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Strategic Stability in the Technology Domain

Disciplining the use of trade and investment restrictions

INSIDE THIS PAPER

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About this paper. This is a working paper, version of September 2026, circulated for comment. It develops remarks delivered at the 12th International Affairs Summer Forum of the University of International Business and Economics (UIBE), Beijing, on 18 July 2026. Comments are welcome.

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AT A GLANCE

The paper in numbers

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"necessity" tests the trading system already applies: TBT Article 2.2, SPS Article 5.6 and GATT Article XX

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security exception, GATT Article XXI, which reserves the judgment of necessity to the invoking state

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self-binding criteria of restraint

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Abstract and Introduction

ABSTRACT

Governments in Washington, Brussels, Beijing and elsewhere now treat economic security as synonymous with national security, and restrictions on trade in and investment into technology have multiplied accordingly. This paper makes three arguments. First, trade and security were never completely separate domains; what ended was a quarter-century bet that closer economic integration with a rival would render security claims redundant. Second, the obvious legal discipline, the least-trade-restrictive-alternative test that the WTO applies under the TBT and SPS Agreements and GATT Article XX, cannot be carried over to the security exception: Article XXI reserves the judgment of necessity to the invoking state, the first panel to interpret it imposed only a minimal objective standard of review, and the Member whose invocations have been most extensively litigated, the United States, refuses to accept even that. Third, what remains available is a self-binding discipline grounded in the logic of strategic stability. In this paper, I propose five criteria of restraint (specificity, nexus, least-restrictive-available, reversibility and transparency) that a state should be willing both to apply to its own measures and to have others apply to them. The paper closes by arguing that the greater danger lies not in governments invoking security cynically, which is relatively easy to expose, but in fears that are genuinely held yet have no natural limit, so that the range of technologies treated as critical to national security keeps expanding without anyone necessarily acting in bad faith.

Keywords: economic security; GATT Article XXI; security exceptions; export controls; investment screening; strategic stability; US–China technology competition

A security claim that no international tribunal will review has to be disciplined, if at all, by the state that invokes it.

The public debate about economic security tends to start from an accusation of bad faith: that governments reach for national security spuriously, or even flippantly, to dress up measures that are really about protecting industry and then use the security label to put those measures beyond challenge. The accusation has often been justified, and some of the examples border on the comical.[1] But as I argue in this paper, the cynical or opportunistic invocation of national security is the smaller of two problems, and the legal tools we instinctively reach for to deal with it are largely unavailable. The larger problem, to which I return in Section 4, is the sincere invocation of national security.

This paper originated as a short talk at the 12th International Affairs Summer Forum hosted by the University of International Business and Economics (UIBE) in Beijing in July 2026. It proceeds in four steps.

[1] In 1975 Sweden imposed global import quotas on certain footwear and justified them under GATT Article XXI, arguing that a domestic production capacity for essential goods such as shoes was needed for its emergency planning in wartime. See GATT, *Sweden – Import Restrictions on Certain Footwear*, L/4250, 17 November 1975.

Section 1 deconstructs a widely held misconception, namely that trade and security used to sit in separate policy silos and have only recently been fused by a new doctrine of economic security. These two policy priorities and their advocates were in fact never separate. What changed is that the belief in one highly seductive idea, that trading with a rival makes a state safer, lost its power. That diagnosis is important, because it alters the question we should be asking.

Section 2 explains why the obvious discipline, the least-trade-restrictive-alternative requirement at the core of the necessity test under the TBT and SPS Agreements and GATT Article XX, cannot simply be transposed to the security exception. Article XXI reserves the judgment of necessity to the invoking Member. The panel in *Russia – Traffic in Transit* reviewed the circumstances listed in the subparagraphs objectively but subjected that judgment only to an obligation of good faith and a minimum requirement of plausibility. The Member whose invocations have been most extensively litigated, the United States, refuses to accept even that standard. Since the Appellate Body ceased to function in December 2019, moreover, adverse panel reports can be appealed into the void.

Section 3 argues that if discipline cannot be imposed through dispute settlement or adjudication, it will have to be self-imposed, and that the rationale for such self-restraint lies in the theory of strategic stability. It proposes five criteria of restraint: specificity, nexus, least-restrictive-available, reversibility and transparency. None of the criteria is new on its own, and proposals to discipline security measures outside adjudication are not new either; each criterion has antecedents in existing instruments, from the 1982 GATT Decision on Article XXI and the Agreement on Safeguards to the OECD's 2009 guidelines on investment screening. What this paper adds is a single standard that applies across trade restrictions, investment screening and export controls alike, that states apply to their own measures, and that is grounded in the logic of strategic stability rather than in welfare economics or treaty design. It also draws on commitments that Washington, Brussels and Beijing have each already expressed and so applies with equal force to measures taken in all three. The section closes by asking what could make a state's commitment to these criteria credible in the absence of third-party enforcement.

Section 4 offers a conclusion that I believe can actually be defended, albeit one more limited in ambition than the one I would ideally propose. For security measures, the binding, if limited, discipline of adjudication is no longer available. What remains instead is a shared vocabulary of restraint, whose force depends on states' interest in a more predictable trade and investment environment and on their desire to be believed when they invoke security, that is, to have their security claims accepted as made in good faith. The paper then returns to the sincere invocation of security, and argues that it, rather than the cynical claim, is what the proposed criteria of restraint are ultimately for.

An annex turns the five criteria into a short self-assessment checklist that a government, or anyone scrutinizing a government, can put to a specific measure.

SECTION

01

The Bet That Ended

IN THIS SECTION

Trade and security were never entirely separate domains. What ended in the years to 2022 was the bet that closer economic integration with a rival would render security claims redundant.

1.1 The Conventional Account

A widely held account of the relationship between trade and security holds that trade policy was once an extension of foreign policy, occupying a realm adjacent to, but distinct from, security policy. More recently, a new doctrine equating economic security with national security has displaced that arrangement, allowing security considerations to override the older agenda of economic integration.[2] It is an account that many including myself, had long found persuasive.

The doctrine itself is real enough, and it now finds formal expression in each of the three capitals that matter most for trade and technology. The United States National Security Strategy of December 2017 declared that economic security is national security.[3] China's holistic national security concept, articulated by Xi Jinping in April 2014, treats economic security as the foundation on which the other elements of national security rest.[4] The European Union, which for decades regarded itself as the least securitized of the three, adopted its first Economic Security Strategy in June 2023.[5] Middle powers have followed. Japan appointed its first minister for economic security in October 2021 and enacted an Economic Security Promotion Act in May 2022, placing economic measures within its national security framework for the first time in legislation.[6] For smaller states living alongside larger and potentially hostile neighbors, however, the fusion is not new. Singapore's Total Defence concept has included an economic pillar since 1984, and Finland's concept of comprehensive security has long treated security of supply as one of its foundations.[7] What is new is less the idea than its adoption by the largest economies. What is contestable is the account of how the doctrine arose, and in particular the claim that it marks a break with a past in which trade and security occupied separate silos.

[2] For an influential account of this transition, see Roberts, Choer Moraes and Ferguson (2019), describing a shift from a neoliberal to a geoeconomic order marked by the securitization of economic policy and the economization of strategic policy.

