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The Validity of Trade Restrictions on Artificial Intelligence Technology Under the General Agreement on Tariffs and Trade's National Security Exception

Isabelle Brundieck

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THE VALIDITY OF TRADE RESTRICTIONS ON ARTIFICIAL INTELLIGENCE TECHNOLOGY UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE'S NATIONAL SECURITY EXCEPTION

ISABELLE BRUNDIECK*

This Comment argues that the U.S. restrictions on the export of semiconductors and other AI technology to China do not violate the General Agreement on Tariffs and Trade 1994 (GATT 1994). Instead, such measures are legitimate expressions under GATT 1994's Article XXI national security exception, which allows a country to break other articles within the agreement if necessary to protect the country's essential national security interests. Given the national security risks associated with the rise of AI technology and the likelihood that such technology will be supplied to a military enterprise, the current trade restrictions qualify for the exception. However, this Comment ultimately argues that while valid under GATT 1994, these trade restrictions are not a permanent solution. Such trade restrictions hurt international trade agreements and multilateral trading systems and do not remedy national security concerns. Ultimately a multilateral agreement regarding the safe trade and use of AI technology is needed to relieve the national security risks and prevent future disruption to trade.

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I. INTRODUCTION

In October 2022, the United States announced restrictions on the export of semiconductors to China.¹ Two months later, China sought World Trade Organization (WTO) consultations, claiming that the United States had violated several articles of the General Agreement on Tariffs and Trade 1994 (GATT 1994), among other trade agreements, because the restrictions were not applied in a “uniform, impartial and reasonable manner.”² The United States responded that its actions were permitted under GATT 1994’s Article XXI national security exception because they were necessary to protect essential American national security interests.³

By analyzing Article XXI’s construction, legislative history, and the application of similar national security exceptions from other

1. U.S. DEP’T OF COM., BUREAU OF INDUS. AND SEC., COMMERCE IMPLEMENTS NEW EXPORT CONTROLS ON ADVANCED COMPUTING AND SEMICONDUCTOR MANUFACTURING ITEMS TO THE PEOPLE’S REPUBLIC OF CHINA (PRC) 1 (Oct. 7, 2022).

2. Request for Consultations by China, *United States - Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, ¶¶ 1, 15, WTO Doc. WT/DS615/1 (Dec. 15, 2022).

3. Communication from the United States, *United States - Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/7 (Mar. 3, 2023); General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994]; General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

multilateral trade agreements, this Comment argues that restrictions on the export of semiconductors and other AI technology to China qualify for the national security exception given the risks associated with the rise of AI. However, a multilateral agreement regarding the use and trade of AI is ultimately needed to relieve these national security risks because trade restrictions hurt multilateral trading systems and do not ensure the safe use of AI.

Section II of this Comment will provide background on United States-China trade, an overview of AI technology, and an introduction to the WTO and GATT. Section III will utilize canons of construction, legislative history, and prior trade disputes to analyze the validity of the United States' restrictions under Article XXI of GATT 1994 and ultimately conclude that these restrictions are permitted considering the national security concerns posed by AI. Section IV will provide a recommendation that the United States and China try to pass both a multilateral and a bilateral agreement regarding the safe use and trade of AI in order to remedy national security concerns and restore healthy trade patterns.

II. BACKGROUND

A. UNITED STATES-CHINA TRADE RELATIONSHIP

1. *Trade History*

After the People's Republic of China was established in 1949, the United States severed ties with the communist government and there was essentially no trade between the two countries over the next thirty years.⁴ In 1979, at the height of the Cold War, the United States normalized relations with China.⁵ Trade with China immediately boomed and further accelerated when President Bill Clinton signed the U.S.-China Relations Act of 2000 and China joined the World Trade Organization in 2001.⁶ China was often the United States' top trading

4. See Anshu Siripurapu & Noah Berman, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELATIONS (Sept. 26, 2023), <https://www.cfr.org/backgrounder/contentious-us-china-trade-relationship> (detailing the trade history between the United States and China).

5. *Id.*

6. See *id.* (“ . . . prompting an explosion of trade over the next four decades

partner throughout the 2000s and 2010s.⁷

Presidents George W. Bush and Barack Obama occasionally imposed trade restrictions on China during their terms, but overall maintained a close diplomatic relationship with China.⁸ President Donald Trump, however, took a particularly strong position on China and campaigned on a protectionist economic platform, promising to be more stringent on China.⁹ In 2017, after he was elected to office, Trump directed the Office of the United States Trade Representative to investigate Chinese economic practices.¹⁰ Trump subsequently brought tariffs on Chinese imports worth more than 50 billion dollars in response to what the White House alleged was Chinese theft of American technology and intellectual property.¹¹ China denied all

from a few billion dollars' worth to hundreds of billions of dollars annually."); U.S.-China Relations Act of 2000, 22 U.S.C. § 6901.

7. See *U.S.-China Relations*, COUNCIL ON FOREIGN RELATIONS (2023), <https://www.cfr.org/timeline/us-china-relations> (providing a timeline of U.S.-China relations); Cork Gaines, *Mexico Replaced China as America's Top Trade Buddy — and it Shows How the Global Economy is Rapidly Transforming*, BUSINESS INSIDER (Aug. 20, 2023), <https://www.businessinsider.com/us-mexico-china-trade-world-economy-changing-2023> (“China was America’s top partner for much of the 2010s and again at the start of the pandemic.”).

8. See Siripurapu & Berman, *supra* note 4 (summarizing the Bush and Obama administration’s “crack downs” and tariffs imposed alongside “high-level dialogues” meant to address trade issues).

9. Nicole Gaouette, *Trump Stakes Out Inward, Protectionist Vision for America*, CNN (Jan. 20, 2017), <https://www.cnn.com/2017/01/20/politics/donald-trump-foreign-policy/index.html> (“President Donald Trump, in his first address as the 45th U.S. President, struck a protectionist, isolationist chord as he vowed to upend the way America relates to and does business with the rest of the world.”); SCMP Reporters, *What is the US-China Trade War?*, SOUTH CHINA MORNING POST (Apr. 13, 2020), <https://www.scmp.com/economy/china-economy/article/3078745/what-us-china-trade-war-how-it-started-and-what-inside-phase> (“U.S. President Donald Trump promised during his 2016 presidential campaign to reduce the large trade deficit with China, which he claimed was based in large part on unfair Chinese trading practices, including intellectual property theft, forced technology transfer, lack of market access for American companies in China and an unlevel playing field caused by Beijing’s subsidies for favoured Chinese companies.”).

10. *Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation*, THE WHITE HOUSE (Mar. 22, 2018), <https://trump.whitehouse.archives.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/>.

11. See *U.S.-China Relations*, *supra* note 7 (detailing Trump administration tariffs imposed on trade with China).

allegations of technology transfer and blamed the United States for escalating the conflict.¹² Trump's successor, President Joe Biden, similarly ran for office with promises to impose "swift economic sanctions" on China.¹³ Accordingly, when he was elected, Biden did not withdraw the Trump-era tariffs and has implemented additional trade restrictions against China.¹⁴

2. Recent Trade Restrictions and Aftermath

As part of the Biden Administration's effort to increase regulation on trade with China, in October 2022, the Bureau of Industry and Security (BIS) announced a series of targeted restrictions on the export of various advanced technologies used for AI and supercomputing to China.¹⁵ In particular, the new restrictions require American companies that make high-performance chips – advanced technology necessary for the rapid data processing and complex computing involved in artificial intelligence – to acquire a license to export to China.¹⁶ This policy applies to both American-made chips and foreign-made chips that use American technology in the design or manufacturing process.¹⁷ The new restrictions also limit American companies from exporting certain machinery to Chinese companies

12. Tom Miles, *U.S. and China Clash Over 'Technology Transfer' at WTO*, REUTERS (May 28, 2018), <https://www.reuters.com/article/us-usa-trade-china/u-s-and-china-clash-over-technology-transfer-at-wto-idUSKCN1I11G> (quoting Chinese Ambassador Zhang Xiangchen's response to the U.S. allegation of forced technology transfers).

13. See Edward Wong, et al., *Joe Biden's China Journey*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2020/09/06/us/politics/biden-china.html> (showing President Joe Biden's campaign promises regarding trade with China).

14. See *id.* ("Mr. Biden has not committed to removing Mr. Trump's tariffs on China; his aides say he would first review how they affect the American middle class."); see also BUREAU OF INDUS. AND SEC., *supra* note 1, at 1.

15. BUREAU OF INDUS. AND SEC., *supra* note 1, at 1, 4.

16. *Id.* at 2-3; Arjun Kharpal, *America's 'Once Unthinkable' Chip Export Restrictions will Hobble China's Semiconductor Ambitions*, CNBC (Oct. 11, 2022), <https://www.cnbc.com/2022/10/12/us-chip-export-restrictions-could-hobble-chinas-semiconductor-goals.html> [hereinafter *Chip Export Restrictions*] (explaining a selection of the applicable new U.S. trade rules).

