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Nations and Markets

Harlan Grant Cohen*

ABSTRACT

Economics and security seem increasingly intertwined. Citing national security, states subject foreign investments to new scrutiny, even unwinding mergers. The provision of 5G has become a diplomatic battleground – Huawei at its center. Meanwhile, states invoke national security to excuse trade wars. The U.S. invoked the GATT national security exception to impose steel and aluminum tariffs, threatening more on automotive parts. Russia invoked that provision to justify its blockade of Ukraine, as did Saudi Arabia and the UAE to excuse theirs of Qatar. And with the spread of COVID-19, states are invoking national security to scrutinize supply lines. Multiplying daily, such stories lead some observers to dub the era one of geoeconomics.

Nonetheless, these developments remain difficult to judge and the relationship between economics and national security confused and slippery. The essay seeks clarity in the deeper logic of these labels, revealing a fundamental choice between the logics of markets and of state. Whether invoked to ‘secure’ borders, privacy, health, the environment, or jobs, ‘national security’ is a claim about the proper location of policymaking. Appeals to economics, with their emphasis on global welfare and global person-to-person relationships, are as well. Resolving disputes, this essay argues, requires recognizing these root choices.

I. INTRODUCTION

Economic and security policy seem increasingly entangled. Often relegated to different sections of the newspaper, recent headlines feature both together, and often on the front page. Citing national security concerns, states around the world are subjecting foreign investments to new levels of scrutiny. In

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some cases, national authorities are even unwinding mergers, forcing divestments in the United States, for example, of LGBTQ dating app Grindr and video sharing app TikTok. The provision of 5G networking services has become a diplomatic battleground. Huawei, a Chinese company, battles not only its worldwide competitors for contracts, but the government of the United States. The latter, declaring Huawei a national security threat, has not only restricted its activities in its territory, but has openly lobbied other countries to ban it, dangling U.S. security cooperation as an incentive. Meanwhile, states have invoked national security to excuse trade wars and imposed trade wars in service of their national security. The United States invoked both its national security laws and the national security exception to the General Agreement on Tariffs and Trade (GATT)—Article XXI—to impose steel and aluminum tariffs on many of its trading partners and has threatened to do the same regarding automotive parts. Russia invoked the same GATT provision to justify its blockade of Ukraine, as did Saudi Arabia and the United Arab Emirates to excuse their blockade of Qatar. All three cases were challenged under the WTO Dispute Settlement Understanding, the first disputes over Art. XXI in the GATT's history to reach dispute settlement. These stories though are but a few of the many that have led some observers to dub the current era one of *geo-economics*.¹ And these trends have only accelerated with the spread of the global COVID-19 pandemic and feared shortages of Personal Protective Equipment (PPE), ventilators, vital medicines, and eventually vaccines. Invoking national security, states around the world began to scrutinize supply lines, add medical equipment to the sectors subject to national security investment screening, and throw up export controls designed to keep supplies at home.

But despite (or perhaps because of) all the recent attention, the relationship between economics and national security remains confused and uncertain. Popular frames like *geo-economics* may accurately describe current events, but they are ambivalent in their diagnoses, leaving it unclear whether the blurring of economics and national security is something worth encouraging or fighting, a harbinger of something new or a return to historic norms. And this ambivalence reflects a deeper confusion in our discourse whether economics and national security are rivals or partners, whether economics is a tool of national security or national security a protector of economic relations.

The problem, this essay argues, is that we have misunderstood what economic and national security labels do. In line with rough caricatures of economic as business and national security as war, we treat the two as categories of behavior or subjects of regulation. Once we know what something is, we know which rules to apply. But neither economic nor national security is self-defining nor defined in these debates, leaving their

¹ Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment,' 22 *Journal of International Economic Law* 655 (2019).

contents fundamentally contested. The same activities can be defined as a function of one, the other, or both.

Parsing carefully the claims being made, and the various possible meanings of economics and national security, the essay argues that economics and national security operate not as subjects but as claims. Current debates, far from capturing the suits v. uniforms caricature, actually instantiate a much more fundamental choice in international law and international relations, between the logic of markets and the logic of state. Whether invoked to ‘secure’ borders, privacy, health, the environment, or jobs, claims of national security are claims about the proper location of policymaking. Appeals to economics, with their emphasis on global welfare and global person-to-person relationships, are as well. The logics driving the current economics-national security dynamic represent paradigmatic, competing models for organizing individuals with different normative justifications and concerns. Resolving the legal claims of both requires recognizing these fundamental, root choices.

After surveying first, in Part II, current economic-security tensions and then, in Part III, the legal rules with which they engage, this essay explores our instincts about the relationship between economics and security in Part IV and the deeper logics of market and nation animating them in Part V. Part VI describes how international law applies different logics to different subfields, while Part VII plumbs the meaning and role of national security claims. National security, I argue in that Part, has been miscast as an subject, when it is in fact, a claim – specifically, a claim to organize subjects through the logic of nations. Part VII wrestles with the recognition that economics and security may reflect irreconcilable paradigms, applying pluralist tools to both reframe current legal tensions and suggest tools for managing conflict. Part IX uses these new pluralist frames to recast emerging long-term fights in international law, particularly over climate change and data.

A few notes on the terms used here: In international law terms, ‘trade’ is treated as a specific legal subject and set of legal disciplines distinguishable from other areas of transnational economic and non-economic activity. For the purposes of this essay, exploring the relationship between transnational economic activity and national security, ‘trade’ is used in its broader sense to describe the relationships created through economic exchange. More bluntly, trade is used here as a stand-in for economic activity. The ‘trade regime’ is used to describe the legal regime governing the trade relations between states including the WTO and Free Trade Agreements.

Similarly, for the purposes of the discussion here, focused on international economic law and security interests, I use the term, ‘markets’ to describe the realm of interpersonal relations. But these interpersonal relations are much richer than mere contracts, reflecting relationships of friendship, family, and interpersonal duties. They focus not only on consent-based agreements, but on the duties and obligations each person holds to others as well. As described below, the focus is on the way individuals

organize through direct interactions, rather than under the authority of the state.

And finally, this essay will use the term ‘nation’ somewhat interchangeably with the more typical international law term—state. The point is not to be anachronistic, but to highlight the relationship to ‘national security’ and to notions of community solidarity that the term implies. As will become clearer below, nation also implies a normative argument for authority and power that the term state often obscures.

II. WORLDS COLLIDING

Business and national security increasingly seem on a collision course. Following logics of economic globalization fostered over the past few decades, businesses seek to build worldwide markets built on world-spanning supply chains. Through flexible supply chain contracts, they seek out value in a borderless business landscape that they can pass on to consumers and shareholders.

Increasingly though, those borders and their guards seem to be reemerging from the landscape as states reassert their security interests in the flow of goods, individuals, and information. The new border posts are popping up everywhere. States consider data localization requirements to guarantee access to information necessary to monitor threats or prosecute criminals.² States subject foreign investment to increasing scrutiny, reaching beyond traditionally sensitive sectors into new areas featuring more speculative concerns. The United States’ move to block acquisition of the LGBTQ dating app Grindr by a Chinese company, based on concerns regarding data security and usage³ is perhaps the most notable example. More recent investigations of the video-sharing service, TikTok, created by the merger of Musical.ly into the Chinese company ByteDance, are yet another.⁴ Both actions were taken by the Committee on Foreign Investment in the United States (CFIUS), an interagency committee tasked with reviewing foreign acquisitions in the United States for national security concerns. Those actions followed closely on decisions to block acquisitions of Lattice Semiconductors by Canyon Bridge Capital Partners, a US-headquartered private equity firm reportedly funded by the Chinese

² See Anupam Chander and Uyên P. Lê, ‘Data Nationalism’, 64 *Emory Law Journal* 677 (2015) (surveying localization laws).

³ See Georgia Wells and Kate O’Keeffe, ‘U.S. Orders Chinese Firm to Sell Dating App over Blackmail Risk’, *Wall Street Journal*, 27 March 2019.

⁴ See Greg Roumeliotis, Yingzhi Yang, Echo Wang and Alexandra Alper, ‘Exclusive: U.S. opens national security investigation into TikTok – sources’, *Reuters*, 1 November 2019 at 11:21 AM, <https://www.reuters.com/article/us-tiktok-cfius-exclusive/exclusive-u-s-opens-national-security-investigation-into-tiktok-sources-idUSKBN1XB4IL>.

government⁵ and Qualcomm by Singapore-based Broadcom,⁶ each raising concerns about national dominance of 5G communications technology.

