Journal of International Economic Law 11(1), 135–154
doi:10.1093/jiel/jgm046. Advance Access publication 1 February 2008

CONCEPTUALIZING SECURITY EXCEPTIONS: LEGAL DOCTRINE OR POLITICAL EXCUSE?

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ABSTRACT

The dominant world political theory for international engagement has long been Realism, where state power and state interests are viewed as determining the limits on state relations. Increasingly, however, new theories have emerged to assist our understanding of how and why states interact in a global setting dominated by international institutions and their antecedent agreements. This is no more apparent than in the field of international economic relations under the control of the World Trade Organization. Using political and legal theories, this essay explores whether WTO security exceptions are legal doctrines or political excuses and how this informs our present, and possibly future, understanding of international state interaction.

I. INTRODUCTION

When the World Trade Organization (WTO) was formed in 1995, several of its initial agreements included security exceptions.[1] Their inclusion suggested formal recognition of state sovereignty and the members' right to self-protection.[2]

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[1] See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement*'), annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190 ('*GATT 1994*'), Article XXI; *Marrakesh Agreement*, annex 1A, (*Agreement on Trade Related Investment Measures*) ('*TRIMs*'), Article 3: adopting 'all exceptions under *GATT 1994*'; *Marrakesh Agreement*, annex 1A (*Technical Barriers to Trade*) ('*TBT*'), Article 2.5; *Marrakesh Agreement*, annex 1B (*General Agreement on Trade in Services*) ('*GATS*'), Article XIV *bis*; *Marrakesh Agreement*, annex 1C (*Agreement on Trade and Intellectual Property*) ('*TRIPS*'), Article 73 (hereafter 'security exceptions').

[2] Wesley A. Cann Jr, 'Creating Standards of Accountability for the Use of the WTO Security Exception: Reducing the Role of Power Based Relations and Establishing a New Balance Between Sovereignty and Multilaterialism', 26 *Yale Journal of International Law* 413 (2001), at 417. See also Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO?', 43 *Virginia Journal of International Law* 365 (2002–3), at 371–2; David T. Shapiro, 'Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT', 31 *George Washington Journal of International Law & Economics* 97 (1997), at 113. Cf Anne Orford, 'The Politics of Collective Security', 17 *Michigan Journal of International Law* 373 (1996), at 395.

Article XXI to *GATT 1994* provides:

Nothing in this agreement shall be construed:

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests:

  (i) relating to fissionable materials or the materials from which they are derived;

  (ii) relating to the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly for the purpose of supplying a military establishment;

  (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contract part from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[3]

A cursory reading of the security exceptions suggests that 'nothing'[4] within the agreements can prevent WTO members suspending their trade obligations to face legitimate security threats. A significant concern is, however, whether the security exceptions are 'self-judging'[5] and entirely deferential to 'the politico-military community'.[6] If so, the WTO's 'cornerstone' principles[7]—Most Favoured Nation[8] and National Treatment[9]—could be avoided by the security exceptions operating as political (state related) excuses. That is, a means of concealing,[10] or justifying, trade protectionist practices. An alternative view is that security exceptions allow members restricted, but lawful, derogation from their trade obligations subject to review by a dispute settlement body.[11] This doctrinal perspective—encapsulated by binding rules, procedures, 'accountability, openness and equality'[12]—considers that

[3] *GATT 1994*, above n 1, Article XXI.
[4] Ibid, at *Chapeau* Article XXI.
[5] Akande and Williams, above n 2, 378.
[6] Antonio F. Perez, 'WTO and U.N. Law: Institutional Comity in National Security', 23 *Yale Journal of International Law* 301 (1998), at 302.
[7] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 3rd ed. (New York: Routledge, 2005) 28.
[8] *GATT 1994*, above n 1, Article 1.
[9] *GATT 1994*, above n 1, Article 19.
[10] *New Oxford Dictionary of English* (1998), 642.
[11] *Marrakesh Agreement*, annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 ('*DSU*'), Article 2.1.
[12] Martti Koskenniemi, 'Out of Europe: Carl Schmitt, Hans Morgenthau, and the turn to "international relations"', in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, (New York: Cambridge University Press, 2002), 500.

security exceptions have judicially discoverable limitations. I argue that the vision of the security exceptions that prevails ultimately informs the relevance of the WTO's greater 'economic integration'[13] project.

In exploring whether WTO security exceptions operate as political excuses or legal doctrines, this essay does not review each case where security exceptions were invoked.[14] Rather, using theories of state sovereignty, Realism, Legal Formalism, Constructivism and Institutionalism, I use a point-in-time framework to reveal the contextually amorphous operation of the security exceptions. Three 'occasions' are used to present the competing political and legal visions. The first—Negotiation—analyses the initial inclusion of security exceptions in WTO Agreements. In the second—Invocation—Realism's reduction of the political to an unchallengeable 'intensity' concept is contrasted with the WTO's formal legal doctrine that encapsulates the sovereignty surrendered by the members. In the final occasion—Enmeshment[15]—the security exceptions mediate traditional member sovereignty to assist the WTO's legalized 'participatory vision',[16] facilitating an evolution of state identity. Finally, I conclude that security exceptions are the necessary legal linchpins to WTO Agreements, mediating political exigencies, while simultaneously orchestrating international economic integration.

II. WTO NEGOTIATION—INCLUDING SECURITY EXCEPTIONS

A. Sovereignty, security exceptions and realism

Traditional sovereignty is intimately tied to notions of 'the inviolability of state borders and decisions about national security interests'[17] within a state's domestic sphere.[18] Sovereignty is 'the State's sphere of liberty',[19] and in this essay, is defined as the allocation of decision-making power.[20] A tension exists between the decision to comply with international

[13] Trebilcock and Howse, above n 7, 25–6.

[14] See generally, e.g., Hannes L Schloemann and Stefan Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence', 93 *American Journal of International Law* 424 (1999); Michael J. Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception', 12 *Michigan Journal of International Law* 558 (1991); Cann Jr, above n 2, 413.