[3] The White House (2017), *National Security Strategy of the United States of America*, December 2017, introduction to Pillar II.

[4] The concept was set out at the first meeting of the Central National Security Commission on 15 April 2014 and was subsequently written into the National Security Law of 2015.

[5] European Commission and High Representative (2023), *Joint Communication on a European Economic Security Strategy*, JOIN(2023) 20 final, 20 June 2023.

[6] Act on the Promotion of Ensuring National Security through Integrated Implementation of Economic Measures (Act No. 43 of 2022), enacted 11 May 2022.

[7] Ministry of Defence of Singapore, "Fact Sheet: Total Defence Logo" (15 February 2020), recording the introduction of Total Defence in 1984 and the addition of Digital Defence as a sixth pillar in 2019; Security Committee of Finland, *Security Strategy for Society*, Government resolution (updated November 2025).

1.2 Trade and Security Were Never Separate

From the earliest days of the post-war economic architecture, trade and security were treated as intertwined rather than separate policy tracks. The General Agreement on Tariffs and Trade (GATT) of 1947 contained a security exception in Article XXI from the outset, because its drafters were well aware that they would need one. The Coordinating Committee for Multilateral Export Controls (COCOM) was agreed among the Western allies in late 1949 and was operating by early 1950, only months after the United States had placed its own peacetime export controls on a statutory footing in the Export Control Act of 1949. Section 232 of the Trade Expansion Act of 1962 authorizes the President to adjust imports of any article that threatens to impair the national security, including through tariffs and quotas.[8]

Throughout the Cold War, export controls, embargoes and technology denial were security instruments administered through the conventional tools of trade policy. The Uruguay Round did not change this but rather extended it. When the WTO agreements were concluded in 1994, the security exception was replicated for services in Article XIV *bis* of the General Agreement on Trade in Services (GATS) and for intellectual property in Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Figure 1 sets out the sequence.

FIGURE 1 · TRADE AND SECURITY, 1947–2022

1947	1949	1962	1982	1994	2017	2019	2022
GATT ships with a security exception in Article XXI	COCOM agreed to coordinate Western export controls against the Eastern bloc	Section 232 lets the US President restrict imports on security grounds	GATT Decision asks parties to inform one another of Article XXI measures	Security exception extended to services (GATS XIV bis) and IP (TRIPS 73)	US National Security Strategy: economic security is national security	Russia – Traffic in Transit; Appellate Body stops functioning	US steel and aluminum panel reports circulated, then appealed into the void in January 2023

Source: Author, based on the instruments and reports cited in Sections 1 and 2.

The 1982 entry in Figure 1 merits attention, because it shows that the contracting parties were uneasy about the breadth of the exception long before the current wave of security-based trade and investment restrictions. Prompted by the trade measures several Western governments imposed on Argentina during the Falklands conflict, the CONTRACTING PARTIES, at their Thirty-Eighth Session in November 1982, adopted a decision recording that, subject to the exception in Article XXI(a), contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI, and that parties affected by such measures retain their full rights under the General Agreement.[9] Although it appears on its face to be a modest text, the Decision is nonetheless, as Section 3 argues, one of several places in which the multilateral trading system has already set down part of the vocabulary of restraint this paper proposes.

1.3 The Integration Bet

What changed, then, was the collapse of one highly seductive idea. For roughly a quarter of a century after 1991, most governments proceeded on the belief that trading with a rival made one safer. Thomas Friedman gave it its most memorable form, the Golden Arches Theory of Conflict Prevention: no two

[8] 19 U.S.C. § 1862. For most of its life Section 232 was used sparingly. Its revival in 2018 against steel and aluminum imports, including those from allies, is what brought it to the center of the current debate.
[9] GATT (1982), Decision Concerning Article XXI of the General Agreement, L/5426, 30 November 1982.

countries with a McDonald's had fought a war against each other since each acquired one.[10] The theory was offered half in jest, but the idea beneath it was held seriously at the highest levels of government. It underwrote China's accession to the WTO in December 2001 and, in Germany, where it went by the name *Wandel durch Handel* (change through trade), a growing dependence on Russian gas. Trade, in other words, became part of security policy. That was the bet on which the post-Cold War economic order rested.

The bet frayed in 1999, when NATO bombed a Yugoslavia that had been serving Big Macs in Belgrade for a decade, and again with Russia's war with Georgia in 2008 and its annexation of Crimea in 2014. It failed conclusively in February 2022, when Russia, home to McDonald's since 1990, invaded Ukraine, where the chain had traded since 1997. Within three months McDonald's had announced its withdrawal from Russia, and its restaurants reopened under a Russian owner and a new name.[11]

The contemporary doctrine that economic security is national security is best understood as the unwinding of that bet. Once integration was no longer expected to deliver security, the restraint it had placed on security claims fell away.

1.4 Why the Diagnosis Changes the Question

This diagnosis is important because it alters the question. If security and trade were always entangled, then the objective cannot simply be to separate them into distinct policy silos, since that would mean reverting to a baseline that never existed.

The real question is how much discipline to place on security claims now that the integration bet no longer restrains them. While that bet held, restraint came largely from outside the law. Governments did not need to be told that restricting trade with a partner was costly and destabilizing; the prevailing theory of security did this work on its own. Security measures were used, but against adversaries with whom integration had never been attempted, as with COCOM, rather than against partners in whom integration was believed to be reinforcing security.

That external restraint has now largely disappeared, and it has done so precisely in the relationship where the stakes are highest: between the United States and China, the two largest economies and the leading technology powers, which remain deeply interdependent in exactly the technologies over which they now compete. The question for the remainder of this paper is where a replacement discipline might come from. For a trade lawyer, the obvious answer is the law. However, Section 2 explains why this approach offers far less than it appears to.

[10] Friedman (1999). Friedman first floated the idea in his *New York Times* column in December 1996.

[11] McDonald's Corporation (2022), announcement of its exit from the Russian market, 16 May 2022. The restaurants reopened in June 2022 under the brand *Vkusno i tochka*.

SECTION

02

Why the Obvious Discipline Is Not Available

IN THIS SECTION

> *[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. ... [T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal.*

Chief Justice Earl Warren, *United States v. Robel*, 389 U.S. 258, 263–64 (1967)

2.1 The Necessity Test

For a trade lawyer, the word "discipline" brings one instrument to mind almost automatically: the necessity test.