This sudden spate of activity is unlikely to abate. In 2018, the U.S. Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA), which extends the coverage of CFIUS review to include ‘certain non-controlling investments into certain U.S. businesses involved in critical technology, critical infrastructure, or sensitive personal data.’⁷ And the United States is not alone in exercising investment screening. The European Union has, in the past year, adopted a mechanism to screen foreign investments in critical infrastructure for national security concerns,⁸ as have many of its member states. The global COVID-19 pandemic has accelerated this process, with the EU encouraging the use of investment screening to protect critical and strategic healthcare industries from foreign raiders.⁹ Spain, Italy,¹⁰ and the Czech Republic,¹¹ among others, have sought to update their own rules; France explicitly added biotechnologies to its list of strategic industries warranting special investment screening.¹² Outside of Europe, Australia, India,¹³ and China¹⁴ have all recently updated their laws providing for national security review of foreign investments.

⁵ See Liana B. Baker, ‘Trump bars Chinese-backed firm from buying U.S. chipmaker Lattice’, *Reuters*, 13 September 2017 at 4:22 PM, <https://www.reuters.com/article/us-lattice-m-a-canyonbridge-trump/trump-bars-chinese-backed-firm-from-buying-u-s-chipmaker-lattice-idUSKCN1B02ME>.

⁶ See Alan Rappeport and Cecilia Kang, ‘U.S. Calls Broadcom’s Bid for Qualcomm a National Security Risk’, *New York Times*, 16 March 2018.

⁷ United States Department of Treasury, Press Releases, ‘Treasury Releases Final Regulations to Reform National Security Reviews for Certain Foreign Investments and Other Transactions in the United States’, 13 January 2020, <https://home.treasury.gov/news/press-releases/sm872>.

⁸ See Sophie Meunier, ‘Monkey Cage: The E.U. will start screening foreign investment. Here’s the full story.’, *Washington Post*, 10 April 2019 at 6:00 AM EDT, <https://www.washingtonpost.com/politics/2019/04/10/eu-will-start-screening-foreign-investment-heres-full-story/>; Regulation of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, 2017/0224 (COD) PE-CONS 72/18, Brussels, 20 February 2019 (OR. en).

⁹ See Przemyslaw Kowalski, ‘Will the post-COVID world be less open to foreign direct investment?’, in Richard E. Baldwin and Simon J. Evenett (eds), *COVID-19 and Trade Policy: Why Turning Inward Won’t Work* 141 (London: CEPR Press, 2020) 131–151.

¹⁰ See *ibid.*, at 144.

¹¹ See Marek Hrubeš, ‘Czech FDI Screening Bill – Get Ready For New Regulatory Challenges’, *O-I-CEE!*, 19 May 2020, <https://www.ccelegalblog.com/2020/05/czech-fdi-screening-bill-get-ready-for-new-regulatory-challenges/>.

¹² Christine Graham et al., ‘Impact of COVID-19 on Global Foreign Direct Investment Screening Mechanisms’, *Cooley*, 15 June 2020, <https://www.cooley.com/news/insight/2020/2020-06-15-covid-19-global-foreign-direct-investment-screening>.

¹³ See Kowalski, above n 9, at 145.

¹⁴ See Chieh Huang, ‘China’s Take on National Security and Its Implications on the Evolution of International Economic Law’ (unpublished paper).

Labs and scientific collaborations, once held up as symbols of global cooperation, are now viewed with suspicion. State authorities worry that they have been infiltrated by foreign spies eager to steal intellectual property and sensitive technologies.¹⁵ Amidst proliferating stories of visa denials, lab raids, and arrests,¹⁶ Director of the U.S. Federal Bureau of Investigations Christopher Wray told a crowd at the Council on Foreign Relations that ‘the academic sector needs to be much more sophisticated and thoughtful about how others may exploit the very open, collaborative research environment that we have in this country and revere in this country.’¹⁷ And at the end of May 2020, the U.S. President issued a proclamation barring entry of and potentially revoking visas for Chinese students with ties to Chinese military schools.¹⁸

At the same time, trade flows are being weaponized, as states look to turn the increasing dependence of businesses on global markets and supply chains into leverage. Tariffs and blockades are instruments of choice in pressure campaigns—from Saudi Arabia and the United Arab Emirates’ ongoing fights with Qatar¹⁹ to Russia’s war with Ukraine to U.S. attempts to pressure Mexico over Central American migration.²⁰ Within the past year, Japan apparently retaliated against South Korean court decisions authorizing suits against Japanese companies for forced labor during World War II by restricting access to key chemicals needed by South Korea’s semiconductor industry and removing South Korea from its list of ‘trusted’ trade partners. South Koreans have responded by boycotting Uniqlo and other Japanese products.²¹ Applying U.S. export control laws, Chinese tech companies Huawei and ZTE have been cut off from buying key American components; concerns about 5G dominance, surveillance and artificial intelligence, sanctions violations, and trade war leverage have variously been cited as

¹⁵ See, e.g., Dennis Normile, ‘China’s scientists alarmed, bewildered by growing anti-Chinese sentiment in the United States’, *Science*, 31 July 2019; Elizabeth Redden, ‘Stealing Innovation’, *Inside Higher Education*, 29 April 2019 (discussing FBI Director Christopher Wray’s speech at the Council on Foreign Relations calling ‘for a ‘whole-of-society’ response to economic espionage threats’).

¹⁶ For more on the Department of Justice’s ‘China Initiative,’ see Margaret K. Lewis, ‘Criminalizing China’, 111 *Journal of Criminal Law and Criminology* (forthcoming December 2020).

¹⁷ Redden, above n 15.

¹⁸ Edward Wong and Julian E. Barnes, ‘U.S. to Expel Chinese Graduate Students With Ties to China’s Military Schools’, *New York Times*, 28 May 2020.

¹⁹ *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, in Minutes of Meeting Held in the Centre William Rappard on 22 November 2017, paras 3.1–3.15, WT/DSB/M/404, 6 March 2018.

²⁰ See Scott R. Anderson and Kathleen Claussen, ‘The Legal Authority Behind Trump’s New Tariffs on Mexico’, *Lawfare*, 3 June 2019 at 4:19 PM, <https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico>.

²¹ See Catherine Kim, ‘The Escalating Trade War Between South Korea and Japan, Explained’, *Vox*, 9 August 2019 at 4:30 PM EDT, <https://www.vox.com/world/2019/8/9/20758025/trade-war-south-korea-japan>; Simon Denyer, ‘Japan-South Korea dispute escalates as both sides downgrade trade ties’, *Washington Post*, 2 August 2019 at 4:20 AM EDT.

justifications. Chinese technology companies have also been targeted by India. Following military tensions at the disputed Himalayan border, India announced a ban on ‘59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order.’²² All 59, including again notably TikTok, were Chinese. And at the same time they are being weaponized, trade flows are increasingly treated as assets; the balance of trade is seen as measure of relative power and trade skirmishes as attempts to rebalance it in one state’s favor or another.

The intermingling of economics and national security is not new. Each of these stories has analogs in the recent and distant past. Some might even argue that the intermingling is a return to historical norms. But the rapid cascading of national security claims, including the first claims under the GATT national security exception to make it to dispute settlement, is a notable break from the past few decades of relative trade ‘peace.’ And while the various overlapping legal regimes could absorb a stray conflict here and there—as they had with U.S. Cuba sanctions,²³ for example—they are straining to remain standing in the face of so many rapid-fire blows.

Lawyers, domestic and international, had sought to channel the parrying between economic and security logics into a carefully choreographed dance of legal rules and dispute settlement mechanisms. But the dance increasingly looks more like a wrestling match. It is thus not surprising to see lawyers jumping back onto the floor to pull the fighters apart in the hopes of reasserting discipline.

III. THE LIMITS OF LEGAL FRAMES

To date, much of the conversation has been refracted through a series of legal rules that might define these relationships. Some of these rules are anchored within international economic law. Within the trade regime, for example, the relationship between economics and national security is governed primarily by Article XXI of the GATT, which provides that ‘nothing in this Agreement shall be construed...to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.’²⁴ This channels the relationship between trade and security

²² Government of India Press Information Bureau, ‘Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order’, 29 June 2020 at 8:47 PM, <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1635206>.

²³ ‘European Union reaches accord with the United States on Helms-Burton’, *Associated Press*, 11 April 1997, <https://apnews.com/cb3158dd5921f5af2fcdece96467f17e>.