[15] See generally, Claire R. Kelly, 'Realist Theory, Real Constraints', 44 *Virginia Journal of International Law Association* 545 (2004).

[16] Peter M. Gerhart, 'The Two Constitutional Visions of the World Trade Organization', 24 *University of Pennsylvania Journal of International Economic Law* 1 (2003), at 3.

[17] Orford, above n 2, 395.

[18] Cf Winston P. Nagan and Craig Hammer, 'The Changing Character of Sovereignty in International Law and International Relations', 43 *Columbia Journal of International Law* 141 (2004), at 170–7.

[19] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Helsinki: Finnish Lawyers' Pub. Co, 1989) 201.

[20] John H. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and the Implementation of the Uruguay Rules', 36 *Columbia Journal of Transnational Law* 157 (1997), at 160.

legal doctrines, and the decision to favour domestic interests over those international obligations. The exercise of decision-making authority by international legal regimes is dependent on a state's willingness to be bound.[21] Thus, when members accepted the WTO Agreements and their antecedent obligations they exercised their 'free will'.[22] Furthermore, states consented to review of the legality of their trade obligation compliance by dispute resolution panels, which shifted decision-making authority from the state to the WTO.[23] This shift fundamentally altered each state's 'rights and responsibilities in a systemic way',[24] necessarily influencing the members' external arrangements.[25]

As panels generally rule on highly contentious domestic issues, the WTO has great potential to destabilize its institutional legitimacy if unconstrained in its decision-making power.[26] Thus, the tension inevitably exists between members' decision-making authority and the limits, if any, of the reach of international law through the WTO.[27] If members conceded sovereignty without reciprocal 'mutual advantage'[28] a 'crisis of sovereignty'[29] through the 'democratic paradox of globalization'[30] would become entrenched. Thus, WTO members have included explicit security exceptions in WTO Agreements allowing for derogation from their obligations when their national security is threatened. Members have sought to retain a degree of autonomy over decisions in 'sensitive'[31] policy areas, while balancing the tension between their sovereignty and institutional integrity. WTO Agreements which include security exceptions recognize that '[s]ecurity is pre-eminent because without it a state has no sovereignty, and its very existence is in doubt'.[32] This negotiated inclusion operates as a salute to traditional state

[21] Robert J. Beck, Anthony Clark Arend and Robert D. Vender Lugt, 'Legal Positivism', in Robert J. Beck, Anthony Clark Arend and Robert D. Vender Lugt (eds), *International Rules: Approaches from International Law and International Relations*, (New York: Oxford University Press, 1996) 156.

[22] Joshua Meltzer, 'State Sovereignty and the Legitimacy of the WTO', 26 *University of Pennsylvania Journal of International Economic Law* 693 (2005), at 693.

[23] Kal Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 (4) *Journal of International Economic Law* 841 (2003), at 849; Gerhart, above n 14, 14; *DSU*, above n 10, Article 2.1.

[24] Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints', 98 *American Journal of International Law* 247 (2004), at 250.

[25] J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 (2) *Journal of World Trade* 191 (2001), at 192–3.

[26] Gerhart, above n 16, 16–17.

[27] Schloemann and Ohlhoff, above n 14, 424–5.

[28] Cann Jr, above n 2, 467.

[29] Martti Koskenniemi, 'What is International Law For?', in Malcolm Evans (ed), *International Law*, (England: Oxford University Press, 2003) 94.

[30] Gerhart, above n 16, 9.

[31] Akande and Williams, above n 2, 372.

[32] Raj Bhala, 'Book Review: International Rules: Approaches from International Law and International Relations', 23 *North Carolina Journal of International Law and Commercial Regulation* 737 (1998), at 760.

sovereignty; an apparent recognition of member autonomy over sensitive domestic political arrangements.[33]

Realism, the 'dominant'[34] theory of international relations, is closely related to issues of national security, and thus the operation of the security exceptions. Realism's central condition is that 'international politics . . . is a struggle for power'[35] and the states' pursuit of power 'matters more than law'.[36] Realism views political issues as 'the degree of intensity with which [an] object [is] linked to the State'.[37] For national security issues, this 'intensity' of feeling demarcates the bounds of the pre-eminent political, considered to prevail over international law's doctrinal constraints. Indeed, Alexander Hamilton proclaimed that 'self-preservation is the first duty of a nation'.[38] As the international sphere exists in a state of 'anarchy'[39]—the absence of an overarching authority[40]—security issues must be solely determined by the sovereign state. On this view, only WTO members have the authority to define their 'essential security interests'[41] as an expression of their sovereignty.[42] Lindsay suggests that when entering an international legal regime, security exceptions provide the necessary means of justifying trade protectionism without needing to resolve the underlying tension 'relating to sovereignty and the nature of the WTO'.[43] For WTO members, security exceptions represent 'an indispensable escape mechanism or safety valve'[44] when their very existence is under threat.

B. WTO bargain—pragmatic institutional and sovereign excuse

For this first 'occasion', the security exceptions negotiated the politically charged 'discursive space'[45] between the WTO's legal authority and the retention of sovereign power by members. In this sense, the security

[33] Hahn, above n 14, 568.
[34] Michael W. Doyle, *Ways of War and Peace: Realism, Liberalism and Socialism*, (New York: Norton, 1997) 41.
[35] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, (New York: Knopf, 1948) 27.
[36] Kelly, above n 15, 546.
[37] Koskenniemi, above n 12, 441.
[38] Hans J. Morgenthau, *In Defense of the National Interest*, (New York: Knopf, 1951) 15.
[39] Ibid, at 102.
[40] Kelly, above n 15, 556. See also, Stephen D. Krasner, 'What's Wrong with International Law Scholarship?: International Law and International Relations: Together, Apart, Together?', 1 *Chicago Journal of International Law* 93 (2000), at 94; Richard H. Steinberg and Jonathan M. Zasloff, 'Centennial Essay: Power and International Law', 100 *American Journal of International Law* 64 (2006), at 72–3.
[41] *GATT 1994*, above n 1, Articles XXI(a), (b).
[42] Schloemann and Ohlhoff, above n 14, 447.
[43] Peter Lindsay, 'The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?', 52 *Duke Law Journal* 1277 (2003), at 1294.
[44] Cann Jr, above n 2, 417.
[45] Steinberg, above n 24, 257.

exceptions operate as a dual political excuse. The WTO, as an institution, is wary that WTO membership 'erodes states' control over cross-border flows'[46] and thus, state sovereignty. A state's participation therefore became dependent on reserving their sovereign rights of power over national security. Members essentially seek confirmation that their security interests supersede trade obligations.[47] This first manifestation is a *sovereign excuse* that appears to function 'as a description of the [members'] norm'.[48] That is, Realism's view that security is a political issue solely for state determination.

