

# Reinterpreting WTO Law to Discipline Resilient Trade: A Compliance Exception Proposal

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## Abstract

The geopolitical confrontation, including the Ukraine-Russia war and the power rivalry between the United States and China, has brought the concept of “resilient trade” to contemporary international economic law. The emphasis on economic security and trade resilience has undeniably slowed the pace of trade liberalization and jeopardized multilateralism. This paper addresses whether and how to discipline resilient trade under the existing WTO law. It provides the economic and strategic account for resilient trade, but it also identifies the prevention of protectionist measures in the mask of resilient trade as the key challenge for WTO law.

Acknowledging the WTO dispute settlement’s inherent dilemma in assessing prospective economic security risk, this paper advocates that the compliance exception, i.e., GATT Article XX(d) or GATS Article XIV(c), is a more suitable ground for accommodating and disciplining resilient trade measures. It proposes that, compared with other exceptions, the compliance exception has the advantages of addressing the knowledge and legitimacy dilemmas of the WTO dispute settlement and guiding Members to institutionalize their economic resilience and security concerns. It finally revisits previous WTO disputes involving resilient trade measures and finds reflections on its viewpoints.

**Keywords:** resilient trade, economic resilience, economic security, security exception, trade disruption, general exception, shortage exception, public order exception, compliance exception, security exception

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## I. Introduction

The geopolitical confrontation, including the Ukraine-Russia war, the power rivalry between the United States and China, and the overall political instability around the world, has dramatically challenged contemporary international economic law. Conventionally, countries engage in trade with each other on a cost-and-benefit basis guided by the economic theory of comparative advantage. This calculation less considers the potential political risks that could cause trade disruption, as they are less of a concern during peacetime. However, the geopolitical confrontation in recent years has eroded trust in current international politics. Lacking trust with their trading partners, countries now aim to establish economic security for themselves and their political allies in aspects such as supply chain, energy, food, or medicine. They adopt various trade restrictions, including local content requirements, subsidies, reshoring, nearshoring, friend-shoring, export restrictions, investment restrictions, and mini-deals on specific goods, to avoid excessive trade reliance on untrustworthy trading partners. The emphasis of international trade in recent years, thus, has shifted from free trade, fair trade, or sustainable trade to “resilient trade.”<sup>1</sup>

Given the current geopolitical confrontation in international politics, the economic security concern behind recent resilient trade measures adopted by countries is not without grounds. However, the emphasis on economic security has admittedly led to more trade-restrictive measures that slowed the pace of trade liberalization, jeopardized multilateralism, and thus challenged international economic law. Some of these measures could even be trade protectionist measures disguised as resilient trade measures. Therefore, designing a legal regime to contain economic security needs in the multilateral trade system while preventing their abuses becomes a pressing issue for international economic law.

Specifically, resilient trade measures entail numerous World Trade Organization (“WTO”) rules, including the non-discrimination principle, domestic substitution subsidies, the general exception, and the security exception, bringing the WTO dispute settlement to the forefront. This raises the question of whether the existing WTO law, based largely on the economic theory of comparative advantage, is adequately equipped to address resilient trade practices, holding different presumptions of political instability. Some observations have cast doubt on the WTO law’s capacity to address the economic security aspect and contain resilient trade.<sup>2</sup>

This paper proposes that WTO law possesses the flexibility to discipline resilient

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<sup>1</sup> For instance, the Indo-Pacific Economic Framework for Prosperity (“IPEF”) identified fair and resilient trade as its Pillar I. *See also* JOINT STATEMENT BY GROUP OF SEVEN (G-7), NATIONS LEADERS ON ECONOMIC RESILIENCE AND ECONOMIC SECURITY (2023).

<sup>2</sup> *See, e.g.,* Mona Paulsen, *The Past, Present, and Potential of Economic Security*, 50 YALE J. INT’L L. (forthcoming, 2025).

trade measures.<sup>3</sup> In theory, it proposes a risk-based approach for understanding the comparative advantage theory and incorporating the political risks into the economic framework. This analytical framework demonstrates the comprehensiveness of the comparative advantage theory, making it valid notwithstanding the current geopolitical confrontation. In law, this paper advocates that with proper interpretation, the compliance exception stipulated under the General Agreement on Tariffs and Trade (“GATT”) Article XX(d) or the General Agreement on Trade in Services (“GATS”) Article XIV(c) can serve as a venue for balancing existing WTO obligations and Members’ economic security needs, while controlling protectionist measures from being disguised as resilient trade measures.

This paper is structured as follows. Section II conceptualizes resilient trade and analyzes the economic justifications for resilient trade. Section III discusses the role of WTO law in disciplining resilient trade measures and presents a case for the compliance exception to perform this function. Section IV provides a critical view of other approaches for disciplining resilient trade measures, including the security exception and various general exceptions. Section V revisits the existing WTO disputes involving resilient trade measures and discusses how they echo this paper’s viewpoint. Section VI concludes this paper. It is anticipated that, guided by the compliance exception, Members may adopt resilient trade measures to address their economic security needs in a more institutionalized manner with enhanced legal certainty.

## **II. Resilient Trade and Its Economic Justifications**

This section will conceptualize resilient trade measures and discuss their economic justifications. Based on these discussions, it will further specify the real concerns underlying resilient trade measures that international economic law should address.

### **A. Conceptualizing Resilient Trade**

Resilient trade is not an established legal concept and, thus, lacks a comprehensive legal definition. In general, economic resilience refers to the ability of a system, including households, firms, and governments, to prevent and prepare for, cope with, and recover from shocks.<sup>4</sup> It calls for countries to possess the ability to use available resources to continue functioning when shocked and to hasten the speed of recovery once the shock is over or under control.<sup>5</sup> Resilient trade, thus, generally refers to trade

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<sup>3</sup> For studies examining this similar topic, *see, e.g.*, Henrique Choer Moraes, *Decoupling by Discrimination? Strategic Competition and the Limits of Trade Law*, 51 GA. J. INT’L & COMP. L. 671 (2023); Andrew D. Mitchell, *Home Remedies: Flexibilities to Onshore Pharmaceutical Manufacturing under WTO rules*, 28 J. INT’L ECON. L. 23 (2024); Xinyue Li, *Pluralistic Reconciliation or Relative Politicization: Emerging Energy Security Through Quantizing Geoeconomics*, 19 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 415 (2024).

<sup>4</sup> WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2021: ECONOMIC RESILIENCE AND TRADE 55 (2021) [hereinafter “WTO REPORT 2021”].

<sup>5</sup> *Id.* at 56.

policies that consider the trade disruption risks and attempt to minimize the interference to the economic functioning once the risks are realized.

Notably, this paper focuses on a narrower scope of resilient trade, that is, those addressing “prospective” trade disruption risks instead of realized or immediate ones.<sup>6</sup> I exclude the resilient trade addressing realized or immediate trade disruption risks because the existing international economic law has envisaged them and designed rules to cope with them. Therefore, the resilient trade practices or measures discussed in this paper are generally precautionary in nature, aiming at risks that are theoretically anticipated but not yet realized or supported by specific evidence.

It might be useful to illustrate the concept of resilient trade with the following hypothetical examples:

- Example 1: Country A is an inland country whose fossil fuel demand is predominantly supplied by Country B. It is of concern that their diplomatic relations are deteriorating, and Country B might restrict its fossil fuel exports in the future as a negotiation chip. Therefore, it adopts trade measures to encourage fossil fuel imports from other allied countries to reduce its reliance on Country B.
- Example 2: Country C is a continental country that is advanced in manufacturing high-tech products and imports semiconductors from other countries to support its high-tech industry. It is of concern that Country D is in deteriorating relations with these importing countries and might adopt actions to disrupt these countries’ exports. Therefore, it adopts trade measures to require overseas semiconductor companies to manufacture a designated level of semiconductors in its territory.
- Example 3: Country E is an island country whose food demand is predominantly supplied by imports. It is of concern that Country F will block its neighboring seas due to the rising tension between the two countries. Therefore, it adopts measures to provide incentives to local restaurants and shops, conditioned on their local food purchases achieving a designated level.

The measures mentioned in the above examples are resilient trade measures addressed in this paper. While the motives behind each measure differ, two common elements are worth emphasizing:

- First, Country A, C, and E adopt trade restrictive measures based on a *non-existing yet prospective* threat of future trade disruption.
- Second, while these countries’ *subjective perception* of the potential of these

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<sup>6</sup> To be sure, the level of risk is a spectrum, and it is undeniably challenging to distinguish between short-term and long-term ones clearly. Therefore, the designation here is inevitably a conceptual one, which needs to be assessed on a case-by-case basis.

threats could be fair, the *objective assessment* of the level and opportunity for the realization of such threats is less available.

In sum, resilient trade possesses a prospective nature, rendering it challenging to be assessed objectively.

## **B. The Rise of Resilient Trade Practices and Their Categories**

Resilient trade is not a new topic, which jumped into the spotlight during the COVID-19 pandemic.<sup>7</sup> However, the recent geopolitical confrontation, which started from the Ukraine-Russia conflict, aggravated the problem.<sup>8</sup> For instance, the Ukraine-Russia conflict caused natural gas shortages in many areas, substantiating the prospective trade disruption threats perceived by some countries before the conflict. Countries have come to realize that they are more vulnerable to external shocks, including geopolitical risks, due to the increasing interconnectedness of international trade.<sup>9</sup> Moreover, their subjective perception of prospective trade disruption threat has become more real due to the rising political tension and instability caused by geopolitical confrontation. Consequently, the call for economic resilience and security arises.<sup>10</sup>

One of the representative turning points was Yellen's public statement as the U.S. Secretary of the Treasury at the time. In her December 2022 statement, Yellen expressed her concern about vulnerabilities resulting from over-concentration and geopolitical and security risks. She highlighted the need for countries to “consider the potential for regional and global shocks to impact our supply chains, *including those shocks driven by the policies of certain foreign governments,*” which explicitly tackles the prospective trade disruption caused by geopolitical confrontations. Accordingly, she emphasized the importance of “friend-shoring,” that is, economic integration with trusted trading partners instead of chasing the cheapest supply chains without regard to the above vulnerabilities.<sup>11</sup>

In May 2023, the Group of 7 (G-7) further made a joint statement on economic resilience and economic security. In this statement, the G-7 underlined the importance of cooperating within the G-7 and with partners to enhance global economic resilience. Specifically, it focused on building resilient supply chains among trusted partner countries both within and outside the G7. It also focused on building resilient critical

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<sup>7</sup> Norbert Gaál, et al., *Global Trade Fragmentation: An EU Perspective*, at 4 (Eur. Econ. Econ. Brief, No. 75, 2023). During COVID-19, most manufacturing sectors were suspended, causing a shortage of numerous goods ranging from health-related products (such as vaccines and masks) to high-tech products (such as semiconductors). WTO REPORT 2021, *supra* note 4, at 44-45.