17. See *Chip Export Restrictions*, *supra* note 16 (writing that the restrictions will have a wide-sweeping effect and extend to certain chips manufactured in Taiwan given that it is unlikely that they did not use American tools at some point).

that manufacture high-performance chips.¹⁸ The restrictions were specifically intended to hinder China's ability to both purchase and manufacture certain technology used in military applications.¹⁹ According to the Under Secretary of Commerce for Industry and Security, Alan Estevez, the policy updates are the direct result of the government "doing everything in [its] power" to protect American national security and prevent sensitive technology with military applications from being acquired by China's military.²⁰

In December 2022, in response to the U.S. restrictions, China made a request for consultations with the United States pursuant to the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO).²¹ In March 2023, the United States countered that its actions were permitted under GATT 1994's Article XXI national security exception.²² Significantly, that same month, the Netherlands and Japan enacted similar but less targeted export restrictions on semiconductors in support of the United States.²³ Though neutral on their face, these restrictions are believed to be aimed at China.²⁴

18. *Id.* ("U.S. companies will be heavily restricted in exporting machinery to Chinese companies that are manufacturing chips of a certain sophistication.")

19. *See id.* (indicating the U.S. government's intentions in introducing the new trade rules governing sophisticated chip technologies and semiconductors); BUREAU OF INDUS. AND SEC., *supra* note 1, at 1.

20. BUREAU OF INDUS. AND SEC., *supra* note 1, at 1.

21. Request for Consultations by China, *supra* note 2, ¶ 1 (claiming that the United States "abuses its export control regime as a tool to achieve its objectives of maintaining its leadership in science, technology, engineering and manufacturing sectors").

22. Communication from the United States, *supra* note 3.

23. *See* Michelle Toh & Junko Ogura, *Japan Joins the U.S. and Europe in Chipmaking Curbs on China*, CNN BUSINESS (Mar. 31, 2023), <https://www.cnn.com/2023/03/31/tech/japan-china-chip-export-curbs-intl-hnk/index.html> (noting that the restrictions required stricter export procedures to around 160 destinations, including China, and were designed to prevent the equipment from being leveraged for military use); Toby Sterling, et al., *Dutch to Restrict Semiconductor Tech Exports to China, Joining U.S. Effort*, REUTERS (Mar. 8, 2023), <https://www.reuters.com/technology/dutch-responds-us-china-policy-with-plan-curb-semiconductor-tech-exports-2023-03-08/> (writing that the Netherlands will implement a national control list for advanced chips in order to have oversight over this technology "with the greatest of speed").

24. *See* Toh & Ogura, *supra* note 23 (noting the context and timing, which support the argument that the restrictions are "part of a coordinated effort led by

In June 2023, U.S. Secretary of State Antony Blinken visited China to meet with China's President Xi Jinping, top diplomat Wang Yi, and Foreign Minister Qin Gang to discuss the importance of maintaining open lines of communications and cooperating on "shared transnational challenges."²⁵ Following his visit, Blinken spoke of progress between the United States and China on issues such as the economy and climate crisis, but stated that advanced technology remains an area of conflict.²⁶ While indicating that the United States desires a resolution to the conflict, Blinken said that it is not in America's interest "to provide technology to China that could be used against us."²⁷

Turning to the future, the United States has no near-term plan to suspend its policy and is even considering additional restrictions to prevent the flow of sensitive technology to China.²⁸ Specifically, the United States is taking steps to restrict American investment in

Washington" though the restrictions were cited as "not aimed at a specific country" by Japan and "protect[ing] national security" by the Netherlands); Sterling, et al., *supra* note 23 (detailing the Dutch restrictions on semiconductor technology exports).

25. Ryo Nakamura, *U.S. Seeks Talks with China on Military AI Amid Tensions*, NIKKEI ASIA (June 14, 2023), <https://asia.nikkei.com/Politics/International-relations/US-China-tensions/U.S.-seeks-talks-with-China-on-military-AI-amid-tensions>. See also Humeyra Pamuk, *Xi, Blinken Agree to Stabilize US-China Relations in Beijing Talks*, REUTERS (June 19, 2023), <https://www.reuters.com/world/china/blinken-wrap-up-rare-visit-china-may-meet-xi-jinping-2023-06-18/> ("The top U.S. diplomat and Xi both stressed the importance of having a more stable relationship, as any conflict between the world's two largest economies would create global disruption.").

26. See Arjun Kharpal, *U.S.-China Tech Battle Entering its 'Primetime' — and Generative A.I. Could be the Next Frontier*, CNBC (June 22, 2023), <https://www.cnbc.com/2023/06/23/us-china-tech-war-why-generative-ai-could-be-the-next-battleground.html> [hereinafter *U.S.-China Tech Battle*] (citing analysts who concluded that the tensions over advanced technology will continue).

27. *Id.*

28. See Karen Freifeld, *U.S. Seeks to Curb Investment in Chinese Chips, AI and Quantum Computing*, REUTERS (May 31, 2023), <https://www.reuters.com/technology/us-seeks-curb-investment-chinese-chips-ai-quantum-computing-2023-05-31/> (detailing additional restrictions under consideration); Stephen Nellis, *U.S. Lawmakers Urge Biden Administration to Tighten AI Chip Export Rules*, REUTERS (July 31, 2023), <https://www.reuters.com/technology/us-lawmakers-urge-biden-administration-tighten-ai-chip-export-rules-2023-07-28/> (citing U.S. lawmakers who are urging the Biden administration to adopt tighter export restrictions on artificial intelligence chips).

Chinese chips, AI, and quantum computing.²⁹

B. UNDERLYING REASONS FOR TENSION BETWEEN THE UNITED STATES AND CHINA

1. *Economic Concerns*

For many decades, the United States has imported more goods than it has exported, creating a so-called trade deficit.³⁰ The United States' largest bilateral trade imbalance lies with China where the trade deficit between the two countries was 382 billion dollars in 2022, a number significantly higher than in previous decades.³¹ While a trade deficit is not inherently bad, a trade deficit of this size does raise some economic concerns as high deficits have been linked to weak economies and financial bubbles.³²

Further, while not necessarily a leading source of conflict, the United States' debt to China complicates United States-China relations.³³ Over the past several decades, China has steadily accumulated U.S. Treasury securities.³⁴ As of January 2023, China owns just under one trillion dollars in U.S. debt and is the second

29. Freifeld, *supra* note 28 (writing that American firms previously poured billions of dollars into sensitive Chinese sectors).

30. See *U.S. Trade in Goods and Services - Balance of Payments (BOP) Basis*, U.S. CENSUS BUREAU (2022), <https://www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

31. See *Trade in Goods with China*, U.S. CENSUS BUREAU, (June 2023), <https://www.census.gov/foreign-trade/balance/c5700.html#1999> (indicating that the average United States-China trade deficit was \$340 billion in the 2010s, \$175 billion in the 2000s, and \$34 billion in the 1990s); James McBride & Andrew Chatzky, *The U.S. Trade Deficit: How Much Does It Matter?*, COUNCIL ON FOREIGN RELATIONS (Mar. 8, 2019), <https://www.cfr.org/backgrounders/us-trade-deficit-how-much-does-it-matter> (“By far the largest bilateral trade imbalance is with China.”).

32. See McBride & Chatzky, *supra* note 31 (citing several economists who are concerned about the risks to American security, employment rates, and financial health posed by the United States-China trade deficit).

33. See James Dorn, *The Role of China in the U.S. Debt Crisis*, 33 *CATO JOURNAL* 77, 77–83 (2013) (explaining that though China is the largest foreign holder of U.S. debt, China's portfolio only amounted to an estimated 8.4% of the total public debt at the end of 2011).

34. See China Power Team, *Is it a Risk for America that China Holds Over \$1 Trillion in U.S. Debt?*, *CTR. FOR STRATEGIC AND INT'L STUD.* (Aug. 26, 2020), <https://chinapower.csis.org/us-debt/> (indicating China's purpose in building up foreign exchange reserves over time since the 1997 Asian Financial Crisis).

largest foreign holder of American debt.³⁵ While China could effectively “call in” its loans and seek repayment by selling its holdings of American debt on the open market, this would likely have little effect on the U.S. economy but would have devastating effects on China’s economy.³⁶ Overall, the real risk for conflict lies in the possibility of “global economic fallout” and a recession that could follow if the United States were to default on its debt.³⁷

2. Diplomatic Concerns

In terms of relevant diplomatic concerns, China’s ongoing disputes with Taiwan and Hong Kong have created opportunities for further tension between the United States and China. China claims that Taiwan is an “inalienable part of China that must be reunified with the mainland” while Taiwan’s government considers Taiwan an independent country.³⁸ Despite China’s objections, the United States has shown support for Taiwan and recently announced a 345 million dollars military aid package for Taiwan.³⁹

China also has ongoing tension with Hong Kong, a special administrative region in China and former British colony.⁴⁰ Recently,

35. *Id.* (“China’s holdings fell to \$1.05 trillion in 2016, marking the lowest level since 2010. Moreover, Japan has at times overtaken China as the largest foreign holder of U.S. debt. This has been the case since 2019, as China’s holdings have fallen and Japan’s have risen.”).