²⁴ General Agreement on Tariffs and Trade, article XXI, 30 October 1947, 55 U.N.T.S. 188. The full provision reads:

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;

through questions about necessity, essentiality, the categories of security interest listed in the article, and most of all, the discretionary space created by ‘it considers.’²⁵ Those questions long structured arguments between members of the GATT and WTO about permissible measures. They are the questions that the WTO dispute settlement panel was forced to answer in the dispute brought by Ukraine against Russia, the first formal dispute raising that exception as a defense,²⁶ and which will need to be answered by the panels considering U.S. steel and aluminum tariffs. Article XIV *bis* of General Agreement on Trade in Services (GATS) and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) apply the same standards to disputes regarding those issues. The former may become relevant to brewing disputes over digital service restrictions; the latter came up in a recent dispute over the Saudi Arabia-based pirating of sports broadcasting from Qatar.²⁷ Investment treaties have their own clauses exempting ‘essential security’ issues, each with their own specific language. At the domestic level, statutes may establish their own standards for deviating from trade or investment rules.²⁸

On the flipside of the equation, rules governing international security may dictate when international economic obligations must give way. The United Nations Charter authorizes the Security Council to mandate ‘complete or partial interruption of economic relations’²⁹ in an effort ‘to maintain or restore international peace and security.’³⁰ The primacy of this provision is

(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.

²⁵ See, e.g., Roger P. Alford, ‘The Self-Judging WTO Security Exception’, 2011 Utah L. Rev. 697 (2011); Stephan Schill and Robyn Briese, ‘“If the State Considers”: Self-Judging Clauses in International Dispute Settlement’, 13 Max Planck Yearbook of United Nations Law 61 (2009); Dapo Akande and Sope Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’, 43 Virginia Journal of International Law 365 (2003).

²⁶ *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019 (adopted 26 April 2019). See Tania Voon, ‘Russia – Measures Concerning Traffic in Transit’, 114 American Journal of International Law 96 (2020).

²⁷ *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567, 16 June 2020.

²⁸ For an excellent in-depth discussion, see Kathleen Claussen, ‘Trade’s Security Exceptionalism’, 72 Stanford Law Review 1097 (2020). The International Emergency Economic Powers Act (IEEPA), for example, grants the U.S. president powers to deal with ‘any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.’ Title II of Public Law 95-223, 91 Statute 1626, enacted 28 October 1977. Section 232 grants the president authority to adjust imports that ‘threaten to impair the national security.’ 19 United States Code (USC) § 1862.

²⁹ UN Charter Article 41.

³⁰ UN Charter Article 39.

explicitly recognized in GATT XXI(c).³¹ The Articles of State Responsibility establish general rules for invoking ‘necessity’ to excuse their violations or to engage in otherwise unlawful countermeasures.³² The Law of Armed Conflict dictates when objects of ordinary international economic relations can become military targets.³³ And domestic national security statute may ground authority to engage economic sanctions.³⁴ Altogether, it is these rules that the WTO Dispute Settlement Body (DSB), investment arbitral tribunals, the International Court of Justice, or domestic courts are asked to parse in resolving disputes.

Much of the time, these rules help discipline the invocation of economic and security interests, channeling those interests through particular language and into particular dispute settlement mechanisms. But when the conflict between economic and security interests is heightened, resolving them through particular language is unlikely to be fully satisfying. At the end of the day, all of these tests hinge on some assessment of the relative normative value of the economic and security claims being made. ‘Essential,’ ‘Necessary,’ ‘Security,’ ‘Peace,’ are subjective assessments even when cloaked in objective tests. Any seemingly neutral attempt at applying a test’s language is likely to hide a normative theory of the relationship between economics and security.

IV. RELATING TRADE AND SECURITY

Part of what makes these developments so confounding is the ambivalent relationship between trade and security. Sometimes, trade is treated as an extension of national security; sanctions, embargos, and blockades are levers of power in international relations that can be used to bend others to a states’ will, as recognized in the United Nations Charter.³⁵ Current examples are far too numerous to list, but would include U.S. sanctions on Iran, Cuba, North Korea, Venezuela, and Russia; Saudi Arabia and the United Arab Emirates’ efforts to pressure Qatar; or Russia’s efforts to pressure Ukraine. On the flipside, under the same logic, trade imbalances are treated as evidence of national weakness. In the broadest sense, states with more positive trade flows are seen as more powerful international players. In the narrower sense, ceding control over certain sensitive technologies, from 5G to microchips, steel to footwear³⁶ is seen as a potential security threat.

³¹ See above n 7.

³² Responsibility of States for Internationally Wrongful Acts, Article 25 (2001).

³³ Such rules might dictate when a ship and its goods might be seized as contraband, when roads or railways might be bombed, when a dual-use factory might become a legal target, or when a cyber-attack crosses a threshold allowing for a counterattack on another states’ cyber-capacities.

³⁴ See, e.g., IEEPA, discussed in note 28 above.

³⁵ UN Charter Article 41.

³⁶ See *Sweden – Import Restrictions on Certain Footwear*, GATT L/4250, 17 November 1975, at para 4; GATT Council, ‘Minutes of Meeting’, GATT C/M/109, 10 November 1975,

Other times, trade is treated as source of national security. Many have supported improved trade relations between states as a means to improve relations, to develop interconnectedness and interdependence, and to drive cultural exchange. Robust trade relations can foster friendship between peoples and reduce friction between states. Trade fosters peace and reduces the need for war. Versions of this view have often been cited as justifications for the post-World War II Bretton Woods arrangements³⁷ and, since 1994, for the World Trade Organization. By this account, a world bound by trade is a securer world in which border defenses become unnecessary, superfluous, perhaps even impediments.

Still on other occasions, trade and security are conceptualized as choices, more ploughshares or more swords, businessmen or soldiers, making deals or making war. Laws—national and international—are often framed this way, laying out one set of pathways or rules if trade is invoked, another if security is.

Toggling between these different frameworks can make discussions of the relationship between trade and security slippery and confusing. The best we can usually do is to pick one conceptualization and work through the relationship within it. Part of the problem is that there are actually subtle differences between the ways in which the terms ‘trade’ and ‘security’ are used in these different contexts. In the first conceptualization, trade is a tool, a discrete activity that is encouraged, allowed, limited, or prohibited as means towards some broader aim, e.g. wealth, happiness, or security. In the second, trade is used to describe something broader—a set of relationships or ways of relating to one another that can obviate the need for fear or insecurity. In the third, trade is a way of describing a fundamental method of organizing human relations, a choice of markets over nations. Security is used similarly. In the second model, security is a desired outcome. In the first, security is the fundamental purpose of society, shorthand for the Hobbesian view that society and state exist for fundamental purpose of providing security against the savagery of others. Security and state in this view are one and the same.

V. COMPETING PARADIGMS

These subtle differences hint at a more fundamental, more difficult relationship between trade and security lurking behind these conceptualizations. Trade and security fundamentally are competing paradigms, ways to see the world and organize relationships. The reason why the relationship is so difficult to conceptualize is because the relationship looks different depending which paradigm one is in.

at 8–9; *Sweden – Import Restrictions on Certain Footwear*, GATT L/4250/Add.1, 15 March 1977, at 1.

³⁷ ‘I reasoned that, if we could get a freer flow of trade — freer in the sense of fewer discriminations and obstructions — so that one country would not be deadly jealous of another and the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance for lasting peace.’ Cordell Hull, *The Memoirs of Cordell Hull* (New York: Macmillan Publishers, 1948) 84.

The paradigm of trade imagines the ‘market’ and the interpersonal relationships of exchange that it fosters as the ideal of human relationships. Individuals exercise their will by choosing the things they want to make or acquire. When trade works best, everyone is happier for the exchanges. In this paradigm, security is a hedge, a set of tools to use when the market and choice break down, when some individuals use their power to dominate others and strip them of their choice and will. Security is thus written as the exception, an alarm button behind glass that when pushed unleashes the protective power of the state. The paradigm of security is quite different. Security imagines the solidarity of the nation as a means to transcend the state of nature, the threat of interpersonal domination, and unleash happiness. It is through community rules and the pooling of power to enforce them that individuals are able to create the conditions allowing individuals to thrive. Security is the ultimate purpose of the state. Trade can be valuable, but it can only provide benefits if security is assured, and accordingly, must always be a secondary consideration.

The security exceptions to trade and investment agreements, the domestic statutes authorizing economic security measures, the necessity provision of the Articles of State Responsibility, and the UN Charter’s grant of sanctions authority all operate as glass doors between these two parallel universes. Some, like the GATT security exception, open from the trade side; others like the UN Charter open from the security side.