<sup>8</sup> See Mary E. Lovely, *Manufacturing Resilience: The US Drive to Reorder Global Supply Chains*, in BUILDING A MORE RESILIENT US ECONOMY 196, 199-200 (Melissa S. Kearney et al., eds., 2023).

<sup>9</sup> WTO REPORT 2021, *supra* note 4, at 14.

<sup>10</sup> *Id.* at 62.

<sup>11</sup> Janet L. Yellen, *Resilient Trade*, PROJECT SYNDICATE (Dec. 22, 2022), <https://www.project-syndicate.org/magazine/biden-trade-agenda-emphasizes-resilience-by-janet-l-yellen-2022-12>.

infrastructure, particularly by assessing political, economic, and other risks of a non-technical nature posed by untrustworthy vendors and suppliers. Finally, it affirmed the need for a well-functioning international rules-based system to preserve economic resilience and economic security.<sup>12</sup>

Resilient trade practices encompass various trade measures. Countries may, for example, adopt liberal approaches to enhance their economic resilience. The WTO, for instance, consistently advocates that countries may diversify their risks and secure their economic resilience and security through re-globalization and more global economic cooperation.<sup>13</sup> However, the current practice largely goes in the opposite direction, leading to various trade-restrictive measures, e.g., local content requirements, subsidies, diversification, reshoring, nearshoring, friend-shoring, export restrictions, investment restrictions, mini-deals on specific goods.<sup>14</sup> This paper will focus on these trade-restrictive resilient trade measures.

### **C. Theoretical Justifications for Resilient Trade**

The emergence of resilient trade measures raises concerns about trade liberalization and multilateralism.<sup>15</sup> Notwithstanding the apparent disruption of international trade, this paper raises the following two accounts that may justify resilient trade measures: economic and political.

#### **a. The Economic Justification of Resilient Trade**

Conventionally, international economic law pursues trade liberalization to reduce state intervention in international trade based on sound economic theories. In short, economists presume that parties rationally calculate their individual costs and benefits expected from the trade and voluntarily engage in trade when their respective expected benefits exceed expected costs. Therefore, trade represents a win-win scenario, or Pareto efficiency,<sup>16</sup> where both parties expect that trade makes them better off in economic welfare terms. This understanding can be further elevated to the international trade context to support the view that international trade between countries yields win-win results for both countries and increases the overall welfare in the international community.

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<sup>12</sup> See JOINT STATEMENT BY GROUP OF SEVEN (G-7), *supra* note 1.

<sup>13</sup> WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2023: REGLOBALIZATION FOR A SECURE, INCLUSIVE AND SUSTAINABLE FUTURE 57-58 (2023) [hereinafter “WTO REPORT 2023”]; WTO REPORT 2021, *supra* note 4, at 18.

<sup>14</sup> For a review of the resilient trade measures adopted by the United States, see Lovely, *supra* note 8, at 202-07. See also Gaál, et al., *supra* note 7, at 6-10.

<sup>15</sup> See Dan Gao & Dong Wang, *New Trends of US Economic and Trade Policy toward China and China's Responses: From the Perspective of Friend-Shoring*, 14 J. WTO & CHINA 87, 97-100 (2024).

<sup>16</sup> Pareto efficiency refers to the situation where it is impossible to change it so as to make at least one person better off (in his own estimation) without making another person worse off (again, in his own estimation). ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 14 (6th ed., 2016).

The theory of comparative advantage, first proposed by David Ricardo in 1817,<sup>17</sup> further lends solid theoretical support for international trade. It views the welfare-enhancing function of international trade from an *opportunity cost* instead of an absolute cost perspective, holding that all countries possess an inherent ability to produce specific products or services at a comparatively lower opportunity cost than others. Therefore, international trade allows countries to export the products or services that they can produce most efficiently and import those that they cannot produce efficiently, enhancing the overall welfare of both countries from a comparative cost-benefit perspective.<sup>18</sup>

Resilient trade measures appear to operate contrary to the above economic theories. Taking the friend-shoring measure in Example 1, for instance. It prioritizes trade with politically friendly countries over unfriendly ones, although the latter import fossil fuels more efficiently in terms of costs and price. Taking the local content requirement in Example 3 as another instance. It prioritizes locally manufactured foods, although their production is less efficient than imported ones. In sum, resilient trade measures appear to prioritize political concerns over the economic interests that may be derived from free trade. Politics seems to prevail over economics.

This paper presents an economic account for resilient trade. Specifically, it proposes that the above economic theories should be understood through a more risk-based lens that incorporates political risks into the economic framework. This risk perspective has the advantage of accommodating conventional economic theories with political motives behind resilient trade.

### **1. *Resilient Trade and a Tail Risk Lens***

As mentioned above, economists hold that trade achieves the win-win scenario or Pareto efficiency and makes both parties better off in economic welfare terms. Here, the “economic welfare” envisaged by economists refers to a broader scope of interests than the immediately observable economic or monetary interests.<sup>19</sup> Specifically, in assessing their individual costs and benefits, economists are aware that these costs and benefits could be immediate, short-term, or long-term. Therefore, economists expect that the cost and benefit calculation made by each party includes not only the immediate benefits to be reaped but also the potential uncertainty in realizing the benefits in the short or long run. So applies to costs.<sup>20</sup>

Given this more comprehensive understanding of economic welfare, in theory, an ideal pricing model for trades should account for all risks underlying the benefits and

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<sup>17</sup> See generally DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817).

<sup>18</sup> For a brief introduction of the comparative advantage theory, see COOTER & ULEN, *supra* note 16, at 30.

<sup>19</sup> See LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18-24 (2002).

<sup>20</sup> See COOTER & ULEN, *supra* note 16, at 44.

costs expected by individual parties. For instance, buyers should assign a risk discount to their purchase price to account for the expected risks or uncertainties that they could not reap the benefits from the trade.<sup>21</sup> In the context of international trade, if importers anticipate risks of trade disruption from potential geopolitical confrontations that could reduce their future welfare, they may want to lower the import price or reduce the import amount to reflect the anticipated risks. If parties adequately consider and price in these risks, some trades might not be cost- or price-efficient to both parties and, thus, should not occur in the first place.

The above economic observation presumes that parties to the trade are rational, will perfectly assess the potential risks to their respective costs or benefits, and make trading decisions based on these assessments. However, in the real world, parties are less than perfect. Specifically, they tend to neglect or underprice the long-term risks, or the so-called “tail risks,” because their ripple effects are less observable or too minimal to be considered. In theory, if parties ignore these tail risks in their trading decisions, they expect fewer costs from the trade, which could result in an excessive number of trades than the optimal. This reduces the overall economic welfare and is not efficient in economic terms.

This paper argues that the growing concern for economic security or resilience stems from the long-standing neglect of geopolitical risks in international trade. After all, international trade has been in peacetime for a while. Therefore, trading partners have not encountered significant geopolitical confrontations and political interventions in international trade for a long time. Against this background, they tended to assess the potential of political tension causing trade disruption as a minimal, or even ignorable, “tail risk.” The pricing model based on this assessment could ignore or undercharge these disruption risks, leading to mispricing in international trade. Such mispricing, in the long run, causes excessive trade that mismatches with the disruption risk, which is economically inefficient.<sup>22</sup> As these tail risks have accumulated to a visible scale, the economic rationale against trade liberalization surfaces.

If the above economic account holds, resilient trade measures may function in restoring international trade to its economically optimal level. One may view the recent geopolitical confrontation as the realization of these ignored tail risks. Alerted by these events, parties to international trade respond by including these risks in their pricing model, while countries respond by adopting resilient trade measures to enhance their

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<sup>21</sup> This presumes that actors are risk-averse. See COOTER & ULEN, *supra* note 16, at 44-45.

<sup>22</sup> Yellen, for instance, noted that “the private sector does not internalize the right level of economic resilience by itself. Some firms are highly incentivized to focus on lowering costs in the short term and may not factor in longer-term risks like over-concentration in supply chains. Even when companies pursue a privately optimal level of resilience through insurance policies and inventory build-up, they will often not consider national-security concerns or how an interruption in their production could affect other firms or consumers.” Yellen, *supra* note 11.

resilience and control their trade disruption risks. From this perspective, resilient trade measures might be economically sound.<sup>23</sup>

## **2. *Resilient Trade and a Transaction Cost Lens***

This paper also offers a parallel economic account for resilient trade from a transaction cost lens. As mentioned above, the theory of comparative advantage advocates that a country should import the products that it produces at a comparatively higher opportunity cost. However, imports notably entail transaction costs. Therefore, a more comprehensive understanding of the theory of comparative advantage should be that a country imports when the importation cost is lower than the opportunity cost of producing domestically.

Reading in this way, the transaction cost entailed in international trade is a crucial factor. The political risk that could cause trade disruption is certainly a transaction cost that parties to international trade should assess. When trading parties and countries have mutual trust in each other, the trade disruption risk is minimal or even ignorable, leading to lower transaction costs and justifying more trade liberalization. However, when countries live in a world where their trading partners might unilaterally disrupt the trade relationship for political reasons, that leads to an additional transaction cost. As a response, reducing the level of trade liberalization in advance to control trade reliance and ensure economic security becomes an economically rational and even efficient direction.