Article 2.2 of the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) requires that a technical regulation not be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account the risks that non-fulfillment would create. Around that single word, "necessary", an entire body of jurisprudence has developed. The measure is compared with reasonably available, less trade-restrictive alternatives, and where the complainant identifies one that would make an equivalent contribution to the objective, the measure is found inconsistent with Article 2.2.[12]

The requirement is not confined to one agreement. The Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), which governs food safety and animal and plant health measures, contains a closely analogous test in Article 5.6: a measure must not be more trade-restrictive than required to achieve the Member's appropriate level of sanitary or phytosanitary protection. A footnote to that provision sets out the elements of the test, which the Appellate Body in *Australia – Salmon* held to be cumulative: the complainant must identify an alternative measure that is reasonably available, taking into account technical and economic feasibility; that achieves the Member's appropriate level of protection; and that is significantly less restrictive to trade. The qualifier "significantly" sets a higher threshold than its TBT counterpart and leaves correspondingly more room for the regulating Member.[13]

The general exceptions in GATT Article XX operate in the same way, at least in those paragraphs that use the word necessary: those concerning public morals, human, animal or plant life or health, and

[12] See in particular Appellate Body Reports, *US – Tuna II (Mexico)*, WT/DS381/AB/R, adopted 13 June 2012, which set out the relational analysis under Article 2.2, and *US – COOL*, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012, on the comparison with reasonably available alternatives.

[13] Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, adopted 6 November 1998.

compliance with laws that are otherwise consistent with the GATT.[14] Where a Member defends a measure as necessary to protect health or public morals, the panel weighs and balances the importance of the interest pursued, the contribution of the measure to it and its trade-restrictiveness, and then asks whether a less trade-restrictive alternative was reasonably available.[15]

Across all three provisions, the test asks whether the aim pursued could have been achieved in a less trade-restrictive manner, which is a more demanding question than whether the measure is connected to a legitimate aim. Table 1 sets the three side by side, and adds the security exception for contrast.

TABLE 1 · THREE NECESSITY TESTS AND ONE EXCEPTION

Provision	Covers	Standard	Who decides
TBT Art. 2.2	Technical regulations	Not more trade-restrictive than necessary to fulfill a legitimate objective	Panel, on an objective assessment
SPS Art. 5.6	Food safety, animal and plant health	Not more trade-restrictive than required to achieve the appropriate level of protection	Panel, on an objective assessment
GATT Art. XX (a), (b), (d)	General exceptions	Necessary, after weighing and balancing and a search for reasonably available alternatives	Panel, on an objective assessment
GATT Art. XXI(b)	Essential security interests	Action "which it considers necessary" for the protection of its essential security interests	The invoking Member, subject to good faith and a plausibility floor

Source: Author, based on the texts of the agreements and the reports cited in this section.

Given how firmly this discipline is embedded elsewhere in the WTO agreements, it might seem natural to extend it to security measures. The literature has generally resisted that step, arguing at most for a review of good faith rather than of necessity,[16] and the reason lies in the text. Where a treaty security clause refers simply to "necessary" measures, international courts and tribunals have applied an objective necessity test; where, as in Article XXI, it refers to action a party "considers necessary", the International Court of Justice has treated the determination as the invoking state's, while still reviewing it for good faith.[17]

2.2 Article XXI and the Reservation of Necessity

Under each of these provisions, whether a measure is necessary is a question for objective assessment by the panel, which examines the relationship between the measure and its objective. Article XXI(b), by contrast, reserves that determination to the invoking Member.

That difference is textual. The relevant paragraphs of Article XX cover measures "necessary to" protect the interests they list, leaving necessity to be established objectively. Article XXI(b) instead covers "any

[14] Paragraphs (a), (b) and (d). Other paragraphs use different language; paragraph (g), on exhaustible natural resources, requires only that a measure be "relating to" conservation, which the Appellate Body has read as a looser means-ends relationship.

[15] Appellate Body Reports, *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001; *US – Gambling*, WT/DS285/AB/R, adopted 20 April 2005; *Brazil – Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007.

[16] Hahn (1991); Schloemann and Ohlhoff (1999); Cann (2001); Akande and Williams (2003); contrast Alford (2011).

[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 116, paras. 222–223; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161; *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177, para. 145.

action which it considers necessary for the protection of its essential security interests". The qualifier "which it considers" attaches the assessment of necessity to the invoking party. The negotiating history indicates that the drafters were aware of the balance they were striking: they sought to preserve genuine latitude for security measures without creating an exception broad enough to shelter measures adopted for commercial reasons.[18] When the TBT and SPS Agreements were negotiated almost five decades later, their drafters chose the opposite approach and made necessity a matter for review by a panel.

For more than seven decades no panel ruled on what, if anything, this meant. In *Russia – Traffic in Transit*, a panel confirmed for the first time that the security exception is justiciable at all.[19] Its reasoning had three elements. First, whether the circumstances listed in the subparagraphs of Article XXI(b) exist, such as an "emergency in international relations", is an objective question for the panel. Second, the invoking Member must articulate the essential security interests at stake sufficiently to demonstrate their veracity, and the further the emergency invoked lies from armed conflict or a breakdown of law and public order, the more specifically it must do so. Third, the measures must meet a minimum requirement of plausibility in relation to those interests, which is to say they must not be implausible as measures protective of them. All of this is overlaid by the obligation to interpret and apply the exception in good faith.

The standard of review that emerges from *Russia – Traffic in Transit* is therefore limited. Two of its elements, the articulation of essential security interests and the plausibility of the measures in relation to them, correspond closely to criteria proposed in Section 3. It does not, however, amount to a necessity test. The panel held that it is for the invoking Member to determine the necessity of its measures for the protection of its essential security interests,[20] and it afforded the Member considerable latitude in defining those interests, subject to the obligation of good faith. Within those limits, the Member's own assessment prevails.

2.3 The Self-Judging Position and the Appellate Void

Even this thin standard of review has not been accepted by the Member whose invocations have been most extensively litigated. In the steel and aluminum disputes, the United States maintained, as it had already argued as a third party in *Russia – Traffic in Transit*, that Article XXI is self-judging and therefore non-justiciable. The panels rejected that position and, in reports circulated in December 2022, found that the Section 232 duties on steel and aluminum had not been taken "in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii). A separate panel reached

[18]The formulation reserving the necessity determination to the invoking party was not present from the outset. The US drafts of 1946 did not contain the "considers" formulation and did not appear to make the exception self-judging. The words "which it may consider to be necessary" entered the text only in mid-1947, after a sustained internal dispute between the US State Department, which feared that a sweeping exception would destroy the ITO, and the military departments, which sought a free hand and were supported by members of the Senate Finance Committee. Even then, the US delegate described the provision as a question of "balance" between latitude for genuine security measures and protection against measures with a commercial purpose, and confirmed that affected Members could seek redress through the nullification or impairment procedures. See Responses of the United States of America to Questions from the Panel and Russia to Third Parties, Russia – Traffic in Transit, WT/DS512, 20 February 2018; E/PC/T/A/PV/33 (24 July 1947), 20–21, 26–27; Pinchis-Paulsen (2020); Panel Report, *Russia – Traffic in Transit*, WT/DS512/R.

[19]Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, circulated 5 April 2019, adopted 26 April 2019. The panel's approach was followed in Panel Report, *Saudi Arabia – IPRs*, WT/DS567/R, circulated 16 June 2020.

[20] Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, para. 7.146.

the same conclusion on the US origin-marking requirement for goods from Hong Kong, China. [21] The United States rejected the reasoning of both sets of reports, stating after the origin-marking report that it would not cede decision-making over its essential security to the WTO, and appealed them in January 2023.[22]

The appeals remain unresolved because the Appellate Body has been unable to hear appeals since 11 December 2019, when the continued blocking of appointments by the United States left it without the three members required to constitute a division; the last sitting member's term expired at the end of November 2020. An appealed panel report therefore cannot be adopted, and the US appeals of January 2023 remain in this legal void.