Secondly, security exceptions operate as a facilitative, *institutional excuse*. They allow the WTO and its Agreements to 'walk the fine line between these two competing concerns'[49] of sovereignty and authority. States are induced, and justify, entering the regime believing their 'essential security interests', which demand great domestic political responsibility, will be protected.[50] Conceptually, therefore, security exceptions are the necessary 'escape clause'[51] used to expedite the conclusion of Agreements, while binding members to their WTO obligations.[52] Pragmatism requires the appearance of the WTO circumscribing its decision-making authority, while the states' political power seemingly exists 'despite [the] institution's rules or norms'.[53] Therefore, by including security exceptions, states are encouraged to consent to WTO membership, underpinning the WTO's negotiated legitimacy.[54]

On accession to an Agreement, however, each member's sovereignty is immediately confined. Removed from the states' control, the members' initial belief in their reservation of sovereignty is directly confronted by the legalized regime.[55] By negotiating this expression of traditional sovereignty *within* the regime, member sovereignty is inherently restricted by the WTO's independent judicial function. At Invocation, a contest exists between security exceptions as self-judging 'release valves' on the one hand, and as a justiciable and limited means of escaping trade obligations on the other.

[46] Meltzer, above n 22, 701.
[47] Perez, above n 6, 302. See also Raj Bhala, 'National Security and International Trade Law: What the GATT Says, and What the United States Does', 19 *University of Pennsylvania Journal of International Economic Law* 263 (1998), at 317; Akande and Williams, above n 2, 396.
[48] Koskenniemi, above n 19, 262.
[49] Lindsay, above n 43, 1295.
[50] Akande and Williams, above n 2, 395–6.
[51] Hahn, above n 14, 602.
[52] Peter B. Rosendorff and Helen V. Miller, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape', 55(4) *International Organization* 829 (2001), at 851.
[53] Kelly, above n 15, 546.
[54] Gerhart, above n 16, 5–6. See also Steinberg, above n 24, 257.
[55] Ibid, at 14.

III. INVOCATION—SECURITY EXCEPTIONS AT LARGE?

A. US invocation as defence

Since the WTO's creation, two trade disputes have seen the security exceptions invoked without being formally determined by a WTO panel.[56] In 1996, the United States adopted the *Helms-Burton Act*,[57] which effectively penalized international companies who operated in the US but also traded in Cuba.[58] The European Union (EU) challenged the legislation as comprising a restrictive trade measure. The EU sought a WTO panel's determination of the consistency of this measure with the WTO obligations of the US. In response, the US said it would invoke Article XXI of GATT to justify its derogation from its trade commitments.[59] The US sought to distinguish illegitimate use of the security exceptions 'motivated by trade protectionism',[60] with instances that were 'expressly justified . . . in pursuit of essential US security interests'.[61] The former would amount to a political excuse, while the latter would legalize the exception for essential security preservation, superseding their trade obligations.[62] The US adopted a Realist approach, arguing that WTO panels were not 'competent' to determine these politically 'intense' concerns relating to state survival,[63] irrespective of the potential for illegitimate invocations as distinguished by the US.

1. Realist intensity—self-judging escapism

The EU–US dispute raises fundamental concerns about whether a WTO panel has the authority to determine a member's invocation of the security exceptions, and if so, to what extent the measure imposed is legally justiciable.[64] Akande and Williams suggest that a panel's competency depends on it being 'faithful to the terms of that article but . . . at the same

[56] World Trade Organization, 'GATT Analytical Index', http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm#index15096 (visited 4 October 2006). See *Nicaragua — Measures Affecting Imports from Honduras and Columbia*, WTO Doc WT/DS188/2 (2000); *Nicaragua — Council for Trade in Services and Goods*, WTO Doc S/C/N/115 (2000) (Notification Pursuant to Article XXI of the GATT 1994 and Article XIV bis of the GATS).

[57] *Helms–Burton Act*, 22 USC §§ 6021–91 (1996).

[58] René E. Browne, 'Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton', 86 *The Georgetown Law Journal* 405 (1997), at 407.

[59] *European Communities — The Cuban Liberty and Democratic Solidarity Act*, WTO Doc WT/DS38/2 (1996) (Request for Establishment of a Panel).

[60] *Dispute Settlement Body — Minutes of Meeting*, WTO Doc WT/DSB/M/24 (1996).

[61] Ibid.

[62] Ibid.

[63] Jeffrey L. Dunoff, 'The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution', 12 *American Review of International Arbitration* 197 (2002), at 206–7. See also C. Todd Piczak, 'The Helms Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Question Doctrine', 61 *University of Pittsburgh Law Review* 287 (1999), at 320–1.