## **3. *Summary***

In sum, introducing the risk perspective to the existing economic theories for international trade lends economic justifications for resilient trade. Economic theories are equipped with models and methodologies, including the above tail risk and transaction cost accounts, to incorporate political risks into their framework. Therefore, they remain capable of explaining the economic justifications for resilient trade. Politics does not prevail over economics; we just need to apply economic theories more sophisticatedly.

### **b. *The Political Justification of Resilient Trade***

Besides the above economic account, this paper proposes that resilient trade measures have a strategic advantage in political terms. Specifically, it proposes that resilient trade may serve as a transition tool in restoring the international trade order.

Assuming that, as the WTO advocates, re-globalization and diversification are the better solutions to economic security concerns. However, the economic welfare maximization effect of trade liberalization hinges on mutual trust between parties and

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<sup>23</sup> For studies that similarly adopt this cost-benefit perspective, Gaál et al., *supra* note 6, at 12 (suggesting governments identify the areas where the benefits of inducing the relocation of value chains would outweigh the costs.)

countries. The political status quo, including the geopolitical confrontation and the polarization of domestic politics in many countries, has significantly eroded this crucial foundation. Against this background, countries inevitably need to rebuild mutual trust domestically and internationally before pursuing trade liberalization.

To rebuild trust, countries must address the political factors that cause trade disruption and economic security concerns. Establishing economic resilience enables countries to better balance their trade interests with domestic factors in response to trade liberalization. After all, countries cannot reestablish trade relations with others, as in peacetime, until these political factors are under control. In that sense, although resilient trade measures compromise trade liberalization, it might be an inevitable transition phase for now. Disallowing resilient trade might, contrarily, fuel the political backlash against trade liberalization and run out the remaining mutual trust in international trade.

From this perspective, accepting resilient trade measures under international economic law may be a political strategy for the long-term good. Reestablishing mutual trust takes time, and accepting resilient trade can have a comforting effect.

#### **D. Real Concerns Underlying Resilient Trade Measures**

The above economic and political accounts for resilient trade measures illustrate that resilient trade might not be problematic *per se*. Instead, they could have sound economic rationales and may facilitate long-term trade liberalization. In this paper's view, the real concern against resilient trade measures is their *implementation*. Specifically, there is a real concern that countries might use economic resilience and security as an excuse to mask their economic protectionism intent, blurring the line between economic resilience and protectionism.

At first glance, economic resilience and protectionism appear similar because both aim to increase a country's economic strength. Some might even argue that economic resilience is simply a fancier term for economic protectionism. However, this paper argues that, conceptually, there is a fine line between them.

Economic resilience seeks to control a country's risk during trade disruption. This is driven mainly by non-economic motivations, such as geopolitical tension. From the risk perspective analyzed above, pursuing economic resilience is economically efficient because it reflects a more adequate assessment of these non-economic risks, which is positive for overall economic welfare.

In contrast, economic protectionism aims to increase a country's economic competitiveness, which is driven mainly by economic self-interest. The economic gains reaped by economic protectionism are at the expense of other countries' economic interests. Its welfare effects are mostly distributive instead of enhancing. In many cases, economic protectionism could even be welfare-reducing.

Therefore, while this paper proposes that international economic law should permit resilient trade measures, it also acknowledges that they should not tolerate protectionist measures disguised as resilient ones. The real problem is how to distinguish between the two and permit the resilient ones while discouraging the latter ones. In the paper's view, the conceptual distinction lies in whether a country's grounds for asserting the existence of trade disruption risk are valid. This assessment, however, is challenging because, as mentioned above, resilient trade aims at risks with a prospective nature whose objective assessment is less available.

### **E. Summary**

In summary, while resilient trade measures are trade-restrictive and may compromise trade liberalization, this paper proposes that they have economic justifications in better accounting for the tail risks and transaction costs of trade disruption. They further have strategic merits in restoring the international trade order. Therefore, this paper advocates that resilient trade is compatible with conventional economic theories for international trade and should be accepted under international economic law.

In this paper's view, the real challenge that resilient trade measures pose to international economic law is how to distinguish them from protectionist measures. Out of this concern for disguised protectionism, this paper proposes that resilient trade measures need some discipline. In the next section, it will discuss how to apply WTO law to address trade-restrictive measures claimed to be resilient trade measures.

## **III. Disciplining Resilient Trade Measures under WTO Law and the Case for the Compliance Exception**

This section discusses how the existing WTO law may be employed to discipline resilient trade measures. Instead of proposing new rules for resilient trade measures, it adopts an interpretative approach, arguing that the existing WTO law possesses the flexibility to discipline resilient trade measures. Specifically, it proposes that the compliance exception, under this paper's reinterpretation, may undertake this role.

### **A. The Relevance of WTO Law**

Before proceeding to the substantive discussion, it is necessary to clarify why discussing the existing WTO law is crucial. After all, the deadlock in its Appellate Body has undeniably compromised the WTO dispute settlement function, and the WTO's negotiations have made limited, if any, progress in recent years. Therefore, several attempts have been discussed to create new rules outside the WTO system.<sup>24</sup>

That said, this paper advocates that the WTO remains the most crucial forum for

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<sup>24</sup> For instance, European Commission chief Ursula von der Leyen recently brought forward the idea of establishing a structured trade cooperation with Asian countries as an alternative to the WTO. Gerardo Fortuna, *Let's Create a New World Trade Organization - Von der Leyen*, EURO NEWS (June 27, 2025).

establishing international economic law to discipline resilient trade measures for the following two reasons.

First, WTO law remains referenced when countries negotiate economic agreements. The recent deadlock in WTO negotiations has undeniably disappointed some countries, leading them to explore opportunities to negotiate other economic agreements to govern emerging international trade issues. However, a closer examination of several emerging economic agreements reveals that their structures largely resemble the basic structure of WTO treaties. Particularly, the WTO provisions to be discussed in this paper, including the general and security exceptions, are largely preserved in these agreements.<sup>25</sup> To that extent, clarifying the interpretation of these exceptions under WTO law may also inform the understanding of similar provisions in other economic agreements.

Second, the WTO dispute settlement remains in use by Members. Even though WTO dispute settlement is not as enforceable as envisaged, it remains more functional and operational if the comparison is made with other international organizations. While the Appellate Body's deadlock admittedly compromises the enforceability and appeal of the WTO dispute settlement, Members continue referring their disputes to the WTO dispute settlement. These cases include the most controversial disputes, such as the U.S.-China dispute,<sup>26</sup> which few people expect the WTO dispute settlement to resolve fully. Not to mention the increasing use of the Multi-Party Interim Appeal Arbitration Arrangement ("MPIA"), which helps restore the enforceability of the WTO dispute settlement.<sup>27</sup> These recent developments demonstrate that Members still find merit in the WTO dispute settlement. Therefore, clarifying the application of WTO law to resilient trade measures remains relevant for the ongoing functioning of the WTO dispute settlement.

That said, considering the current political environment among WTO Members and the WTO's negotiation deadlock, this paper believes it is impractical to expect WTO Members to negotiate and agree upon substantive WTO rules on resilient trade. Therefore, this paper focuses on the interpretative aspect and explores the potential space within the existing WTO law that may govern resilient trade measures.

Resilient trade measures will likely be inconsistent with a Member's several WTO

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<sup>25</sup> For instance, those representative mega-FTAs, such as the CPTPP and RCEP, contain exception clauses similar to the WTO's exception clauses.

<sup>26</sup> *See, e.g.*, Request for Consultations by China, United States — Universal and Country-Specific Additional Duties on Imports from China, WT/DS638/1 (Apr. 8, 2025); Request for Consultations by China, United States — Additional Tariff Measures on Goods from China, WT/DS633/1 (Feb. 5, 2025).

<sup>27</sup> In July 2025, MPIA Arbitrators awarded MPIA's second award. Award of the Arbitrators, China — Enforcement of Intellectual Property Rights, WT/DS611/ARB25 (July 21, 2025).

obligations. For instance, measures aiming at establishing a Member's domestic capacity, such as local content requirements or reshoring, could be inconsistent with its national treatment obligation. Measures aiming at establishing trade alliances with designated countries, such as nearshoring, friend-shoring, or mini-deals, could be inconsistent with a Member's most-favoured-nations ("MFN") obligations. Export restrictions could be inconsistent with a Member's market access obligations. Import substitution subsidies are prohibited subsidies under the SCM Agreement.<sup>28</sup>

That said, being inconsistent with the above WTO obligations is not the end of the world for resilient trade measures because they may find justifications under exception clauses, including general exceptions and security exceptions. Based on the existing WTO jurisprudence<sup>29</sup> and scholarly discussions,<sup>30</sup> potential candidates include the security exception,<sup>31</sup> the public order exception,<sup>32</sup> the compliance exception,<sup>33</sup> and the shortage exception.<sup>34</sup> When the individual resilient trade measures involve the life and health of humans, animals, or plants, the public health exception<sup>35</sup> is also relevant. These exceptions allow WTO law to balance the pursuit of trade liberalization, as embodied in WTO obligations, with Members' other public policy objectives.

## **B. Elements for an Effective Resilient Trade Discipline**

As mentioned above, the real challenge that resilient trade measures pose to international economic law is how to distinguish them from protectionist measures. Therefore, to design a regime for disciplining resilient trade measures, this regime must build in a mechanism to inhibit protectionist measures. Furthermore, this regime must establish a mechanism to effectively determine if a Member faces a prospective economic security risk. This observation leads to two necessary elements for an effective disciplinary regime for resilient trade: (i) anti-protectionism, and (ii) economic security risk assessment.