36. *See id.* (explaining that because U.S. debt is a highly desirable asset, when China does sell it, the debt is simply purchased by other countries and has little impact on the U.S. economy).

37. Laura He, *Why China and Japan are Praying the U.S. Won’t Default*, CNN (May 25, 2023), <https://www.cnn.com/2023/05/25/economy/japan-china-us-debt-default-intl-hk/index.html> (quoting analysts from the Atlantic Council’s GeoEconomics Center on the economic consequences of a U.S. debt crisis).

38. Ctr. for Preventive Action, *Confrontation Over Taiwan*, COUNCIL ON FOREIGN RELATIONS (July 26, 2023), <https://www.cfr.org/global-conflict-tracker/conflict/confrontation-over-taiwan>.

39. Nomaan Merchant, et al., *U.S. Announces \$345 Million Military Aid Package for Taiwan*, AP NEWS (July 29, 2023), <https://apnews.com/article/taiwan-military-aid-china-support-06e61a0e0ed787ea120f839ef59885fa>.

40. *See* Lindsay Maizland, *Hong Kong’s Freedoms: What China Promised and How It’s Cracking Down*, COUNCIL ON FOREIGN RELATIONS (May 19, 2022), <https://www.cfr.org/backgrounder/hong-kong-freedoms-democracy-protests-china-crackdown> (describing the manner in which Hong Kong functions as a special administrative region and the tension and mass protests that resulted from recent

China has received international criticism for its efforts to encroach on Hong Kong's political system and its response to the 2019-2020 pro-democracy protests in Hong Kong.⁴¹ Responding to this conflict, the United States passed the Hong Kong Human Rights and Democracy Act of 2019, which requires the U.S. government to impose sanctions against any Chinese officials responsible for human rights abuses in Hong Kong.⁴² China condemned this decision and promised retaliation, writing that the Act "grossly interferes in China's internal affairs, which fully reveals the ill intentions of some people in the United States to mess up Hong Kong and contain China's development."⁴³

3. Privacy Concerns

Recently, privacy and espionage concerns have escalated tension between the United States and China. In late January 2023, an unauthorized Chinese balloon was spotted over the United States and was subsequently shot down by the U.S. Air Force.⁴⁴ While Chinese officials claimed it was a civilian weather balloon, a U.S. investigation revealed that the balloon had intelligence collection capabilities.⁴⁵ The United States called China's action a "clear violation" of U.S. sovereignty and postponed Secretary of State Blinken's scheduled diplomatic visit to Beijing.⁴⁶ While the United States' investigation

Chinese crackdowns on freedom in Hong Kong).

41. *Id.* ("In recent years, Beijing has cracked down on Hong Kong's freedoms, stoking mass protests in the city and drawing international criticism.")

42. See 22 U.S.C. §§ 5721-26.

43. Catherine Wong & Shi Jiangtao, *Beijing Vows to Retaliate after US' Hong Kong Human Rights Bill is Approved by Congressional Committees*, SOUTH CHINA MORNING POST (Sept. 26, 2019), <https://www.scmp.com/news/china/diplomacy/article/3030403/beijing-vows-retaliate-after-us-hong-kong-human-rights-bill>.

44. See Jim Garamone, *F-22 Safely Shoots Down Chinese Spy Balloon Off South Carolina Coast*, DEP'T OF DEFENSE (Feb. 4, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3288543/f-22-safely-shoots-down-chinese-spy-balloon-off-south-carolina-coast>.

45. See Chloe Kim, *Chinese Spy Balloon did not Collect Information, says Pentagon*, BBC (June 30, 2023), <https://www.bbc.com/news/world-us-canada-66062562> (quoting Pentagon spokesperson Brigadier General Pat Ryder and citing Chinese officials).

46. Humeiry Pamuk, et al., *Blinken Postpones China Trip Over 'Unacceptable' Chinese Spy Balloon*, REUTERS (Feb. 4, 2023), <https://www.reuters.com/world/china-expresses-regret-that-civilian-airship-strays-over-us-2023-02-03>.

ultimately revealed that the balloon did not successfully transmit data to China, this was not the first instance of suspected Chinese balloon surveillance in the United States.⁴⁷ In fact, the U.S. government has indicated that Chinese espionage has become a serious concern in recent years, and that China's efforts go much further than spy balloons.⁴⁸ Since 2017, in an effort to combat Chinese espionage, the United States has investigated certain Chinese land purchases, closed a regional consulate, and blocked suspected efforts to plant listening devices near government and military facilities.⁴⁹

Additionally, the United States has investigated a number of China-based hacking attacks in recent years, identifying cybersecurity as a particular area of concern.⁵⁰ In 2022, FBI Director Christopher Wray announced that China had stolen more of Americans' business and personal data than all other countries combined.⁵¹ In June 2023, the United States reported that China-based hackers accessed email accounts at more than twenty organizations, including several U.S. government agencies, in "an apparent spying campaign aimed at acquiring sensitive information."⁵² The growing threat of cyberattacks has led the United States and United Kingdom to join forces to fight

47. See Kim, *supra* note 45 (quoting Pentagon spokesperson Brigadier General Pat Ryder); Zachary Cohen, *A Look at China's History of Spying in the US*, CNN (Feb. 4, 2023), <https://www.cnn.com/2023/02/04/politics/china-us-spying/index.html> (indicating that the United States reported similar incidents of Chinese surveillance over Hawaii and Guam).

48. See Cohen, *supra* note 47 (explaining the various methods China has used to conduct espionage including covert infrastructure projects within the United States); *The China Threat*, FBI, <https://www.fbi.gov/investigate/counterintelligence/the-china-threat> (noting the FBI's priority in addressing the Chinese counterintelligence efforts).

49. Cohen, *supra* note 47.

50. See Kevin Collier, *China Spent Years Collecting Americans' Personal Information. The U.S. Just Called it Out.*, NBC NEWS (Feb. 10, 2020), <https://www.nbcnews.com/tech/security/china-spent-years-collecting-americans-personal-information-u-s-just-n1134411> (citing various U.S.-led investigations from 2014 to 2018).

51. Luke Barr, *China has Stolen American data More than Any Country: FBI Director Wray*, ABC NEWS (Nov. 15, 2022), <https://abcnews.go.com/Politics/china-stolen-american-data-country-fbi-director-wray/story?id=93337968>.

52. Sean Lyngaas, *China-Based Hackers Breached U.S. Government Email Accounts, Microsoft and White House Say*, CNN (July 12, 2023), <https://www.cnn.com/2023/07/12/politics/china-based-hackers-us-government-email-intl-hnk/index.html> (including the Department of State and Department of Commerce).

espionage and hacking attempts initiated by the Chinese government.⁵³

However, not all of China's suspected data collection is done illegally.⁵⁴ China also has a history of using sophisticated software to legally mine data on Americans from the internet and social media platforms.⁵⁵ Chinese data collection, both that which is legal and illegal, has given rise to widespread privacy concerns among Americans.⁵⁶ In light of these concerns, within the United States, there have been numerous attempts to restrict the Chinese-owned social media company Tik Tok, including state-wide bans of the app and the ban of the app on federal government devices.⁵⁷

C. ARTIFICIAL INTELLIGENCE (AI)

1. AI and its Capabilities

Artificial intelligence (AI) refers to the intelligence of machines or software rather than the intelligence of a living being.⁵⁸ In recent years, governments and private investors around the world have invested billions to further the development of AI technology, and generative

53. See Evan Perez, *FBI Director Wray, MI5 Chief Raise Alarm Over China Spying*, CNN (July 6, 2022), <https://www.cnn.com/2022/07/06/politics/fbi-mi5-wray-china/index.html> (writing that FBI Director Christopher Wray met with MI5 Director General Ken McCallum in 2022 to discuss the agencies' joint work to fight Chinese hacking and espionage).

54. See Joseph Choi, *Documents Show Chinese Government Collects Drones of Data from Western Social Media*, THE HILL (Dec. 31, 2021), <https://thehill.com/policy/international/china/587839-documents-show-chinese-government-collects-drones-of-data-from/> (citing China's sophisticated data mining of Western social media platforms like Twitter and Facebook).

55. See *id.* (indicating that China used data-mining platforms to gather data on American journalists and key personnel from political, business and media circles).

