the strength of our national economy and the capacity of the United States to meet national security requirements, the Department shall also, with regard for the quantity, availability, character and uses of the imported article under investigation, consider the following: (1) The impact of foreign competition on the economic welfare of any domestic industry essential to our national security; (2) The displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects; and (3) Any other relevant factors that are causing or will cause a weakening of our national economy.").

[75] *See generally* BUREAU OF EXP. ADMIN., DEP'T OF COM., THE EFFECT OF IMPORTS OF IRON ORE AND SEMI-FINISHED STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (2001) [hereinafter IRON ORE AND SEMI-FINISHED STEEL]; BUREAU OF EXP. ADMIN., DEP'T OF COM., THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: (2018) [hereinafter STEEL].

[76] STEEL, *supra* note 75, at 14 n.15 ("The 2001 Report used the phrase 'fundamentally threaten to impair' when discussing how imports may threaten to impair national security. Because the term 'fundamentally' is not included in the statutory text and could be perceived as establishing a higher threshold, the Secretary expressly does not use the qualifier in this report. The statutory threshold in Section 232(b)(3)(A) is unambiguously 'threaten to impair' and the Secretary adopts that threshold without qualification. The statute also uses the formulation 'may impair' in Section 232(d)." (citations omitted)).

[77] IRON ORE AND SEMI-FINISHED STEEL, *supra* note 75, at 6; *see* STEEL, *supra* note 75, at 13, 15.

[78] IRON ORE AND SEMI-FINISHED STEEL, *supra* note 75, at 5; STEEL, *supra* note 75, at 13–14.

[79] STEEL, *supra* note 75, at 13 (quoting IRON ORE AND SEMI-FINISHED STEEL, *supra* note 75, at 5).

[80] 15 C.F.R. § 705.4(b)(1) (2020).

[81] 19 U.S.C.A. 1862(d) (Westlaw through Pub. L. No. 116-259).

[82] *Id.*

security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, that are critical to the minimum operations of the economy and government,"[83] including transportation systems, the electric power grid, water systems, and energy generation systems.[84] For this purpose, a list of critical industry sectors has been compiled.[85] Finally, the Secretary of Commerce and the President are specifically directed to consider the close relationship between the nation's economic welfare and national security.[86]

From the perspective of public international law, the following conclusions can be proffered with respect to Section 232. First, it gives almost unfettered discretion to the President of the United States to determine what constitutes U.S. national security and inform its external economic response. No state, whether operating through its executive or with the approval of its legislature, can displace the role of international law in defining national security as it relates to external consequences that impact other states' rights under international law. There are certain limits here that have a bearing on the capacity of nations to determine their national security interests, including their choice of economic response.

Second, Section 232's conception of national security is open-ended. Importantly, it is not just concerned with U.S. defense but also with its offensive capability.[87] Moreover, it is also concerned with the economic welfare of the nation.[88] U.S. foreign relations, informed by strategic interests operationalized through the projection of global military capabilities, involves the imposition of a price for its exercise on foreign nations whether or not they are beneficiaries of U.S. foreign policy. Similarly, the conflation with the nation's economic welfare considerably stretches the notion of national security. Thus, its focus includes the "displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects; and . . . [a]ny other relevant factors that are causing or will cause a weakening of our national economy."[89]

The wide economic character of national security is reinforced by the fact that "an interested party" can initiate a Section 232 investigation, and in particular, that the principal investigator and interpreter or implementor of Section 232 is the Secretary of Commerce not the Secretary of Defense.[90] Moreover, both the defense and economic welfare limbs of national security are informed by a wide, temporal canvas involving projected threats without

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[83] IRON ORE AND SEMI-FINISHED STEEL, *supra* note 75, at 5.
[84] *Id.* at 14.
[85] Press Release, Office of the Press Sec'y, Presidential Policy Directive—Critical Infrastructure Security and Resilience (PPD-21) (Feb. 12, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil [https://perma.cc/Y4Z7-VGG8].
[86] 19 U.S.C.A. § 1862(d).
[87] *See supra* note 75 and accompanying text.
[88] 19 U.S.C.A. § 1862(d).
[89] 15 C.F.R. § 705.4(b)(2)–(3) (2020).
[90] 19 U.S.C.A. § 1862(b)(1)(A).

any qualifications. Both offensive military capabilities and the economic welfare of the nation, in an all-encompassing sense, do not fall within the existential character of the international conception of national security. The international conception of national security is limited to the protection of the state's very existence. In addition, this concept of national security is inconsistent with Article XXI of GATT 1994, which, in its widest form, refers to the protection of essential security interests "taken in time of war or other emergencies in international relations."[91] Article XXI of GATT 1994 has been interpreted as referring to "those interests relating to the quintessential functions of the state."[92] Moreover, these interests do not refer to "political or economic differences" between the members of the WTO "unless they give rise to defense and military interests, or maintenance of law and public order interests."[93]

Third, there are due process issues that may have an impact in terms of the minimum standard under customary international law.[94] The invocation and application of national security legislation have a due process relevance to foreign interests and a national security apparatus that conflates defense with economic welfare. Not all relevant interested parties are accorded an assured participatory right in the investigation process. The investigation is conducted in the United States and does not allow interested foreign parties to effectively participate. There is no economic impact study, nor one that takes into account the external economic impact of the chosen responses, which includes consideration of alternatives with less destructive measures of the international trading system.