### **a. The Anti-Protectionism Element**

WTO law is familiar with the first anti-protectionism element. The most notable anti-protectionism mechanism incorporated in the WTO law is the chapeau of general exceptions. Both GATT Article XX chapeau and GATS Article XIV chapeau explicitly

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<sup>28</sup> For a discussion, see Andrew D. Mitchell, *Hometown Heroes: Onshoring, Promoting Local Content & WTO Law*, 25 J. WORLD INVESTMENT & TRADE 481, 486-495 (2024).

<sup>29</sup> See *infra* V.

<sup>30</sup> See, e.g., Paulsen, *supra* note 2; Moraes, *supra* note 3; Mitchell, *supra* note 3; Li, *supra* note 3.

<sup>31</sup> GATT Art. XXI or GATS Art. XIV-bis.

<sup>32</sup> GATS Art. XIV(a).

<sup>33</sup> GATT Art. XX(d) or GATS Art. XIV(c).

<sup>34</sup> GATT Art. XX(j).

<sup>35</sup> GATT Art. XX(b) or GATS Art. XIV(b).

reject measures applied in a manner that “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” The existing WTO jurisprudence related to these chapeaus has further developed comprehensive and coherent rules for identifying arbitrary or unjustifiable discrimination or disguised restrictions on international trade.<sup>36</sup> These chapeaus provide the legal basis and criteria for the WTO dispute settlement to identify the protectionist measures disguised as resilient trade measures.<sup>37</sup>

However, the function of these chapeaus is mainly to rule out protectionist measures. For a non-protectionist resilient trade measure to be justified, it must first find provisional justifications by one of the subparagraphs of these general exception clauses. Identifying the applicable subparagraphs to serve this purpose is a more challenging task.

#### **b. The Element of Economic Security Risk Assessment**

As mentioned above, the conceptual distinction between resilient trade measures and protectionist ones lies in whether a Member has a valid ground for asserting the existence of trade disruption risk. However, because resilient trade measures aim at a non-existent yet prospective threat of future trade disruption based primarily on the Member’s subjective perception, the objective assessment of such a threat is nearly unavailable. This ironic characteristic of resilient trade measures poses a significant challenge to the WTO dispute settlement.

On the one hand, the WTO dispute settlement is not unfamiliar with risk assessment. For instance, it has been invited frequently to assess the existence of health risks addressed by contested measures.<sup>38</sup> In conducting its task, it could follow its mandate to make an objective assessment of the matter. For instance, in the case involving health risks, it used to consult scientific evidence to assess whether a proclaimed health risk exists.<sup>39</sup> However, this objective assessment approach does not work in the case of resilient trade measures because the risk addressed by resilient trade measures is prospective, which is not scientifically observable or objectively verifiable. Its assessment is based on political judgment.

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<sup>36</sup> For discussions about these anti-protectionism clauses, *see, e.g.*, Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109(1) AM. J. INT’L L. 95 (2015); Philip Joseph Wells, *Unilateralism and Protectionism in the World Trade Organization: The Interpretation of the Chapeau within GATT Article XX*, 13(3) J. INT’L TRADE L. & POL’Y 222 (2014).

<sup>37</sup> In the EU—Energy Package dispute, which will be illustrated later, the Panel rejected a proclaimed resilient trade measure by finding it a means of arbitrary discrimination under GATT Article XX chapeau. Panel Report, European Union and its Member States—Certain Measures Relating to the Energy Sector, WTO Doc. WT/DS476/R, ¶ 7.1250-7.1253. (Aug. 18, 2018) [hereinafter EU—Energy Package].

<sup>38</sup> This is especially the case when disputes involve GATT Article XX(b) or the SPS Agreement.

<sup>39</sup> *See, e.g.*, Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R, ¶ 8.182 (Sept. 18, 2000).

WTO dispute settlement is ill-equipped to make this judgment. A Member's economic security concern may stem from various sources, including geopolitical or socioeconomic factors that are within the local domain. WTO dispute settlement lacks the political legitimacy and local knowledge necessary to predict or judge a Member's economic security risks. Instead, it settles disputes based on objective facts and evidence. Asking the WTO dispute settlement to undertake a subjective judgment of a Member's future would change its dispute settlement nature. This expectation will be controversial, given the current dissatisfaction with the WTO dispute settlement's judicial activism.

On the other hand, the WTO dispute settlement is not unfamiliar with handling disputes involving local knowledge. For instance, it has been frequently invited to assess the existence of public moral concerns proclaimed by Members.<sup>40</sup> In these disputes, the WTO dispute settlement typically adopts a deferred approach by acknowledging Members' discretion in identifying their public moral concern.<sup>41</sup> While this approach avoids the WTO dispute settlement's interference in issues involving local knowledge, it compromises the WTO dispute settlement's screening function. In the case of resilient trade measures, if the WTO dispute settlement simply defers to Members' proclaimed economic security concerns, it could leave an enormous space for Members to abuse exceptions.

To be sure, even if WTO dispute settlement defers to Members' discretion in proclaiming their economic security concern, the following necessity test or chapeau, as mentioned above, could control Members' abuse. However, considering that resilient trade measures are susceptible to abuse by their nature, this paper proposes that a robust mechanism for assessing economic security risks is preferred.

In sum, an effective regime for disciplining resilient trade requires a robust mechanism for economic security risk assessment, but the WTO dispute settlement is ill-equipped for this task. Therefore, this paper proposes that such a robust mechanism needs to be in place, but built outside of WTO dispute settlement.

### **C. Resilient Trade Measures and the Case for the Compliance Exception**

Current scholarly research diverges on how to accommodate resilient trade measures under the existing WTO law. After reviewing different candidates, this paper advocates that the compliance exception is the most suitable ground for accommodating and disciplining resilient trade measures. In this paper's view, the compliance exception possesses the following advantages in disciplining resilient trade measures.

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<sup>40</sup> This is especially the case when disputes involve GATT Article XX(a) or GATS Article XIV(a).

<sup>41</sup> See, e.g., Panel Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, ¶ 6.461 (adopted Apr. 20, 2005).

### **a. The Encompassing Nature**

The compliance exception justifies measures necessary to secure compliance with laws or regulations that are not WTO-inconsistent. By interpretation, it may apply to a broad range of policy objectives as long as a domestic law or regulation pursues them. Throughout the history of WTO law, the compliance exception has exhibited this encompassing nature. As reflected in GATT Article XX(d), GATT CONTRACTING PARTIES designed this exception in 1947, bearing in mind the particular public policy needs related to customs, monopolies, intellectual property rights protection, and deception prevention. In the 1990s, when WTO Members revisited the compliance exception under GATS Article XIV(c), their focus extended to default effects on contracts, protection of personal data and confidentiality, and safety. These evolutions illustrate the compliance exception's encompassing nature, which may adapt to regulatory focuses at different times.

The compliance exception's encompassing nature makes it a suitable forum for accommodating resilient trade measures. By interpretation, it may encompass resilient trade measures pursuing economic security as long as a domestic law or regulation pursues them. Therefore, the WTO dispute settlement does not need to engage in interpreting whether economic security falls within the scope of the compliance exception. Instead, the WTO dispute settlement's focus should be to examine whether the alleged domestic law or regulation pursues the alleged economic security objective.<sup>42</sup> This is less challenging considering that WTO jurisprudence has rich experience in identifying a measure's objective.<sup>43</sup>

### **b. The Institutionalized Mechanism for Assessing Economic Security Risk**

The compliance exception further builds in a robust mechanism for assessing if a Member faces a real economic security risk. To elaborate, a Member invoking the compliance exception must have a domestic law or regulation in place. To be clear, this “domestic law or regulation” is not the resilient trade measure *per se*. Instead, it is a separate set of laws or regulations that the resilient trade measure seeks to comply with.

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<sup>42</sup> For instance, In the Turkey-Pharmaceutical dispute, the Arbitrators found that the measure was not taken to secure compliance with the relevant laws or regulations with the objective of pursuing pharmaceutical safety. Award of the Arbitrators, Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products, WT/DS583/ARB25, ¶ 7.10 (July 25, 2022).

<sup>43</sup> In some cases, WTO dispute settlement ascertained the legislative intent of a measure, and it has developed some general criteria for this task. For instance, in the Canada-Periodical case, the Appellate Body examined the legislative history to derive the legislative intent of the contested measure and, in the end, found such intent to be protectionist in nature. In other cases, WTO case law also examined the preamble of a measure, the texts, the stated legislative intent of a measure, and, in particular, the “design, architecture and the revealing structure of a measure.” For an introduction, *see* SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 226–231 (2007).

Therefore, a Member cannot invoke the compliance exception by simply adopting a resilient trade measure and proclaiming its economic security needs. Instead, it must engage in domestic legislation or rule-making processes to substantiate said needs in advance. Due to this special design, the resilience defense thereunder is not self-declaratory.

Moreover, following the WTO's jurisprudence, the domestic law or regulation cannot merely declare its economic security aspiration or policy goal.<sup>44</sup> Instead, it must substantiate this aspiration or policy goal into enforceable legal obligations,<sup>45</sup> bearing a normative nature.<sup>46</sup> This legislative requirement effectively compels Members to produce objective evidence to substantiate their intent to pursue economic security, i.e., specific laws or regulations. This enhanced transparency requirement mitigates the potential of some Members to invoke the general exception opportunistically to disguise their protectionist motivation.

Containing resilient trade measures under the compliance exception further offers a simpler and objective way for WTO dispute settlement to determine a Member's economic security needs. As mentioned above, WTO dispute settlement faces a knowledge dilemma in assessing the existence and risk levels of a Member's economic security threat because this assessment is prospective and judgmental in nature, lacking objective facts and evidence as its support. The compliance exception introduces more objective elements and clarity for the WTO dispute settlement's assessment. WTO dispute settlement may simply examine if a Member has in place enforceable legal obligations stipulated in black-letter laws or regulations that pursue specific economic security.

The compliance exception further resolves the WTO dispute settlement's legitimacy dilemma. WTO jurisprudence has recognized that, under the compliance exception, the invoked domestic laws or regulations must be adopted by a Member's legislative or executive branches of government.<sup>47</sup> Therefore, to invoke the compliance exception to justify its resilient trade measures, a Member's assessment of its economic security threat needs to be endorsed by its legislative or executive bodies through the domestic rule-making process. This design assigns Members a duty to deliberate and specify their perceived economic security threats internally.