[64] Akande and Williams, above n 2, 369, 379.

time . . . prevent[ing] abuse of the system'.[65] The open-textured and ambiguous[66] language of 'its essential security interests'[67] seemingly places the avoidance of trade obligations squarely within a member's discretion of what 'it considers necessary'.[68] These broad and 'opaque provisions'[69] have been used to support the Realist view that 'national security is a matter to be decided by a State taking a measure'.[70] That construction implores subjectivity and thus a self-judging exculpation,[71] taking these 'political questions' beyond the competency of any panel or other state to determine.[72]

Indeed, when a state's will is oppositional to a legal doctrine, according to Realism, it is the law that must yield to the state's political decision.[73] Law 'could not and should not be applied in situations that were essentially political'.[74] For a panel to rule on the legality of a member's invocation of the security exceptions 'carries politically incendiary risks'[75] which Realists oppose. This is because WTO members' sovereign identity is constructed from their role in security provision,[76] and security is a politically intense concern. Morgenthau expressed the state's self-preservation as 'both [a] political necessity as well as moral duty'.[77] The 'political' and 'legal' are, therefore, asymmetrical concepts.[78] The political is determined by the state, and only when legal doctrines reflect the state's position can a conflict be a 'legal dispute' rather than a 'political tension'.[79]

The normative Realist view of security exceptions is of 'vast discretion at the hands of the member invoking the provisions'.[80] Because a state's 'feelings'[81] toward national security are so intense the security exceptions can never be 'judicially discoverable'.[82] Security exceptions thus encapsulate the 'emotional projection'[83] of the members' right to defence, relieving members

[65] Ibid, at 369.
[66] Lindsay above n 43, 1296–9.
[67] *GATT 1994*, above n 1, Articles XXI(a), (b); Schloemann and Ohlhoff, above n 14, 427.
[68] *GATT 1994*, above n 1, Article XXI(b). See *Contra* Cann Jr, above n 2, 479; Schloemann and Ohlhoff, above n 14, 437.
[69] Weiler, above n 25, 197. See also, Browne, above n 56, 410.
[70] Akande and Williams, above n 2, 381.
[71] See, e.g., Browne, above n 58, 410.
[72] Piczak, above n 63, 318–19.
[73] Morgethau, above n 38, 144; Oscar Schachter, 'The Nature and Reality of International Law', in Oscar Schachter (ed), *International Law in Theory and Practice*, (Boston: M. Nijhoff Publishers, 1991) 5.
[74] Koskenniemi, above n 12, 481.
[75] Steinberg, above n 24, 262.
[76] Orford, above n 2, 397.
[77] Koskenniemi, above n 12, 438; Morgethau, above n 38, 38.
[78] Koskenniemi, above n 12, 441–2.
[79] Ibid, at 441–5.
[80] Schloemann and Ohlhoff, above n 14, 445.
[81] Koskenniemi, above n 12, 444.
[82] Piczak, above n 63, 319.
[83] Koskenniemi, above n 12, 444.

of their trade obligations at the subjective 'whim'[84] of the state.[85] They do not operate as legal doctrines as they 'could not . . . be delimited by legal-technical language'.[86] Instead, from the Realist view, the security exceptions exist as political constructs, designed to avoid judicial review, while possessing the potential—when not used for genuine security threats—to operate as political excuses.

B. Legal limitations?

1. The nature of legal doctrine

To be an independent legal doctrine the security exceptions must, as Koskenneimi suggests, retain both 'normativity and concreteness'.[87] In contrast to Realism's subjectivism, international law's normativity demands 'distance between it and State behaviour, will and interest',[88] while its concreteness is defined by its 'distance from a natural morality'.[89] Indeed, it is the Realists' idealism of the national interest and security[90]—'moral principles derived from political reality'[91]—which the security exceptions, as legal doctrines, must avoid to be valid.[92] This presents an inherent paradox; if states are synonymous with the pursuit of power, and '"[p]ower" and "law" are entangled',[93] how can the security exceptions—embodying the core of traditional sovereign state identity—ever be separate from the state? National security is the sum of a state, its sovereignty and international legal personality. On this view, law cannot achieve the desired doctrinal detachment. If left to a members' decisional autonomy, however, the security exceptions are vulnerable to abuse as an instrument of power.[94] Either construction demonstrates 'the insufficiency of both logics'.[95]

Acknowledging the security exceptions' paradoxical relationship with the influence of the political, however, allows for 'law' to be reformulated as either '*principles or doctrines* on the one hand, and as *institutional practices* on the other'.[96] Here legal rules 'shape future behaviour . . . constraining and modifying state power'.[97] The Legal Formalism of security exceptions

[84] Cann Jr, above n 2, 425.
[85] Koskenniemi, above n 12, 443.
[86] Ibid 444.
[87] Koskenniemi, above n 19, 2.
[88] Ibid.
[89] Ibid.
[90] Doyle, above n 34, 19.
[91] Morgethau, above n 38, 33.
[92] Koskenniemi, above n 12, 455–6.
[93] Koskenniemi, above n 29, 103.
[94] Ibid, at 102. See also Steinberg and Zasloff, above n 40, 72; Cann Jr, above n 2, 79.
[95] Koskenniemi, above n 29, 104.
[96] Ibid, at 107 (emphasis added).
[97] Anne-Marie Slaughter, Andrew S. Tumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *American Journal of International Law* 367 (1998), at 380.

attempts to harness the political concealment of trade protectionist measures. First, doctrinally, the security exceptions are not left as unwritten rules for the subjective discretion of state power.[98] Instead, they are distilled into legally binding texts, open to challenge before an independent arbiter, signifying their 'concreteness'. Secondly, as a process, the security exceptions limit the political 'struggle for power'[99] *within* the institution. Politically motivated invocations are constrained by the WTO's legal process because even legitimate invocations are to be determined within the system. The embodiment of 'law' in legal doctrine and legal process constrains the politicization of security exceptions.

2. Robust legalism—law as process and doctrine

According to Higgins, international legal institutions require a 'robust attitude to what is a "legal" matter'.[100] Therefore, whether security exceptions are justiciable is a 'matter' to be determined by WTO panels. Panels are competent to determine the legality of the security exceptions because members gave unconditional consent to equal access to panel dispute resolution.[101] Panels are empowered to hear disputes arising under the WTO Agreements,[102] and determine their own jurisdiction.[103] The legality of invocation is dealt with as a legal abstraction; the law 'is a product of political and social forces',[104] but the resulting legal doctrine is different to politics.[105] 'Legal doctrine' within this process is detached from the co-existing powers of the 'political and diplomatic efforts'[106] that pervade international institutions.[107] In upholding the tenets of 'legal objectivity', a WTO panel would confine its focus to the dispute before it, to 'the proper place of formal law'[108]—legal arguments,[109] interpretation, decision-making[110]—distancing itself from the political externalities and state sensitivities of national security. Legal process necessarily attempts to overcome the 'simplistically cynical'[111] Realist power-based perspective, confining the influence of political reductionism.