Trade and security are each totalizing paradigms through which to view the world that view the realm of the other as the exception; seen through the eyes of the trade regime, security is a regrettable, but sometimes necessary evil; through the eyes of the security regime, trade is a peacetime privilege, rather than right, and a wartime tool.³⁸ The exceptions clauses act as doors between these two parallel universes. But the code for opening them is different depending on which side one is on. This makes relying on them to contain disputes between the two worldviews extraordinarily dangerous.

VI. ORGANIZING INDIVIDUALS

This underlying logic hints at the broader dispute the trade-security debates surface. At a deep level, international law and international society are torn between two competing models of how to organize individuals. This is compounded (though not created) by the liberalism underlying much of the system’s rules. One common description of liberalism is that it elevates the value of the individual and the individual will. Each person has dignity, is a subject rather than an object of the law, whose choices are worthy of respect. Such formulations are common fodder of human rights instruments. But those basic commitments pose a challenge for broader organization: how can/should those competing wills be accommodated when individuals come

³⁸ See Kenneth Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley Publishing Company, 1979) 126 (‘Only if survival is assured can states safely seek such other goals as tranquility, profit, and power.’).

into contact or conflict with one another? If each individual's will is worthy of respect and should be promoted, how can they be balanced against one another? Today, two imperfect answers dominate in international law: the market and the nation.³⁹ The former reflects the logic of the interpersonal. Individuals find each other and build consensual relationships based on affinity, exchange, or contract. Individual wills are accommodated through consensual interactions and interpersonal obligations. Such self-organization has taken many forms, but the at a macro, international level, this type of organization is today often associated with the market. The latter reflects the logic of community. Individual wills are accommodated through notions of group solidarity and, in some cases, democratic decision-making. Such communities can take many forms and may be of varying size, ranging from the family or the congregation, to the locality, province, state, or even international organization, but the dominant imagined policymaking unit today, the presumptive font of communitarian authority at the international level, is the nation or state.⁴⁰

Neither model is above criticism from within the logic of liberalism. Both forms of relationship, while able to help individuals realize their goals in groups, can also threaten individual liberty. The market allows for domination of weaker individuals by more powerful ones. The nation allows the majority to dominate the minority. Both systems have developed methods to soften those concerns, including fiduciary duties or requirements of consent (sometimes, deep and robust, sometimes, thin) in the former and notions of rights and due process in the latter.⁴¹ They have also each sought to remedy their respective deficiencies by creating space for the other to

³⁹ See, e.g., Benedict Kingsbury, 'Whose International Law—Sovereignty and Non-State Groups', 88 *American Society of International Law Proceedings* 1, 1 (1994) (describing 'two current, competing visions of international relations—namely, international society and liberal transnational civil society—and their accompanying approaches to sovereignty'). The particular shape of these two models—the mix of liberties and responsibilities, right and duties attached to each—has shifted with shifting conceptions of the individual, community, society, and nation. Today, these two views might be best exemplified by Friedrich Hayek and John Rawls. Whereas Hayek argued that individual liberty was best protected by maintaining a well-functioning transnational market, Rawls focused on the duties owed by individuals to each other within a particular nation or society. For Rawls, the duties owed to those outside the political community were decidedly secondary, as his *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) demonstrates.

⁴⁰ See, e.g., *ibid.*, at 9. As Kingsbury explains of this model, 'state sovereignty is the centering of power/authority inside a given territory, enabling the development there of justice and law, freedom and social progress; but it is also the negation of such community outside the state.' *Ibid.*, at 3.

⁴¹ These models are fluid: self-organization can result in communal organizations whose relationship to individuals begins to resemble nations, and nations can enter the marketplace and act as incredibly powerful market players. Unsurprisingly, when these shifts happen, protections created for each model may seem insufficient, drawing calls to regulate rights within corporations, NGOs, international organizations, and religious communities through public-law like rules of transparency, due process, and reason-giving or to treat nations like ordinary market players, stripping them of privileges like sovereign immunity and subjecting them to notions of fair dealing and contractual obligation.

operate as a counterweight. Markets rely on the laws of nations to guarantee against certain, particularly evil forms of domination and to guarantee the continued functioning of the marketplace. Nations cede massive areas of policy space to markets, allowing individuals to vote through their interpersonal interactions rather than through group politics.

At the international level, the ambivalence between these two methods of organizing has led to a rough division of labor across different 'fields,' 'subjects,' or 'disciplines.' In some, international law leans heavily on the state, granting it primary authority and obligation to achieve policy goals. In others, international law leans heavily on markets or interpersonal interactions.⁴² The basic allocations of authority have been reasonably stable over the past decades, but hardly uncontroverted, with critics questioning both the location of authority in states or markets and the over-reliance on those two forms of organizing over others.

Modern international law is deeply intertwined with states. Many of its most basic rules exist not to constrain states (as some sovereigntists depict), but to empower them. By recognizing the state as the basic unit of international relations, empowering those who claim to speak in its name, endowing it with legal personality, and recognizing its monopoly on force with its territorial boundaries, international law grants states first crack at organizing individuals within their jurisdiction. All of international law in this sense defaults back to states, as the political units able to make binding commitments. International law's general preference for states is true even in fields that seem designed to limit state power in favor of the individual and interpersonal relations. Human rights law, for example, self-consciously recognizes the liberty of individuals to self-organize in social groups, families, religions, or political parties. But it embeds that liberty within states: States, not individuals or corporations, bear the obligation to respect the rights of those within their jurisdiction; states, in turn, are granted a 'margin of appreciation' in how best to do so. Limitations and derogations clauses assume some room for the state's collectivity to make policy judgments on how best to balance various rights and policy concerns against one another. Only in extremis are those state decisions scrutinized by others outside the state. Only in extremis is the solidarity of individuals regionally or worldwide elevated over the solidarity within the nation-state. International Criminal Law goes further in elevating interpersonal obligations: individuals have obligations not to harm other individuals in certain ways, regardless of their nationality and irrespective of any state's orders. The recognition that '[c]rimes against international law are committed by men, and not by abstract entities'⁴³ is, in a sense, the ultimate

⁴² These two conceptualizations are sometimes associated with Hedley Bull's distinction between 'pluralist' views of international society in which states are the central subjects and 'solidarist' ones focused on the transnational individual. See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan Publishers, 1977) 13.

⁴³ 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 223 (1947).

vindication of individuals' obligations to other individuals. Even in that field though, state solidarity does not disappear. Jurisdiction is, for the most part,⁴⁴ controlled by states that opt into or vote for various international courts. More tellingly, jurisdiction is cabined by the doctrine of complementarity, in which states get an exclusive crack at providing justice that disappears only after states have proven 'unwilling or unable' to do so.

By contrast, trade and investment law have been given over (by states—it is international law, after all) to the logic of the interpersonal, or in their terms, the market. The underlying assumption of both regimes is that comparative advantage knows nothing about territorial boundaries and that markets will make better decisions in the global allocation of goods, labor, and investment than states would. The state is thus relegated to the margins, retaining supremacy over decisions deemed within its ambit—redistribution, health and safety policy, environmental protection, and national security. State intervention is treated as exceptional—literally—relegated principally to the exceptions clauses like Articles XX and XXI of the GATT. By some accounts, this was precisely the goal of the system's designers, to insulate global markets from the protectionists impulses of national decisionmaking.⁴⁵

There is nothing inherent or obvious about the current allocation of subjects between nation and market, and tensions often arise over implicit (or explicit) arguments that the mix is incorrect. Human rights violations by transnational corporations, for example, have posed a challenge for human rights law's state-focused regime. Many arguments for recognizing corporate obligations to respect human rights invoke notions of interpersonal responsibility—human rights responsibilities that those individuals (or groups of individuals, e.g., corporations) in a more powerful economic position owe to those in a weaker one.⁴⁶ They suggest a relational notion of human rights quite different from the state-focused one we currently have.

Closely entwined with both borders and national welfare, migration is generally seen as a matter for state policy within international law. But that frame is far from uncontroverted. Some like Tendayi Achiume, have tried to break out of this dynamic to emphasize the transborder obligations

⁴⁴ Obviously, there are exceptions, including ICC jurisdiction over non-state-party nationals who commit a crime in the territory of a state-party, or perhaps, as in the Rohingya case, where crimes in a non-state-party spill over into territory of a state-party. See Michail Vagias, 'Case No. ICC-RoC46(3)-01/18', 113 *American Journal of International Law* 368 (2019).

⁴⁵ See generally Quinn Slobodian, *The Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018).