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<sup>44</sup> See Panel Report, India – Solar Cells, *supra* note 69, ¶¶ 7.332.

<sup>45</sup> See Panel Report, Indonesia – Measures Relating to Raw Materials, WT/DS592/R, ¶¶ 7.192, 7.200 (Nov. 30, 2022).

<sup>46</sup> Appellate Body Report, India – Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/AB/R, ¶ 5.109 (adopted Sept. 16, 2016).

<sup>47</sup> Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, ¶ 69 (adopted March 24, 2006); Appellate Body Report, India–Solar Cells, *id.* ¶ 5.107.

Notably, the compliance exception requires Members to specify their perceived economic security threat in a more institutionalized manner as opposed to on a case-by-case basis. For a Member to invoke the compliance exception to justify its resilient trade measures, demonstrating a specific economic security concern and asserting that the contested resilient trade measures address this concern is insufficient. Instead, it should first introduce a domestic law or regulation stipulating specific economic security goals and imposing enforceable obligations. It should then design its individual resilient trade measures to comply with the obligations stipulated in that law or regulation, thereby achieving the specific goals stipulated thereunder. In this context, a Member can raise the compliance exception only when it has institutionalized its economic security plans in enforceable legal obligations in advance. This design ensures that the invoking Member is sincerely concerned about its economic security threat.

### **c. The Anti-Protectionism Element**

Notably, the necessity requirement and the anti-protectionist chapeau are available in the compliance exception. Therefore, for a Member to justify its resilient trade measures under the compliance exception, it needs to establish further that the measures are necessary for securing its economic security and not constituting arbitrary or unjustifiable discrimination. The necessity requirement minimizes the impact of resilient trade measures on trade. The chapeau also serves the function of screening out protectionist measures disguised as resilient trade measures and controls the protectionism concern of resilient trade measures.

### **D. Summary**

In summary, this paper proposes that the compliance exception, applied appropriately, may reduce Members' empty talk on economic resilience and security. To invoke the compliance exception, Members need to substantiate their economic security goals in an institutionalized manner by legislating them into enforceable legal obligations. The domestic legislative process further motivates Members to assess and manage their prospective economic security threat in a more deliberative and rule-based manner. These would enhance the transparency of a Member's economic security concern, ensure the legitimacy of resilient trade measures, and reduce the arbitrariness and protectionist concerns.

Notably, the domestic law or regulation stipulating the economic security goals cannot be WTO-inconsistent. For instance, it cannot be discriminatory. Suppose a Member is concerned about an unexpected import disruption and plans to reduce its reliance on imports, such as Country C in Example 2 and Country E in Example 3. In

that case, these countries may consider designing their domestic law or regulation in a manner that stipulates their normative obligation to achieve a certain level of domestic production within a target period. This law or regulation pursues self-sufficiency, and it is non-discriminatory and is not WTO-inconsistent. Therefore, it can serve as the basis for Countries C and E to adopt resilient trade measures necessary for achieving the target level of production.

Suppose a Member is concerned about its concentrated reliance on specific imports and plans to diversify its imports, such as Country A in Example 1. In that case, it may design its domestic law or regulation in a manner that stipulates its normative obligation to ensure a minimum level of supply at any time. This law or regulation pursues an uninterrupted supply, and it is non-discriminatory and is not WTO-inconsistent. Therefore, it can serve as the basis for the Member to adopt resilient trade measures necessary for maintaining the target level of supply.

#### **IV. Disciplining Resilient Trade Measures by Other Exceptions?**

This section compares other exception clauses applicable to resilient trade measures. In general, this paper has reservations about disciplining resilient trade measures by these exceptions and will explain them in turn.

##### **A. Resilient Trade and the Security Exception**

Members have increasingly invoked the security exception to justify their resilient trade measures.<sup>48</sup> The argument is that economic security is also the type of security covered by this exception, specifically the “emergency in international relations.” Moreover, this exception is self-judging, which allows Members the discretion to adopt measures that contribute to their national security protection.

As trade measures in the name of security have become prevalent, the concerns about their potential abuse have risen. Therefore, some scholarly research has discussed whether the security exception may cover economic security and extend to resilient trade measures.<sup>49</sup> This paper proposes that the security exception is not the right fit for resilient trade measures from both interpretative and normative perspectives.

##### **a. The Security Exception is Not Completely Self-Judging**

Regarding the interpretative perspective, it must be clarified that the security

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<sup>48</sup> WTO REPORT 2023, *supra* note 13, at 49. *See also* Andrew D. Mitchell, *The Geography of Health: Onshoring Pharmaceutical Manufacturing to Address Supply Chain Challenges*, 23 WORLD TRADE REV. 519, 525 (2024).

<sup>49</sup> *See, e.g.*, Mitchell, *supra* note 3, at 33-36; Moraes, *supra* note 3, at 704; David Chieng, *Supply Chains, COVID-19 and the GATT Security Exception: Legal Limits of ‘Pandemic Exceptionalism’*, 39 AUST. YEARBOOK INT’L L. 13 (2021).

exception is not completely self-judging. Misunderstanding often results from the term “it considers” built into this exception, leading to the perception that treaty interpreters will defer to the adopting Member’s subjective judgment. However, as noted, the security exception contains the subjective and objective elements, while the latter remains subject to scrutiny.<sup>50</sup>

The existing WTO jurisprudence has established that the security exception is not read this way and that WTO dispute settlement will intervene in substantive reviews. Taking GATT Article XXI:1(b)(iii) for instance, panels shall examine if a measure is (i) taken in time of war or other emergency in international relations, and (ii) considered necessary by the adopting Member for protecting its essential security interests.<sup>51</sup> For the first element, the WTO jurisprudence has demonstrated that it will closely examine whether a Member faces an emergency in international relations. The term “it considers” in GATT Article XXI:1(b) chapeau only applies to the element in the chapeau, i.e., the measure’s necessity. It does not extend to the subparagraph elements, leaving room for dispute settlement bodies to examine the emergency element.<sup>52</sup> Therefore, Members must still demonstrate that an emergency in international relations exists and that their measures are taken in response to this emergency.

Moreover, the second element is not completely self-judging. WTO jurisprudence has clarified that a measure would be inconsistent with this element if the adopting Member fails to exercise its discretion of designating particular concerns as the protected essential security interests in good faith.<sup>53</sup> To satisfy this element, the adopting Member must (i) articulate its essential security interests with greater specificity, and (ii) demonstrate the plausible connection between the measure and the protected essential security interests.<sup>54</sup> Therefore, Members must still specify their essential security interests and demonstrate the contribution of their measures.

#### **b. The Security Exception Cannot Address the Protectionism Concern**

To the extent that the security exception is not self-judging, which mitigates the abusive concern, there might be room to expand its scope to include resilient trade measures. However, this paper proposes that the security exception is not a suitable venue for accommodating resilient trade measures from a normative perspective.

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<sup>50</sup> Mitchell, *supra* note 3, at 31; Chieng, *supra* note 49, at 23-25.

<sup>51</sup> Panel Report, United States – Origin Marking Requirement, WT/DS597/R, ¶ 7.263 (Dec. 21, 2023).

<sup>52</sup> Panel Report, Russia – Measures Concerning Traffic in Transit, WT/DS512/R, ¶¶ 7.82, 7.100-7.101 (Apr. 26, 2019); Panel Report, United States – Origin Marking Requirement, WT/DS597/R, ¶¶ 7.88-7.89 (Dec. 21, 2023).

<sup>53</sup> Panel Report, Russia – Measures Concerning Traffic in Transit, WT/DS512/R, ¶¶ 7.131-7.132 (Apr. 26, 2019).

<sup>54</sup> *Id.* ¶ 7.138.

To be clear, it remains an open question whether the existing security exception covers some economic security concerns. WTO jurisprudence defines “emergency in international relations” as a situation of armed conflict, latent armed conflict, heightened tension or crisis, or general instability engulfing or surrounding a state, which causes a Member’s defense or military interests or maintenance of law and public order interests in question.<sup>55</sup> One may argue that economic security concerns are incomparable to defense or military interests. In contrast, the other may say that economic security concerns could involve the maintenance of law and public order interests.<sup>56</sup>

However, regardless of which position is adopted, based on the security exception’s text, the economic security concern in a given case must be sufficiently “emergent” to meet the requirement. In practice, most resilient trade measures aim at “prospective” threats of trade disruption for precautionary purposes, whose severity and immediacy can hardly meet the emergency level.

While some might advocate a broader understanding of the term “emergency” under the security exception to accommodate Members’ need to pursue economic resilience and security,<sup>57</sup> this paper takes a reserved position. The primary reason is that the security exception lacks the anti-protectionism element for addressing the protectionism concern associated with resilient trade measures. As mentioned above, the need to discipline resilient trade measures arises from distinguishing between those pursuing economic resilience and security and those pursuing economic protectionism. The conventional tool for WTO law to halt protectionist practices is the anti-protectionism clause in the chapeau of the general exception. This design is essential to the overall functioning of general exceptions, allowing them to provisionally permit measures allegedly pursuing vital public interests and then restrict those effectively pursuing protectionism in the name of public interests.

In contrast, the security exception lacks this anti-protectionism clause to prevent those resilient trade measures from effectively pursuing protectionism in the name of economic security.<sup>58</sup> Therefore, if the security exception is read broadly to cover

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<sup>55</sup> Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, ¶ 7.76 (Apr. 26, 2019).

<sup>56</sup> Some commentators noted that the Panel of the *Russia-Traffic in Transit* held that the national security exception should not be read as affording protection for political or economic conflicts with other states unless they give rise to defence and military interests, or maintenance of law and public order interests and, therefore, perceive that the Panel leaves narrow space to invoke the security exception for resilient trade measures where the link to defense and military interests can be elusive. Moraes, *supra* note 3, at 704. See also Mitchell, *supra* note 3, at 33.