[98] Schloemann and Ohlhoff, above n 14, 437.
[99] Morgethau, above n 35, 27.
[100] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Clarendon Press, 1994) 195.
[101] *DSU*, above n 11, Article 1.1.
[102] *DSU*, above n 11, Article 2.1. Cf Higgins, above n 100, 186.
[103] *DSU*, above n 11, Article 7. Cf Higgins, above n 100, 194.
[104] Schachter, above n 73, 5 (emphasis added).
[105] Ibid, at 4.
[106] Higgins, above n 100, 195.
[107] Ibid, at 3–5.
[108] Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations', in Stephen Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford: Oxford University Press, 2000) 31.
[109] Ibid.
[110] Higgins, above n 100, 195.
[111] Koskenniemi, above n 12, 478.

Drawing the security exceptions within this institutional legal process shapes state behaviour. Members must justify their trade measures before panels empowered with legal authority; a requirement that brings political power within the institutional legal structures.[112] As the security exceptions are vulnerable to abuse, it was recognized that their invocation needed to be 'subject to consultation, decision and control of legality under the . . . dispute settlement procedure'.[113]As legal doctrine, the security exceptions are imbued with the demand of formalism that WTO members justify their invocation and antecedent suspension of their trade obligations. The legal process applies pressure to procure only legitimate invocations by WTO members who are under *real* security threats.

3. Doctrinal constraints

To suggest that the security exceptions are self-judging is to implicitly endorse the security exceptions as a legitimate means of concealing illegitimate trade measures. Such a view is disingenuous against the background of the security exceptions' negotiated limitations. Drafters of the security exceptions highlighted the 'great danger in having too wide an exception'.[114] They indicated an inherent need to 'take care of *real* security interests and . . . [simultaneously] *to limit* the exception so as to prevent the adoption of protection . . . under the guise of security'.[115] It was thus recognized that members, motivated by the exigencies of state policy, might invoke the security exceptions to conceal protectionist intent, creating the feared 'loophole'[116] escape clause. This would be exacerbated if a member's invocation could not be legally reviewed.

Article XXI of GATT uses restrictive language to limit the use of security to 'specific exceptions to cover specific instances'.[117] Within a WTO Agreement, a 'technical instrument'[118] designed to control member relations and obligations, it transcends the mere political regulation of state activities. While a member may have scope to determine what constitutes its own essential security interests[119]—perhaps including human rights[120]—the adequacy of the measure cannot be removed from judicial review.[121]

[112] Slaughter, Tumello and Wood, above n 97, 380.
[113] Hahn, above n 14, 568.
[114] World Trade Organization, *Guide to GATT Law and Practice: GATT Analytical Index*, (Geneva: World Trade Organization, 1995), 600.
[115] Ibid, (emphasis added).
[116] Schloemann and Ohlhoff, above n 14, 426.
[117] Akande and Williams, above n 2, 384.
[118] Hahn, above n 14, 580.
[119] Ibid, at 599; Akande and Williams, above n 2, 396.
[120] See generally, Ryan Goodman, 'International Human Rights Law in Practice: Norms and National Security: The WTO as a Catalyst for Inquiry', 2 *Chicago Journal of International Law* 101 (2001).
[121] Cann Jr, above n 2, 478–9. *Contra* Akande and Williams, above n 2, 398–99.

WTO panels are competent to determine whether the trade measure, imposed in reliance on the exception, legitimately addresses the determined security threat.[122] Panels must analyse whether the measures used by a member are in fact 'necessary' and arguably, when applied, are 'proportionate'[123] to the determined threat.[124] At the very least, panels are competent to determine whether a 'war or other emergency in international relations'[125] actually exists.[126] By limiting 'legal escape in cases of necessity',[127] security exceptions serve to circumscribe each member's power to derogate from their trade obligations, thus enhancing the economic integration agenda.

4. Realism's assumptions

Realists construct security exceptions as politically malleable implements couched in terms of traditional sovereignty. The Realist interpretation, however, 'poses a latent, lingering threat to the stability of the fledgling [WTO]'.[128] The Realist view presupposes a given order or 'naturalness'[129] to the affairs of nations. '[I]t serves to make the *status quo* seem inevitable'.[130] Power, aggression and anarchy are assumed 'realities' of international state relations,[131] with self-judging security exceptions the edifice of this purported natural state. In this way the 'GATT could not be understood as legally binding by any normal usage of the term'.[132] Accordingly, security exceptions would operate not as 'neutral principles arising from community consent but, rather, politics by other means'.[133] If this view prevailed, WTO 'law' would simply reflect powerful state interests as the 'epiphenomenon of underlying power'.[134] This partial 'naturalness' would prevail despite the drafter's intention to limit the expression of state power through legally reviewable and limited security exceptions. It is apparent, however, that Realism is challenged by the confining influence of Legal Formalism over political escapism.

[122] Schloemann and Ohlhoff, above n 14, 443.
[123] Akande and Williams, above n 2, 400.
[124] Ibid, at 395.
[125] *GATT 1994*, above n 1, Article XXI(b)(iii).
[126] Akande and Williams, above n 2, 399.
[127] Schloemann and Ohlhoff, above n 14, 437.
[128] Browne, above n 58, 409.
[129] Orford, above n 2, 398.
[130] Ibid Cf Morgethau, above n 38, 144; Krasner, above n 40, 94.
[131] Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* 455 (1996), at 465; Slaughter, Tumello and Wood, above n 97, 382.
[132] Hahn, above n 14, 584.
[133] Steinberg and Zasloff, above n 40, 72.
[134] Ibid, at 74. See also Raustiala, above n 23, 855–56; Anne Marie Slaughter-Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 (2) *American Journal of International Law* 205 (1993), 206.