56. See Laura Silver, et al., *Most Americans Support Tough Stance Toward China on Human Rights, Economic Issues*, PEW RSCH. CTR. (Mar. 4, 2021), <https://www.pewresearch.org/global/2021/03/04/most-americans-support-tough-stance-toward-china-on-human-rights-economic-issues/> (discussing the American public's negative impression of China and lack of confidence in the administration's handling of foreign policy).

57. See Darreonna Davis, *Government TikTok Bans: Exploring the Global Impact*, FORBES (June 6, 2023), <https://www.forbes.com/sites/darreonnadavis/2023/06/06/government-tiktok-bans-exploring-the-global-impact/?sh=4a284efd70c0>.

58. *What is Artificial Intelligence (AI)?*, IBM, <https://www.ibm.com/topics/artificial-intelligence>.

AI in particular.⁵⁹ Generative AI is developed through machine learning, which involves training the AI to perform tasks by exposing it to large amounts of data, and is designed to mimic past human behavior to create new content.⁶⁰ Generative AI technology has recently experienced significant improvements and is now being leveraged for both consumer and military use around the world.⁶¹

Improved AI technology brings great promise as it can be easily leveraged to improve business practices, quality of life, and future technological development, but it also brings great risk as the same technology can also be leveraged for harm.⁶² In particular, AI could be used to make weapons that spy or kill on a mass scale.⁶³ Additionally, there are more discrete risks accompanying AI improvements,

59. See John Villasenor, *Artificial Intelligence and the Future of Geopolitics*, THE BROOKINGS INST. (Nov. 14, 2018), <https://www.brookings.edu/articles/artificial-intelligence-and-the-future-of-geopolitics/> (writing that countries including the United States, China, Israel, United Kingdom, France, Japan, South Korea, and Russia have invested in AI); *AI Investment Forecast to Approach \$200 Billion Globally by 2025*, GOLDMAN SACHS (Aug. 1, 2023), <https://www.goldmansachs.com/intelligence/pages/ai-investment-forecast-to-approach-200-billion-globally-by-2025.html> (indicating that global private investment totaled \$91.7 billion in 2022 and is on track to reach \$200 billion by 2025).

60. See Rebecca Heilweil, *What is Generative AI, and Why is it Suddenly Everywhere?*, VOX (Jan. 5, 2023), <https://www.vox.com/recode/2023/1/5/23539055/generative-ai-chatbot-stable-diffusion-lensa-dall-e> (explaining how AI systems like Chat GPT are fed vast amounts of information to train the software).

61. See IBM, *supra* note 58 (explaining how AI is being used for speech recognition, customer service, recommendation engines, automated stock trading, and more); *How Artificial Intelligence is Changing the Future of Military Defense Strategies*, NAT'L SEC. TECH. ACCELERATOR (Jan. 24, 2023), <https://nstxl.org/how-artificial-intelligence-is-changing-the-future-of-military-defense-strategies/> (writing that AI can be used to improve military recruitment, training, transportation, target recognition, and threat monitoring).

62. See MICHAEL LITTMAN, ET AL., GATHERING STRENGTH, GATHERING STORMS: THE ONE HUNDRED YEAR STUDY ON ARTIFICIAL INTELLIGENCE (AI100) 2021 STUDY PANEL REPORT, 48-56 (Stanford University 2021) (observing that AI poses promising opportunities for drawing enhanced insights, assisting with decision-making, and improving the functionality of virtual assistants but that increasing use of AI causes risks of misuse, overuse, and explicit abuse).

63. David Ingram, *ChatGPT Has Thrown Gasoline on Fears of a U.S.-China Arms Race on AI*, NBC NEWS (Mar. 5, 2023), <https://www.nbcnews.com/tech/innovation/chatgpt-intensified-fears-us-china-ai-arms-race-rcna71804> (noting that AI can be used for autonomous weapons, cyberattacks, and synthetic biology).

including disinformation, discrimination, and techno-solutionism.⁶⁴ In fact, without human oversight, increased reliance on AI decision-making has the potential to skew results and amplify existing biases, which can be particularly dangerous in the context of the medical and law enforcement industries.⁶⁵ Further, AI technology can be easily leveraged to manipulate public opinion and undermine social trust through deep fake videos, online bots, and fake news.⁶⁶

2. *United States and China AI Development*

The United States and China have been engaged in a prolonged competition to develop new technology before the other.⁶⁷ Recently, the two countries have directed great effort towards the development of AI technology.⁶⁸ In 2017, China announced its intent to become a global AI leader and to increase the worth of its AI industry to over one trillion RMB by 2030.⁶⁹ China has since been researching various types of air, land, sea, and undersea autonomous vehicles among other AI applications.⁷⁰ Additionally, China has reportedly been using AI to “monitor, track, and surveil its citizens, and fuel its military

64. See LITTMAN, ET AL., *supra* note 62, at 53-56 (citing the risks inherent in AI and the potential for abuse of AI).

65. See *id.* (writing that the public accepting AI-derived conclusions as certainties “can have dire implications in both criminal and healthcare settings.”).

66. See *id.* at 55 (explaining the ways that AI can contribute to disinformation and threaten democracy).

67. See Peter Engelke & Emily Weinstein, *Assessing China’s Approach to Technological Competition with the United States*, ATLANTIC COUNCIL (Apr. 24, 2023), <https://www.atlanticcouncil.org/content-series/strategic-insights-memos/assessing-chinas-approach-to-technological-competition-with-the-united-states/> (citing competition in technological fields between China and the U.S. since the mid-2000s).

68. Ingram, *supra* note 63 (“The race to develop the next generation of AI isn’t just between tech companies like Microsoft and Google — it’s also between nations, which are working furiously to foster and develop their own technology.”).

69. See *A Next Generation Artificial Intelligence Development Plan*, CHINESE STATE COUNCIL, Order No. 35 (July 20, 2017), translated in NEW AMERICA, FULL TRANSLATION: CHINA’S ‘NEW GENERATION ARTIFICIAL INTELLIGENCE DEVELOPMENT PLAN’ (2017) (describing China’s “top-level design blueprint charting the country’s approach to developing artificial intelligence (AI) technology and applications.”).

70. KELLEY M. SAYLER, CONG. RSCH. SERV., R45178, ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY 22 (Aug. 26, 2020).

modernization.”⁷¹

The United States has made a similar effort to prioritize AI development and has invested billions of dollars into AI research in recent years.⁷² In 2021, the United States established the National Artificial Intelligence Initiative Office to oversee the country’s overall AI strategy and the AI Center of Excellence in 2019 to oversee the adoption of AI technology into government agencies.⁷³ In 2023, the National Science Foundation invested 140 million dollars to establish seven new National AI Research Institutes.⁷⁴ However, with the United States’ recent trade restrictions, experts have speculated that the United States has shifted its goal from outpacing China’s speed of development to actively denying it access to American technology that may aid its progress.⁷⁵ This policy change follows significant evidence that China has been both seeking out and utilizing various American technology and weaponry without the approval of the United States.⁷⁶

71. BUREAU OF INDUS. AND SEC., *supra* note 1, at 1.

72. *Artificial Intelligence for the American People*, THE WHITE HOUSE, <https://trumpwhitehouse.archives.gov/ai/>. See also NESTOR MASLEJ, ET. AL., ARTIFICIAL INTELLIGENCE INDEX REPORT 2023 286–88 (Stanford University Institute for Human-Centered AI 2023), https://aiindex.stanford.edu/wp-content/uploads/2023/04/HAI_AI-Index-Report-2023.pdf (indicating that the U.S. budget for nondefense AI R&D, AI-related contract spending, and AI-related Department of Defense budget requests have all increased in recent years).

73. *Artificial Intelligence for the American People*, *supra* note 72.

74. *NSF Announces 7 New National Artificial Intelligence Research Institutes*, NAT’L SCI. FOUND. (May 4, 2023), <https://new.nsf.gov/news/nsf-announces-7-national-artificial>.

75. See *Chip Export Restrictions*, *supra* note 16 (citing the United States’ shifting policy toward China with respect to AI development and research).

76. See Cate Cadell & Ellen Nakashima, *American Technology Boosts China’s Hypersonic Missile Program*, WASH. POST (Oct. 17, 2022), <https://www.washingtonpost.com/national-security/2022/10/17/china-hypersonic-missiles-american-technology> (writing that evidence indicates that many Chinese military research groups that are on U.S. export blacklists are discreetly purchasing and using Pentagon-funded technology); Xiaoshan Xue, *U.S. Experts Urge More Efforts to Thwart China’s Acquisition of U.S. Military Technology*, VOA NEWS (Mar. 17, 2023), <https://www.voanews.com/a/us-experts-urge-more-efforts-to-thwart-china-s-acquisition-of-us-military-technology-/7010346.html> (“China’s sixth-generation fighter jets, hypersonic weapons and missiles, and even the spy balloons that crossed the continental United States last month all appear to incorporate elements of American technology.”).