<sup>57</sup> For related discussions, see Mitchell, *supra* note 3, at 33-36.

<sup>58</sup> Some commentators cited the Panel Report of *Russia – Traffic in Transit* case and argued that Members’ use of security exceptions remains subject to the good faith requirement. Chieng, *supra* note 49, at 22.

resilient trade measures, it will fail to address this crucial normative concern behind them.<sup>59</sup>

Expanding the scope of “emergency” to include prospective threats to trade disruption also challenges the WTO dispute settlement. As mentioned above, WTO dispute settlement lacks the political legitimacy and local knowledge to assess a Member’s economic security threat. Extending the term “emergency” beyond immediate and objectively ascertainable threats to prospective trade disruption threats would ask the WTO dispute settlement to undertake a subjective judgment of a Member’s future, which would risk the overall legitimacy of the WTO dispute settlement mechanism.

## **B. Resilient Trade and the General Exception**

Given the above concerns against the security exception, this paper turns to other general exceptions. Unlike the security exception, the general exception contains the anti-protectionism clause in its chapeau, which satisfies the basic anti-protectionism element. The next question is whether they can better satisfy the economic security risk assessment element.

### **a. Resilient Trade and the Shortage Exception**

GATT Article XX(j) stipulates the shortage exception, which justifies measures essential to the acquisition or distribution of products in general or local short supply. Some scholarly research proposes extending this shortage exception to include prospective risks of becoming in short supply.<sup>60</sup> However, this paper holds a more cautious stance regarding this proposal.

This paper does not deny that the literal meaning of “short supply” under the shortage exception may extend beyond current risks to prospective risks. However, as mentioned above, this paper is concerned about the WTO dispute settlement’s local knowledge and political legitimacy in assessing these prospective risks. After all, unlike the current risk, which is more ascertainable by objective facts and evidence, prospective risks entail subjective judgment. When Members adopt resilient trade measures, arguing that they have not experienced but face a prospective threat of trade disruption due to geopolitical reasons, the WTO dispute settlement may have limited objective means to determine whether such a risk exists.

### **b. Resilient Trade and the Public Order Exception**

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<sup>59</sup> For similar observations, *see id.*

<sup>60</sup> Li, *supra* note 3, at 442.

GATS Article XIV(a) stipulates the public order exception, which justifies measures to protect public morals or to maintain public order. In the *EU-Energy Package* case, the Panel accepted that the security of energy supply is a fundamental interest of society<sup>61</sup> and found that foreign control posed a genuine and sufficiently serious threat to the EU's energy supply security.<sup>62</sup> Therefore, the public order exception seems an available venue for justifying resilient trade measures.

This paper does not deny the possibility for economic security to be considered a society's fundamental interest and, thus, the public order. Not to mention that the WTO jurisprudence has long deferred to a Member's identification of its public order,<sup>63</sup> rendering it easier for Members to justify their resilient trade measures under the public order umbrella.

There could also be a good case for accommodating resilient trade measures by the public order exception. After all, resilient trade measures are not automatically justified under the public order exception. To be justified, they must further pass the necessity test and the anti-abuse clause. For instance, in the *EU-Energy Package* case, the EU's resilient trade measure eventually did not pass the anti-protectionism clause.<sup>64</sup> Therefore, only the resilient trade measures necessary for securing a Member's economic security, and not constituting arbitrary or unjustifiable discrimination, would be permitted under the public order exception. This operation reduces the chance for resilient trade measures to be employed for protectionist purposes.

That said, the devil lies in the details of the public order exception, specifically in its definition. As GATS Footnote 5 requires, the public order exception may be invoked only where a *genuine and sufficiently serious threat* is posed to one of the fundamental interests of society. Therefore, in the case of resilient trade measures, WTO dispute settlement needs to examine not only whether a Member faces economic security threats but also the level of such threats. That was why the Panel in the *EU-Energy Package* case further discussed whether the EU faced a genuine and serious threat of energy disruption.

Nevertheless, this examination returns dispute settlement bodies to the hurdle mentioned above. As repeatedly emphasized, resilient trade measures typically aim at prospective threats to a Member's economic security instead of existing ones. Since the adopting Member's economic security concern is prospective, the WTO dispute

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<sup>61</sup> Panel Report, EU — Energy Package, *supra* note 37, ¶¶ 7.1148-7.1156.

<sup>62</sup> *Id.* ¶ 7.1202.

<sup>63</sup> Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, ¶ 6.461 (Nov. 10, 2004).

<sup>64</sup> Panel Report, EU — Energy Package, *supra* note 37, ¶ 7.1254.

settlement will have to assess the prospective risk level when determining its genuineness and seriousness. To determine this prospective risk level, the WTO dispute settlement again needs to employ its subjective judgment instead of relying on objective facts and evidence. In this sense, they continue to face the aforementioned local knowledge and political legitimacy challenges.

### **c. Resilient Trade and the Public Health Exception**

For resilient trade measures pursuing security in health-related products or services, the public health exception could be implicated. GATT Article XX(b) and GATS Article XIV(b) stipulate the public health exception, which justifies measures necessary to protect human, animal, or plant life or health. Some scholarly research, thus, proposes extending this exception to include prospective health risks arising from disruption in trade in health-related products, such as risks of future shortage.<sup>65</sup>

This paper, again, holds a more cautious stance regarding these proposals. This paper does not deny that the literal meaning of the “life or health risk” under the public health exception may extend beyond current risks to prospective risks. However, this paper remains concerned with the WTO dispute settlement’s local knowledge and political legitimacy in assessing these prospective risks. The WTO dispute settlement simply lacks a robust mechanism for conducting the assessment of prospective economic security risks.

To be clear, this paper’s concern arises from the WTO dispute settlement’s inherent difficulty in assessing the “existence” of economic security risks alleged by the adopting Member, not in identifying a Member’s “optimal level” of economic security risks. WTO jurisprudence has long deferred to a Member’s determination of the desired risk level to be pursued.<sup>66</sup> Therefore, WTO dispute settlement does not need to, and does not have the legitimacy to, determine this optimal level for Members. This paper is concerned with the WTO dispute settlement’s difficulty in assessing the existence and actual level of the economic security concern in the first place, which is the precondition for Members to invoke public health exceptions.

## **C. Summary**

In summary, unlike the compliance exception, this paper is cautious against employing other exceptions as tools to discipline resilient trade measures. In this paper’s view, the security exception is ill-equipped in the first place because it lacks the anti-protectionism element. Moreover, all these exceptions cannot satisfy the economic

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<sup>65</sup> Mitchell, *supra* note 3, at 28-29.

<sup>66</sup> See, e.g., Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/AB/R, ¶ 168 (adopted Apr. 5, 2001).

risk assessment element because they require the WTO dispute settlement to intervene in assessing the economic security risks alleged by Members. Note that the economic security risks addressed by resilient trade measures are prospective in nature, whereas the WTO dispute settlement lacks the local knowledge and political legitimacy to assess these risks.

## V. Revisiting WTO's Jurisprudence on Resilient Trade Measures

The WTO dispute settlement has handled at least three disputes related to resilient trade measures: the *India-Solar Panels* in 2016, the *EU-Energy Package* in 2018, and the *Turkey-Pharmaceutical Products* in 2022.<sup>67</sup> They suggest several general exceptions that could potentially form the basis for justifying resilient trade measures. However, none of them is easily applicable under the existing WTO jurisprudence.<sup>68</sup> This paper revisits these disputes and discusses how the above analyses may shed some light.

### A. India – Solar Panels

The measure at issue is essentially a local content requirement maintained by India to establish India as a global leader in solar energy and create the policy conditions for its diffusion across the country as quickly as possible.<sup>69</sup> Specifically, in its long-term power purchase agreements with solar power developers, India provided a guaranteed rate for a 25-year term at which India bought the electricity that developers generated. Only companies satisfying the local content requirement could be selected for these agreements.<sup>70</sup> The Panel easily found this local content requirement inconsistent with India's national treatment obligations under GATT Article III:4.<sup>71</sup>

#### a. India's GATT Article XX(j) Defense

India raised the shortage exception under GATT Article XX(j) to justify its local content requirement. Specifically, it argued that its domestic production of solar cells and modules could not meet its domestic demand. However, the Panel and the Appellate Body rejected this defense. They clarified that the “products in general or local short supply” under this subparagraph refers to a situation in which a product's available supply quantity does not meet demand in the relevant geographical area or market.<sup>72</sup>

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<sup>67</sup> Other related WTO disputes may include *Brazil-Taxation* and *China-Rare Earths*. For related discussion, see Moraes, *supra* note 3, at 699-700.

<sup>68</sup> See Moraes, *supra* note 3, at 701, 703, and 709.

<sup>69</sup> Panel Report, India — Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456/R, ¶ 7.1 (Feb. 22, 2016) [hereinafter “India — Solar Cells”].

<sup>70</sup> *Id.* ¶¶ 7.2-7.7.

<sup>71</sup> *Id.* ¶¶ 7.95-7.97.

<sup>72</sup> *Id.* ¶ 7.207.

In India's case, the Panel found that India only established a local short "production" but not "supply", and such a short in production did not cause a domestic short supply because the demand could still be met through international sources of supply.<sup>73</sup> Therefore, simply asserting the shortage in domestic production is insufficient.<sup>74</sup>

Moreover, the Panel addressed India's concern that relying on international supplies may introduce additional risks when trade disruption occurs. Specifically, it held that the GATT Article XX(j) shortage risk only covers "immediate risks" and does not cover prospective shortages.<sup>75</sup> In this case, the Panel found that the GATT Article XX(j) defense was unavailable to India because India failed to establish the imminent disruption risk of India's solar power developers' supply of foreign solar cells and modules.<sup>76</sup>

The Panel and the Appellate Body apparently adopted a narrow understanding of the term "short supply" under this subparagraph in two aspects. First, they adopted a strict stance on the temporal element of short supply, requiring it to pose an immediate risk. Second, they adopted a holistic approach for determining whether a shortage exists. In determining whether a Member's demand for a specific good is unmet, their examination was not limited to domestic production. Instead, they further examined whether a Member could meet its local demand from other international sources. This approach inevitably reduces the room for Members to justify their local content requirements.

