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The securitisation of international economic law and 'global security': an analysis of the EU law approach through the prism of the Common Commercial Policy

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The so-called 'securitisation' of international economic law is largely premised and enacted on grounds of defensive security exceptions, whereby governments invoke their national security interests to depart from their international economic obligations. This article aims to contribute to the ongoing debate on the compatibility of such security-driven unilateral measures with international law and within the current system of global governance, by exploring whether legal patterns tackling essential security interests under international economic law may reach beyond State-centred national security interests to also encompass concerns arising from global security threats (such as environmental security). In doing so, this article focuses on the relevant approaches taken by the European Union (EU), particularly in the operation of the EU Common Commercial Policy (CCP) under Article 207 of the Treaty on the Functioning of the European Union. The EU enjoys broad exclusive competence in framing and implementing its trade and investment policy under the CCP, both in terms of its internal regulation and external action. In this context, security considerations are bound to arise. This article explores a series of relevant legal instruments originating from or concluded by the EU, and analyses how these incorporate security considerations and the EU's understanding of the concept of security thereunder. After considering security under EU primary law, the article reviews the position taken by the EU as a bilateral treaty player, by reference to the Trade and Comprehensive Agreement with the United Kingdom, and as a member of the World Trade Organization, notably on the interpretation of the General Agreement on Tariffs and Trade security exceptions clause. It also looks into EU internal action on foreign direct investment screening, export control and foreign subsidies regulations, as well as the EU's proposed 'anti-coercion mechanism' and its 'global human rights sanction regime'. The analysis of the EU's multifaceted practice shows that while global security concerns may increasingly underlie obligations to cooperate and coordination clauses, existent security-related legal patterns in bilateral and multilateral treaty practice remain 'national security'-centred; and despite the increasing 'enlargement' of the scope of national security to encompass additional non-military threats, the vast array of global security threats and vulnerabilities are hardly covered by this expansion.

Keywords: *national security, essential security interests, global security, securitisation of international economic law, rule of law, EU Common Commercial Policy*

1. INTRODUCTION

In the debate on the 'securitisation' of international economic law, focus has been put on national security and its traditional appraisal as a State's self-protecting attitude.[1] This is the main use and reading of the 'security exceptions' clauses found in trade and investment agreements.[2] This defensive legal approach has been applied to government measures adopted to address an increasingly vast array of threats and vulnerabilities, including climate change, diseases, cyberattacks and terrorism. In other words, 'security interests' seem to go beyond external, military threats to the territory and institutions of a State and extend to worldwide emergencies and risks that severely affect the internal life of a State. This development blurs the lines between security measures and ordinary regulation, posing a 'significant and permanent threat to the system' of international economic regulation.[3]

Such broadened 'national security' claims, on the one hand, and typical 'global security' claims, on the other hand, take different approaches to tackling a vast array of threats. The securitisation of international economic law from a State-self-protecting perspective at the same time reflects the understanding that there are diverse sources of risk for national security, and is entangled with cooperative efforts to address global security challenges. It reflects the contemporary organisation of international society, which allows States to suspend or deviate from their international trade treaty commitments on compelling defensive grounds, while at the same time entrusts the United Nations (UN) with the pursuit of universal political goals and collective security tasks. The above shows that there is room to investigate whether any legal relationship may be established between the protection of national security and the pursuit of global security within international economic law. Put differently, the question is whether current legal constructs in international economic law tackling essential security interests by way of derogations from international obligations include or are suitable to respond to global security concerns. In substance, this article examines whether considerations of global security are embraced by governments when formulating national security policies and adopting trade-restrictive measures or whether justifications of deviations from international trade obligations on security grounds are confined to parochial State-centred legal or political interests. If the former is the case, does the

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[1] Mona Pinchis-Paulsen, 'Trade Multilateralism and US National Security: The Making of GATT Security Exceptions' (2020) 41 Michigan Journal of International Law 109, 110, quoting Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (OUP, Oxford 2003) 186.

[2] General Agreement on Tariffs and Trade (adopted 30 October 1947, provisionally applied as of 1 January 1948) 55 UNTS 194 (GATT) art XXI. The leading World Trade Organization (WTO) panel report dealing with this provision understood the term 'essential security interests' as those interests 'relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally': WTO*, Russia: Measures Concerning Traffic in Transit – Report of the Panel* (5 April 2019) WT/DS512/R (Russia – Traffic in Transit) [7.130]. See also Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments (adopted 14 November 1991, entered into force 20 October 1994) 31 International Law Materials 124 (US–Argentina BIT) art XI. The inward-looking reading of security under this clause is reflected, eg, in the *LG&E v Argentina* tribunal's reference to 'the lives of an entire population and the ability of the Government to lead': *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic* (Decision on Liability) ICSID Case No ARB/02/1 (3 October 2006) 46 International Law Materials 36 [238].

[3] J Benton Heath, 'The New National Security Challenge to the Economic Order' (2020) 129 Yale Law Journal 1020, 1020.

understanding of national security under applicable international economic law require recourse to the 'security exceptions' approach to address global vulnerabilities, or should we turn to alternative approaches under international economic law to face global security challenges?

This article aims to contribute to the debate by considering the overlap between recent national security policies worldwide and the 'global security agenda', by systematising and closely examining the European Union (EU) law approach to the securitisation of international trade relations. With the impact of EU law developments worldwide in mind,[4] this article argues that the EU is a promising international legal subject to look at because the Lisbon Treaty has significantly developed primary EU law on the Common Commercial Policy (CCP).[5] This is a sphere in which the EU exercises a broad exclusive competence, on the basis of Article 207 of the Treaty on the Functioning of the European Union (TFEU), its praetorian interpretation by the Court of Justice of the European Union (CJEU) and its policy implementation.[6] TFEU Article 207 not only covers new aspects of contemporary international trade,[7] but also lays down the rule that the CCP 'shall be conducted in the context of the principles and objectives of the Union's external action'.[8] This provision, read in conjunction with other primary EU law norms, places the obligation on the EU to integrate those principles and objectives into the conduct of its CCP.[9] Thus, with regard to primary EU law, both EU internal and external trade action must 'safeguard its values, fundamental interests, security, independence and integrity',[10] while also contributing to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples; free and fair trade; the eradication of poverty and the protection of human rights; and the strict observance and development of international law.[11] The EU has increasingly dealt (and will certainly continue to deal) with security matters when exercising trade and investment policy under the CCP. This article aims to shed light on whether the EU law approach to the securitisation of international economic law via the CCP has considered or is underpinned by any conception of 'global security'.

To that end, the rest of the article is structured as follows. Section 2 sketches the main tenets of the conception of 'global security' in international law and of the 'securitisation' debate in international economic law, as the background against which the EU's approach will be considered. Section 3 considers the EU treaty grounds on which the EU is allowed to invoke security in its internal regulation or external action under the aegis of the CCP. Section 4 then turns to international agreements concluded by the EU to consider how the EU has understood legal norms pertaining to security when acting externally within its CCP competence.

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[4] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP, Oxford 2019).
[5] *Opinion 2/15 pursuant to Article 218(11) TFEU* [2017] EU:C:2017:376 (Opinion 2/15) [141].
[6] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU). On the scope of the CCP, see ibid [35]–[36]. See also Joris Larik, 'Common Commercial Policy' in Ramses A Wessel and Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart, Oxford 2020) 209.
[7] Case C-414/11 *Daiichi Sankyo Co Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* [2013] EU:C:2013:520 [46] and [48].
[8] Opinion 2/15 (n 5) [142].
[9] Consolidated Version of the Treaty on the European Union [2016] OJ C202/13 (TEU) art 21(3); TFEU (n 6) art 205. See Opinion 2/15 (n 5) [143].
[10] TEU (n 9) art 21(2)(a).
[11] Ibid arts 3(5) and 21(1)–(2). See Section 3

Section 5 discusses recent EU legislative initiatives imposing unilateral trade or investment restrictions based on security considerations. Through this matrix of sources and legal techniques, this article explores the different shapes and forms of the EU's (and its Member States') security considerations underlying the operation of the CCP. Section 6 summarises and concludes.