Appellate review has not vanished entirely. A group of Members, including the European Union and China, established the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in 2020 as an interim mechanism among themselves, and its membership had grown to 61 by the close of the Ministerial Conference in Yaoundé in March 2026.[23] But the MPIA binds only its participants, and the United States is not among them. For the measures that matter most in the technology domain, it offers no recourse.

A further point is often obscured by the focus on the appellate crisis. Were the Appellate Body restored tomorrow, the discipline available for security measures would still be the deferential standard of review articulated in *Russia – Traffic in Transit*. The difficulty lies not only in the breakdown of the machinery: even when it functioned, it was never designed to apply a necessity test to security measures.

Taken together, these developments leave little room for optimism about adjudication. The discipline one might ideally seek is not available under the existing text, cannot be created within the system as it currently stands, and has been resisted by the Members whose measures have been at issue. The United States is not alone in this. As respondents, Russia argued that the panel could do no more than record its invocation of Article XXI, and Saudi Arabia asked the panel to decline to make any findings at all, although without framing its request in terms of justiciability.[24] China, which has argued for review of US measures as a complainant, has tended when defending its own measures to rely on the general exceptions in Article XX rather than on Article XXI. Members' positions on review of the security exception have thus tended to depend on whether they were invoking the exception or contesting its invocation by others. Of the forty-two Members that participated as parties or third parties in the disputes decided so far, only the United States consistently maintained throughout that the exception is non-justiciable.[25] As matters stand, any strategy for disciplining security measures that relies on WTO adjudication is less a plan than a wish.

[21] Panel Reports, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/R (China), WT/DS552/R (Norway), WT/DS556/R (Switzerland) and WT/DS564/R (Türkiye), circulated 9 December 2022; Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R, circulated 21 December 2022.

[22] Office of the United States Trade Representative, statements on the WTO panel reports in the steel and aluminum disputes, 9 December 2022, and in the origin-marking dispute, 21 December 2022; notifications of appeal by the United States, 26 January 2023.

[23] European Commission, Directorate-General for Trade and Economic Security, "Outcome of the 14th WTO Ministerial Conference", 30 March 2026. MC14 closed without agreement on dispute settlement reform, and consultations continue in Geneva.

[24] Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, para. 3.2; Panel Report, *Saudi Arabia – IPRs*, WT/DS567/R.

[25] E Xiaomei (2024), 82, citing Li Xiaoling (2023), 38.

2.4 Beyond Goods: Services, Technology and Capital

This paper addresses investment restrictions as well as trade restrictions, and the legal position there is thinner still. The security exceptions in the GATS and the TRIPS Agreement track the language of the GATT. Much of what is being restricted in the technology contest, however, lies outside trade in goods altogether: the export of know-how and tools through export controls, the acquisition of companies through inbound investment screening and, increasingly, the outward flow of capital itself.

Most of these measures fall largely outside WTO disciplines. Investment screening regimes such as the Committee on Foreign Investment in the United States (CFIUS), strengthened by the Foreign Investment Risk Review Modernization Act of 2018, the European Union's screening framework under Regulation (EU) 2019/452, and China's Measures for the Security Review of Foreign Investment, in force since January 2021, operate under domestic law. The United States added an outbound investment regime in 2023.[26] Where international investment agreements reach these measures, many contain security exceptions drafted in self-judging terms: the US Model Bilateral Investment Treaty of 2012, for example, preserves measures that a party "considers necessary" for the protection of its own essential security interests. Export controls are coordinated, where they are coordinated at all, through non-binding arrangements such as the Wassenaar Arrangement rather than through any justiciable regime.

China has built a parallel set of controls over the outward movement of technology, know-how and, increasingly, people. Its Catalogue of Technologies Prohibited or Restricted from Export brought the recommendation algorithms at the center of the TikTok dispute under licensing in 2020 and rare earth processing and magnet manufacturing technology in December 2023; a package of further controls announced in October 2025, covering related equipment and technologies, was at the time of writing suspended under the Busan arrangements until November 2026, while the Catalogue itself remains in force.[27] In April 2026 the National Development and Reform Commission, acting under the foreign investment security review mechanism, ordered the unwinding of Meta's completed acquisition of the AI start-up Manus, even though the company had moved its headquarters and core staff from China to Singapore the previous year, and after its co-founders had been barred from leaving China during the investigation.[28] A State Council framework tightening control over overseas transactions involving Chinese investors, technology and data followed in June 2026.[29] Less formally, Beijing has reportedly encouraged regulators and local governments to curb transfers of technology, equipment and skilled personnel to India and Southeast Asia, guidance widely linked to Foxconn's recall of several hundred Chinese engineers from its Indian plants in 2025.[30] Like their US counterparts, these measures operate under domestic law and largely outside any justiciable international regime.

The reach of law thus diminishes as one moves from goods to technology and capital, which is precisely where the contest is most intense. If discipline is to exist at all in this domain, it will have to come from somewhere other than international adjudication.

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[26] Executive Order 14105 of 9 August 2023, implemented by Treasury regulations in force from 2 January 2025.

[27] Catalogue of Technologies Prohibited or Restricted from Export (MOFCOM and MOST), as revised in August 2020 and December 2023; MOFCOM announcements of 9 October 2025.

[28] NDRC, Office for the Foreign Investment Security Review Working Mechanism, decision of 27 April 2026. For analysis, see O'Melveny & Myers, "China Unwinds Meta's Acquisition of Manus" (5 May 2026).

[29] Reuters, "China expands curbs on foreign deals, tech transfer after Meta-Manus block" (1 June 2026).

[30] Bloomberg, reports of 2 July 2025 and 23 August 2025.

SECTION

03

A Discipline States Impose on Themselves

IN THIS SECTION

An unbounded doctrine of economic security generates security dilemmas, and the case for restraint rests on the same logic of mutual vulnerability that made nuclear stability tractable.

3.1 From Adjudication to Self-Restraint

Where discipline cannot be imposed through adjudication, it will have to be self-imposed. The incentive for states to accept criteria of restraint lies less in the prospect of sanction by a tribunal than in the recognition that unbounded recourse to the economic security rationale is collectively self-defeating.

Self-restraint is admittedly a weaker mechanism than adjudication. It nonetheless has a considerable history in international economic relations, where much of the order of the post-war system rested on commitments that were never subject to effective third-party enforcement, and it is at present the only mechanism available for security measures. The remainder of this section sets out the logic that makes it rational for a state to bind itself, the criteria to which it would bind itself, and the conditions under which such a commitment could be regarded as credible.