⁴⁶ See, e.g., 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', U.N. E/CN.4/Sub.2/2003/12/Rev.2 (2003) ('Recognizing that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.').

between peoples.⁴⁷ Applying the logic of trade, economists often argue in favor of liberalized immigration and an open labor market as a source of potential gains for all.⁴⁸ And ‘refugee’ or ‘asylum’ invokes a different sort of relationship, bringing to mind interpersonal obligations (sometimes described in religious terms) to support those in danger and in need of help.⁴⁹

To put it another way, while these regime frames are often taken for granted, they are inherently unstable, in part because of the imperfect choices underlying each, and in part because of the permeable lines between different policy areas delegated to each method of organization. The lines we have drawn between trade and economic rights, health and safety, and environmental policy, among others, while ingrained, are difficult to sustain, particularly as policy in each area deepens and widens in scope. This has long been apparent in ‘trade and...’ topic areas, but is quickly coming to a head in new areas like data regulation,⁵⁰ freer of preconceptions, and subject to tugs-of-war between different paradigms or frames.

VII. DEFINING NATIONAL SECURITY

Recognizing these elemental tensions in international law and international relations put national security claims in a new light. Attempts at cutting through the normative fog often start by trying to define, or really, delimit, the *subject* ‘national security.’ Security, as exemplified in the wide range of stories noted at the beginning of this paper, is a difficult concept to restrain in the wild. Its blob-like character presents a daunting, even menacing challenge.⁵¹ As Ben Heath has well-documented, the range of issues credibly described as security seems to be expanding exponentially with each passing decade.⁵² There have always been expansive, abusive security claims—2019’s claim that off-shoring auto-parts research threatens U.S. national security⁵³ brings to mind 1975’s threat to Sweden from footwear imports⁵⁴—

⁴⁷ E. Tendayi Achiume, ‘Migration as Decolonization’, 71 *Stanford Law Review* 1509 (2019); E. Tendayi Achiume, ‘Governing Xenophobia’, 51 *Vanderbilt Journal of Transnational Law* 333 (2018).

⁴⁸ See, e.g., David Dollar and Aart Kraay, ‘Spreading the Wealth’, 81(1) *Foreign Affairs* 120 (January/February 2002).

⁴⁹ See, e.g., Jaya Ramji-Nogales, ‘Undocumented Migrants and the Failures of Universal Individualism’, 47 *Vanderbilt Journal of International Law* 699, 706–07 (2014).

⁵⁰ See below Part IX.

⁵¹ See Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (New York: Harvester Wheatsheaf, 1991) 18.

⁵² J. Benton Heath, ‘The New National Security Challenge to the Economic Order’, 129 *Yale Law Journal* 924 (2020). See also Congyan Cai, ‘Enforcing a New National Security – China’s National Security Law and International Law’, 10 *Journal of East Asia and International Law* 65 (2017).

⁵³ See ‘President Donald J. Trump is Protecting the American Automobile Industry and its Vital Role in Our National Security’, *The White House*, 17 May 2019. Notably, the above press announcement is listed under the heading ‘Economy & Jobs.’

⁵⁴ See *Sweden – Import Restrictions on Certain Footwear*, GATT L/4250, 17 November 1975, at para 4; GATT Council, ‘Minutes of Meeting’, GATT C/M/109, 10 November 1975,

though arguably, in the 21st century world of complex supply chains, any key product could be the source of ‘weaponized interdependence.’⁵⁵ But those prior claims usually posited some nexus to traditional warfare or its demands. Today, no one blinks when data and cyber security, terrorism, economic crisis, drug and human trafficking, infectious diseases, and even climate change are described as national security concerns. This has led to attempts to contain the blob, to demand that security only be invoked as an exception to trade when it bears a close relationship to traditional militarized security. This is one of the techniques floated by the WTO dispute settlement panel in *Russia—Traffic in Transit* case. In that decision, the panel emphasized the proximity of the Russia-Ukraine conflict to more traditional notions of warfare as a factor in favor of Russia’s invocation of GATT Article XXI.⁵⁶ Overall though, the push is often to define “security” as a means of cabining these exceptions.

But this tact, I would argue, misses the underlying dynamic driving the blob’s growth. It is ‘national’ rather than ‘security’ that seems to be doing much of the work. National security is not a *subject* of international regulation, but a *claim* about where regulation should be centered.

Security, as a subject, need not be understood in national terms. Discussions of ‘human security,’ for example, often focus on the extent to which individuals themselves have access to certain rights or basic needs. The efforts to provide such notions of security are often conceived in transnational terms. Similarly, some descriptions of the challenge posed by climate change sound in transnational or human security—recognition that all are threatened and need protection.⁵⁷

The question we should be asking when examining the varied security claims described here is not the manner in which security is being sought, nor the means through which security is threatened, but what is being ‘secured.’ While some of the claims currently being made can be connected to traditional military activities and traditional concerns about, war, invasion, or subjugation, others like concerns over data privacy, intellectual property theft, refugee flows, or environmental protection are not, or if they are, only in very attenuated ways.⁵⁸ Certainly, concerns about data, highlighted in the

at 8–9; *Sweden – Import Restrictions on Certain Footwear*, GATT L/4250/Add.1, 15 March 1977, at 1.

⁵⁵ Henry Farrell and Abraham L. Newman, ‘Weaponized Interdependence: How Global Economic Networks Shape State Coercion’, 44 *International Security* 42–79 (Summer 2019).

⁵⁶ On the *Russia – Traffic in Transit* decision, see Geraldo Vidigal, ‘WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed – Something Blue?’, 46(3) *Legal Issues of Economic Integration* 203 (2019); Voon, above n 26.

⁵⁷ See, e.g., Maryam Jamshidi, ‘The Climate Crisis Is a Human Security, Not a National Security, Issue’, 93 *Southern California Law Review Postscript* 36 (2019).

⁵⁸ There is a contingent of national security professionals who likely do see military threats in every corner of transnational activity. And for some, anything that might provide a bargaining advantage might be classified as a matter of security. See, e.g., Thomas C. Schelling, *Arms and Influence* (New Haven: Yale University Press, 1966). Their concerns are amplified considerably though by their alliance with those more concerned about

Grindr, TikTok, and Huawei cases, for example, have been framed in traditional national security language, but the nature of the actual threat posed has remained vague—some concerns regarding state or industrial espionage, some concerns regarding personal privacy, gestures to the threat of influence campaigns and election interference, or speculative concerns about the value of expanded data-flows to militarized artificial intelligence.⁵⁹ To put it another way, the national security claims underlying these concerns rely on preconceptions either that national security includes notions of influence or propaganda, far removed from the physical threats traditionally implicated, or that national security concerns have no temporal bounds, that any advantage another state might accrue, for any eventual physical conflict, no matter how speculative or distant, constitutes a national security threat. Under these preconceptions, national security collapses upon itself, becoming synonymous with national advantage or disadvantage.⁶⁰ A belief in the intrinsic value of the particular ‘nation’ is the core, fundamental engine of the claim.

This reveals the true logic of these national security claims: the common thread running through all of these claims is that a particular political unit, the nation or state, is threatened, that its wealth or power is under attack, that its ability to determine the rules that will govern and apply to its nationals warrant protection. National security claims at their most fundamental level are claims about the value of nations and the right to protect nations’ essential characters. This is true whether the claims are really about military technology or about protecting jobs.⁶¹ Even in militarized contexts, this idea is intrinsic in modern concepts of national security. Combined with notions of self-determination, national security recognizes the right of individuals to choose their national community.⁶² Borders, real

protecting national wealth and pride. The latter often use the language of the former to keep them on board with their goals and to take advantage of international law’s exceptions for true national emergencies.

⁵⁹ See, e.g., Drew Harwell and Tony Romm, ‘U.S. government investigating TikTok over national security concerns’, *Washington Post*, 1 November 2019.

⁶⁰ See, e.g., Peter Navarro, ‘Why Economic Security Is National Security’, *RealClearPolitics*, 9 December 2018 (‘[S]uch economic security readily translates into national security because it is only through an enduring American prosperity where we will find the growth, resources, and technological innovations necessary to field the most advanced military in the world.’).

⁶¹ See ‘Fact Sheets: President Donald J. Trump is Protecting the American Automobile Industry and its Vital Role in Our National Security’, *White House*, 17 May 2019 (gesturing in both directions in one press release). See also ‘Fact Sheets: President Donald J. Trump is Addressing Unfair Trade Practices That Threaten to Harm Our National Security’, *White House*, 8 March 2018. That fact sheet notes simultaneously that: (1) ‘The Department of Commerce’s report concluded that levels of foreign steel imports threaten to impair national security by displacing domestic production’; (2) ‘[T]hese industries will be able to re-open closed mills, sustain a skilled workforce, and maintain or increase production’; and (3) ‘One of the pillars of the President’s National Security Strategy is to “Promote American Prosperity.”’ *Ibid*.