2 GLOBAL SECURITY IN INTERNATIONAL (ECONOMIC) LAW: SCOPE, PERSPECTIVES AND LEGAL CONSTRUCTS

'Global security' is a broad and complex concept which (like 'security') is not formally defined under international law.[12] Over the last few decades, objects such as 'the environment' or 'social groups' have been included in the global security agenda. This 'process of widening and deepening of the global security agenda' is arguably based on the emergence of securitisation theory, which has challenged the traditional view of security as being primarily and essentially focused on sovereign States.[13] The qualification of issues as ones of global security is based on several factors, such as their emergence and development transcending the State and purely inter-State relations; the worldwide scale of their threat, presence or effects; and their identification as such, collectively by States or non-State actors, including (but not limited to) the UN.[14]

Through the complex coexistence and cooperation of States, international law has also developed beyond traditional issues of national and international security (notably aggression, armed conflicts, disarmament and arms control and nuclear proliferation) to address new challenges of a transnational nature, such as issues relating to corruption, terrorism and organised crime; 'human security' (eg human trafficking, modern slavery, migration and displacement alongside atrocities and large-scale violations of human rights and civilian protection in armed conflicts); 'environmental security' (climate change, international disasters, pandemics and endangered species); and 'technology security' (artificial intelligence and robotics, biosecurity, cybersecurity and outer space security). From this deepened perspective, 'security' may also be seen as capturing 'economic security' and 'resource security' (encompassing energy security, financial crises, food security and water security).[15] Yet such broader readings of security do not seem necessarily to coincide with the current understanding of security in the context of transnational governance, agreements and disputes.

Focusing now on international economic law, States often apply international trade and investment measures as a means of enforcing 'security' concerns. Although it is not news that trade measures are used to

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[12] Nigel D White and Auden Davies-Bright, 'The Concept of Security in International Law' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP, Oxford 2021) 19.
[13] Hitoshi Nasu, 'The Global Security Agenda: Securitization of Everything?' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP, Oxford 2021) 37, 38.
[14] For a systematic account and a critical discussion of the contribution of the UN, especially of the Security Council, to the international law on global security, as a lawmaker, an interpreter of international law and an agenda-setter, see Adam Day and David M Malone, 'The Role of the United Nations in Shaping Global Security Law' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP, Oxford 2021) 1071.
[15] For illustrative purposes, these items are modelled on the issues covered in Robin Geiß and Nils Melzer (eds), The Oxford Handbook of the International Law of Global Security (OUP, Oxford 2021).

pursue non-trade concerns,[16] trade enforcement within domestic and international law has been increasingly centred on security issues. These regimes have relied upon existent legal constructions in the contemporary, post-World War II international regulation of transnational economic relations, under which security has been essentially contemplated as a legitimate defence for departing from obligations between States.[17]

As is well known, several international trade and investment treaties address security from the angle of exceptions, that is to say, by defining measures taken by a party on security grounds as permitted action under the treaty, most notably Article XXI of the General Agreement on Tariffs and Trade (GATT) and Article XI of the Bilateral Investment Treaty (BIT) between the United States and Argentina.[18] As such, the prevailing view is that such measures may clash with the parties' commitments on trade liberalisation or investment promotion and protection without amounting to unlawful conduct under the relevant treaty.[19] In the context of such a legal construct, security references may appear both in the form of a State's 'essential security interests'[20] and in relation to the 'maintenance of international peace and security'.[21] The former

often relate to the disclosure of information; fissionable and fissionable-derived materials; traffic in arms, ammunition and implements of war and the supply of a military establishment; and the existence of a time of war or other emergency in international relations.[22] The latter formulation is usually specified with reference to the obligations of the State invoking the security exception under the UN Charter.[23] The notion of security, under such-phrased exceptions, seems to pertain to traditional national security concerns and to 'international peace and security' issues as determined under the UN framework.

Recourse to such treaty defences, however, is not straightforward. On the one hand, current debate revolves around third States' reaction to an act of aggression by a State. Past and recent events have resulted in third States resorting to restrictive trade and economic measures, pending or notwithstanding the absence of the activation of the UN's collective security system by the UN Security Council. In particular, since February 2022, in the context of Russia's aggression against Ukraine, third States have been restricting their economic relations with Russia by imposing sanctions.[24] Justifications for such trade-related measures have pointed to

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[16] This is, eg, the case for human-rights-related concerns which are implemented in bilateral deals or through unilateral regulation of restrictive trade measures (see Sections 4.2 and 5).
[17] Diane Desierto, 'Protean "National Security" in Global Trade Wars, Investment Walls, and Regulatory Controls: Can "National Security" Ever be Unreviewable in International Economic Law?' (EJIL:Talk!, 2 April 2018) <https://www.ejiltalk.org/national-security-defenses-in-trade wars-and investment-walls-us-v-china-and-eu-v-us> accessed 4 April 2023.
[18] US–Argentina BIT (n 2) art XI.
[19] *CMS Gas Transmission Company v The Republic of Argentina* (Decision on Annulment) ICSID Case No ARB/01/8 (25 September 2007) [129].
[20] . See eg GATT (n 2) art XXI(a–b); US–Argentina BIT (n 2) art XI.
[21] See eg GATT (n 2) art XXI(c); US–Argentina BIT (n 2) art XI.
[22] See eg GATT (n 2) art XXI(a–b); Agreement on Reciprocal Promotion and Protection of Investments Between the Government of the Republic of Singapore and the Islamic Republic of Iran (adopted 29 February 2016, entered into force 28 February 2018) (Iran–Singapore BIT) art 14; Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (adopted 2 June 2009, entered into force 1 September 2009) art 21.
[23] See eg GATT (n 2) art XXI(c); Iran–Singapore BIT (n 22) art 14(d).
[24] As far as the EU is concerned, see the subsequent amendments that have been adopted since February 2022 to Council Regulation (EU) 833/2014 of 31 July 2014 Concerning Restrictive Measures in View of Russia's Actions

waivers and security exceptions under World Trade Organization (WTO) law and/or other trade or investment treaties. However, the question as to whether a situation of war or emergency in international relations may be invoked by third States to deviate from commitments under WTO law remains.[25] Restrictive measures undertaken by third States have also been justified with reference to the customary rules on the international responsibility of States, specifically the norms concerning the circumstances precluding the wrongfulness of measures adopted in breach of international obligations (including WTO treaty obligations). The issue of third-party countermeasures under customary international law is also under debate: the International Law Commission itself has left the question open in the Articles on Responsibility of States for Internationally Wrongful Acts.[26]

On the other hand, ongoing debate in international economic law has addressed questions of the judicial review, scope and legal test of 'security exceptions' treaty clauses. States have repeatedly invoked their 'essential security interests' in inter-State political and legal relations to support restrictive unilateral measures addressing international trade and foreign investment. Over the last two decades, respondent governments in international investment arbitral disputes have often framed the defence of contested measures within treaty exceptions around security, where available.[27] More settlement system too.[28] The scope of such norms has arguably expanded beyond traditional, military-defence-related security issues to include interests considered essential for the functioning of a State and for the wellbeing of its population, including 'economic security'.[29] The unilateralist turn in trade after Donald Trump's victory in the 2016 US presidential election and the China–

Destabilising the Situation in Ukraine [2014] OJ L229/1 and to Decision 2014/512/CFSP of 31 July 2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine [2014] OJ L229/13.

[25] See Section 4.

[26] Danae Azaria, 'Trade Countermeasures for Breaches of International Law Outside the WTO' (2022) 71 International and Comparative Law Quarterly 389. Moreover, the Appellate Body has held that WTO members are not permitted to invoke GATT art XX(d) to justify unilateral measures taken 'to secure compliance with laws or regulations' with respect to another member's international obligations (in any field, eg on human rights): WTO, Mexico: *Tax Measures on Soft Drinks and Other Beverages – Report of the Appellate Body* (24 March 2006) WT/DS308/AB/R [75]–[79].