D. MILITARY CIVIL FUSION IN CHINA

A key concern of many parties conducting business with China-based companies is whether the company will be obligated or motivated to turn over sensitive information to the Chinese government.⁷⁷ The Chinese government supports a Military Civil Fusion (MCF) strategy, which refers to a close coordination between civic and military sectors in which defense companies, universities, and research institutions openly share dual-use technology and information with the military and civilian sectors of the government.⁷⁸ China has supported the MCF strategy since the founding of the People's Republic of China but experts have indicated that enhancing MCF is a particular priority for current Chinese President Xi Jinping.⁷⁹

While there is no law explicitly enforcing MCF in China, experts have identified several laws that could potentially compel companies to participate in MCF, including China's Counter-Espionage Law, National Security Law, Cybersecurity Law, and National Intelligence Law.⁸⁰ China's Counter-Espionage Law, for example, states that "when the state security organ investigates and understands the situation of espionage and collects relevant evidence, the relevant organizations and individuals shall provide it truthfully and may not refuse."⁸¹ Further, China's National Intelligence Law requires

77. See Arjun Kharpal, *Huawei Says it Would Never Hand Data to China's Government. Experts Say it Wouldn't Have a Choice*, CNBC (Mar. 5, 2019), <https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html> [hereinafter Kharpal, *Huawei*] (noting the concerns of many parties over the Chinese government's control over companies like Huawei).

78. See Audrey Fritz, *The Foundation for Innovation Under Military-Civil Fusion*, SINOPSIS, 3–4 (Oct. 8, 2021), <https://sinopsis.cz/wp-content/uploads/2021/10/mcf0.pdf> (citing China's recognition and implementation of scientific and technological innovation strategy as the backbone of an advanced military, economy, and society).

79. See Arthur Ding & K. Tristan Tang, *Xi Seeks to Reinvigorate Military-Civilian Integration*, 23 THE JAMESTOWN FOUND. CHINA BRIEF 19, 19–22 (Apr. 14, 2023), <https://jamestown.org/program/xi-seeks-to-reinvigorate-military-civilian-integration> (discussing Xi's comments to the People's Liberation Army and People's Armed Police force to reinvigorate China's unique strategy of CMF).

80. See Kharpal, *Huawei*, *supra* note 77 (listing the various Chinese Laws that may indirectly compel companies to follow suit with China's MCF strategy).

81. *Id.* Zhonghua renmin gongheguo fan jian die fa (中华人民共和国反间谍法 [Counter-Espionage Law] (promulgated by the Standing Comm. Nat'l People's

organizations and citizens to “support, assist, and cooperate with national intelligence efforts in accordance with law” and “protect national intelligence work secrets they are aware of.”⁸² Despite not specifically mentioning MCF, these laws further the overall goal of the strategy, which is to increase collaboration between corporations and the government for the purpose of growing China’s military power.

While some scholars have indicated that in practice, such statutes are generally used to encourage rather than require participation in MCF, others have stated that Chinese companies have no choice but to obey orders from the Chinese Government.⁸³ The United States government has largely believed that participation in MCF is required.⁸⁴ Regardless of the level of voluntariness, however, Chinese companies have been known to work and share data with the Chinese military, thus posing serious security risks for parties who provided sensitive information or technology to a Chinese company.⁸⁵

Cong., Apr. 26, 2023, effective July 1, 2023), art. 32, *translated in* <https://www.chinalawtranslate.com/en/counter-espionage-law-2023>.

82. *Id.* Zhonghua renmin gongheguo guojia qingbao fa (中华人民共和国国家情报法) [National Intelligence Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 27, 2017, effective June 28, 2017), art. 7, *translated in* <https://www.chinalawtranslate.com/en/national-intelligence-law-of-the-p-r-c-2017>.

83. *See id.* (quoting New York University law professor Jerome Cohen who said that Chinese companies are required to turn over any and all data requested by the government); Elsa Kania & Lorand Laskai, *Myths and Realities of China’s Military-Civil Fusion Strategy*, CTR. FOR A NEW AMER. SEC. (Jan. 28, 2021), <https://www.cnas.org/publications/reports/myths-and-realities-of-chinas-military-civil-fusion-strategy> (arguing that MCF appears to rely more on incentives than coercion).

84. *See* Michael Pompeo, Former Secretary, U.S. Dep’t of State, Remarks on Technology and the China Security Challenge (Jan. 13, 2020) (discussing China’s prioritization of MCF as a mandatory policy whereby Chinese companies and researchers must, under penalty of law, share technology with the Chinese military); H.R. McMaster, *How China Sees the World*, DEFENSE ONE (Apr. 25, 2020), <https://www.defenseone.com/ideas/2020/04/how-china-sees-world/164870> (detailing former National Security Advisor H.R. McMaster’s views on the mandatory nature of China’s MCF policy).

85. *See, e.g.*, Kirsty Needham, *China Gene Firm Providing Worldwide COVID Tests Worked with Chinese Military*, REUTERS (Jan. 30, 2021), <https://www.reuters.com/article/us-china-genomics-military-exclusive/exclusive-china-gene-firm-providing-worldwide-covid-tests-worked-with-chinese-military-idUSKBN29Z0HA> (noting the links between the BGI Group, “the world’s largest genomics company,” and the People’s Liberation Army (PLA), including “research with China’s top military supercomputing experts”).

In addition to concerns about the Chinese military acquiring American technology, a recent intelligence report from the U.S. Office of the Director of National Intelligence has indicated that China is likely supplying military and dual-use technology to Russia.⁸⁶ China has denied this allegation.⁸⁷ However, customs records show Chinese state-owned defense companies shipping navigation equipment, jamming technology, and fighter jet parts to sanctioned Russian government-owned defense companies.⁸⁸ This is a particular concern to the United States given that the United States has had prolonged tension with Russia and has chosen to support Ukraine in the ongoing Russia-Ukraine War.⁸⁹

E. THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND WORLD TRADE ORGANIZATION

1. *The General Agreement on Tariffs and Trade 1947*

The General Agreement on Tariffs and Trade 1947 (GATT 1947) was one of the most important multilateral trade agreements.⁹⁰ GATT 1947 was ratified in the wake of World War II, and predated the creation of the World Trade Organization.⁹¹ The original agreement

86. See SUPPORT PROVIDED BY THE PEOPLE'S REPUBLIC OF CHINA TO RUSSIA, OFF. OF THE DIR. OF NAT'L INTEL. (July 2023), https://democrats-intelligence.house.gov/uploadedfiles/odni_report_on_chinese_support_to_russia.pdf (providing evidence that China has been a critical economic partner to Russia and has supplied Russia with military and dual-use technology); Kanishka Singh & Michael Martina, *U.S. Intelligence Report Says China Likely Supplying Tech for Russian Military*, REUTERS (July 27, 2023), <https://www.reuters.com/world/us-intelligence-report-says-china-likely-supplying-tech-russian-military-2023-07-27> (illustrating China's role as a practical partner for Russia to avoid Western sanctions, acquire dual-use technologies, and continue its war in Ukraine).

87. Singh & Martina, *supra* note 86.

88. See OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 86 (observing Russia's reliance on China to offset the effect of sanctions and Russia's recent increase in trade volume with China); Singh & Martina, *supra* note 86.

89. See Angela Stent, *Why are US-Russia Relations so Challenging?*, THE BROOKINGS INST. (Apr. 27, 2020), <https://www.brookings.edu/articles/why-are-us-russia-relations-so-challenging> (discussing the current state of tensions between the United States and Russia).

90. *General Agreement on Tariffs and Trade*, ENCYC. BRITANNICA (Sept. 29, 2023), www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade.

91. *Id.*

was negotiated and ratified by twenty-three countries, including the United States and China.⁹² GATT 1947 was intended to be a provisional agreement while the United Nations finalized the formation of the International Trade Organization (ITO).⁹³ However, despite being an initial supporter of the organization, the United States ultimately blocked the ITO's formation.⁹⁴ As a result, GATT 1947 was amended and continued to serve as the guiding trade agreement until the WTO was created and replaced the agreement.⁹⁵

The original stated purpose of GATT 1947 was “to promote the security and predictability of the reciprocal and mutually advantageous agreements and the substantial reduction of tariffs and other barriers of trade.”⁹⁶ Arguably the most important principle of GATT 1947 was the principle that “any advantage, [favor], privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally” to the like product of all contracting parties.⁹⁷ GATT 1947 ultimately proved to be one of the most effective instruments for open and stable trade as it was largely responsible for the sharp growth in world trade during the second half of the 20th century.⁹⁸

92. See CHAD BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 11 (The Brookings Inst. 2009).

93. ENCYC. BRITANNICA, *supra* note 90.

94. See *The GATT years: from Havana to Marrakesh*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (explaining that the International Trade Organization failed because it lacked the support of U.S. Congress despite the U.S. being a driving force for the Organization).