⁶² Notably, human rights treaties allow derogation from their rules ‘[i]n time of war or other public emergency threatening the life of the nation.’ European Convention on Human Rights

and virtual, are justified (quite poorly in many cases) as protection of those collective choices.

Thus while ‘security’ implies a risk worth defending against, ‘national’ suggests where that defense should be centered. National security concerns are not ones best left to local policing, nor to transnational action. To put it another way, when something is asserted as a national security ‘threat,’ it is a *claim* to national prerogative and choice.⁶³ To suggest that those threats aren’t urgent, based on some alternative baseline of what should be in a nation’s interest, fails to take the claims for what they are and attempts to replace them with their opponents want them to be. Such threat claims can be (perhaps, should be) contested. They cannot be subjected to objective, external legal definition.

The national security exceptions are thus at their most fundamental levels expressions of nationalism, a fence thrown up to preserve the integrity of national communities, national solidarity, and national decisionmaking against dissolution into the global mush.⁶⁴ It is thus no surprise that populist nationalists invoke the language of national security to justify protectionist and anti-immigrant policies. But nationalism here need not be understood in a pejorative sense. While this nationalism might reflect parochialism, it might also reflect democratic ideals and principles of subsidiarity or a realistic assessment of the threat environment—a recognition that individuals need the state’s protection against external threats/that only the state can protect them from threats of domination. In this sense, national security claims not only embody arguments favoring organization through national solidarity, they encompass and represent all such arguments. If trade symbolizes all arguments for organization through markets; national security symbolizes all such claims for organization through nations.

States’ reactions to the global COVID-19 pandemic have exemplified this logic. The threat of disease and death, coupled with real and feared shortages of necessary equipment and medicines have fairly been described as vital security concerns.⁶⁵ But as in other areas described here, security has most often been equated with *national* security and national security with

Article 15.1; International Covenant on Civil and Political Rights Article 4. At least implicitly, the ‘life of the nation’ is held up as an intrinsic value worth special, perhaps even preeminent protection.

⁶³ This observation aligns with work of the Copenhagen School of international relations. See Chien-Huei Wu, ‘The Securitisation of US-China Economic Relations: Contagion and Resilience’ (unpublished working paper) (describing work of Barry Buzan, Ole Wæver, and others). As Ole Wæver has explained, naming something a national security threat is a ‘speech act.’ ‘By uttering “security,” a state-representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it.’ Ole Wæver, ‘Securitization and Desecuritization’, in Ronnie D. Lipschutz (ed), *On Security* (New York: Columbia University Press, 1995) 46–86 at 55.

⁶⁴ See Wæver, above n 63 (‘Threats seen as relevant are, for the most part, those that effect the self-determination and sovereignty of the unit.’).

⁶⁵ See, e.g., Oona Hathaway, ‘COVID-19 Shows How the U.S. Got National Security Wrong’, *Just Security*, 7 April 2020, <https://www.justsecurity.org/69563/covid-19-shows-how-the-u-s-got-national-security-wrong/>.

securing each states' access to its own supplies. Focusing attention on the safety of the 'nation,' national security rhetoric seems to have crowded out calls for international responses and international cooperation in the allocation of necessary supplies in favor of more parochial responses.⁶⁶ Thus in Europe,⁶⁷ India,⁶⁸ and Canada,⁶⁹ among others, national security investment screening has been extended to medical fields. Stories that the United States had sought to lure CureVac from Germany to the United States in hope of gaining access to a potential vaccine only seemed to confirm the need for a defense against strategic acquisitions.⁷⁰ Other states invoked national security to throw up export controls and keep necessary supplies from leaving the country. Geoffrey Gertz, using data from the International Trade Centre, counted '95 countries have introduced some form of temporary export restrictions related to COVID-19' by May 10.⁷¹ At the same time, states have invoked national security powers, like the Defense Production Act in the United States, to buy supplies wherever they can find them. Recently, it was reported that the United States had bought 'virtually all the stocks for the next three months of one of the two drugs [Remdesivir] proven to work against Covid-19, leaving none for the UK, Europe or most of the rest of the world.'⁷²

But notably, though perhaps not surprisingly, the invocation of national security to fight the pandemic has not been confined to medical supplies. As states have turned their attention to supply chains for medical supplies, talk of 'reshoring' for national security has quickly moved beyond the disease to other economic interests. Japan has considered 'encouraging manufacturers to source more from Southeast Asia and bring production of highly profitable products, such as critical auto parts, back to Japan.'⁷³ In the

⁶⁶ See Geoffrey Gertz, 'Coordinating the international distribution of medical goods', in John R. Allen and Darrel M. West (eds), *Reopening the World: How to Save Lives and Livelihoods* (Washington, DC: Brookings Institution, 2020), 12–16; Mona Pinchis Paulsen, 'COVID-19 Symposium: Thinking Creatively and Learning from COVID-19 – How the WTO can Maintain Open Trade on Critical Supplies', *Opinio Juris*, 2 April 2020, <http://opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning-from-covid-19-how-the-wto-can-maintain-open-trade-on-critical-supplies/>.

⁶⁷ See above Part II.

⁶⁸ *Ibid.*

⁶⁹ Amanda Connolly, 'Risks from Chinese takeovers mean Canada needs tougher investment rules: experts', *Global News*, 8 June 2020 at 5:02 PM, <https://globalnews.ca/news/7040029/canada-foreign-takeovers-china/>.

⁷⁰ 'Germany tries to stop US from luring away firm seeking coronavirus vaccine', *Reuters*, 15 March 2020 at 7:31 AM EDT, updated 15 March 2020 at 9:38 PM EDT, <https://www.cnbc.com/2020/03/15/coronavirus-germany-tries-to-stop-us-luring-away-firm-seeking-vaccine.html>.

⁷¹ Gertz, above n 66, at 12.

⁷² Sarah Bosely, 'US secures world stock of key Covid-19 drug remdesivir', *Guardian*, 30 June 2020, <https://www.theguardian.com/us-news/2020/jun/30/us-buys-up-world-stock-of-key-covid-19-drug>.

⁷³ 'Japan Aims to Break Supply Chain Dependence on China in Light of Covid-19', *Japan Times*, 6 March 2020, <https://www.japantimes.co.jp/news/2020/03/06/business/japan-aims-break-supply-chain-dependence-china/#.Xv5bt5NKhsY>.

United Kingdom, an industry representative argues that the pandemic ‘has shown the importance of the manufacturing base not only to the economy but to national security as well and that has been recognised by the Government.’⁷⁴ ‘I would hope that there will be [a boost] from reshoring,’ he continued.⁷⁵ In the U.S., the Trump administration has couched its response as part of much larger trade fight with China, a message echoed by an EU Commissioner.⁷⁶ And of course, China has noticed. ‘The pandemic has brought numerous challenges for China: a protracted slowdown in the global economy, prevailing anti-China sentiment in the West and the mixing of politics and business. “National security” is now often misused to block Chinese companies from markets and technologies.’⁷⁷

The quick elision of these policy concerns, of pandemic response and jobs, demonstrates how the national security frame is fundamentally about the interests of the nation rather than any particular threat. It equates security with nation and prioritizes national needs, national prerogatives, and national decisionmaking. It is, in its most irreducible, essential form, a claim for organizing through states.

VIII. OF PARADIGMS AND PLURALISM

What does this redefinition of the trade-security dilemma mean for current attempt to find a path forward through or between the two? If trade and security reflect truly different paradigms—market and nation—we can no longer treat conflicts between the two simply as technical matters of interpretation. Rather, when looking at the claims of trade and security, we are looking at the claims of two competing systems. Mediating conflicts through law is difficult, if not impossible.

Recognizing that trade and security, market and nation, reflect two different paradigms clarifies but complicates the attempts to mediate the two. Seen through the lens of international economic law, the test of any security measure is whether it can meet the standards of the treaties in question and their exceptions clauses. The question will be how much exceptional behavior by states the international economic law tribunals should tolerate. But seen through the eyes of national security, the question will be how long to tolerate trade rules that impinge upon core state concerns. Rather than

⁷⁴ Tim Wallace, ‘Economy facing deep freeze without a vaccine’, *Daily Telegraph*, 13 May 2020.