[27] Suffice here only to mention the strand of investor–State disputes on the 2001–2002 Argentina financial crisis. More recently, see *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v The Republic of India* (Award on Jurisdiction and Merits) PCA Case No 2013-09 (25 July 2016), further discussed in Prabhash Ranjan, 'Essential Security Interests in International Investment Law: A Tale of Two ISDS Claims Against India' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer, Singapore 2020) 579. In the context of investment arbitral disputes, the customary defence of necessity as a circumstance precluding wrongfulness has also been raised. This norm has usually been addressed with reference to art 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (10 August 2001) II(2) Yearbook of the International Law Commission 31, UN Doc A/56/10 128 (ARSIWA), which excludes the international responsibility of a State on grounds of necessity only for an act that is 'the only way for the State to safeguard an essential interest against a grave and imminent peril'. There is a vast body of literature on this investment arbitral practice, as well as on the specific characteristics of and the relations between security treaty exceptions and the customary necessity defence, which cannot be cited here: see among earlier references, William Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non Precluded Measures in Bilateral Investment Treaties' (2007) 48 Virginia Journal of International Law 307.

[28] Peter van den Bossche, 'The National Security Exception in International Trade Law Today: Can We Avoid Abuse?' in P L H van den Bossche, B Dekker, J J van Hees et al, *Vereeniging 'Handelsrecht' Preadviezen 2020: Toetsing van buitenlandse investeringen in geo politiek en juridisch perspectief* (Uitgeverji Paris, Zutphen 2020) 111.

[29] Broadly, see Alain O Sykes, 'Economic "Necessity" in International Law' (2015) 109 American Journal of International Law 296.

US trade 'war' has further exacerbated the trend of invoking 'essential security interests' as regards 'economic security'. In addition, the COVID-19 pandemic has triggered 'health security'-related trade and

investment restrictiveness. Such security-driven action in the fields of trade and investment has also been brought about by new challenges and perceived threats to 'sovereignty' and 'autonomy' from new digital technologies, especially when these technologies are owned and developed by foreign enterprises.[30] Notably, in the same vein, security concerns have been put forward in relation to data protection.

The securitisation of trade and investment policies by way of security defences has two main implications. First, it injects State action with urgency, due to the requirements of the security exceptions treaty clauses. Second, as recent practice on disputes shows quite consistently, the subjective nature of security concerns and their invocation is acknowledged, at least to a certain extent. Indeed, even when adjudicators deny the self-judging nature of these clauses in the absence of explicit language, they recognise a certain degree of deference to the State invoking security.[31] Thus, recourse to such a legal technique stretches the terms of the confrontation in international trade and investment relations and in the implementation of international legal rules in the field. It also seems to allow a unilateral determination of what constitutes a security concern, going even beyond the traditional understanding of security under international law.

That said, an enlarged substantive scope of security exceptions in international trade and investment treaties is arguably not the way to address issues that are relevant for global security. It is true that self-concerned national security interests may sometimes overlap with global security concerns. This is exemplarily shown in the pandemic context. In that scenario, restrictive economic measures by States have served the goal of protecting an inward-looking interest, namely threats to a State's own population. At the same time, an interest of the international community in containing threats to health at a global level may be seen in the adoption of recommendations and resolutions by international or regional institutions. However, some global security-related interests and concerns may be included under general exceptions or in the very interpretation of substantive standards of conduct under trade and investment treaties. This is notably so in relation to environmental security. The practice of resorting to reasoning based on systemic integration or balancing and proportionality can also be used to incorporate certain non-trade issues in States' international commitments on international trade and investment.[32] In this way, global security concerns may come into play when

[30] At the EU level, see policy discourse recently centring on such self-interested concepts as 'European open strategic autonomy' and 'European technological sovereignty': Ségolène Barbou des Places (ed), 'Questioning European (Union) Sovereignty' (2020) 5 European Papers 287 <https://www.europeanpapers.eu/it/e-journal/EP_eJ_2020_1> accessed 24 March 2023; Sara Poli and Elaine Fahey, 'The Strengthening of the European Technological Sovereignty and its Legal Bases in the Treaties' (Eurojus.it, 23 May 2022) <https://rivista.eurojus.it/the-strengthening-of-the european technological-sovereignty-and-its-legal-bases-in-the-treaties/> accessed 30 January 2023.

[31] Eg *Russia – Traffic in Transit* (n 2) [7.131]–[7.132].

[32] See eg Stephan W Schill and Vladislav Djanic, 'Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law' (2018) 33 ICSID Review 29; Geraldo Vidigal and Stephan W Schill, 'International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception' (2021) 48 Legal Issues of Economic Integration 109.

assessing the norms which a State has allegedly violated, rather than by invoking security exceptions, thus promoting rather than detracting from international cooperation.

3 THE EU LAW APPROACH TO THE 'SECURITISATION' OF INTERNATIONAL ECONOMIC LAW: EU PRIMARY LAW SHAPING THE COMMON COMMERCIAL POLICY

In the treaties establishing the EU, there are various legal grounds allowing the EU to deal with security issues, internally and internationally. 'Security' is explicitly framed with reference to Member States' security, the EU's security and international security. The following section will address each of these three facets. In doing so, it will also consider whether the concept of global security, while not explicitly mentioned, is implicitly addressed in EU primary law.

3.1 Member States' security

In the EU treaty framework, Member States' security explicitly falls in an area of reserved competence of EU Member States, as far as the safeguarding of their own 'national security' is concerned.[33] Moreover, Member States are allowed to derogate from EU law commitments in several fields on the grounds of security and public order. Considered all together, this framework has several implications as regards legal relations within the EU legal order.

The EU legal framework legitimises the departure from, or non-application of, EU primary and secondary law by a Member State. This also applies to EU law-making with respect to the CCP under TFEU Article 207, for example with respect to the conclusion of tariff and trade agreements relating to trade in goods and services or foreign direct investment (FDI).[34] Thus, under EU law, Member States are entitled to invoke concerns related to their security to depart from EU international commitments, to which they are bound pursuant to TFEU Article 216(2). Yet, while Member States may invoke quite a broad and subjectively identified range of security concerns, these can only lead to derogation from their obligations under strictly interpreted conditions.[35]

It is also well established that, although it is for Member States to adopt appropriate measures to ensure their internal and external security, this does not mean that such measures fall entirely outside the scope of EU

[33] TEU (n 9) art 4(2) ('The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State').

[34] Traditionally, EU law on Member States' security has been specified with reference to internal market rules, especially following the *Campus Oil* preliminary ruling on national restrictions to the free movement of goods of energy for security reasons: Case 72/83 *Campus Oil Limited and Others v Minister for Industry and Energy and Others* [1984] EU:C:1984:256.

[35] Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Poland, Hungary and Czech Republic* [2020] EU:C:2020:257 [144].

law. This was recently reiterated by the CJEU.[36] There is no 'inherent general exception' or carve-out excluding all security-related measures from the scope of EU law; rather, the TFEU provides for security-based derogations in specific and clearly defined cases.[37] The same goes for EU agreements with third States. EU primary law on Member States' security finds outward reflection at the international level. EU agreements with third States do not impinge upon the possibility for Member States to legitimately invoke their security concerns within the agreements' legal frameworks. However, as confirmed by the CJEU in 2017, when the security-related measures taken by Member States relate to FDI or other areas within the scope of the CCP, 'the conditions under which such measures may exceptionally be applied come equally within that policy'[38] and therefore within the EU's competence.[39] This is because the provisions on exceptions do not contain an obligation of implementation, but only a possibility. They also fix requirements ensuring that the treaty commitments are not made redundant.[40] As a result, the discretion of the Member States to depart from EU treaty commitments on national security grounds is limited in the sphere of the CCP as regards the EU's external action as well.[41] As Advocate General Eleanor Sharpston opined, and the CJEU endorsed in Opinion 2/15, such a limitation of a Member State's discretion is inherent in the conduct of international trade, and thus falls within the sphere of the CCP, which is under the exclusive competence of the EU.[42]

In addition, TFEU Article 346(1) on a Member State's 'essential interests of its security' becomes relevant. The provision, which has been left unchanged since the original founding treaties, specifies that Member States are not precluded from adopting certain 'rules'. These rules may concern (1) the supply of information; and (2) the adoption of security measures in connection with 'the production of or trade in arms, munitions and war material'.[43] Using treaty language similar to that of GATT Article XXI, primary EU law delimits a Member State's discretion to cases where the disclosure of information is considered 'contrary to the essential interests of its security', and the other measures are considered 'necessary for the protection' of its essential security interests.[44] The latter must not 'adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes'.[45] This provision altogether might be read as an internal limitation for the EU on the external exercise of its CCP-based