95. *Id.*

96. Kentaro Ikeda, *A Proposed Interpretation of GATT Article XXI(b)(ii) in Light of its Implications for Export Control*, 54 CORNELL INT'L L.J. 437, 449 (2021).

97. GATT 1947, *supra* note 3, at art. I; see also ENCYC. BRITANNICA, *supra* note 90 (describing the GATT, its functions, and its inception); *Principles of the trading system*, WTO https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (noting that this principle is known as the Most-Favored-Nation Principle and that it supports stable trade and limits discrimination by requiring countries seeking to lower trade barriers or open up a market to provide uniform treatment to all trading partners—“whether rich or poor, weak or strong”).

98. ENCYC. BRITANNICA, *supra* note 90 (writing that GATT 1947 was “the most effective instrument of world trade liberalization”).

2. *The World Trade Organization and the General Agreement on Tariffs and Trade 1994*

The World Trade Organization (WTO) was created in 1995 with the passing of the WTO Agreement.⁹⁹ Annex 1A of the WTO Agreement contains GATT 1994, an updated agreement that incorporates all GATT 1947 provisions, which is in effect today.¹⁰⁰ The WTO has jurisdiction over a wide range of trade areas including most government practices directly related to trade, such as tariffs, subsidies, government procurement, and trade-related intellectual property rights.¹⁰¹ Within the WTO, the Council for Trade in Goods oversees the workings of the GATT 1994 and the Dispute Settlement Body (DSB) handles disputes between WTO members.¹⁰²

When a GATT-related dispute arises, WTO members can seek dispute consultations, which are WTO-organized conversations for parties to discuss and resolve the conflict, if they believe that doing so would be “fruitful.”¹⁰³ In many cases, conflicts are resolved in this stage or the moving party decides to not pursue the matter further.¹⁰⁴ However, in the event the parties do not reach a mutually agreed upon resolution, one or both of the parties may request a dispute settlement panel.¹⁰⁵

A dispute settlement panel consists of a selection of three to five individuals who meet the WTO’s requirements in terms of expertise

99. See CONG. RSCH. SERV., 98-928, THE WORLD TRADE ORGANIZATION: BACKGROUND AND ISSUES (Mar. 5, 2003) [hereinafter CRS WORLD TRADE ORG.].

100. GATT 1994, *supra* note 3; see also *General Agreement on Tariffs and Trade (GATT) 1994*, WTO, https://www.wto.org/english/rese/publicationse/ai17e/gatt1994_e.htm.

101. See CRS WORLD TRADE ORG., *supra* note 99 (discussing the scope of WTO’s authority).

102. See *GATT and the Goods Council*, WTO, https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (describing the role of the Goods Council); *Dispute Settlement System Training Module*, WTO, Ch. 3.1, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s1p1_e.htm (describing the role of the DSB).

103. See *Dispute Settlement System Training Module*, *supra* note 102, at Ch. 6.2, 1 (“By its express terms, Article 3.7 of the DSU entrusts the Members of the WTO with the self-regulating responsibility of exercising their own judgment in deciding whether they consider it would be fruitful to bring a case.”).

104. See *id.*

105. See *id.* at Ch. 6.3, 1.

and independence.¹⁰⁶ Once the panel is formed, each party submits a written submission containing relevant facts and legal arguments and then orally presents their views and answers questions at the WTO headquarters in Geneva.¹⁰⁷ After deliberating on the material, the panel will issue a report containing its findings, conclusions, and recommendations for implementation.¹⁰⁸ A panel report only becomes binding when the DSB has adopted it, which occurs automatically unless there is an appeal.¹⁰⁹

If a party has decided to appeal, the panel report will not be adopted until the appeal is completed.¹¹⁰ However, the Appellate Body of the WTO has been nonfunctional for the past three years as the United States has blocked the appointment of appellate judges.¹¹¹ This disruption has allowed WTO members to appeal panel reports “into the void” and leave the dispute unresolved.¹¹² The United States has stated that it is working to get the Appellate Body running again by 2024 but has expressed the need to reform the system.¹¹³ There is

106. *See id.* at Ch. 6.3, 2 (explaining that the panelists are proposed by the WTO Secretariat and are typically selected from a list of governmental and non-governmental individuals nominated by WTO Members and parties may not oppose these nominations other than for compelling reasons).

107. *See id.* at Ch. 6.3, 3 (detailing the panel stage of the dispute settlement process).

108. *See id.* (“The panel is mandated to make an objective assessment of the relevant factual questions and legal issues in order to assess the conformity of the challenged measure with the covered agreement(s) invoked by the complainant.”).

109. *See id.* at Ch. 6.4, 1 (noting that the DSU requires the DSB to “adopt the report no earlier than 20 days, but no later than 60 days after the date of its circulation”).

110. *See id.* (clarifying that this policy exists because the Appellate Body could modify or reverse the decision).

111. *Appellate Body*, WTO, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (noting that the term of the last sitting Appellate Body member expired on November 30, 2020).

112. *See* Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to from here?*, INT’L INST. FOR SUSTAINABLE DEV. (Mar. 2, 2022), <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> (critiquing the WTO’s system for appeals).

113. *See* Emma Farge, *U.S. Wants World Trade Organization Dispute System Fixed by 2024*, REUTERS (Jan. 27, 2023), <https://www.reuters.com/markets/us-wants-world-trade-organization-dispute-system-fixed-by-2024-2023-01-26/> (noting that the United States has criticized the WTO’s alleged overreach and lengthy processes).

currently a growing backlog of more than twenty appellate cases.¹¹⁴

3. GATT 1994's Article XXI Security Exception

National security exceptions are common provisions in international trade agreements.¹¹⁵ Article XXI of GATT 1994 allows members to take any actions that it considers necessary to protect its national security, even if it violates another provision of the agreement.¹¹⁶ A wide variety of Article XXI interpretations have been proposed by legal scholars and WTO Member countries.¹¹⁷ In particular, there has been significant debate about whether Article XXI is self-judging.¹¹⁸ If Article XXI were self-judging, the country invoking the national security exception would be allowed to determine for itself if the exception applied rather than a dispute settlement panel being able to review the decision.¹¹⁹ While the United States and several other countries still argue that the overall grammatical structure of Article XXI supports a self-judging interpretation, the panel report in *Russia - Measures Concerning Traffic in Transit* indicates that the WTO does not share this belief.¹²⁰

114. See *id.* (reporting U.S.-led consultations for reform).

115. Peter Van den Bossche & Sarah Akpofure, *The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994* (World Trade Inst., Working Paper No. 03/2020).

116. See GATT 1947, *supra* note 3, at art. XXI, ¶ (b).

117. See BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10223, THE “NATIONAL SECURITY EXCEPTION” AND THE WORLD TRADE ORGANIZATION (Nov. 28, 2018) [hereinafter CRS NAT’L SEC. EXCEPTION] (“Historical practice involving the invocation of Article XXI under the WTO agreements and the GATT demonstrates that member countries have often argued that each country is the sole judge of questions relating to its own security interests.”).

118. See *id.*; Panel Report, *Russia - Measures Concerning Traffic in Transit*, ¶¶ 7.35–52, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) (containing arguments from several countries both for and against a self-judging interpretation of Article XXI).

119. See *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.22–23, 7.26.

120. *Id.* ¶¶ 7.102–104 (“It follows from the Panel’s interpretation of Article XXI(b), as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member, that Article XXI(b)(iii) of the GATT 1994 is not totally ‘self-judging’ in the manner asserted by Russia.”). *But see* Communication from the United States, *supra* note 3 (“Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every

Instead, the WTO has held that it has jurisdiction to review invocations of the national security exception.¹²¹ Therefore, this Comment will proceed with analysis under the assumption that Article XXI is not self-judging.

III. ANALYSIS

A. GATT 1994'S ARTICLE XXI SECURITY EXCEPTION

1. *The Text of Article XXI*

Section (b) of GATT Article XXI provides that nothing in the agreement should be construed to prohibit a Member country from “taking any action which it considers necessary for the protection of its essential security interests.”¹²² Section (b) has three sub-articles that narrow its application to only interests (i) “relating to fissionable materials or the materials from which they are derived,” (ii) “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”, and (iii) “taken in time of war or other emergency in international relations.”¹²³

2. *Focused Argument Under Sub-Article (b)(ii)*

The United States has two potential options for applying Article XXI to the trade of AI technology. The first option uses (b)(ii) to argue that exporting AI technology to China is either supplying an implement of war or “directly or indirectly” supplying a “military establishment.”¹²⁴ The second option uses (b)(iii) to argue that the current situation between the United States and China should be considered an “emergency in international relations.”¹²⁵ Though

Member of the WTO retains the authority to determine for itself those measures that it considers necessary to the protection of its essential security interests. . . .”).