Finally, the authorized responses to national security concerns do not seem to have any qualifications. Thus, exceptions to restrictions can differentiate between foreign countries, and as between U.S. importers and foreign producer-exporters. Such discriminatory practices can be inconsistent

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[91] GATT art. XXI(b)(iii).

[92] *Traffic in Transit*, *supra* note 6, ¶ 7.130.

[93] *Id.* ¶ 7.75.

[94] *See* L.F.H. Neer (U.S. v. Mex.), 4 R.I.A.A. 60, 61–62 (Gen. Claims Comm. 1926) ("[T]he propriety of governmental acts should be put to the test of international standards, and . . . the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."); *see also, e.g.*, Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), 11 ICSID Rep. 361 (2007) ("[T]he minimum standard of treatment . . . is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.").

with Articles I and III of GATT 1994.[95] Moreover, whilst, the received wisdom is that under general international law there is no obligation not to discriminate between goods originating from different countries,[96] this author has elsewhere questioned this wisdom, given contemporary developments in state practice.[97] Furthermore, agreements entered into under the authority of Section 232, for example, restricting the import of goods from abroad by a U.S. company in joint ventures with foreign companies, could implicate the foreign state in indirect expropriation with the complicity of the U.S. government—contrary to the prohibition on expropriation without compensation. In the absence of an agreement, the U.S. government may also be engaging in acts of expropriation of foreign property.

In sum, the national security exception would not absolve liability under international law if the rationale for the import restrictions is demonstrably based on the welfare of the U.S. economy, albeit in a piece of legislation intended to safeguard national security. Furthermore, the national security exception would not absolve international responsibility if the United States' measures were concerned with offensive U.S. military operations abroad.

V. CONCLUSION

Section 232 is a poorly drafted piece of U.S. legislation because it reflects an unfortunate sense of the United States' power as a nation. Section 232 does not withstand the scrutiny of international law, let alone the growing sense of civilized behavior that infuses international economic order. Instead, it reflects the basest human instincts of opportunism, self-aggrandizement and dominance. Section 232 is quintessentially the Achilles Heel of international economic order, which could bring the downfall of this order, especially given the difficulty in effectively policing Section 232's application. In the United States, the conception of national security, as interpreted in Section 232, must be one that accords with international law. Also, the U.S. response to its national security concerns must conform to relevant international disciplines. There is not only a need for an economic impact study but also a legal impact study.

Clearly, there is a need for a normative framework that manages the concept of national security within an international institutional structure where it is implemented.[98] There are three distinct ways in which this can be

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[95] *See* GATT art. I, paras. (1), (4).

[96] *See, e.g.*, Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 43–76 (Lorand Bartels & Federico Ortino eds., 2006); JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 271–85 (2002).

[97] *See* ASIF H. QURESHI, INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES 339–55 (2d ed. 2015) (discussing the question of WTO member states' freedom to engage in discriminatory trade relations as a fundamental question in the relationship between the WTO and preferential trade agreements).

[98] I am grateful to Professor John W. Head for drawing my attention to this aspect of my paper.

achieved. First, there is a need for a normative code on state national security. This is an objective that the U.N. International Law Commission should embark on through a more in-depth study of state practices in the economic sphere. Specifically, the Commission should focus on a systematic study of state practices for defining national security and responding to national security threats from an economic perspective. But the question remains as to who will initiate such a proposal in this forum. Second, there are existing dispute settlement mechanisms, such as the WTO, investment arbitral tribunals and the International Court of Justice that can and do serve to manage and elucidate a normative framework, albeit within the context of a dispute and against the backdrop of specialized regimes in international law. Finally, the U.N. Security Council is ineffective because the way it is organized puts decision-making authority in the hands of one member, and that does not facilitate a uniform definition of national security on an international scale.

Overall, there is certainly a need for the U.N. General Assembly to engage in this field and play a more proactive role. Such an orchestrated focus on national security through an economic lens will serve to regulate the external consequences of a state's national security apparatus. The focus will also create an opportunity for the international community to bring to bear an international consensus regarding how national security concerns are to be managed domestically; thus, bringing to light some of the human rights abuses committed by states on their own people.

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