[36] Ibid [143]. See also Federico Casolari, 'Equality of States and Mutual Membership in European Union Law: Contemporary Reflections' in Daniele Amoroso, Loris Marotti, Pierfrancesco Rossi et al (eds), *More Equal than Others? Perspectives on the Principle of Equality from International and EU Law* (TMC Asser, The Hague 2022) 39, 43.
[37] Ibid.
[38] *Opinion 2/15 Pursuant to Article 218(11) TFEU* [2017] EU:C:2017:376, Opinion of A G Sharpston [335].
[39] Because this falls under the scope of the CCP, the EU acts under TFEU art 207(4).
[40] Opinion 2/15 (n 5) [100]–[104].
[41] Ibid.
[42] Opinion of A G Sharpston (n 38) [335]; endorsed in Opinion 2/15 (n 5) [102]
[43] TFEU (n 6) art 346(1). According to art 346(2), 'the Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drafted on 15 April 1958, of the products to which the provisions of paragraph 1 (b) apply'.
[44] CJEU case law on this provision is relatively scarce: see recently, Case C-601/21 *European Commission v Republic of Poland* (pending). In case C-284/05 *Commission v Finland* [2009] ECR I–10626, the Court of Justice at [47] noted that mere reliance on those interests could not justify measures under the then art 296 of the Treaty establishing the European Community.
[45] TFEU (n 6) art 346(1)(b).

competence, including the negotiation of security exceptions clauses: when the EU fixes the contents and the requirements of such provisions in its international trade agreements, it must ensure that Member States can adopt measures pursuant to TFEU Article 346. At the same time, CJEU case law pertaining to this provision affirms, on the one hand, that it is for a Member State to define its essential security interests and the security measures necessary for their protection, while, on the other hand, these measures are not excluded in their entirety from the application of EU law and, when relating to derogations from fundamental freedoms of EU law, they must be interpreted strictly.[46] A proper balancing test is applied under this provision, as opposed to the looser test adopted by the WTO dispute settlement organs under the similarly worded GATT Article XXI provisions.[47]

Finally, it is worth noting that under TFEU Article 347 Member States shall consult each other when measures taken by a Member State in circumstances concerning security affect the functioning of the internal market.[48] From the above analysis, two main points emerge. First, Member States enjoy discretion to determine whether an issue relates to their national security. This, in principle, means that they retain room for shaping their own national security, taking into consideration global security issues too. Second, Member States cannot exercise their reserved competence on national security free from constraints under EU law.

3.2 EU security and international security

The EU treaty framework also contemplates security in relation to the EU's external relations, thus encompassing action adopted pursuant to the CCP. For the purposes of this article, it is relevant that the principles and the objectives of EU external action are both internally and internationally identified.

According to TEU Article 3(5),

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.[49]

In a similar vein, according to TEU Article 21(1), 'the Union's action on the international scene' is directed by the principles 'which have inspired its own creation, development and enlargement' that the EU 'seeks to advance in the wider world'.[50] The listed principles include 'the respect for the principles of the UN Charter

[46] Case C-187/16 *European Commission v Republic of Austria* [2018] EU:C:2018:194 [72]–[77].
[47] Cf ibid [78]–[80] and *Russia – Traffic in Transit* (n 2) [7.138].
[48] According to TFEU art 347, 'measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.
[49] TEU (n 9) art 3(5).
[50] Ibid art 21(1).

and international law'.[51] Thus, UN Charter Article 2 principles on sovereign equality, cooperation in good faith, peaceful dispute settlement, the prohibition of threat or use of force, mutual assistance and respect for domestic jurisdiction are incorporated by reference.

The safeguarding by the EU of its security falls within the objectives of its external action, together with the safeguarding of its values, fundamental interests, independence and integrity.[52] Security-related objectives also encompass the preservation of peace, the prevention of conflicts and the strengthening of international security.[53] While the former notions of EU security, fundamental interests, independence and integrity are not further qualified, the latter objective of international security is to be pursued in accordance with 'the purposes and principles of the UN Charter',[54] thus incorporating UN-wide objectives such as the maintenance of international peace and security, the development of friendly relations among nations and the achievement of international cooperation 'in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms'.[55]

This excursus shows that the safeguarding of the EU's own security, fundamental interests, independence and integrity is, in itself, an express objective of EU external action, in contrast to Member States' security, which in principle falls within the Member States' reserved competence and is contemplated primarily by means of embedded derogations.

3.3 Security in Europe and security in the world

The other explicit references to security with respect to the Common Foreign and Security Policy (CFSP) merit separate consideration. According to the preamble of the TEU, security both 'in Europe' and 'in the world', alongside peace and progress, are to be pursued within the framework of the CFSP, 'thereby reinforcing the European identity and its independence'. 'Security in Europe' is specified as 'Union's security': all questions relating to it are covered by the CFSP, along with all areas of foreign policy.[56] Turning to 'security in the world', this expression is not further qualified. Arguably, it may concern security in a given part of the world or encompass global security issues. Reference to the CFSP is of relevance from the perspective of the principle of coherence in EU external action and for reliance on CCP measures among others to implement the EU's security and defence strategy.

In light of the general provisions on the EU's external action, as well as of the TEU preamble, it may be argued that restrictive (trade) measures adopted pursuant to TFEU Article 215 as a means of CFSP may be

[51] Among the listed principles in TEU art 21(1) are 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for … international law'.
[52] TEU (n 9) art 21(2)(a).
[53] Ibid art 21(2)(c).
[54] Ibid.
[55] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 1
[56] TEU (n 9) art 24(1).

aimed at security both 'in Europe' and 'in the world'.[57] At the same time, the principles and objectives of EU external action require that any conduct taken by the EU is in compliance with the principles of the UN Charter and international law.[58] This, notably, provides a framework within which the EU may adopt unilateral trade restrictive measures while also securing compliance with third States' international obligations.

Against this background, it is also worth noting that the 2022 Strategic Compass (the most recent EU strategic document on the Common Security and Defence Policy (CSDP)) elaborates a comprehensive concept of 'security' with respect to the 'defence of Europe', encompassing global security.[59] More specifically, the policy aim of the Strategic Compass is to build 'a stronger and more capable EU in the field of security and defence'.[60] The same document affirms that such an EU 'will contribute positively to global and transatlantic security'.[61] A deepened notion of defence under the CSDP emerges from the new strategy, as it addresses 'a new world of threats' such as 'the instrumentalization of migrants, the privatisation of armies and the politicisation of the control of sensitive technologies'.[62] Moreover, the strategy is meant to defend Europe from attacks in cyberspace, on the high seas and in space, which are defined as 'global commons'.[63] Climate change, environmental degradation and natural disasters, terrorism, emerging and disruptive technologies, global health crises and competition for natural resources are also identified as 'transnational threats and challenges ... at [a] global level'.[64] From this perspective, the implementation of the strategy relies heavily upon the exercise of EU competences in areas other than the CFSP, including the CCP insofar as global supply chains and international investments come into play.[65] While this seems to point to the 'securitisation' of EU trade policy, in the sense of directing trade policy to tackle a broad array of security concerns, the question arises as to the identity of the international legal norms on which the EU intends to rely. In particular, the question is whether the EU will have recourse to security exceptions to derogate from international agreement obligations as the main vehicle for implementing the CCP.

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[57] On the case law pertaining to the relationship between the Council's CFSP decisions and the Council's TFEU art 215 regulations, see Maria E Bartoloni, '"Restrictive measures" Under Art 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the Bank Refah Judgment' (2020) 5 European Papers 1359 <https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2020_I_052_Maria_Eugenia_Bartoloni_00442.pdf> accessed 30 January 2023.

[58] TEU (n 9) art 21(1).

[59] Council of the European Union, 'A Strategic Compass for Security and Defence: For a European Union that Protects its Citizens, Values and Interests and Contributes to International Peace and Security' 7371/22, adopted at the meeting of 21 March 2022 (Strategic Compass) 6. The Compass was 'adopted' by the Council in its Foreign Affairs/ Defence formation; it was then 'endorsed' by the European Council in their conclusions of 24–25 March 2022. It is premised on a 'common acknowledgement' of a need for a change in the defence area, on account of Russia's invasion of Ukraine in February 2022.