121. See *id.* - *Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.53–58, 7.102–104.

122. GATT 1947, *supra* note 3, at art. XXI, ¶ (b).

123. *Id.*

124. See *id.* ¶ (b)(ii).

125. See *id.* ¶ (b)(iii).

tensions between the United States and China have escalated in recent years, the current situation likely does not qualify as an “emergency in international relations” under (b)(iii).¹²⁶ Therefore, this Comment will focus on the stronger argument under (b)(ii).

3. *Interpretation of (b)(ii) Using Canons of Construction and Legislative History*

Sub-article (b)(ii) of Article XII pertains to two types of items: (1) arms, ammunition and implements of war, and (2) other goods and materials that are directly or indirectly supplied to a military establishment.¹²⁷ It is initially unclear how the sub-article should be applied to dual-use items that have both an everyday use as well as a dangerous or military use.¹²⁸ However, analyzing the sub-article’s construction and legislative history provides insight into how it was intended to be interpreted.

Within the first half of (b)(ii), the terms “arms” and “ammunition” are quite clear, while “implements of war” is less so. Regarding the definition of “implements of war,” the term’s nexus to “arms” and “ammunition” supports an interpretation that the term refers to goods similarly designed or used nearly exclusively for war or military operations.¹²⁹ This is a likely interpretation given that it does not create an overlap between the items covered by the first and the second halves of (b)(ii).¹³⁰ Therefore, dual-use technologies are not considered implements of war under this narrow definition and instead should be analyzed under the second half of (b)(ii).¹³¹

126. See *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.111–125 (indicating that the Russia-Ukraine conflict qualified for (b)(iii) because it had become an armed conflict); Panel Report, *United States — Certain Measures on Steel and Aluminum Products*, ¶¶ 7.137–149, WTO Doc. WT/DS544/R (adopted Dec. 9, 2022) (indicating that the United States failed when it sought to invoke section (b)(iii) to justify trade restrictions on steel and aluminum Products to China and the European Union).

127. GATT 1947, *supra* note 3, at art. XXI, ¶ (b)(ii).

128. See Ikeda, *supra* note 96, at 466 (offering interpretations for various terms in the sub-article).

129. See *id.* at 466–67 (analyzing the legislative history of subparagraph (ii)).

130. See *id.* at 467 (discussing the parties’ desire to avoid overly broad definitions).

131. See *id.* (stating that the second half of the sub-article covers anything other than ammunition, arms, and implementations of war).

The second half of (b)(ii), which covers other goods and materials, comes with an additional requirement that such goods are “carried on directly or indirectly for the purpose of supplying a military establishment.”¹³² When this language was questioned during the Geneva session of the Preparatory Committee, the United Nations Economic and Social Council concluded that the requirement is met “if a Member exporting commodities is satisfied that the purpose of the transaction was to supply a military establishment, immediately or ultimately.”¹³³ Therefore, the relevant considerations implied from this standard are (1) the probability of the goods reaching a military installation, (2) the sensitivity of the goods, and (3) the level of military tension between the countries.¹³⁴

Overall, a country traditionally has significant leeway when making decisions to protect human lives.¹³⁵ Negotiators and drafters of an early version of Article XXI indicated that a national security exception is a crucial element of GATT 1994 but that maintaining balance between protecting trade and protecting security is key.¹³⁶ As the drafters noted, the exception should not be “too tight,” because the agreement should not “prohibit measures which are needed purely for security reasons.”¹³⁷ However, the drafters indicated that the exception was not intended to be “so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.”¹³⁸ Therefore, it is critical to maintain a balanced approach to applying Article XXI that allows discretion when lives are at stake but that does not stretch the national security exception to apply in cases of mere political or financial disagreement.

132. GATT 1947, *supra* note 3, at art. XXI, ¶ (b)(ii).

133. Verbatim Report, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, WTO Doc. EPCT/A/PV/36, 18-19 (Aug. 12, 1947).

134. See Ikeda, *supra* note 96, at 469 (outlining the considerations of what may constitute military-related traffic).

135. See Justin Hughes, *Fitting China-U.S. Trade into WTO Trade Law-National Security and Nonviolation Mechanisms*, 2022 MICH. STATE L. REV. 319, 340 (2022) (considering nations’ obligations to protect national security).

136. See *Analytical Index of the General Agreement on Tariffs and Trade 1994*, WTO 600 (1995) [hereinafter *Analytical Index of the GATT*] (analyzing the Preparatory Committee’s discussions during the Geneva session).

137. *Id.*

138. *Id.*

B. MODERN APPLICATION OF THE NATIONAL SECURITY EXCEPTION

There have been few WTO adjudicated cases dedicated to GATT 1994's Article XXI national security exception, and sub-article (b)(ii) has received no discussion.¹³⁹ However, there are relevant disputes that have explored sub-article (b)(iii) and similar national security exceptions that help clarify what is generally allowed under such a national security exception.¹⁴⁰ Further, this is not the first time that technology has been limited when its capabilities are not fully understood and trust regarding its use has not been established.¹⁴¹ Therefore, looking at a prior example of technology trade limitation, specifically the global regulation of 5G technology, is also insightful.

The key takeaways from these examples are that (1) the WTO carefully considers history and context when deciding national security-related disputes, leaving ample opportunity for the countries to independently resolve the dispute and (2) national security exceptions can be interpreted broadly so long as care is taken to preserve the intent of the overall agreement and the trade restrictions are plausibly related to the national security interest.

1. *The Importance of History and Context*

In the past, national security exceptions have typically been applied in disputes between two countries that have a long and complicated

139. See Stephen Kho & Yujin K. McNamara, *Focus on China: The Expansive Use of National Security Measures to Address Economic Competitiveness Concerns*, 17 U. PA. ASIAN L. REV. 368, 377 (2022) (noting that no decision on the application of the GATT national security exception was made prior to *Russia - Measures Concerning Traffic in Transit* and *Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights*).

140. See, e.g., Request for Consultations by the Republic of Korea, *Japan - Measures Related to the Exportation of Products and Technology to Korea*, ¶¶ 1, 7, WTO Doc. WT/DS590/1, (Sept. 16, 2019); *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 1.1, 3.2; Panel Report, *Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights*, ¶¶ 7.229-7.231, WTO Doc. WT/DS567/R, (adopted June 16, 2020) [hereinafter *Saudi Arabia Panel Report*].

141. See Melissa L. Ken, *The Real Cost of 5G Technology: National Security Implications of 5G Implementation and Impact on The U.S.-China Relationship*, 9 NAT'L SEC. L.J. 143, 146-157 (2022) (discussing the U.S. putting Huawei and other Chinese companies on an Entity List due to potential espionage concerns).

history of political, financial, and/or military conflicts with one another.¹⁴² This history, as well as the context surrounding the current dispute, has regularly been considered by dispute settlement panels in cases involving a national security exception.¹⁴³ These elements may also influence whether the dispute is settled through bilateral conversations and consultations or by using a dispute settlement panel.¹⁴⁴ Particularly relevant examples of how this history and context has influenced the outcome of trade disputes include recent trade disagreements between Japan and South Korea, Russia and Ukraine, and Saudi Arabia and Qatar.¹⁴⁵

i. Japan-South Korea Trade Dispute (2019-2023)

In July 2019, Japan tightened its regulations on the export of several chemicals used in chip and smartphone production to South Korea and removed South Korea from the “white list” for preferential trading, meaning South Korea was no longer entitled to blanket licenses or expedited trade procedures.¹⁴⁶ This decision came shortly after Japanese media indicated that South Korea was allegedly shipping one of the restricted chemicals to North Korea.¹⁴⁷ In September 2019, South Korea requested WTO consultations with Japan, alleging that Japan’s new policies violated the GATT 1994 and several other trade

142. See, e.g., Request for Consultations by the Republic of Korea, *supra* note 140, ¶¶ 1, 5-7; *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 1.1, 7.1; Saudi Arabia Panel Report, *supra* note 140, ¶¶ 1.1, 2.19–20.

143. See, e.g., sources cited *supra* note 140.

144. Request for Consultations by the Republic of Korea, *supra* note 140, ¶ 7 (highlighting an example of a WTO dispute that was resolved through such bilateral conversations and consultations).

145. See sources cited *supra* note 140.

146. See Agence France-Presse, *Japan Restricts Chip, Smartphone Materials Exports to South Korea*, FRANCE 24 (Jan. 7, 2019), <https://www.france24.com/en/20190701-japan-restricts-chip-smartphone-materials-exports-south-korea-0> (highlighting the context of South Korean complaints towards Japanese wartime activities in the trade dispute).