⁷⁵ “‘And if there’s any vindication of the President’s “Buy American, secure borders, and a strong manufacturing base” philosophy, strategy, and belief, it is this crisis – because it underscores everything that we see there.’” 2 April 2020 Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (quote from Peter Navarro).

⁷⁶ “‘The issue of dependency of the EU vis-à-vis China, and other countries . . . was on the table before Covid-19,” said [EU Commissioner Stella] Kyriakides.’ Jim Brunsdon and Michael Peel, ‘Covid-19 Exposes EU’s Reliance on Drug Imports’, *Financial Times*, 20 April 2020, <https://www.ft.com/content/c30eb13a-f49e-4d42-b2a8-1c6f70bb4d55>.

⁷⁷ Edward Tse, ‘Staying for the Duration’, *South China Morning Post*, 29 April 2020.

focusing on the language of those treaties, focus will fall on international law's basic protections of sovereignty, on domestic national security statutes that turn off trade laws' effects, on the deliberate hedging against full effect embodied in domestic treaty implementation,⁷⁸ and on the ultimate option of withdrawal. And these paradigms are reinforced in siloed or semi-siloed communities of practice,⁷⁹ whose member spend almost all their time on one side of the glass door.⁸⁰ A WTO Dispute Settlement Body or investment arbitration decision that states appear to accept will be seen by practitioners in those areas as a win for the trade or investment regimes, but it will be a mirage. So too, in the opposite direction, with national security claims that are seemingly acquiesced to by the trade or investment regime. Two separate systems of law, each and its proponents will claim the right to determine the space allowed for the other. Peaceful accommodation between the trade and security regimes does not reflect systemic integration, but merely peaceful accommodation.

Trade and security thus inhabit the realm of legal pluralism, and the laws in question are best conceived as conflicts rules.⁸¹ This puts the various tribunals tasked with judging the relationship in an uncomfortable position familiar to national courts dealing with transnational litigation. They can strictly apply the rules or develop bright-line tests and risk irrelevance, or they can experiment with judicial diplomacy, adopting forms of comity that risk sully their mystique as courts.

Noting the apparently irreconcilable claims of the trade and security paradigms, some scholars have focused less on mediating conflicts than on forcing each paradigm and its proponents to internalize the costs its actions impose on the other. Simon Lester and Huan Zhu have thus suggested reinterpreting national security actions within the trade regime as a type of safeguard measure, a measure explicitly conceived as national political safety

⁷⁸ See, e.g., Maria Angela Jardim de Santa Cruz Oliveira, *International Trade Agreements Before Domestic Courts: Lessons from the EU and Brazilian Experiences* (New York: Springer Publishing, 2015) 48–50.

⁷⁹ Cf. Brendan Sargeant, 'Integrating Australia's Security And Economic Policy Cultures', *East Asia Forum*, 5 December 2019, <https://www.eastasiaforum.org/2019/12/05/integrating-australias-security-and-economic-policy-cultures/> (noting and bemoaning the separation of economic and security into different domains in Australia). On international law's communities of practice, see Harlan Grant Cohen, 'International Precedent and the Practice of International Law', in Michael A. Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015) 172–194.

⁸⁰ See Heiko Borchart, 'Supply chain management and economic statecraft: a five-point agenda', *East Asia Forum*, 29 June 2020, <https://www.eastasiaforum.org/2020/06/29/supply-chain-management-and-economic-statecraft-a-five-point-agenda/> ('Whereas the security community considers FDI a potential vector for unwanted outside interference, the economic community sees it as a lubricant of economic cooperation. Cooperation will not be possible without a proper understanding of the drivers shaping each partners' worldview.').

⁸¹ See Harlan Grant Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', 44 *NYU Journal of International Law and Politics* 1049 (2012), at 1090–97.

valve for those invoking it.⁸² As with safeguards,⁸³ they suggest, the best response may not be to judge the measure lawful or unlawful, but to instead allow other states, harmed by the national security measure, to engage in rebalancing, withholding commensurate benefits from the state that has invoked national security. Simon Lester has since proposed with Inu Manak embedding such rebalancing within a carefully designed WTO Committee on National Security that can structure and guide discussions over both national security measures and proper compensation.⁸⁴ Nicolas Lamp has alternatively suggested responding to national security claims with non-violation complaints within the WTO system.⁸⁵ Such complaints would allow states harmed to seek compensation without requiring any normative judgment of the national security claims.⁸⁶

From a pluralist perspective, one of the benefits of these suggestions is that they shift focus from authoritative normative decisions and towards information sharing. By focusing on the costs to others of national security claims, they can help those within the national security paradigm to properly price their intervention and weigh their impact not just within their frame but within that inhabited by others as well. While this approach is exemplified in these non-adjudication models, it can be extended to adjudication ones as well. An alternative vision of the dispute settlement mechanisms—in trade, investment, at the United Nations—is that they can be used to help establish normative baselines. The point would not be to adjudicate the ultimate legality of particular measures, but instead to help share perspectives from one regime or paradigm to the other, clarifying the range of acceptable and unacceptable processes and measures, with the hope of facilitating long-term accommodations. Actors within each paradigm may still overstep what actors in the other will view as acceptable, but having identified the space of acceptable actions, may more often be able to remain within it. In this regard, the key to the WTO panel’s decision in *Russia—Traffic in Transit* is not that Russia won, nor that the panel found aspects of Art. XXI claims to be justiciable, but instead its guidance as to what it and future panels would review such claims for.⁸⁷ Likewise, the United States’ national security claims regarding its steel and aluminum tariffs may be an opportunity for the

⁸² Simon Lester and Huan Zhu, ‘A Proposal for “Rebalancing” To Deal With “National Security” Trade Restrictions’, 42 *Fordham International Law Journal* 1451 (2019).

⁸³ Under GATT Article XIX and the Safeguards Agreement, WTO members can temporarily use trade restrictions to protect a domestic industry facing ‘serious injury’ as a result of a sudden and recent influx of imports.

⁸⁴ Simon Lester and Inu Manak, ‘A Proposal for a Committee on National Security at the WTO’, 30 *Duke Journal Comparative and International Law* 267 (2020).

⁸⁵ Nicolas Lamp, ‘At the Vanishing Point of Law: Rebalancing, Non-Violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars’, Queen’s University Legal Research Paper, forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470617.

⁸⁶ The GATT allows members to bring a dispute where they believe that the actions of another member have ‘nullified or impaired’ a benefit they negotiated for, even when that other member has not violated any GATT rules.

⁸⁷ See Voon, above n 26.

panels considering them to send a signal about the frontier of acceptable claims within the trade regime.⁸⁸ The key observation though is that whatever mechanism is used to respond to disputes, accommodations between trade and national security will in the end be political rather than legal.

IX. WHOSE JOBS, WHOSE DATA, WHOSE ENVIRONMENT?

The contested political space between these paradigms will become all the more important as the market v. nations dynamic extends into old and new fields. The exceptions clauses of the GATT and the UN Charter reflect accommodations between trade and security, market and nation, of the late 1940's, based on geopolitical and economic realities of the time,⁸⁹ tweaked around the edges to reflect changing circumstances over the decades that followed. The stability of that accommodation reflected stability in relative material conditions of the postwar world.⁹⁰ But deepening disaffection over the allocation of wealth and resources punctuated by the global financial crisis, growing recognition of the crisis posed by climate change, and anxiety about the revolutionary changes of new technologies have challenged settlements over allocations of decisionmaking authority. Many are unhappy with how wealth and power have been allocated and anxious how these changes will allocate and reallocate them in the future. And, this frayed consensus is reified in tensions between frames and appeals to shift from one to other. Battles over wealth distribution, over climate change policy, and over the regulation of data are likely to sound in the language of markets v. nations, of freedom v. threat, of growth v. security, of everyone v. us.

Questions about global wealth distribution and the allocation of growth policies to markets (trade) and redistribution policies to nations have been an early signal of the instability inherent in existing regime choices—scouts in the coming battle for decisionmaking territory.⁹¹ Populist politics

⁸⁸ Which those claims are certainly beyond.

⁸⁹ For a nuanced account of the how the language of the GATT security exception emerged from a particular moment, reflecting an imperfect accommodation between warring frames even within the U.S. government itself, see Mona Pinchis-Paulsen, 'Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions', 41 Michigan Journal of International Law 109 (2020).