[60] Ibid 10.

[61] Ibid 15. Reference is made to the complementary role of the EU's Common Security and Defence Policy in the context of the Member States' membership of the North Atlantic Treaty Organization (NATO), the EU's support for the global rules-based order anchored in the UN and the EU's regional partners. In the same vein, see the reference to 'global security' with respect to Russia's invasion of Ukraine (ibid 17) or to China's development of its military means (ibid 18).

[62] Ibid 5.

[63] Ibid.

[64] Ibid 20.

[65] See Barbou des Places (n 30).

4 'SECURITY' IN THE EU'S INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

By virtue of its competence under the CCP, the EU has stepped onto the international stage and dealt with security issues in different settings.[66] The EU has thus been developing and taking positions internationally on the scope and content of security-related norms in international trade and investment law. The section below considers (and compares) EU approaches to such norms in the context of its bilateral treaty relations with third States and in the context of a multilateral treaty framework (through the WTO).

4.1 EU treaty-making power exercised: inputs from the EU–UK Trade and Cooperation Agreement

A look at the 'new generation' of trade agreements concluded by the EU since the entry into force of the Lisbon Treaty in 2009 reveals that global security is not generally addressed in explicit treaty language. However, several such treaty cooperation frameworks include provisions pertaining to facets of that concept.

This article takes as a reference the EU–UK Trade and Cooperation Agreement (EU–UK TCA).[67] Although adopted under TFEU Articles 217 and 218 rather than under TFEU Article 207,[68] this agreement between the EU and a former Member State (and current NATO member) contains many chapters that are commonly included in CCP-based EU agreements (ie commitments having a specific link with trade in accordance with CJEU jurisprudence on TFEU Article 207). The EU–UK TCA contains formulations close to the concept of 'global security' and addresses several security-related issues.[69] Concerning the trade pillar of the agreement, 'security exceptions' are addressed in a clause that does not differ much from GATT Article XXI, except for the extension of the scope of the provisions pertaining to the 'essential security interests' of the parties to cover both trade and investment.[70] Thus, what will be identified as the EU position on GATT Article XXI may be considered to also apply in bilateral treaty frameworks. Beyond the trade pillar, the EU–UK TCA also explicitlycontemplates 'new' security threats of a global nature.

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[66] Of course, this issue is premised on, and framed according to, the capacity of the EU to act internationally as an international legal subject. From the perspective of international institutional law and the law of treaties concluded by international organisations, the EU has a functional capacity regarding its international action, including any action on security: *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174. This capacity is governed by its own rules as far as treaty-making is concerned: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 6.

[67] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10 (EU–UK TCA).

[68] Council Decision (EU) 2021/689 of 29 April 2021 on the Conclusion, on Behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland Concerning Security Procedures for Exchanging and Protecting Classified Information [2021] OJ L149/2.

[69] See among others Joris Larik and Ramses A Wessel, 'The EU–UK Trade and Cooperation Agreement: Forging Partnership or Managing Rivalry?' in Adam Lazowski and Adam Jan Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing, Cheltenham 2022) 122.

[70] EU–UK TCA (n 68) art 415.

First, the parties recognise the importance of 'global cooperation to address issues of shared economic, environmental and social interest' and engagement in promoting 'multilateral solutions to common problems' inasmuch as this is 'in their mutual interest'.[71] The following paragraph is worth quoting:[72]

> While preserving their decision-making autonomy, and without prejudice to other provisions of this Agreement or any supplementing agreement, the Parties shall endeavour to cooperate on *current and emerging global issues of common interest* such as peace and security, climate change, sustainable development, cross-border pollution, environmental protection, digitalisation, public health and consumer protection, taxation, financial stability, and free and fair trade and investment. To that end, they shall endeavour to maintain a constant and effective dialogue and to coordinate their positions in multilateral organisations and forums in which the Parties participate, such as the United Nations, the Group of Seven (G-7) and the Group of Twenty (G-20), the Organisation for Economic Co-operation and Development, the International Monetary Fund, the World Bank and the World Trade Organization.

Most relevantly for the purposes of this article, among the 'current and emerging global issues of common interests', the EU–UK TCA presents quite clear concepts of global security concerns. Specifically, the parties consider that 'climate change represents an existential threat to humanity' and 'reiterate their commitment to strengthening the global response to this threat'.[73] In the same vein, the agreement addresses 'the most serious crimes of concern to the international community as a whole'.[74] In parallel, the proliferation of weapons of mass destruction is considered 'one of the most serious threats to international stability and security'.[75] The global scale of terrorism is envisaged within the obligation upon the parties to enhance cooperation on counter-terrorism in their 'common security interests' by providing that the UN Global Counter-Terrorism Strategy and the relevant UN Security Council resolutions are to be taken into account.[76] The reference to 'small arms and light weapons and other conventional weapons'[77] points to a more traditional understanding of security under international law, as certain activities relating to them pose a 'serious threat to peace and international security'.[78] All these matters (alongside democracy, the rule of law and human rights, as well as personal data protection) are included under the 'Basis for Cooperation'.[79] Thematic cooperation covers health security[80] and cybersecurity.[81] These issues are tackled by way of provisions on dialogue and obligations on cooperation between the parties.

[71] Ibid art 770(1) (emphasis added).
[72] Ibid art 770(2) (emphasis added).
[73] Ibid art 764(1) (emphases added).
[74] Ibid art 767(1) (emphasis added).
[75] Ibid art 765(1) (emphasis added).
[76] Ibid art 768(2) (emphasis added).
[77] Ibid art 766.
[78] Ibid art 766(1).
[79] Ibid art 763 (under Title II (Basis for Cooperation) Chapter Six (Dispute Settlement and Horizontal Provisions)).
[80] Ibid art 702.
[81] Ibid art 703.

Second, in some instances, prescriptive provisions on the above issues are akin to a subordination clause. They provide that the parties 'refrain from acts or omissions that would materially defeat the object and purpose' of specified, relevant multilateral agreements,[82] or that the parties cooperate through 'full compliance with and national implementation of existing obligations' under relevant treaties.[83]

Third, some of these issues operate as grounds for the termination or suspension of the agreement. In particular, 'the fight against climate change' and 'countering of proliferation of weapons of mass destruction', alongside the 'commitment to democratic principles, the rule of law and human rights' are listed as the 'essential elements' of the EU–UK TCA.[84] Accordingly, a 'serious and substantial failure' to fulfil any of the obligations pertaining to these essential elements, as considered by one party with respect to the other party, allows for the termination or suspension, 'in whole or in part', of the operation of the agreement, including its trade-related parts.[85] A failure is defined as serious and substantial by virtue of its gravity and nature, which must be of 'an exceptional sort that threatens peace and security or that has international repercussions'.[86]

Finally, some provisions of the EU–UK TCA do not preclude unilateral measures aimed at addressing global challenges, by way of derogations from treaty commitments. Such measures are envisaged as being justifiable under the general exceptions clause of the trade part of the agreement.[87] Arrangements of this type are considered from the perspective of 'mutual supportiveness between trade and environment policies, rules and measures'.[88] For example, for multilateral governance and agreements that are 'a response of the international community to global or regional environmental challenges',[89] the parties acknowledged the right to adopt or maintain measures 'to further the objectives of multilateral environmental agreements' by which they are bound.[90] In this case, the permitted grounds for departing from treaty obligations are explicitly identified, and are limited to the response to global challenges by the international community through multilateral cooperation.

Overall, the above analysis suggests legal paths through which some global security-related issues may be dealt with under the bilateral (trade) agreements between the EU and third-State partners. The EU–UK TCA addresses global security concerns through cooperation obligations, coordination clauses and exceptions.[91] Such arrangements provide for the integration of long-term action and sustainability concerns within the

[82] Ibid art 764(1).
[83] Ibid art 765(1).
[84] Ibid preamble.
[85] Ibid art 772(1).
[86] Ibid art 772(4).
[87] Ibid art 400(4), referring to the 'General exceptions' clause under art 412.
[88] Ibid art 400(1).
[89] Ibid (emphasis added).
[90] Ibid art 400(4).
[91] In a similar way, the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23, art 24(4) on multilateral environmental agreements, incorporating all three approaches.

relevant bilateral trade and cooperation agreements. Moreover, this broad concept of security might be considered the relevant context for the interpretation of the 'security exceptions' clause in the agreement.