C. Legal formalism—curtailment of the powerful

1. EU–US dispute and doctrinal constraints

It is significant that the invocation by the US was never legally determined.[135] Despite US rhetoric that it would boycott any convened panel, the impending threat of determination by the WTO's judicial body[136] facilitated the EU–US move to 'peaceful settlement . . . despite the highly politicised nature of the dispute'.[137] Judicial determination would invite refinement of the security exceptions' nascent ambiguity, suggesting the security exceptions do exist as legal doctrines. Here, 'law and power *interacted* in some way',[138] with the doctrinal security exceptions shaping the members' conduct. Browne's observation of the continued assertion of 'self-defining' security exceptions reveals, however, an underlying scepticism about the legal doctrine's present influence.[139] Indeed, this scepticism supports the view that the US panel avoidance is only demonstrative of the 'manipulative diplomatic practices . . . that presume the primacy of hegemonic powers'.[140] Such circumvention of the institution's legal process undermines the WTO's legitimacy.[141] The ease of avoidance illustrates the impotence of legal doctrine, devoid of its required 'normativity and concreteness'.[142]

If Realism's claim that '[t]he only relevant laws were the "laws of politics"'[143] was accurate, then the EU–US settlement is inexplicable. If power politics were determinative, then a WTO panel's ruling would not concern these states as 'economic superpowers'.[144] Political power would supersede the juridical process, and the security exceptions would be instruments of state power rendering a panel's determination irrelevant. Instead, the settlement of the dispute wholly undermines the claim that '[t]he relations between the superpowers were "politics" and not law'.[145] The better view, I argue, is that WTO judicial review, as an initiative of the members themselves, has 'shift[ed] the basis of the system . . . from power to law'.[146] The legal doctrine—synonymous with legal process—influenced the EU and US to settle their dispute. While it may be argued that the EU and US simply engaged in a pragmatic political settlement of their dispute to avoid undermining an economic institution valuable to their interests, it is apparent that their conduct was still, formally at least, curtailed by the legal process.

[135] Browne, above n 58, 409.
[136] Cf Weiler, above n 25, 201–2.
[137] Browne, above n 58, 409.
[138] Slaughter-Burley, above n 134, 208 (emphasis added).
[139] Browne, above n 58, 421.
[140] Koskenniemi, above n 131, 472.
[141] Browne, above n 58, 420–1.
[142] Koskenniemi, above n 19, 247.
[143] Slaughter-Burley, above n 134, 207.
[144] Browne, above n 58, 408.
[145] Koskenniemi, above n 12, 481.
[146] Schloemann and Ohlhoff, above n 14, 451.

Legal formalism, as an institutional 'culture of resistance to power . . . whose status cannot be reduced to the political positions of any one of the parties'[147] is therefore inherent in the security exceptions.

Indeed, '[i]f law is only about what works, and pays no attention to *the objectives for which it is used*, then it will become only a smokescreen for effective power'.[148] In this example, the law impacted on the EU and US, rather than the security exceptions being *used* as an instrument for an illegitimate invocation. If panels were entirely deferential, then the exception would be vast and all encompassing.[149] The invocation by the US would have operated as the drafters most feared; 'primarily as a foreign policy tool by powerful states to influence the social, political and economic policies of weaker nations'.[150] The formalism of security exceptions' established 'a platform to evaluate behaviour, including the behaviour of those in dominant positions'.[151] The political power of the US was curtailed by the doctrinal design that only legitimate invocations prevail, compelling the US to use informal diplomatic negotiations to sustain *Helms–Burton*.[152]

D. Invocation as formal legal doctrine

Where at 'Negotiation' the security exceptions were a salute to traditional sovereignty, at 'Invocation' they are drawn within the institution as distilled, restrictive legal doctrines— 'fixed and ascertainable'.[153] Operating within a legal process of openness and accountability allows the security exceptions to limit expressions of political power, with the doctrinal process influencing state behaviour.[154] Security exceptions thus balance 'apology'[155] for accepting the politics of national security while simultaneously constraining its reach. Indeed, the formal limitations at Invocation suggest the security exceptions might embody the 'dynamic'[156] law sought by Morgenthau; flexible enough to constrain illegitimate political escapism (the excuse), while allowing legitimate invocations for measures 'taken in time of war or other emergency in international relations'.[157] What remains compelling is that the debated operation of security exceptions as political excuses (from Realism) or legal doctrines (from Legal Formalism) occurs *within* the legalized WTO system.

[147] Koskenniemi, above n 12, 500.
[148] Ibid, at 486 (emphasis added).
[149] Browne, above n 58, 413.
[150] Cann Jr, above n 2, 426, 435.
[151] Koskenniemi, above n 29, 102.
[152] Perez, above n 6, 317.
[153] Koskenniemi, above n 29, 102.
[154] Slaughter-Burley, above n 134, 209.
[155] Koskenniemi, above n 19, 2.
[156] Koskenniemi, above n 12, 443.
[157] *GATT 1994*, above n 1, Article XXI(b)(iii).

IV. INSTITUTIONAL ENMESHMENT—LEGALISM AND THE ECONOMIC INTEGRATION PROJECT

A. Legal authority and institutionalism

In this final occasion—Enmeshment—the security exceptions are situated at the intersection of a legalized institution and the transcendence of traditional sovereignty. The security exceptions, operating *within* the institution as legal doctrines, 'mediate' traditional sovereignty,[158] assisting the shift from the Realist prioritizing of politics and power to interdependent enmeshment. Here, the security exceptions are conduits through which traditional sovereignty is legally limited to overcome political escapism,[159] signifying a reciprocal increase in institutional 'constitutional authority'.[160] The WTO's 'external, participatory vision'[161] recognizes that each member's conduct affects the internal arrangements of other members,[162] requiring institutional laws to control their interdependence. Through its agreements, the WTO seeks to shape member preferences and power, rather than merely reflect them.[163] As Schloemann and Ohlhoff observe, while insulating the WTO from political tensions extraneous to trade, the security exceptions assist in a 'gradualist'[164] constitutionalization of world trade.