This paper agrees with the Panel's and Appellate Body's narrow approach. After all, the WTO dispute settlement can hardly assess or predict whether India will encounter any unexpected incident in the future that disrupts India's imports of solar cells and modules. If it accepts that GATT Article XX(j) includes prospective shortage, it might have to either defer to India's judgment or conduct its own assessment. Neither way could effectively assess whether a real economic security threat exists.

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<sup>73</sup> *Id.* ¶¶ 7.224-7.225.

<sup>74</sup> The Appellate Body further added that the determination of shortage considers not only whether there is a mathematical difference at a single point in time between demand and supply, but also other factors, including: the level of domestic production of a particular product and the nature of the product that is alleged to be in general or local short supply; the relevant product and geographic market; potential price fluctuations in the relevant market; the purchasing power of foreign and domestic consumers; the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad; the total quantity of imports that may be available to meet demand in a particular geographical area or market; the extent to which international supply of a product is stable and accessible, including by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains; the level of economic development of the relevant Members. Appellate Body Report, India—Solar Cells and Solar Modules, *supra* note 46, ¶¶ 5.71-5.72, 5.89.

<sup>75</sup> Panel Report, India – Solar Cells, *supra* note 69, ¶¶ 7.249 and 7.255.

<sup>76</sup> *Id.* ¶ 7.264.

## **b. India’s GATT Article XX(d) Defense**

India also raised the compliance defense under GATT Article XX(d) and defended that the local content requirement is integral to its compliance with domestic and international laws.<sup>77</sup> Regarding international laws, the Panel rejected India’s defense because the international laws identified by India<sup>78</sup> are neither incorporated into India’s domestic laws nor have a direct effect on India. Regarding domestic laws, the Panel also rejected India’s defense because the local content requirement merely ensures the attainment of objectives referenced in India’s laws, not serving to enforce specific obligations.<sup>79</sup>

While this paper makes a case for the compliance exception, it supports the Panel and the Appellate Body’s findings in India’s case. In this paper’s view, India’s defense was rejected because it failed to identify a domestic law or regulation that the alleged resilient trade measures seek to comply with.<sup>80</sup> Panels and the Appellate Body took this case to clarify that the “domestic law or regulation” under the compliance exception refers to enforceable legal obligations. In contrast, the objectives mentioned in a domestic law or regulation do not count.

India’s case is alarming. For most Members, the economic resilience and security pursued by their resilient trade measures are not enforceable legal obligations, but mostly government policies or objectives. In that case, the compliance exception is not available.<sup>81</sup> To invoke the compliance exception proposed by this paper, Members need to undergo their legislative process and stipulate their economic security goals into specific normative obligations. Only by institutionalizing their economic security plans could they demonstrate their sincere concerns and raise the compliance exception.

## **B. EU – Energy Package**

The EU’s measure at issue essentially designated certain infrastructure projects as “projects of common interest” (PCIs) and provided certain incentives to these projects, including, among other things, more streamlined administrative processing of the applications, other regulatory treatment incentives, and some financial assistance. To be eligible, a project should meet the designated geographical criteria.<sup>82</sup> This measure

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<sup>77</sup> The international laws identified by India include the Preamble of the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development, and the United Nations General Assembly Resolution adopting the Rio+20 Document: *The Future We Want*. *Id.* ¶ 7.298.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ¶ 7.332.

<sup>80</sup> For similar observations, Mukta Batra & Namit Bafna, *Renewable Energy: The WTO’s Position on Local Requirements*, 39 *ENERGY L.J.* 401, 422 (2018).

<sup>81</sup> For similar observations, *see* Li, *supra* note 3, at 435.

<sup>82</sup> Panel Report, EU — Energy Package, *supra* note 37, ¶ 2.54.

aimed to foster cross-border energy infrastructure development to diversify the natural gas supply in the EU.<sup>83</sup> Russia, thus, brought the complaint against the EU because the geographic criteria excluded Russia's projects from being recognized as PCIs.

The Panel found the measure inconsistent with the EU's national treatment obligations under GATT Article III:4 because the criteria for PCI designation were aimed at connecting certain EU member states with sources of natural gas supply other than Russia, rendering projects transporting non-Russian natural gas designated as PCIs and receiving benefits.<sup>84</sup> The Panel also found the measure inconsistent with the EU's MFN obligations under GATT Article I:1 because it provided more favourable conditions for gas transportation of non-Russian origin.<sup>85</sup>

#### **a. GATT Article XX(j) Defense**

The EU similarly raised the shortage exception under GATT Article XX(j) to justify its measure. Specifically, it defended that natural gas is "in general or local short supply" because external events may disrupt the supply from any given source or through any given route. To the extent that the EU imported 66 percent of its natural gas from a single external source of supply, while the infrastructure interconnecting the transmission networks of various EU member States was inadequate, the gas supply was vulnerable in the EU.<sup>86</sup>

While the Panel agreed that the risks of natural gas supply disruptions were not merely hypothetical, it found that the EU had provided neither arguments nor evidence to support that natural gas was currently in short supply in the EU.<sup>87</sup>

Moreover, the Panel found that the EU did not establish that the risk of such disruptions affected the EU's ability to take measures "essential to the acquisition or distribution" of natural gas. Specifically, the Panel noted that simply demonstrating that the diversification of natural gas supply and routes contributed to energy supply security did not establish that the diversification also contributed to the "acquisition or distribution" of natural gas.<sup>88</sup>

Similar to India's case, the Panel in the EU's case adopted a narrow understanding of the term "short supply." Specifically, it required the short supply to be current, not covering prospective shortages, even though the risk of shortage is not merely hypothetical. Based on this narrow interpretation, most resilient trade measures can

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<sup>83</sup> *Id.* ¶ 2.52.

<sup>84</sup> *Id.* ¶ 7.1299.

<sup>85</sup> *Id.* ¶¶ 7.1310-7.1311.

<sup>86</sup> *Id.* ¶¶ 7.1336-7.1337.

<sup>87</sup> *Id.* ¶¶ 7.1351-7.1353.

<sup>88</sup> *Id.* ¶¶ 7.1372.

hardly satisfy the “short supply” element because they primarily pursue precautionary purposes, aiming at the short supply caused by prospective trade disruption instead of existing ones.<sup>89</sup>

This paper agrees with the Panel’s narrow interpretation of the term “short supply.” Notably, the Panel also examined closely whether a Member’s efforts in diversifying its supply sources could contribute to its ability to acquire or distribute the products in short supply. This is also a valid point because rigidly diversifying the supply sources might, in turn, reduce the total supply, which may not contribute to economic security. This observation is applicable when examining the necessity test under the compliance exception proposed by this paper.

#### **b. GATS Article XIV(a) Defense**

In addition to the shortage exception, the EU invoked the public order exception under GATS Article XIV(a) to justify the inconsistency of its third-party certification measures with GATS Article XVII. Under this measure, transmission service operators controlled by persons from a third country must undergo a certification process, which assesses whether granting certification will not put at risk the security of the energy supply.<sup>90</sup> The EU defended that this measure is necessary for ensuring its energy supply security and maintaining its public order.<sup>91</sup> ◦

In contrast to its position under GATT Article XX(j), the Panel accepted the EU’s defense under GATS Article XIV(a). It acknowledged that the security of energy supply is a fundamental interest of society<sup>92</sup> and found that foreign control posed a genuine and sufficiently serious threat to the EU’s energy supply security.<sup>93</sup> Ultimately, it concluded that the measure was designed to protect public order and was necessary under GATS Article XIV(a).<sup>94</sup>

The measure, however, failed to pass the arbitrary discrimination test under GATS Article XIV chapeau. The Panel found that the certification requirement was only applied to transmission service operators controlled by persons from third countries but excluded domestic transmission service operators, which constitutes differential treatment and discrimination. Specifically, it found that domestic operators are similarly likely to be required or incentivized by a foreign government to harm the EU’s energy

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<sup>89</sup> Some commentators emphasized this point by highlighting that the Panel of the EU’s case rejected the EU’s argument based on “imminent risks” notwithstanding a long-lasting geopolitical conflict between the EU and Russia. Li, *supra* note 3, at 433.

<sup>90</sup> Panel Report, EU — Energy Package, *supra* note 37, ¶ 7.1125.

<sup>91</sup> *Id.* ¶¶ 7.1142-7.1143.

<sup>92</sup> *Id.* ¶¶ 7.1148-7.1156.

<sup>93</sup> *Id.* ¶ 7.1202.

<sup>94</sup> *Id.* ¶ 7.1240.

supply security, although the level of risk might differ. To the extent that domestic operators are likely to be susceptible to similar energy supply security risks, applying the certification requirement exclusively to transmission service operators controlled by persons from third parties constitutes an arbitrary discrimination.<sup>95</sup>

The EU's provisional victory under GATS Article XIV(a) sheds light on resilient trade advocates because the Panel acknowledged that the concept of public order may include economic security.<sup>96</sup> Besides, defending resilient trade measures under the public order umbrella is ideal for adopting Members because WTO jurisprudence has long recognized and deferred to Members' autonomy in identifying their public order.<sup>97</sup> Therefore, Members may, to some extent, characterize their economic resilience concerns as their public order, less fettered by the WTO dispute settlement. This autonomy sharply contrasts with other exceptions, where the WTO dispute settlement intervenes heavily into whether the alleged trade disruption risks are demonstrable.

However, this paper wishes to highlight some cautionary notes. First, the public order defense is explicitly available under GATS Article XIV(a), but it is less clear whether the public moral exception under GATT Article XX(a) may cover the public order aspect. After all, defending that economic resilience meets the definition of public morals, i.e., standards of right and wrong maintained by a community or nation,<sup>98</sup> is less intuitive.