4.2 EU law approach to GATT Article XXI-type provisions

As mentioned in Section 2, in international economic law disputes, the concept of security has come to the forefront due to respondent governments raising the principle as a defence to justify non-compliance with international trade and investment commitments.[92] 2017 saw the first invocation of GATT Article XXI in the WTO era in Russia – Traffic in Transit. Other cases on the same provision have followed. In all these cases, the exception invoked concerned the protection of the 'essential security interests' of the respondent 'in time of war or other emergency in international relations'.[93] The intervention of the EU as third party in these proceedings[94] was motivated by the view that the legal issues arising in relation to the interpretation of the provisions at stake were of the 'utmost systemic importance'.[95]

In the context of Russia – Traffic in Transit, as is well known, the EU maintained that the GATT security exception clause worked as a defence and was of a justiciable nature.[96] This position appears to be in line with the principles and objectives of the EU's external action as far as the rule of law is concerned.[97] Along these lines, when addressing the relevant standard of review, the EU pointed to the plausibility of the invocation of essential security interests.[98] Overall, the EU considered that a purely economic interest cannot qualify as a 'security interest', and that a 'security interest' is essential if it is pressing enough given the context. Furthermore, the necessity of the measure for the protection of an essential security interest must be evaluated objectively in light of all factors relating to the structure and operation of the measure, while the characterisation of the measure under domestic law is not dispositive.[99] Finally, the existence of war or another

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[92] On this, a note should be made on the dispute between the EU and Ukraine under the Association Agreement between the European Union and its Member States, on the one side, and Ukraine, on the other ([2014] OJ L161/3) (EU–Ukraine AA). When taking into consideration the legitimate policy objectives relating to sustainable development, including fighting against the exploitation of natural resources, such as forests, neither the EU nor Ukraine invoked the concept of (environmental) security, which is absent from the language of the sustainable development chapter of the agreement. Nor did the parties invoke concerns with a security con notation when arguing whether the measure served a legitimate policy goal under the general exception clause (in accordance with GATT art XX, as incorporated under EU–Ukraine AA art 36). The situation faced by Ukraine in its relations with Russia at the time when it adopted the 2015 ban was not even invoked as a defence under the 'security exceptions' justification allowed under the agreement (again, in accordance with GATT art XXI, incorporated under EU–Ukraine AA art 36). Rather, Ukraine referred to the 'emergency in international relations' as the factual context relevant to its conduct, such that the measures it adopted were the only workable ones: *Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union*, Final Report of the Arbitration Panel established pursuant to art 307 (11 December 2020) [47]. In that context, Ukraine pointed to the destruction of forests where military actions were conducted and to the increased reliance on wood for heating by the population in the rest of the country induced by the emergency: [49].
[93] GATT (n 2) art XXI(b)(iii).
[94] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization Annex 2 1869 UNTS 401 (DSU) art 10.
[95] *Russia – Traffic in Transit* (n 2) Annex B-1 [1.3]
[96] Otherwise, the rules-based approach to international trade would be questioned, as is raised in the summary of EU submissions: ibid Annex D-5 [5]
[97] See Section 3.2.
[98] *Russia – Traffic in Transit* (n 2) Annex D-5 [9]–[11].
[99] Ibid [10].

emergency in international relations must be determined in relation to an objective, factual situation. International law should be considered in the interpretation of both terms.[100]

Against this overall approach, it nonetheless emerges that the EU traces the identification of a security interest back to the subjective determination of a Member State and that a review of such a determination can only concern its reasonableness or plausibility from the perspective of that State to avoid abuses of the exception.[101] Content wise, the EU acknowledges that security interests may vary in time and space, and thus it is open to evolutive and different determinations. At the same time, it does not allow for the conflation of security interests with interests protected under a general exception clause.[102] Another set of considerations concerns the necessity of the measure. On this, the EU proposed the same meaning of 'necessary' in GATT Article XXI as that of GATT Article XX according to its interpretation by the Appellate Body. The relevant determination entails a 'process of weighing and balancing' a series of factors. This is a much more flexible standard than the 'only means' approach that has been adopted in the framework of other security exceptions clauses or in their interpretation, notably in the field of international investment law.[103]

After this seminal case dealing with the GATT security exception in the WTO, the EU intervened with third-party submissions in the Saudi Arabia – IPRs case (where security was invoked in respect of terrorist financing by Qatar),[104] in the US – Steel case[105] and in the US – Origin Marking case. In the two latter cases, the US defended the contested measures as ones taken 'in time of emergency in international relations' by reference to an upsurge of steel and aluminium imported products and the implementation of the National Security Law by China in Hong Kong.[106] According to the US, the latter represented a threat to its own national security.[107] While the EU submissions added further elements to its previous analysis and interpretation of GATT Article XXI in the context of its Russia – Traffic in Transit submissions, the EU remained consistent in its overall position. For the purposes of this article, it is relevant to note, first, the assertion by the EU that a security exceptions clause such as GATT Article XXI is an affirmative defence.[108] Thus, the EU rejects the contention that this type of provision is a positive rule that establishes obligations in and of itself. In other words, in the EU's view, it is not through exception clauses that the parties to a treaty are bound to commitments

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[100] Ibid [17].
[101] Ibid [19].
[102] Ibid
[103] On incorporation of the WTO Appellate Body's interpretative methodology into the international investment regime see Giorgio Sacerdoti, 'BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity (2013) 28 ICSID Review 351.
[104] WTO, *Saudi Arabia: Measures Concerning the Protection of Intellectual Property Rights – Report of the Panel* (16 June 2020) WT/DS567/R.
[105] WTO, *United States: Certain Measures on Steel and Aluminium Products – Report of the Panel* (9 December 2022) WT/DS544/R (*US – Steel*); see also cases DS547; DS548; DS552; DS554; DS556; and DS564. The EU's submissions in *US – Steel* have not been made public at the time of writing. They are summarised in Annex C-2 of the Panel's Report (*US – Steel* Addendum 45) and are recalled in the EU's submissions of 16 July 2021 in the *US – Origin Marking* proceedings (see WTO, *United States: Origin Marking Requirement – Report of the Panel* (21 December 2022) WT/DS597/R (*US – Origin Marking*)) <wto-disputes-documents - Biblioteca (europa.eu)> accessed 4 April 2023.
[106] *US – Origin Marking* (n 105).
[107] Ibid [7.331].
[108] *US – Steel* (n 105) Annex C-2 [35]; *US – Origin Marking* (n 105) Third Party Written Submission by the EU [29].

to address security issues. Those clauses only provide for the possibility of defending a measure on security grounds.

In addition, in its intervention in the above-mentioned cases, the EU has specified its view on the meaning of 'other emergency in international relations' for the purposes of GATT Article XXI. The EU considered that the term is broader than 'war' (both declared war and armed conflict) and that the presence of a situation of an 'emergency in international relations' must be objectively assessed in light of its gravity.[109] Moreover, both the temporal element of the action taken by the Member State invoking the security defence and the nature of the situation referred to in invoking security interests as an emergency, as provided by GATT Article XXI, require that a certain nexus exists between the action and the emergency situation. Such a nexus consists of the responsive function and the temporal proximity of the action to the situation. Having given this interpretation, the EU has expressed the view that the term 'other emergency in international relations' does not extend to 'an "emergency" in commercial or trade relations'.[110] On the contrary, the EU considered that the developments in Hong Kong concerning its autonomy from mainland China and the respect for protected rights and freedoms fell under the term. In this situation, the EU itself agreed to adopt an initial response package including restrictive trade measures against China in July 2020.[111]

In this regard, it appears that the EU conceives of unilateral action under a security exception clause as a means to address emergencies in international relations that concern and affect third countries, arguably reflecting a widened approach to security and emergencies that may encompass international human-rights-related concerns. While it is true that the US appeared to consider the emergency in question as affecting its own national security interests, the EU's submission appears to support the (broader) view that disrespect for human rights and fundamental freedoms in any part of the world may (contribute to) qualify(ing) a situation as an 'emergency in international relations' in accordance with security exception clauses in international trade agreements (even if it does not directly concern its own (or its Member States') security).[112] This notwithstanding, and although the relevant action is unilateral, the determination of the existence of an 'emergency in international relations' must correspond to an objective factual situation and be adopted taking international law into consideration.[113]