1. Institutionalism

Accepting 'the need to tie law closely to the political interplay of power and interest',[165] Institutionalism directly confronts Realism's claim that international law is irrelevant. Members' traditional identity is initially destabilized by this 'new and frightening interdependence of global communities'.[166] The security exceptions exist, however, to assist this movement to an interdependent world,[167] where the WTO has 'the *potential* to facilitate cooperation'.[168] Within the legalized WTO, member compliance is demanded in the exercise of rights and responsibilities.[169] The doctrinal security exceptions therefore operate as ordering mechanisms,[170] allowing for limited derogation from trade obligations with 'some autonomous power'[171] used to shape

[158] Cf Perez, above n 6, 306.
[159] Schloemann and Ohlhoff, above n 14, 437.
[160] Perez, above n 6, 302.
[161] Gerhart, above n 16, 53.
[162] See Cann Jr, above n 2, 472–3.
[163] Robert O. Keohane, 'International Institutions: Two Approaches', in Robert J. Beck, Anthony Clark Arend and Robert D. Vender Lugt (eds), *International Rules: Approaches from International Law and International Relations*, (New York: Oxford University Press, 1996) 190.
[164] Schloemann and Ohlhoff, above n 14, 446.
[165] Slaughter-Burley, above n 134, 212.
[166] Orford, above n 2, 397.
[167] Gerhart, above n 16, 3, 53–4.
[168] Keohane, above n 163, 203 (emphasis in original).
[169] Ibid, at 194.
[170] Cf David Kennedy, 'The Move to Institutions', 8 *Cardozo Law Review* 841 (1986–87), at 845.
[171] Steinberg and Zasloff, above n 40, 84–5.

state behaviour. The flexible security exceptions are designed to facilitate this constitutionalization at a rate acceptable to the members.[172] As members gradually relinquish their sovereignty they benefit from the comparable increase in economic integration, which engenders enmeshment.[173] The security exceptions, as legal doctrines, manipulate the bounds of traditional sovereignty by rendering it a limited source of exculpation.[174] Within this space, the institution facilitates international law,[175] allowing the interdependent Constructivist conception of the security exceptions and state identity to challenge Realism's traditional dominance.

2. Institutionalism's restraint of Realism

The Realist concern with maintaining the status quo is irreconcilable with the WTO's demand for states to fulfil their obligations to achieve its economic integration objective. Realists view international 'legal institutions as a sham'[176] because they unjustifiably encroach on political issues of state survival and security—the members' 'core interest'.[177] Institutionalists, however, 'reject Realism's pessimism about international institutions'.[178] Recognizing that economic integration cannot be achieved 'by Adam Smith's invisible hand'[179] the WTO's laws seek to weaken 'state autonomy . . . with the realities of strategic and economic interdependence'.[180] The legal doctrines attempt to create new 'norms, rules and decision-making procedures that pattern state expectations and behaviour'.[181] By harnessing Realism's primacy of state political power within the doctrinal security exceptions, Institutionalists attempt to overcome the subsisting climate of 'anarchy' by engendering supranational interdependent co-operation between the WTO members.[182]

Critics of Institutionalism suggest that it fails to 'provide a politico-economic theory to help conceptualise and analyse the law that regulates'[183] state–state relations or state–institution relations. Part III, however, renders this analysis doubtful. The security exceptions operate as the cornerstone legal doctrine of WTO Agreements and, more broadly, the linchpin to achieving the institution's legal authority. The security exceptions embody

[172] Schloemann and Ohlhoff, above n 14, 446.
[173] Kelly, above n 15, 574.
[174] Slaughter-Burley, above n 134, 213.
[175] Ibid, at 220.
[176] Koskenniemi, above n 29, 107.
[177] Joseph M. Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism', in Robert J. Beck, Anthony Clark Arend and Robert D. Vender Lugt (eds), *International Rules: Approaches from International Law and International Relations*, (New York: Oxford University Press, 1996) 155; Perez, above n 5, 350.
[178] Grieco, above n 177, 149.
[179] Krasner, above n 40, 96.
[180] Keohane, above n 163, 187.
[181] Slaughter-Burley, above n 134, 206.
[182] Koskenniemi, above n 12, 479.
[183] Slaughter-Burley, above n 134, 225.

a tripartite attempt to regulate WTO member and WTO institutional relationships. This is seen firstly at Negotiation, where individual-state and institutional relations are demarcated;[184] secondly, at Invocation, where member–member relationships are influenced;[185] and finally, at Enmeshment, where the institution integrates the economies of its members while shaping their self-conceptions through its legal doctrines.

B. Constructivism—transcending sovereign security identity

Constructivists maintain that an international society exists with 'norms . . . [that] influence and determine the behaviour and identity of states'.[186] Traditional state identity is bound closely to national security and sovereignty, influencing the interests that each state pursues.[187] Constructivists view international law not just as the Realists' instrument of power, but 'as a social artifact [sic] that reinforces identities, interests, and power'.[188] Security exceptions, as a social and legal construction, become relevant to understanding how the WTO influences its members' identity to achieve its strategic economic goals.[189] As 'law is about *defining*, not regulating',[190] the security exceptions institutionally define each member's identity, interests and commitment to fulfilling their trade obligations. Security exceptions that are entirely self-judging operate to reflect traditional sovereign identities. Security exceptions of the Realist persuasion therefore become the edifice of a 'natural' state identity that is fearful,[191] 'aggressive, self-interested and competitive'[192] operating in a state of anarchy. So defined, security exceptions would operate as political excuses that prioritize security within the regime,[193] rather than legally limited carve-outs that support the WTO's economic integration project.