⁹⁰ Notably, the most significant potential shift in material conditions of the postwar world—decolonization—also produced the most significant threat to the postwar market-nation accommodation. The New International Economic Order (NIEO) proposed by newly independent states specifically sought to re-center control of resources *within* the nation, asserting, for example, their 'permanent control of natural resources.' Proponents objected to purported international law rules that left their economies in control of foreign capitalists. The response, as Quinn Slobodian describes, was a redoubled effort to provide legal protections for capital and markets at the international level, including by strengthening and expanding existing international economic law institutions. See Slobodian, above n 45, at 218–62. In that battle between nations and markets, markets emerged triumphant.

⁹¹ See Harlan Grant Cohen, 'What is International Trade Law For?', 113 American Journal of International Law 326 (2019).

both left and right have sought to dislodge the assumption that the mix of jobs available is a question of markets rather than national policy. Tariffs and industrial policy⁹² are bandied about as national policy tools that can guarantee a particular mix of jobs at home,⁹³ even at the expense of broader wealth creation across nations.

Climate change has become a similarly contested problem, pulled between competing frames. Is the problem, requiring complex balancing between policy priorities, one best tackled through (1) national decisionmaking (and attendant *national* sharing of burdens and benefits),⁹⁴ a model exemplified by the Green New Deal,⁹⁵ (2) an international problem best approached through transnational cooperation,⁹⁶ or (3) an interpersonal problem requiring individual solidarity across borders over resource consumption and sustainability. In other words, is the paradigmatic response national subsidies for solar panel production⁹⁷ and programs to create ‘good green jobs’ at home, an environmental goods agreement liberalizing trade in green technologies,⁹⁸ or personal commitments to veganism, reduced air-travel, and a politics of sustainability rather than growth. The conflicts have

⁹² See, e.g., Michael Nienaber, ‘Germany, France agree industrial policy plan for Europe’, *Reuters*, 19 February 2019 at 8:06 AM, <https://www.reuters.com/article/us-germany-france-industrial-policy/germany-france-agree-industrial-policy-plan-for-europe-idUSKCN1Q811O>; Todd Tucker, ‘Industrial Policy and Planning: What It Is and How to Do It Better’, *Roosevelt Institute*, 30 July 2019, <https://rooseveltinstitute.org/industrial-policy-and-planning/>; Marco Rubio, ‘Made in China 2025 and the Future of American Industry’, Washington, DC: US Senate Committee on Small Business and Entrepreneurship, 2019; Elizabeth Warren, ‘A Plan For Economic Patriotism’, *Medium*, 4 June 2019, <https://medium.com/@teamwarren/a-plan-for-economic-patriotism-13b879f4cfc7>.

⁹³ Again, Trump administration statements are telling: “‘Your business was dead. And I put a little thing called a “25 percent tariff” on all of the dumped steel all over the country. And now your business is thriving,” Trump said at a rally in August in Monaca, Penn.’ Jeff Stein, ‘As a Kentucky mill shuts, steelworkers see the limits of Trump’s intervention’, *Washington Post*, 25 October 2019.

⁹⁴ Compare Mark P. Nevitt, ‘The Commander in Chief’s Authority to Combat Climate Change’, 37 *Cardozo Law Review* 437, 443–44 (2015), with Richard H. Moss, ‘Environmental Security? The Illogic of Centralized State Responses to Environmental Threats’, in Paul Painchaud (ed), *Geopolitical Perspectives on Environmental Security* (Quebec: Studies and Research Center on Environmental Policies (GERPE), Université Laval, 1990) at 24 (critiquing this view).

⁹⁵ See, e.g., Lisa Friedman, ‘What is the Green New Deal?: A Climate Proposal Explained’, *New York Times*, 21 February 2019.

⁹⁶ See Moss, above n 94; Jamshidi, above n 57.

⁹⁷ See, e.g., Ryan Driskell Tate, ‘The federal government subsidized the carbon economy. Now it should subsidize a greener one.’, *Washington Post*, 26 April 2019 at 6:00 AM EDT, <https://www.washingtonpost.com/outlook/2019/04/26/federal-government-subsidized-carbon-economy-now-it-should-subsidize-greener-one/>; Timothy Meyer, ‘How Local Discrimination Can Promote Global Public Goods’, 95 *Boston University Law Review* 1939 (2015).

⁹⁸ See, e.g., James Bacchus and Inu Manak, ‘The Green New Deal Is Missing a Critical Element: Trade’, *Hill*, 28 March 2019, available at <https://www.cato.org/publications/commentary/green-new-deal-missing-critical-element-trade>.

become particularly clear in divergent responses⁹⁹ to local subsidies attached to environmental policies and the WTO dispute settlement system's response.¹⁰⁰ The conventional allocation of redistribution policies to the national and growth policies to the transnational¹⁰¹ here cast a long shadow. As the rhetoric of threat heats up, it will be important to recognize the inherent disagreements over who should be making climate change policy, through what logic, and according to what process.

The regulation of data too has put these questions in stark terms. Discussions of transnational data flows toggle constantly between frames of personal privacy, competitiveness, crime control, and national security, among others. With these frames come competing policy prescriptions—national (or regional, as in GDPR) attempts at privacy protection,¹⁰² demands for data localization,¹⁰³ trade agreements promising the free flow of data across supply chains,¹⁰⁴ and pressures for decoupling the technologies of potentially adversarial states.¹⁰⁵ Emerging battles over 5G, for example, toggle between national security concerns over access to sensitive data, concerns about national competitiveness in future technological fields, and concerns over corporate abuses of personal privacy. The first suggest firewalls around national internets; the second, supporting national champion companies in worldwide competition; the third, reining in oligopolistic internet companies. The *Schrems II*¹⁰⁶ decision in Europe highlights these conflicts in different terms, pitting European control over privacy against U.S. demands for security surveillance and private attempts to contract over data flows. The extreme instability of these frames is enough to induce whiplash in observers.

That instability though reflects the extreme ambivalence between markets and nations underlying these frames. Data policies have the potential

⁹⁹ Compare Todd Tucker, 'Monkey Cage: There's a big new headache for the Green New Deal', *Washington Post*, 28 June 2019 at 5:00 AM EDT, <https://www.washingtonpost.com/politics/2019/06/28/theres-big-new-headache-green-new-deal/> with Simon Lester, 'Misunderstandings on the WTO, Trade, and the Environment', *CATO At Liberty*, 28 June 2019 at 9:16 AM, <https://www.cato.org/blog/misunderstandings-wto-trade-environment>.

¹⁰⁰ See, e.g., *United States — Certain Measures Relating to the Renewable Energy Sector*, DS510, 27 June 2019 (finding U.S. state-level green energy programs requiring local equipment in violation of U.S. obligations not to discriminate against foreign producers).

¹⁰¹ See generally Cohen, above n 91; Gregory Shaffer, 'Retooling Trade Agreements for Social Inclusion', 2019 *University of Illinois Law Review* 1 (2019).

¹⁰² See, e.g., Shannon Togawa Mercer, 'The Limitations of European Data Protection as a Model for Global Privacy Regulation', 114 *AJIL Unbound* 20 (2020).

¹⁰³ See, e.g., Jennifer Daskal, 'Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues', 8 *Journal of National Security Law and Policy* 473 (2016); Chander and Lê, above n 2.

¹⁰⁴ See, e.g., Neha Mishra, 'Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows', 52 *Vanderbilt Journal of Transnational Law* 463 (2019).

¹⁰⁵ See, e.g., Michael Hirsh, 'Trump's Economic Iron Curtain Against China', *Foreign Policy*, 23 August 2019 at 6:03 PM, <https://foreignpolicy.com/2019/08/23/trumps-economic-iron-curtain-against-china-hawk-peter-navarro-american-factory-obama/>.

¹⁰⁶ Case C-311/18, Judgment of the Court (Grand Chamber), 16 July 2020.

to massively reallocate wealth and authority in ways unfathomable to the designers of the current legal infrastructures. To many, data looks different in kind from other newly developed resources or industries; other developments may have required tweaking the rules, but didn't fundamentally threaten the basic calculus underlying them. The rules provided the right amount of give to allow adaptation. The battles over data regulation suggest a shared instinct that that is no longer the case, that it is not the rules that are being debated, but the basic allocation of authority to make them. States, corporations, and individuals shift alliances to gain advantage in a constant game of tug-of-war.

X. CONCLUSION

Geopolitical sands are shifting, leaving us feeling off balance. Our carefully framed picture of the relationship between economics and national security seems out of focus. And sharpening the picture seems only able to bring one or the other into clear view. But our ambivalence reveals more than it obscures. The clarity of the prior picture was a mirage, a temporary alignment between two views of how to organize the world. The logic of markets and nations have diverged, promising different distributions of wealth, power, and authority. In a world changed by multipolarity, technology, and climate, battles between national security and economics are now battles for control.