5 EU UNILATERAL LEGISLATION: AN ANALYSIS OF RECENT INITIATIVES ADDRESSING SECURITY CONCERNS

In the post-Lisbon Treaty framework, the EU has proposed and adopted a range of legislative acts that are aimed at regulating action by the EU and its Member States in the fields of trade and investment with a view to protecting essential interests. The EU, in the context of its trade-related competence, appears to be

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[109] *US – Origin Marking* (n 105) Third Party Written Submission by the EU [32].
[110] *US – Steel* (n 105) Annex C-2 [45]; US – Origin Marking (n 105) Annex C-4 [36].
[111] Council Conclusions on Hong Kong (24 July 2020) 9872/1/20 <https://www.consilium.europa.eu/media/45225/st09872-re01-en20.pdf> accessed 19 March 2023.
[112] *US – Origin Marking* (n 105) Third Party Written Submission by the EU [11]–[16] and [40].
[113] Ibid [32]–[33].

increasingly securitising its trade policy (ie carrying out its trade policy with reference to security considerations), and, vice versa, uses trade or investment enforcement policy (eg through imposing economic restrictions) to pursue non-trade-related concerns in securitised policy fields, such as human rights. This tendency is reflected in EU instruments such as the 2021 Export Control Regulation,[114] the 2019 FDI Screening Regulation,[115] the Foreign Subsidies Regulation[116] and the proposed 'Anti-Coercion Mechanism'.[117] At the same time, the EU has adopted measures restricting international investment pursuant to TFEU Article 215 and its CFSP. Although these are not TFEU Article 207 instruments, these 'sanctions' broadly relate to the securitisation of non-trade fields. The EU Global Human Rights Sanction Regime is a good example in this regard.[118] This section discusses the above-mentioned instruments with a view to identifying the conceptual modes of security interests underpinning and motivating this strand of EU legislation on trade and investment, and whether these include any consideration of global security.

Although it represents the last-in-time recast of legislation first adopted in 1994,[119] the modernised regime 'for the control of exports, brokering, technical assistance, transit and transfer of dual-use items' is premised on a much broader range of policy objectives than its previous versions. The necessity for an effective 'common system for the control of exports of dual-use goods' has always been justified 'to ensure that the international commitments of the Member States and the European Union, especially non-proliferation, are complied with'.[120] The 2021 recast of the Export Control Regulation, however, no longer limits these international commitments to non-proliferation, but, for the first time in this strand of trade legislation, also refers to 'regional peace, security and stability and respect for human rights and international humanitarian law'.[121] Furthermore, Recital 2 of the Export Control Regulation introduces the explicit aim of ensuring that, in the area of dual-use items, full account is taken of 'all relevant considerations', notably 'international obligations and commitments, obligations under relevant sanctions, considerations of national foreign and security policy … among them human rights, and considerations about intended end-use and the risk of diversion'. In particular, it is notable that this trade tool is directed at preventing the risk of cyber surveillance

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[114] Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 Setting Up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items (Recast) [2021] OJ L206/1 (Export Control Regulation).
[115] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union [2019] OJ L79I/1 (FDI Screening Regulation).
[116] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market [2022] OJ L330/1 (Foreign Subsidies Regulation).
[117] Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and its Member States from Economic Coercion by Third Countries [2021] COM/ 2021/775 final (Anti-Coercion Mechanism).
[118] Council Regulation (EU) 2020/1998 of 7 December 2020 Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses [2020] OJ L410I/1 (Global Human Rights Sanction Regime); Council Decision (CFSP) 2020/1999 of 7 December 2020 Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses, ibid 13.
[119] Council Regulation (EC) 3381/94 of 19 December 1994 Setting up a Community Regime for the Control of Exports of Dual-Use Goods [1994] OJ L367/1.
[120] Ibid preamble. See also Council Regulation (EC) 428/2009 of 5 May 2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items (recast) [2009] OJ L134/1 recital 3.
[121] Export Control Regulation (n 114) recital 5.

items being used 'in connection with internal repression or the commission of serious violations of human rights and international humanitarian law'.[122] It is also notable that a mechanism is put in place allowing Member States to prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I of the Regulation 'for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations'.[123] Overall, these developments expand the scope of the EU's restrictive trade policy. The reliance on international law for the definition of the objectives and scope of the Regulation, including human rights, is predominant, although considerations of national foreign and security policy legitimise export controls too.

Security issues are also at the centre of the FDI Screening Regulation. This legislative act tries to combine EU primary law on Member States' national security and essential security interests (see Section 3.1) and the will of the Commission to ensure some scrutiny of third-State investment into the Union for 'security' reasons.[124] This legislation must be compatible with international commitments binding the EU legislator (pursuant to TFEU Article 216(2)) and/or those still in place for the Member States (as long as they are not precluded by EU law, in particular under TFEU Article 351).[125] It follows that whether a Member State's ultimate screening measure denying or conditioning the admission or maintenance of FDI within the EU requires defending under international law on the grounds of security depends on a case-by-case analysis of the EU's and the Member State's international obligations. In this overall legal context, it may be noted, first, that the EU legislative framework on FDI screening reifies the objectives of the Union in its relations with the wider world under TEU Article 3(5),[126] from the specific angle of upholding and promoting 'its values and interests and contribut[ing] to the protection of its citizens'.[127] Indeed, the notion of security, although left undefined in light of the competence issue, is clearly circumscribed to the national security of a Member State, while also indirectly pointing to the Union's security. This flows from the scope of the framework established by this legislative act, which relates to FDI into or within the EU.[128] This is reaffirmed by the emphasis on the impact of FDI, which is taken into consideration for screening purposes. The FDI Screening Regulation's mechanism links security to the effects that FDI may have, inter alia, on critical infrastructure, technologies and inputs in the EU.[129]

This inward-looking approach towards security is also a feature of the 2022 Foreign Subsidies Regulation and the proposed, but still unrealised, EU Anti-Coercion Mechanism. Exploring these examples of EU legislation formed on the basis of the CCP pursuant to TFEU Article 207 may help to further illustrate the

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[122] Ibid recital 2.
[123] Ibid art 9(1).
[124] FDI Screening Regulation (n 115) recital 8, implicitly capturing the ambiguous foundation of this legislation.
[125] Ibid recital 3.
[126] See Section 3.2.
[127] FDI Screening Regulation (n 115) recital 2.
[128] Ibid recital 3.
[129] Ibid recital 13, referring to 'the effects on critical infrastructure, technologies (including key enabling technologies) and inputs which are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a Member State or in the Union' and recital 19, referring to 'foreign direct investments likely to affect projects and programmes of Union interest on grounds of security or public order'.

EU's approach to security when it comes to trade-and-investment-related internal action. Because 'foreign subsidies' are considered to be within the scope of the CCP, the Foreign Subsidies Regulation has been adopted on the basis of TFEU Article 207.[130] The regulation at stake was indeed conceived as complementary to the FDI Screening Regulation, which focuses on the effects of foreign-owned investment on security interests within the EU.[131] As designed by the Commission, the legislation on foreign subsidies aims to protect the proper functioning of the internal market by addressing distortions that are caused, directly or indirectly, by third-State measures, which undermine the level playing field of economic activities in the EU. As such, the discipline envisaged therein is not grounded on security considerations, insofar as 'security' cannot be identified on the basis of purely economic grounds, according to consistent case law and practice regarding the internal market and the external trade relations of the EU.[132] Moreover, while the targeted measures and the activities they underpin may qualify as investment or trade under relevant international law, the 'redressive measures' that the Commission may adopt cannot restrict the international treaty commitments of the EU.[133] A compatibility clause with the EU's international obligations is crafted in such a way as to apparently exclude recourse to treaty exceptions.[134] Thus, the foreign subsidies framework arguably complements the FDI screening mechanism on non-security concerns.