Constructivists consider Realism's views as 'far too simple',[194] neglecting the values inherent within the legalized security exceptions. Although traditional 'sovereignty precludes hierarchical enforcement',[195] *within* the WTO members have ceded this aspect of their sovereignty, and in so doing, elevated the security exceptions to a self-constraining norm. Accordingly, security exceptions appear to construct a new interdependent

[184] See above, Part II.
[185] See above, Part III.
[186] Krasner, above n 40, 97.
[187] Kelly, above n 15, 560.
[188] Steinberg and Zasloff, above n 40, 82.
[189] Kelly, above n 15, 549.
[190] Steinberg and Zasloff, above n 40, 82 (emphasis added).
[191] Kelly, above n 15, 546.
[192] Orford, above n 2, 398.
[193] Kelly, above n 15, 556. *Contra* Akande and Williams, above n 2, 395–6.
[194] Krasner, above n 40, 97.
[195] Keohane, above n 163, 197.

state identity.[196] As members' 'power diffuses'[197] within the WTO's legalized apparatus, the exercise of political power by states is constrained by Legal Formalism. The security exceptions thereby 'facilitate cooperation that would otherwise not occur',[198] progressively transforming the states' constructed identity[199] and traditional belief that they 'must preserve their relative power or risk increasing insecurity'.[200] WTO Agreements are binding on entry to the institution, constraining members' resort to political excuses, and thus influencing the enmeshment experienced by states.[201]

Where the Realist view is reliant on a lack of authoritative power, from the Constructivist and Institutionalist perspective, security exceptions operate 'to mitigate the anarchic consequence of the Realist premise'.[202] Institutions exist as sites of cooperative enterprise for relations between the members, and relations between members and the institution, 'mov[ing] from chaos to order'.[203] The legalized WTO seeks to break the nexus between 'a world of distrust and insecurity'[204] expressed in self-judging security exceptions, with 'values and norms'[205] that assist 'compliance and cooperation'.[206] The Realist view presupposes a myopic WTO intention for the security exceptions to express state power and conceal other political reasoning for its invocation.[207] For Constructivists and Institutionalists, the WTO is a forum for the international society, under the control of its Agreements. The WTO procedures, doctrines, rights and obligations organize its membership into that society.[208] From this view, security exceptions construct and reinforce a cooperative identity of interdependence within the WTO.

By recognizing that a WTO member's identity is constructed from national security and traditional sovereignty, the security exceptions attempt to facilitate a transformation to 'a preferred international norm'[209] of social cohesion.[210] Within these parameters, members' identities are reconstructed—beyond pure political Realism—by this cooperative ideal. This has raised criticism of the Constructivist view, however, as 'ultimately just another version of the utopian position, assuming the objectivity of a

[196] See Raustiala, above n 23, 856; Meltzer, above n 22, 728–30.
[197] Steinberg and Zasloff, above n 40, 79.
[198] Ibid.
[199] Slaughter, Tumello and Wood, above n 97, 382.
[200] Kelly, above n 15, 562.
[201] Ibid, at 574.
[202] Ibid, at 557.
[203] Kennedy, above n 170, 848.
[204] Kelly, above n 15, 564.
[205] Ibid, at 560.
[206] Ibid.
[207] Cf Doyle, above n 34, 226–7.
[208] Krasner, above n 40, 97–8.
[209] Slaughter, Tumello and Wood, above n 97, 386.
[210] Kennedy, above n 170, 847.

natural morality'.[211] That is, the Enmeshment ideal simply replaces the Realist political morality—the 'idealism'[212] of traditional sovereign identity and security interests—with a new morality framed as interdependent cooperation. Notwithstanding such scepticism, security exceptions as legal doctrines attempt to avoid the repeated cycle from 'apology' to 'idealism' by 'appealing to an impersonal systemic value';[213] the reduction to Legal Formalism within a legal process.

Where some international legal institutions have been constructed as instrumental repositories for the expression of state power, through mechanisms like the security exceptions, the WTO uses Legal Formalism to avoid such instrumentalism. The WTO actively seeks to affect state sovereignty.[214] Indeed, the negotiated security exceptions represent the sum of the members' political will, a restricted exculpation for the gravest of circumstances. Security exceptions attempt to break free from Realisms intangible, and unconfined emotive structure, while simultaneously avoiding a new construction that might attract scant normative support. The legal doctrine—detached and objective—provides the greatest prospect for engendering member compliance to achieve the economic integration project.

V. CONCLUSION

The WTO Agreements with security exceptions 'reveal the ongoing nature of the relationship between nature, danger, sovereignty and security'.[215] Security exceptions retain three distinct, but related temporal qualities, reflecting their operation within the WTO as a legalized institution. At Negotiation, the security exceptions operate as dual institutional and sovereign excuses, a politically expedient means for deferring difficult questions regarding the limitation of state authority over national security issues. They initially appeal to members' traditional identity construction 'as an exception to . . . the applicable international law'.[216] Brought within the legal regime, however, the security exceptions are transmogrified by the legal process into a constraining legal doctrine. At Invocation, security exceptions moderate the subsisting tension between Realism and the WTO's legal authority, where Legal Formalism influences state power and the link between sovereignty and security. As evidenced by the EU–US dispute, by overcoming the Realist interpretation as a self-judging political excuse, security exceptions operate as limited, doctrinal constraints on state power,

[211] Koskenniemi, above n 19, 233.
[212] Doyle, above n 34, 27.
[213] Koskenniemi, above n 19, 234.
[214] Cf Keohane, above n 163, 195.
[215] Orford, above n 2, 398.
[216] Schloemann and Ohlhoff, above n 14, 426.

attempting to break the nexus between 'the twin dangers of apologism and utopianism'.[217] Once constrained *within* the institution, at Enmeshment, Institutionalists and Constructivists suggest that the security exceptions—as legal doctrines—mediate a shift in state identities toward an ideal of interdependent cooperation. The legalized WTO thereby becomes a conduit for legitimate expressions of a newly fashioned state identity.

[217] Koskenniemi, above n 19, 6.