This proposal builds on a growing literature, and departs from it in identifiable respects. Prazeres argued early that pathways other than WTO litigation should be explored for trade restrictions justified on security grounds.[31] Pinchis-Paulsen, Saggi and Mavroidis have criticized the emphasis in panel practice on when security action may be taken rather than on what action is taken, and argued that "security" must be disaggregated before the appropriateness of a measure can be assessed.[32] Hrynkiv and Lavrijssen similarly propose that panels combine the plausibility test with closer scrutiny of a measure's objectives, including its economic effects, the consistency of the state's conduct and the connection between the measure and the interest claimed.[33] Institutional proposals include a WTO committee on national security and improved notification of security measures.[34] In investment, Bian has argued for reciprocal treaty constraints on screening regimes as a means of preventing tit-for-tat escalation.[35] Chinese scholarship, for its part, has called for the security exceptions to be invoked in good faith and with restraint, and for their key terms to be given clearer definition, echoing China's

[31] Prazeres (2020).
[32] Pinchis-Paulsen, Saggi and Mavroidis (2024).
[33] Hrynkiv and Lavrijssen (2024), 81–82.
[34] Lester and Manak (2020); Pinchis-Paulsen (2022).
[35] Bian (2021).

official position on WTO reform.[36] The criteria proposed here differ from these contributions in three respects. They are applied by a state to its own measures rather than by a panel, a committee or a treaty partner. They extend across trade restrictions, investment screening and export controls rather than to trade in goods alone. And they rest on the strategic logic of mutual vulnerability rather than on the economics of optimal intervention or the design of treaty obligations.

3.2 Strategic Stability and the Security Dilemma

The concept of strategic stability, from which this paper takes its title, originates in nuclear deterrence theory, where it describes a condition in which neither side has an incentive to act first because unrestrained action would leave both worse off.[37] The same logic can be applied to the use of trade and investment restrictions.

An unbounded doctrine of economic security generates security dilemmas. Each restriction is read by its target as an act of hostility and invites a symmetrical response, and each round degrades the shared infrastructure on which everyone's security ultimately rests: payment systems, standards bodies, supply chains and research networks. Farrell and Newman describe the underlying mechanism as weaponized interdependence: states positioned at the hubs of global networks can turn those networks into instruments of coercion.[38] Their account also implies that every such use teaches the target to route around the hub, and teaches third parties that the hub cannot be relied upon.

The sequence of measures since 2022 illustrates the dynamic. The US export controls on advanced computing and semiconductor manufacturing equipment of October 2022, subsequently extended and joined in part by the Netherlands and Japan, were followed by Chinese export licensing requirements on gallium and germanium from August 2023, then graphite, and then a range of medium and heavy rare earths in April 2025.[39] Each step was defended as a response to the last. Each also taught firms and governments on both sides that access to inputs they had treated as commodities had become contingent on politics, and supply chains, payment channels and research collaborations have been reorganized as a result. The disconnection of Russian banks from SWIFT in 2022 has had a comparable effect on payment infrastructure, accelerating the development of alternative systems, notably Russia's SPFS and China's CIPS, which remain far smaller than SWIFT but over which Western governments have considerably less visibility and influence.[40]

What made nuclear stability tractable was mutual vulnerability, that is, the recognition that unrestrained action leaves each side worse off rather than safer. The same logic applies here, and it supplies the link between strategic stability and trade and investment restrictions. The logic requires no trust between the parties, only a shared recognition that an unbounded doctrine, applied by both, produces an outcome worse for both than a bounded one. The application of security-dilemma logic to

[36] E Xiaomei (2024), 88–91; MOFCOM (2019).

[37] The classic statement is Schelling and Halperin (1961). On the security dilemma, see Herz (1950) and Jervis (1978).

[38] Farrell and Newman (2019).

[39] MOFCOM and General Administration of Customs, Announcement No. 23 of 2023 (gallium and germanium, in force 1 August 2023); MOFCOM, Announcement No. 18 of 2025 (seven medium and heavy rare earth elements, 4 April 2025).

[40] Council Regulation (EU) 2022/345 of 1 March 2022, OJ L 63, 2.3.2022, p. 1; M. Cipriani, L.S. Goldberg and G. La Spada, "Financial Sanctions, SWIFT, and the Architecture of the International Payment System", *Journal of Economic Perspectives* 37(1) (2023), 31–52; see also Farrell and Newman (2019).

economic interdependence is not itself new.[41] Shen Wei, for example, argues from game theory that the vagueness of national security, its political character and the absence of remedies against security review have trapped states in a security dilemma in which each wants to protect itself while wanting others to rely less on security measures, and concludes that such measures should be used with moderation.[42] The contribution here is to derive from the same logic criteria against which a particular measure can be assessed.

3.3 Five Criteria of Restraint

This paper proposes five self-binding criteria, summarized in Figure 2. They are intended as design norms rather than legal tests: standards that a state acting in good faith should be willing both to adopt and to have applied to its own measures.

FIGURE 2 · FIVE CRITERIA OF RESTRAINT

01 **Specificity**	02 **Nexus**	03 **Least-restrictive**	04 **Reversibility**	05 **Transparency**
Name a real, non-generic interest, not "economic security" at large	A plausible causal chain from this good, service or investment to the harm	Entity-specific over origin-wide; conditions and assurance over prohibition	Tied in duration to the harm, and reviewed or lifted when it recedes	Publish the rationale, in terms others can test
Red flag: the interest cannot be stated without invoking the whole doctrine	**Red flag: national origin is doing the work evidence should do**	**Red flag: no less restrictive option was ever considered**	**Red flag: no exit, no review date, no removal procedure**	**Red flag: the reasoning cannot be stated in public**

Source: Author.

3.3.1 Specificity

The security interest invoked must be identified and non-generic. Economic security at large, which can absorb any measure at all, does not suffice. What is required is a stated harm that can actually be described, such as the compromise of a particular category of network, the loss of a defense-critical production capability or the transfer of a specific technology to a military end use. An interest that cannot be named without invoking the doctrine as a whole is usually a red flag that the criterion has not been met.

The criterion is not novel. It corresponds to the first element of the standard applied in *Russia – Traffic in Transit*, which required the invoking Member to articulate its essential security interests sufficiently to demonstrate their veracity. The panel added that the level of detail required depends on the circumstances: the further the emergency invoked lies from armed conflict or a breakdown of law and public order, the less self-evident the security interests at stake, and the more specifically the Member must articulate them.[43] Specificity asks a state to meet that standard voluntarily and in public, whether or not its measure ever comes before a panel.

[41] Crawford (1995); Bulman (2021); Pearson, Rithmire and Tsai (2022).
[42] Shen Wei (2023).
[43] Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, paras. 7.134–7.135.

3.3.2 Nexus

There must be a plausible causal chain linking the particular good, service or investment to the stated harm. What is required is a causal account, not an inference from status. A determination that something is dangerous because of where it comes from does not establish a nexus; it allows national origin to do the work that evidence is required to do.