The envisaged anti-coercion instrument is itself presented as the EU's response to third-State measures affecting trade and investment as a means for inducing policy choices within the EU. Through its implementation, the EU seeks to complement 'structural initiatives to enhance the resilience of the Union's economic and financial system to various forms of external pressure.[135] As such, it reflects a 'geo-economic context' in which 'rising global tensions with trade' are 'increasingly weaponised';[136] in other words, a trend towards the securitisation of trade. In turn, it provides that the EU's response consist of measures falling under the CCP and counteraction in other policy areas. This legislative development, grounded in TFEU Article 207, is inward-looking insofar as it is aimed at protecting 'the interests of the Union and its Member States' in a situation of economic coercion.[137] This proposed anti-coercion instrument is, however, again not qualified in terms of 'security'. Instead, third-State action is assessed in terms of 'interference with legitimate sovereignty choices' of the EU or a Member State.[138] As coercion is framed as prohibited conduct under international law when it 'reaches a certain qualitative or quantitative threshold',[139] the EU's ultimate response, as presented in the legislative proposal, takes the form of countermeasures, once negotiation, mediation or adjudication have not been effective. Thus, the EU and its Member States' international responsibility for otherwise

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[130] Commission's Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market [2021] COM/2021/223 final.
[131] Ibid.
[132] See Section 4.2.
[133] Pursuant to Foreign Subsidies Regulation (n 116) art 7.
[134] Ibid art 44(9).
[135] Commission's Explanatory Memorandum to the Anti-Coercion Mechanism (n 117) 2.
[136] Ibid, referring to Communication from the Commission of February 2021 on the Trade Policy Review – An Open, Sustainable and Assertive Trade Policy COM(2021) 66 final.
[137] Anti-Coercion Mechanism (n 117) art 1.
[138] Ibid recital 11.
[139] Ibid.

internationally wrongful conduct could be precluded under the customary international law on countermeasures,[140] rather than on the grounds of treaty (security) exceptions.[141] International cooperation is also envisaged, both with third countries affected by the same or similar measures of economic coercion and any interested third countries in relevant international fora.[142]

While some of the previous EU tools may be seen as implementations of the securitisation of trade policy, the Global Human Rights Sanction Regime may be viewed the other way round, as trade (or rather, investment) enforcement of a securitised policy field like human rights. The Global Human Rights Sanction Regime is established by the Council Regulation and CFSP Decision adopted in late 2020 to address 'serious human rights violations and abuses worldwide'.[143] Like other sanction regimes, it targets natural or legal persons, entities and bodies, including State actors, other actors exercising effective control or authority over a territory and other non-State actors. In other words, individuals and entities may be sanctioned irrespective of their status vis-à-vis a State. The determining condition for being sanctioned is objective in nature: it is the perpetuation of serious violations and abuses of human rights.[144] The regime covers genocide and crimes against humanity,[145] a closed list of 'serious human rights violations'[146] and an open list of 'other human rights violations or abuses',[147] provided that a threshold of gravity is met: these violations or abuses must be 'widespread, systematic or … otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU'.[148] It may accordingly be inferred that any consideration pertaining to global security within the objectives of the EU's external action (see Section 3.2) can be indirectly addressed through this mechanism.

6 SUMMARY AND CONCLUSION: ADDRESSING 'GLOBAL SECURITY' ISSUES THROUGH TRADE MEANS?

The above analysis explores the EU law approach to the securitisation of international economic law, in light of the broad competence on trade policy conferred to the EU under the current EU treaty framework, as well as EU treaty law constraints on the exercise of this competence. Such constraints stem both from the Member

[140] ARSIWA (n 27) arts 22 and 49–54.
[141] Anti-Coercion Mechanism (n 117) recitals 10 and 15.
[142] Ibid art 6.
[143] Global Human Rights Sanction Regime (n 118) recital 1.
[144] Issues of attribution of conduct for the purposes of international State responsibility are not envisaged. It may also be noted that the range of covered human rights expands beyond the scope of the international criminal responsibility of individuals.
[145] Anti-Coercion Mechanism (n 117) art 2(1)(a) and (b) respectively.
[146] Ibid art 2(1)(c): '(i) torture and other cruel, inhuman or degrading treatment or punishment; (ii) slavery; (iii) extrajudicial, summary or arbitrary executions and killings; (iv) enforced disappearance of persons; (v) arbitrary arrests or detentions'.
[147] Ibid art 2(1)(d). This cluster includes trafficking in human beings, as well as abuses of human rights by migrant smugglers; sexual and gender-based violence; and violations or abuses of the freedom of peaceful assembly and of association, of freedom of opinion and expression, and of freedom of religion or belief.
[148] Ibid.

States' reserved competence over their national security and from the encapsulation of the trade policy of the EU within the principles and objectives of its external action.

The article shows that the EU is committed to international law in identifying and addressing security threats in trade relations or by trade means. It also shows that EU trade-related practice addresses security challenges and goals in different ways, ranging from security exceptions clauses to coordination clauses in treaty frameworks. However, while the concept of security is open-ended in terms of the EU's CCP, security interests are rarely explicitly addressed as such in trade and investment instruments. The EU tends to limit 'security'-labelled interests to the realm of security exceptions, consider their invocation subject to objective review and exclude purely economic considerations from their scope. This does not imply that security interests are confined to purely military concerns, as demonstrated by the FDI Screening Regulation and the CSDP Strategic Compass. It does show, however, that the EU explicitly addresses 'security' considerations primarily from the perspective of legal defences.

At the same time, global security challenges, including those concerning the environment and human rights, tend to be addressed by the EU using one of two mechanisms: the broader framework of treaty cooperation with third States, or unilateral restrictive measures addressed to targeted States and individuals, wherein trade powers are combined with CFSP decisions to create and justify sanctions. Under both approaches, EU trade measures are used to enforce the EU's (and third countries') non-trade international obligations. Under the former approach, treaty provisions that address global security issues may be considered relevant context for the interpretation of the other trade and investment provisions of the agreement, including its exceptions clauses. It remains to be seen, however, whether existent exceptions clauses will be interpreted more broadly in the future to cover wider (global) security interests (such as 'climate security' or 'human security' in third countries), both by the EU itself,[149] and internationally by international courts and panels/tribunals. That said, given the emphasis on multilateral fora and cooperative treaty frameworks, the determination of the relevant issues and means is mainly considered on the basis of international law, rather than through reliance on subjective definitions. On the other hand, the EU's unilateral sanctions are designed by reference to international law. However, their implementation is seemingly dependent upon unilateral and subjective determinations by the EU that the relevant international legal rule has been violated. This determination does not necessarily involve a consideration of how those measures fit within the UN Charter's approach to international security.

Tensions may arise between the securitisation of international economic law and States' compliance with international law when pursuing interests that extend beyond traditional security ones. Within the strand of international economic law, most governments have adopted a traditional approach towards security, involving an inward, self-protective attitude, while at the same time enlarging the scope of threats included under this notion. However, when considering the parallel strand of using trade mechanisms to enforce other securitised policy fields, non-defensive concerns regarding those same threats can also be envisaged. In both

[149] See Section 4, referring to the EU's third-party submission in the context of *US – Origin Marking* (n 105).

strands of practice, a broader array of risks and vulnerabilities, beyond traditional concerns over the territorial and institutional integrity of the State, are taken into account. Further, both strands of practice are driven by unilaterally and subjectively identified concerns. These concerns are encapsulated in the classical means of securitising international economic law, namely treaty security exceptions and unilateral sanctions.

Thus, a tension emerges between the broad scope of the interests pursued by States and the discretion left by security exceptions treaty clauses to derogate from international economic legal commitments. This tension persists in light of the prevailing adjudicative practice that recognises that security-related defences are judicially reviewable where the treaty language does not expressly exclude this process. At the same time, the prevailing understanding of security exceptions does not allow for the implementation of such treaty clauses with regard to outward, global-scale problems. Tensions also emerge between the adoption of unilateral sanctions and the international law on countermeasures. This unilateral turn clashes with the shared or common nature of the threats posed by many global security challenges.

The continued unilateralisation and securitisation of trade policies negatively impacts multilateral international cooperation. The inclusion of global security concerns into the basis for treaty-based cooperation, obligations to cooperate on those challenges and coordination clauses (as modelled by the EU's bilateral treaty practice), although formally it does not extend legal effects beyond the relations between the treaty parties, may help generate solutions compatible with international law.