Second, Members invoking the public order exception still need to demonstrate, per GATS Footnote 5, that their fundamental interests face genuine and sufficiently serious threats. In the EU's case, the Panel did not defer to the EU's self-declaration but conducted an objective assessment of the EU's demonstration. Therefore, the public order defense is not completely discretionary. Members still need to demonstrate and substantiate the level of their economic security risks.

As mentioned above, this need for demonstration is the devil lying in the details of the public order exception. It is less than clear how the EU demonstrated that it was facing a genuine and serious threat to its energy supply security. For instance, why was foreign control of the EU's energy supply a genuine and serious threat? Was there

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<sup>95</sup> *Id.* ¶ 7.1250-7.1253.

<sup>96</sup> *See, e.g.,* Moraes, *supra* note 3, at 703 (concluding that it is an open question whether future panels will have the flexibility to recognize that measures to diversify suppliers could fit under Article XX(a); Li, *supra* note 3, at 436 (observing that the threshold for demonstrating a "genuine and sufficiently serious threat to a fundamental interest of society" under GATT Article XX(a) is lower than that of "presently in short supply" under GATT Article XX(j)).

<sup>97</sup> *See, e.g.,* Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, ¶ 6.461 (Nov. 10, 2004).

<sup>98</sup> Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, ¶ 7.759 (Aug. 12, 2009).

specific evidence demonstrating that the EU was about to witness trade disruption in its foreign energy supply? Perhaps the EU's diplomatic relations with Russia were more well-known to the Panel, leading to the Panel's sympathy toward the EU's energy supply security threat. However, this paper maintains the view that the WTO dispute settlement is ill-equipped for assessing a Member's prospective threat of trade disruption in terms of legitimacy and knowledge.

### **C. Turkey – Pharmaceutical Products**

Turkey's measures at issue included, among others, the localisation requirement, which required foreign producers to commit to localising the production of certain pharmaceutical products and would cancel reimbursements if they did not. Turkey claims that the requirement was designed to achieve its gradual transition from imports to domestic pharmaceutical manufacturing.<sup>99</sup> The Panel unsurprisingly found the requirement inconsistent with Turkey's national treatment obligation under GATT Article III:4 because it created a financial incentive for consumers to select domestic over imported pharmaceutical products.<sup>100</sup>

#### **a. GATT Article XX(b) Defense**

Turkey invoked the public health defense under GATT Article XX(b), but the Panel rejected it. The Panel emphasized that, to invoke this defense, Turkey must demonstrate, at a minimum, that the asserted risk arising from alleged over-reliance on imports was more than a merely hypothetical possibility.<sup>101</sup> In the Panel's view, Turkey failed to provide instances or link the past shortage instances to Turkey's over-reliance on imports.<sup>102</sup> Failing this demonstration, the Panel found that the localisation requirement served no public health objective, but pursued an industrial policy.<sup>103</sup>

Moreover, the Panel addressed Turkey's target of meeting 60 percent of domestic demand through domestic production. This target was mentioned in Turkey's Tenth Development Plan, which the Grand National Assembly of Turkey passed. In the Panel's view, this Plan had no rational relationship to the public health objective because Turkey failed to explain why and how specifically the 60 percent was designed.<sup>104</sup>

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<sup>99</sup> Panel Report, Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products, WT/DS583/12, ¶ 2.20 (unrestricted Apr. 28, 2022) [hereinafter “Turkey — Pharmaceutical Products”].

<sup>100</sup> *Id.* ¶¶ 7.125.

<sup>101</sup> *Id.* ¶¶ 7.170.

<sup>102</sup> *Id.* ¶¶ 7.175-7.177.

<sup>103</sup> *Id.* ¶¶ 7.195, 7.197-7.198.

<sup>104</sup> *Id.* ¶¶ 7.195, 7.205-7.206.

The Panel seems to show less sympathy toward Turkey's situation.<sup>105</sup> While it has repeatedly acknowledged the vital importance of preventing health risks,<sup>106</sup> it does not seem to accept the long-term health risks caused by prospective trade distortion. In this paper's view, this position echoes its longstanding position against introducing the precautionary principle into related WTO agreements.<sup>107</sup> In the context of the public health exception, the WTO jurisprudence has examined whether sufficient scientific evidence supported the existence of health risks.<sup>108</sup> The tendency to ask for scientific evidence also explains why the Panel asked Turkey to explain how the 60 percent target was related to its public health objective. To that extent, the WTO jurisprudence has consistently constructed the public health exception based on scientifically established health risks.

If scientific evidence is a prerequisite for Members to invoke the public health exception, the WTO jurisprudence could hardly accept health risks based on a non-scientific prediction of prospective trade disruption. However, this position is inherently incompatible with resilient trade measures because the risks to be addressed by these measures, i.e., prospective trade disruption, are mostly non-scientific in nature.<sup>109</sup>

#### **b. GATT Article XX(d) Defense**

Turkey also raised the compliance exception under GATT Article XX(d), arguing that the localisation requirement is necessary to secure compliance with its laws and regulations requiring Turkey to ensure accessible, effective, and financially sustainable healthcare. The Panel rejected this defense, finding that it overlaps with Turkey's GATT Article XX(b) defense. Therefore, the Panel rejected this defense for the same reasons

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<sup>105</sup> Some commentators read Turkey's case more optimistically, arguing that the Panel offers clues on the flexibility of WTO rules to account for Members' increasing interest in strengthening their resilience in the pharmaceutical sector. In this view, the Panel recognized, in principle, that Members may adopt policies to develop their pharmaceutical sectors, provided a rational relationship exists between this objective and the specific public health objective invoked. Moraes, *supra* note 3, at 701. *See also* Mitchell, *supra* note 3, at 29-30.

<sup>106</sup> *See, e.g.*, Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, ¶¶ 144 and 179 (Dec. 17, 2007); Panel Report, Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products, WT/DS484/R, ¶ 7.225 (Nov. 22, 2017); Panel Report, Brazil – Certain Measures Concerning Taxation and Charges, WT/DS472/R, ¶¶ 7.913-7.916 (Aug. 30, 2017).

<sup>107</sup> *See, e.g.*, Appellate Body Report European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26,48/AB/R, ¶¶ 120-125 (Feb. 13, 1998); Panel Reports, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, ¶¶ 7.76-7.89 (Nov. 21, 2006).

<sup>108</sup> *See, e.g.*, Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R, ¶ 8.182 (Sept. 18, 2000).

<sup>109</sup> For instance, some commentators raised the point that, given the experience of the COVID-19 pandemic, countries cannot anticipate the source and cause of perhaps the most acute shortage. Mitchell, *supra* note 3, at 27-28.

above.<sup>110</sup>

Unlike India's case, Turkey had laws in place. Specifically, Turkey's Grand National Assembly passed the Tenth Development Plan, targeting 60 percent of domestic pharmaceutical demand through domestic production. However, because the objectives designed under these laws were health-related, which overlap with those under the public health exception, the Panel connected Turkey's compliance defense with its public health defense and did not separately examine the contested measures under the compliance exception. Following this logic, the Panel seems to reject Turkey's compliance defense because the objectives that its laws were designed to address were unclear. To that extent, the Panel appears to examine the objective pursued by the identified laws or regulations.

At first glance, the Panel's finding does not support this paper's compliance exception proposal. However, a closer examination might reveal that it reinforces this paper's viewpoint. Unlike under other exceptions, where the WTO dispute settlement intervenes in assessing whether a prospective economic security risk exists, the Panel focused more on how the 60 percent target was designed and whether it has a rational connection with the alleged pharmaceutical products security objective. In other words, the existence of a specific law or regulation reduces the Panel's need for assessing the existence and level of prospective trade disruption risk per se. Instead, it could shift its inquiry to the actual objective pursued by the identified law or regulation, whether economic security or economic protectionism. This is progress and a relief for WTO dispute settlement.

## **VI. Conclusion**

This paper offers the economic rationale for resilient trade, arguing that it enhances overall economic welfare by urging parties and countries in international trade to consider economic security and trade disruption risks and price them into the trade model. Based on this welfare-enhancing observation, this paper proposes that the real challenge that resilient trade poses to international economic law, particularly WTO law, is how to screen out trade-restrictive measures for protectionist purposes in the guise of economic security and resilience.

This paper proposes that the WTO law's response should possess two elements:

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<sup>110</sup> Panel Report, Turkey—Pharmaceutical Products, *supra* note 99, ¶¶ 7.195, 7.216-7.218. The Arbitrators of this dispute also found that the lack of a rational relationship between the localisation requirement and the proclaimed objective and concluded that the measure was not taken to secure compliance with the relevant laws or regulations. Award of the Arbitrators, Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products, WT/DS583/ARB25, ¶ 7.10 (July 25, 2022).

the anti-protectionism design and a robust economic security risk assessment mechanism. However, a Member's economic security risk is prospective in nature, whose assessment depends on subjective judgment. WTO dispute settlement is ill-equipped to conduct this assessment due to its lack of political legitimacy and local knowledge.

This paper proposes that, compared with security or other general exceptions, the compliance exception is a better forum for accommodating and disciplining resilient trade measures. By requiring Members to legislate their economic security concerns into enforceable legal obligations under their domestic laws or regulations, the compliance exception resolves the WTO dispute settlement's knowledge and legitimacy dilemma in subjectively judging Members' economic security risks. The compliance exception further urges Members intending to justify their resilient trade measures to undertake a legislative or rule-making process to institutionalize their economic security plans, which leads resilient trade measures to be more transparent, institutionalized, deliberative, and rule-based.

Geopolitical confrontation erodes the trust between countries and escalates the economic security concerns. Given this political reality, the concept of resilient trade has its economic justifications, but at the same time, it needs discipline. Given the WTO's deadlock in negotiations, this paper attempts to introduce the disciplines through reinterpreting the existing WTO law. With proper interpretation, this paper anticipates that WTO law may guide resilient trade practices in the intended welfare-enhancing direction.