One qualification is necessary, because it is here that the criterion is most open to challenge. National origin is not irrelevant to the assessment of risk. A government may argue, for example, that the laws of a supplier's home state can compel the supplier to cooperate with its intelligence services, creating a risk that exists independently of the supplier's own intentions. [44] Such an argument establishes a legitimate nexus, but it does so by identifying a mechanism, whether legal compulsion, control over software updates or access to data, and it must be articulated and defended in those terms. What the criterion excludes is reliance on origin as a proxy for the mechanism itself. The second element of the *Traffic in Transit* standard, the requirement that measures meet a minimum requirement of plausibility in relation to the essential security interests invoked, is a minimal legal expression of the same idea.[45]

3.3.3 Least-Restrictive-Available

This criterion carries the least-trade-restrictive-alternative requirement of TBT Article 2.2, SPS Article 5.6 and GATT Article XX into the security context, as a discipline a government applies to itself in the absence of a tribunal to apply it. In practice, this means favoring entity-specific measures over origin-wide bans, and conditions, testing or assurance regimes over outright prohibition.[46]

The acquisition by Dubai Ports World of the Peninsular and Oriental Steam Navigation Company in 2006 offers an earlier and now uncontroversial illustration. The transaction gave DP World, a company owned by the government of Dubai, control of terminal operations at several major US ports. CFIUS cleared the transaction in early 2006 on the basis of security assurances given by the company, which is to say that the US government's own screening process identified a less restrictive alternative to prohibition and adopted it.[47] The clearance nonetheless provoked strong opposition in Congress, and in March 2006, facing legislation that would have blocked the transaction, DP World undertook to transfer the US port operations to a US owner. The episode led directly to the Foreign Investment and National Security Act of 2007, which reformed the CFIUS process.[48]

The episode is instructive in two respects. First, it demonstrates that a less restrictive alternative was reasonably available, since the agency charged with assessing the risk concluded that assurances were sufficient. Second, it shows that such an alternative can be displaced by political pressure without any finding that it was inadequate, which is precisely the kind of decision the transparency criterion is designed to expose. A further dimension appears where one state's restriction forecloses another

[44] Such arguments have frequently cited Article 7 of China's National Intelligence Law of 2017. Equivalent arguments can be, and are, made about legal compulsion under the laws of other states, including the United States, for example under Section 702 of the Foreign Intelligence Surveillance Act and the Clarifying Lawful Overseas Use of Data (CLOUD) Act of 2018.

[45] Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, para. 7.138.

[46] The OECD's work on the proportionality of screening mechanisms similarly emphasizes tailored responses, mitigation and restriction only as a last resort: OECD, *Proportionality of Investment Screening Mechanisms* (19 May 2022). On the greater difficulty of justifying a general ban on semiconductor exports to China under Article XXI(b)(ii) than case-by-case licensing of particular items, see Hrynkiv and Lavrijssen (2024), 76–77.

[47] J.K. Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, Congressional Research Service Report RL33388, which describes the review of the Dubai Ports World transaction and its aftermath.

[48] Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246.

state's less restrictive choice. In 1982 the United States extended its export controls on equipment for the Soviet gas pipeline to the foreign subsidiaries and licensees of US firms, overriding the decision of several European governments to direct their companies to fulfill existing contracts, and the resulting dispute with US allies was resolved only when the controls were lifted in November of that year.[49] Whether a less trade-restrictive alternative was available can therefore be examined in good faith even if no panel will examine it, and the answer is better debated in public than settled by assertion.

3.3.4 Reversibility

A genuine security measure should be tied in duration to the harm it identifies, and should lapse, or at least be reviewed, when that harm recedes. The idea is not foreign to Article XXI itself, which in subparagraph (b)(iii) links the exception to action "taken in time of war or other emergency in international relations". A restriction with no provision for review or removal is difficult to characterize as a response to a threat, and is more readily understood by those it targets as a permanent structural exclusion.

The trading system already recognizes time-bound necessity in another context. Safeguard measures under the Agreement on Safeguards are justified by an emergency and limited accordingly: to an initial period of four years, extendable to a maximum of eight, with progressive liberalization required along the way. There is no reason why security measures could not carry legislated review dates, published criteria for removal and a functioning procedure through which a listed entity can demonstrate that the conditions for its listing no longer apply. Several existing regimes already provide for removal procedures of this kind, including the US Entity List and China's Unreliable Entity List.[50] Whether a measure is genuinely reversible depends less on the existence of such procedures than on whether they are applied in practice.

3.3.5 Transparency

The rationale for a measure should be published. Publication obligations have long been a fixture of international trade rules, from the requirements of GATT Article X to the 1982 Decision on Article XXI, which, subject to the exception in Article XXI(a), asked that contracting parties be informed of security measures "to the fullest extent possible". The criterion also reinforces the first two: a government that is unwilling to state its rationale in public is often unable to identify a specific interest or a plausible mechanism linking the measure to it.

Transparency has a limit that should be acknowledged, since some of the evidence underlying a security decision will legitimately be classified. The obligation, however, concerns the rationale for a measure rather than the evidence that supports it. A government can state which interest it is protecting, and by what mechanism the measure protects it, without disclosing its intelligence. It can also allow the evidence to be tested by someone other than the decision-maker under appropriate safeguards, as domestic courts do when they review security decisions, a point taken up in Section 3.7.

[49]A.J. Blinken, *Ally versus Ally: America, Europe, and the Siberian Pipeline Crisis* (New York: Praeger, 1987).

[50] 15 C.F.R. § 744.16 (procedure for requesting removal or modification of an Entity List entry); Provisions on the Unreliable Entity List, MOFCOM Order No. 4 of 2020, Article 13.

3.4 Applying the Criteria Cumulatively

The five criteria are intended to be applied cumulatively. No single criterion is decisive: a measure may be specific, supported by evidence and narrowly drawn yet make no provision for review or removal, while a measure published in full may still rest on origin alone. The approach resembles the holistic weighing and balancing that the Appellate Body has described in the context of the necessity test, in which the relevant factors are assessed together rather than in isolation.[51] Taken together, the criteria provide a common vocabulary for assessing whether a security claim is made in good faith.

That vocabulary retains its value even in the absence of an enforcer, because it defines what a government must be able to justify. A government that expects its measures to be assessed in these terms, by its trading partners, by the states it targets and by its own legislature and courts, has an incentive to design them so that they can be defended on that basis.

3.5 An Old Vocabulary

Several of these criteria have antecedents in existing instruments and identifying them helps to answer the inevitable objection that a proposal of this kind is utopian. Indeed, most of what is proposed has already been set down, in one instrument or another, by the governments that would be asked to adopt it and apply it in good faith.

The OECD's Guidelines for Recipient Country Investment Policies relating to National Security, adopted in 2009, recommend that governments observe four principles when screening investment on security grounds: non-discrimination, transparency and predictability, regulatory proportionality, and accountability.[52] Proportionality in the Guidelines requires that restrictive measures be tailored to specific security risks and not exceed what is necessary to address them, a formulation that combines the criteria of specificity, nexus and least-restrictive-available. Other elements appear elsewhere: transparency in the 1982 GATT Decision on Article XXI, reversibility in the time limits of the Agreement on Safeguards, and minimal legal versions of specificity and nexus in the standard applied in *Russia – Traffic in Transit*. US officials have themselves described their export control strategy as a "small yard, high fence", meaning tight controls on a narrow set of genuinely critical technologies rather than broad restrictions on trade in general.[53] The formula amounts to a claim of specificity and least restrictiveness. Seven months earlier, however, the same official had said that in certain foundational technologies, including advanced chips, the United States must maintain "as large of a lead as possible", a standard that is difficult to reconcile with a small yard.[54] The European Union's Economic Security Strategy, for its part, commits the Union to measures guided by proportionality, keeping its tools in line with the level of risk and limiting unintended spillovers, and by precision, defining exactly which goods, sectors or industries are targeted so that measures respond to the risks themselves.[55] China's 2019

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[51] See Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para. 182.

[52] OECD (2009).

[53] Sullivan (2023).

[54] Remarks by National Security Advisor Jake Sullivan at the Special Competitive Studies Project Global Emerging Technologies Summit, The White House, 16 September 2022; see also Hrynkiv and Lavrijssen (2024), 67.

[55] European Commission and High Representative (2023), *Joint Communication on a European Economic Security Strategy*, JOIN(2023) 20 final, 20 June 2023.

proposal on WTO reform, for its part, called for the security exception to be invoked in good faith and with restraint, and for its invocation to be further clarified and regulated within the WTO.[56]

The vocabulary therefore already exists. What has been lacking is a willingness on the part of governments to be bound by it, particularly where the measure in question is their own. The size of the yard, after all, is decided by the same government that builds the fence.

3.6 The Same Standard in Every Capital

The standard is intended to be applied even-handedly. It is not a device for criticizing any one country's measures, and it applies with equal force to restrictions imposed from Washington, Brussels and Beijing, and to those of other states, including India, the Netherlands and Australia, whose Treasurer ordered China-linked investors to divest their holdings in the rare earths developer Northern Minerals in June 2024 and again in May 2026.[57] A discipline that only ever ruled against the other side would not be a discipline at all; it would be simply advocacy with better manners. The point is recognized in Chinese scholarship as well, which has observed that a Member challenging another's security measure in one dispute may invoke the exception for its own measures in the next, and has urged that China, too, invoke the exception with restraint and accept review when it does.[58]

Table 2 sets out examples of measures adopted in each jurisdiction, together with the criteria they most directly engage. The examples are illustrative only. Reaching a view on any individual measure would require a closer examination than is possible here, and the purpose of the table is limited to showing that measures raising these questions can be found in each jurisdiction.

TABLE 2 · THE SAME QUESTIONS, SIX CAPITALS

Capital	Examples of measures	Criteria most directly engaged
Washington	Section 232 duties on steel and aluminum (2018), applied to allies; export controls on advanced computing and chipmaking tools (from 2022); rules restricting connected-vehicle hardware and software from China and Russia (2025)	**Specificity** and **nexus** for duties on allied steel; **reversibility** for controls whose scope has widened with each revision
Brussels	EU 5G Toolbox restrictions on high-risk suppliers (2020); investment screening under Regulation (EU) 2019/452; Anti-Coercion Instrument, Regulation (EU) 2023/2675	**Nexus** where risk profiles rest on supplier origin; **transparency** where screening outcomes are not reasoned in public
Beijing	Unreliable Entity List (2020); export controls on gallium, germanium, graphite and rare earths (2023–2025); cybersecurity review decision against Micron (May 2023)	**Transparency** and **specificity** where, as with Micron, a finding of "relatively serious network security risks" is announced without the risks being identified
New Delhi	Blocking of more than 200 Chinese-linked apps under Section 69A of the Information Technology Act (2020); Press Note 3, requiring government approval for investment from countries sharing a land border with India (2020)	**Specificity** where apps were blocked in batches on a common rationale; **transparency** where blocking orders are confidential under Rule 16 of the 2009 Blocking Rules

[56] Ministry of Commerce of the PRC, *China's Proposal on WTO Reform* (13 May 2019), 5–6.
[57] Foreign Acquisitions and Takeovers Act 1975 (Cth), s. 69; disposal orders of June 2024; Foreign Acquisitions and Takeovers (Disposal of Interests in Northern Minerals Limited) Orders (No. 1) 2026.
[58] E Xiaomei (2024), 89–90.

Capital	Examples of measures	Criteria most directly engaged
Canberra	National security test in foreign investment screening (2021); divestment orders against China-linked investors in the rare earths developer Northern Minerals (2024, 2026)	**Nexus** where orders turn on the origin of the investor rather than on an identified mechanism of harm
The Hague	Order over the chipmaker Nexperia under the Goods Availability Act (September 2025), suspended in November 2025 after China restricted exports from Nexperia's plant in Dongguan	**Least-restrictive-available** and **reversibility**; an illustration of the security dilemma described in Section 3.2

Source: Author. Examples are illustrative, not exhaustive, and are not findings of inconsistency with any legal obligation.

The Micron and TikTok cases illustrate the point. In May 2023 the Cyberspace Administration of China concluded, following a cybersecurity review, that Micron's products posed "relatively serious network security risks" and barred operators of critical information infrastructure from purchasing them, without identifying the risks in question.[59] In April 2024 the United States enacted legislation requiring the divestiture of TikTok on pain of a prohibition, notwithstanding the company's offer of a draft national security agreement with CFIUS providing for US data storage and third-party oversight of its source code. The D.C. Circuit, assuming without deciding that strict scrutiny applied, held that the draft agreement was not a less restrictive alternative capable of meeting the government's concerns, and the Supreme Court upheld the legislation in January 2025.[60] Both cases raise the same questions: what the specific risk was, by what mechanism the supplier created it, and whether anything short of exclusion was seriously considered. A reader inclined to regard those questions as legitimate in one case but not in the other has encountered precisely the asymmetry that this paper seeks to address.

3.7 What Would Make Restraint Credible

The obvious objection to self-restraint is that commitments without enforcement lack credibility, since a state that binds only itself remains free to depart from its commitments whenever it finds it convenient to do so. The objection is well founded, and self-restraint is not self-enforcing. There are nonetheless sources of credibility short of an international tribunal on which a state seeking to be believed can draw, of which three are considered here.

The first is domestic. A published rationale is one that a state's own courts and legislature can test. United States courts have held that a company whose acquisition was prohibited by presidential order on national security grounds was entitled, as a matter of due process, to see the unclassified evidence relied upon and to respond to it, even though the merits of the President's determination remained unreviewable, and have preliminarily enjoined a listing by the Department of Defense that rested on reasoning the court found inadequate, after which the listing was withdrawn.[61] Legislated review dates and removal procedures work in the same way: they create a record against which the state's own institutions can hold it to account.

[59] Cyberspace Administration of China, announcement of the conclusion of the cybersecurity review of Micron products, 21 May 2023.

[60] Protecting Americans from Foreign Adversary Controlled Applications Act, enacted as Division H of Pub. L. No. 118-50 (24 April 2024); *TikTok Inc. v. Garland*, 122 F.4th 930 (D.C. Cir. 2024); *TikTok Inc. v. Garland*, 604 U.S. 56 (2025) (per curiam).

[61] *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296 (D.C. Cir. 2014); *Xiaomi Corp. v. Department of Defense*, No. 21-cv-280 (D.D.C. 12 March 2021).

The second is plurilateral. The 1982 GATT Decision could be given practical effect, with Members notifying security measures and their stated rationales and discussing them in a committee or in the course of Trade Policy Reviews. Although such a process would produce no rulings, it would create a record against which a government's stated rationale could later be tested, making it harder to revise that rationale after the fact. Proposals along these lines include a dedicated WTO committee on national security and improved notification of security measures.[62] China's 2019 proposal on WTO reform likewise called for stronger notification discipline for tariffs imposed on national security grounds and for multilateral review of such measures.[63] The criteria proposed here do not depend on any such institution being created, since each state can publish its own rationale unilaterally; a plurilateral process, where one exists, adds a forum in which that rationale can be examined.

The third source of credibility is reciprocal, and it returns to the logic of strategic stability. A state known to apply these criteria to its own measures is more likely to be believed when it invokes security against another state's firms or products. Its partners are more willing to align with it, and the states affected by its measures have less reason to regard each one as part of a wider campaign warranting retaliation. A state that applies an unbounded doctrine loses that credibility, and with it the means of persuading others that its genuine security measures are distinguishable from those adopted with more protectionist or opportunistic motives.

[62] Lester and Manak (2020); Pinchis-Paulsen (2022).
[63] Ministry of Commerce of the PRC, *China's Proposal on WTO Reform* (13 May 2019), 6.

SECTION

04

A Vocabulary of Restraint

IN THIS SECTION

For security measures, adjudicated discipline is no longer available. What remains is a vocabulary of restraint whose force depends on states' interest in predictability and in being believed when they invoke security.

4.1 A Modest Conclusion

The conclusion I seek to defend with this paper is rather modest. There is no near-term prospect of states agreeing on binding disciplines for security measures, and even a restored Appellate Body would apply no more than the deferential standard of review articulated in *Russia – Traffic in Transit*. Restraint, if it is to be exercised at all, will therefore rest on criteria that states choose to adopt and apply to themselves, because they have an interest in a more predictable trade and investment environment and in being believed when they invoke security.

4.2 A Test of Coherence

This points to the real test of whether economic security is a coherent doctrine or merely a license. Acceptance of a state's criteria by its opponents proves little. What matters is whether the state is prepared to apply those criteria to its own measures, including where they would weigh against a measure that the government or domestic interests wish to maintain. A state that insists on judging for itself what its security requires assumes, by the same token, a heightened obligation to exercise that judgment in good faith.[64]

4.3 The Sincere Invocation

The introduction described the cynical invocation of national security as the smaller of two problems. The reasons for that assessment follow from the analysis in Sections 2 and 3.

Cynical invocations are, at least in principle, the kind of conduct that existing legal tools are designed to address. The obligation of good faith identified in *Russia – Traffic in Transit*, and the related doctrine of abuse of rights, are directed at measures whose stated security rationale conceals a different purpose.[65] But these tools are less well suited to situations where the security concern is sincerely held but has no evident limit.states continue to depend. The difficulty in such cases lies in the scope of the claim rather than in the sincerity of the claimant.[66] A government may genuinely regard a widening

[64]See S. Schill and R. Briese, "'If the State Considers': Self-Judging Clauses in International Dispute Settlement", 13 *Max Planck Yearbook of United Nations Law* 61 (2009), arguing that self-judging clauses remain subject to good-faith review.

[65] Panel Report, *Russia – Traffic in Transit*, WT/DS512/R, paras. 7.132–7.133; on abuse of rights, see Akande and Williams (2003).

[66] On security as a contested concept, see Heath (2022). Chinese scholarship describes the same phenomenon as the "pan-securitization" (泛安全化) of economic governance: see Peng Yang (2022); Shen Wei (2023).

range of technologies, suppliers and investors as threats, and each measure it adopts may satisfy a test of good faith, while their cumulative effect is a steady contraction of the trade and investment relationships on which all states continue to depend. The difficulty in such cases lies in the scope of the claim rather than in the sincerity of the claimant.

It is here that the five criteria are most useful, and also where their limitations are clearest. They will have little effect on a government acting in bad faith. A government acting in good faith, however, has reason to take them seriously, since they provide its own officials, legislators and courts with a structured means of assessing whether a genuinely held concern has been translated into a measure of appropriate scope. The criteria do not require a government to discount the threat it perceives. Instead they demand that the threat be specifically identified, linked to the measure by a plausible mechanism, addressed by the least restrictive measure reasonably available, made subject to review and publicly justified.

It is therefore to sincere but unbounded security claims that the discipline embodied in these criteria most needs to be applied. That task is more demanding than exposing cynical claims, and in the current state of WTO dispute settlement neither panels nor any appellate mechanism is in a position to undertake it. It falls instead to states themselves. This paper has argued that they have good reason to adopt and apply these criteria, or others of similar effect, since an unbounded doctrine of economic security, applied by all, leaves each state less secure and less credible than it would be if all applied a shared and clearly articulated standard to their own measures.

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ANNEX

A

A Self-Assessment Checklist

Questions a government can put to its own security measure, and that anyone scrutinizing a measure can put to a government. The same questions apply whichever capital the measure comes from.

CRITERION 1

01

Specificity

Guiding questions

1. Which essential security interest does the measure protect, stated in one sentence without the words "economic security"?
2. How far does the emergency invoked lie from armed conflict or a breakdown of law and public order? The further it lies, the more has to be said about the interest at stake.
3. Would the same statement of interest justify almost any other restriction on the same partner? If so, it is not yet specific.

Red flags

The rationale refers to competitiveness, leadership or dependence in general terms, or changes each time the measure is challenged.

CRITERION 2

02

Nexus

Guiding questions

1. By what mechanism does this good, service, entity or investment create the harm named under Criterion 1?
2. If national origin is relied upon, what is the mechanism behind it: legal compulsion, control over updates, access to data, or something else?
3. Would the measure still be justified if the same product came from a trusted partner? If not, is that because of the mechanism, or only because of its origin?

Red flags

The measure applies to everything from a given country, regardless of product, function or end use.

CRITERION 3

03

Least-Restrictive-Available

Guiding questions

1. Which less restrictive options were considered: entity-specific rather than origin-wide measures, licensing rather than bans, testing and assurance regimes, conditions on the transaction?
2. Why would each of them fail to protect the interest named under Criterion 1?
3. Is the record of that consideration written down, and could it be shown to a domestic court or legislative committee?

Red flags

No alternative was considered, or alternatives were dismissed on grounds of administrative convenience alone.

CRITERION 4

04

Reversibility

Guiding questions

1. What change in circumstances would lead the measure to be lifted, and is that stated?
2. Does the measure carry a review date, and has any review actually led to narrowing or removal?
3. Is there a procedure by which an affected entity can seek removal, and has anyone ever succeeded in using it?

Red flags

The measure has only ever expanded, and no removal criteria exist.

CRITERION 5

05

Transparency

Guiding questions

1. Has the government published the interest protected and the mechanism by which the measure protects it?
2. Where evidence is classified, can it be tested by someone other than the decision-maker, such as a court or oversight body?
3. Has the measure been notified to trading partners in the spirit of the 1982 GATT Decision on Article XXI?

Red flags

The only public statement is that the measure protects national security, or that the target poses unspecified risks.

Declaration of Generative AI Use

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