147. See Lindsay Maizland, *The Japan-South Korea Trade Dispute: What to Know*, COUNCIL ON FOREIGN RELATIONS (Aug. 5, 2021), <https://www.cfr.org/in-brief/japan-south-korea-trade-dispute-what-know> [hereinafter *Japan-South Korea Trade Dispute*] (detailing how disputes over foreign policy, wartime grievances, and geopolitical strategy may have influenced Japan’s decision to restrict South Korean trade rights).

agreements.¹⁴⁸ However, Japan claimed that the export restrictions were a legitimate expression of the country's ability to protect its national security interests under existing national security laws.¹⁴⁹

A dispute settlement panel was established but no recommendation was made before the countries resolved the dispute themselves in 2023.¹⁵⁰ Since the trade dispute began in 2019, Japan and Korea had been working towards forming a stronger bilateral relationship and had been taking steps to reconcile their differences.¹⁵¹ After making significant progress in 2023, Japan suspended its restrictions on exports to South Korea and South Korea withdrew its WTO complaint.¹⁵²

While Japan never had to formally defend its decision to use the national security exception, the country justified the export restrictions in several statements claiming that there was a lack of trust between the two countries, particularly relating to North Korea.¹⁵³ Tension and a general lack of trust between the two countries dates back more than a hundred years with numerous conflicts.¹⁵⁴ One particular area for

148. See Request for Consultations by the Republic of Korea, *supra* note 140, ¶¶ 1–2 (noting that South Korea alleged breaches of the GATT 1994, the Trade Facilitation Agreement, the TRIMS Agreement, the TRIPS agreement, the GATS, as well as the WTO's founding document, the Marrakesh Agreement).

149. See METI Japan (@METI_JPN), X (formerly known as TWITTER) (July 16, 2019), https://twitter.com/METI_JPN/status/1151320269912330240 (defining the Japanese Ministry of Economy, Trade, and Industry's decisions against South Korea as being rooted in "national security" instead of "diplomatic issues").

150. See *Circular Notice on Partial Amendment to the Circular Notice on the Operation of the Cabinet Order on Export Trade Control and Other Circular Notices*, JAPAN MINISTRY OF ECONOMY, TRADE AND INDUSTRY (March 23, 2023), https://www.meti.go.jp/english/press/2023/0323_001.html [hereinafter Japan METI Circular Notice] (resolving the trade dispute by including the disputed items in the "Special General Bulk Export License system").

151. See Staff Report, *Japan and South Korea Eye Package to Resolve Wartime Labor Row and Other Issues*, JAPAN TIMES (March 5, 2023), <https://www.japan-times.co.jp/news/2023/03/05/national/politics-diplomacy/south-korea-japan-package-agreement> (describing bilateral talks aimed at resolving the diplomatic issues at the heart of the trade dispute).

152. See Japan METI Circular Notice, *supra* note 150 (exhibiting the Japanese withdrawal of trade restrictions on South Korea).

153. See METI Japan (@METI_JPN), *supra* note 149 (demonstrating the Japanese government's reasoning for restricting South Korean trade rights as being related to "national security.>").

154. See generally Nicholas Szechenyi, *Mounting Tensions: A Timeline of Japan-*

conflict leading up to the trade dispute was the Supreme Court of South Korea's decision "ordering Japanese corporations to pay reparations for forced labor during Japan's occupation of the Korean Peninsula" which were made shortly before the trade restrictions were announced.¹⁵⁵ Additionally, South Korea's decision to cancel the General Security of Military Information Agreement (GSOMIA) with Japan indicated "potential decay in bilateral security ties."¹⁵⁶

The United States supported Japan's use of the national security exception, arguing that Article XXI is self-judging.¹⁵⁷ No other country voiced support or opposition for the use of the national security exception.¹⁵⁸ Though this conflict did not formally test the limits of the national security exception, the lack of outrage and urgency in response to Japan's position indicates that a policy of this kind may be allowed. In particular, such a policy may be permitted if a country has the support of other countries, and the restrictions are a temporary policy as the countries work towards a permanent resolution.

Outside of the WTO and unrelated to the national security exception, several countries and other parties responded to the trade restrictions and subsequent proceedings with concern regarding the implication on the economy and multilateral trading systems and urged Japan and South Korea to reconcile.¹⁵⁹ This indicates that while

South Korea Relations, CTR. FOR STRATEGIC AND INT'L STUD. (Oct. 22, 2019), <https://www.csis.org/analysis/mounting-tensions-timeline-japan-south-korea-relations> (detailing the decades of conflict that define the Japan-South Korea relationship).

155. *Id.*

156. *Id.*

157. See Dispute Settlement Body, *Minutes of Meeting held in the Centre William Rappard on 29 July 2020*, ¶ 6.4, WTO Doc. WT/DSB/M/443 (Oct. 14, 2020) [hereinafter DSB Minutes 29 July 2020] (quoting the American position arguing that "if Japan formally invoked an essential security exception in defence of the challenged measures, only Japan, and not the WTO, could judge for the Japanese people what was necessary to protect Japan's national security interests.").

158. See *id.* ¶¶ 6.4–6.6 (evidencing the absence of support for the concept of the national security exception).

159. See Lee Haye-ah, *Trump Says S. Korea-Japan Row Puts U.S. in 'Very Bad' Position*, YONHAP NEWS AGENCY (Aug. 10, 2019), <https://en.yna.co.kr/view/AEN20190809010853325> (describing then U.S. President Trump's view that the breakdown in relations was "concerning."); Samuel Goodman, et al., *The South Korea-Japan Trade Dispute in Context: Semiconductor Manufacturing, Chemicals*

supportive or at least unconcerned with Japan's national security-based reasoning, other countries supported a permanent resolution to the dispute and an end to the trade restrictions.¹⁶⁰ Despite other avenues available, given the complex nature of the dispute and the countries' history, third parties largely indicated support for Japan and South Korea to resolve the dispute independently.¹⁶¹

ii. *Russia-Ukraine Trade Dispute (2016-2019)*

In September 2016, Ukraine requested WTO consultations with Russia alleging that Russian restrictions on traffic traveling from Ukraine through Russia to other countries violated GATT 1994.¹⁶² Ukraine argued that Russia failed to observe its transparency and publication obligations and failed to provide freedom of transit as required under GATT 1994.¹⁶³ Alternatively, Russia argued that the measures it took were legitimately taken in response to an emergency in international relations that presented threats to Russia's essential security interests.¹⁶⁴ Russia also argued that its measures were valid

and Concentrated Supply Chains 24–25 (U.S. International Trade Commission, Working Paper ID-062, 2019) (concluding that the Japanese restrictions risk undermining the competitiveness of firms in Japan and Korea).

160. See Goodman, et al., *supra* note 159 (demonstrating varied dissatisfaction with the deterioration of trade relations between Japan and South Korea).

161. See Hye-ah, *supra* note 159 (writing that the U.S. State Department recommended the two countries “find the space for creative solutions”); see also Tomoyuki Tachikawa, *China Urges Japan, S. Korea to Resolve Dispute Through Dialogue*, KYODO NEWS (Aug. 21, 2019), <https://english.kyodonews.net/news/2019/08/06da87acd4c0-update1-japan-china-s-korea-should-cooperate-despite-soured-ties-kono.html> (writing that China urged the two countries to find “an appropriate solution through dialogue”); Hye-Ryung Choi & Keun-Hyung Yoo, *U.S. Tech Industry Voices Concerns Over Japan's Export Restrictions Against S. Korea*, THE DONG-A ILBO (July 25, 2019), <https://www.donga.com/en/article/all/20190725/1799465/1> (discussing a letter from six U.S. technology associations asking South Korea and Japan to promptly find a solution).

162. Request for Consultations by Ukraine, *Russia - Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/1, at 1, 6-7 (Sept. 21, 2016) (detailing how Russian restrictions on travel violated GATT 1994 in eight separate ways).

163. *Id.* at 6 (stating that “the Russian Federation denies freedom of transit through the territory of the Russian Federation”); see also *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.269(c), 7.285(c), 7.316–317 (elaborating in detail on the individual policies that Ukraine argued were violative of Russia's international obligations).

164. See *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.2–

because Article XXI preserves the right of each Member to “react to wars and other emergencies in international relations in the way that the Member itself considers necessary.”¹⁶⁵

A dispute settlement panel was requested and composed in 2017 and the panel released its report in 2019.¹⁶⁶ The panel, which was the first in WTO history to interpret the national security exception, determined that Russia’s actions were legitimately taken in time of an emergency in international relations under Article XXI(b)(iii).¹⁶⁷ In making this decision, the panel considered the conflict between Russia and Ukraine, which had been particularly active since 2014, to determine that the Russia-Ukraine relationship had deteriorated to such a degree that it was an emergency in international relations.¹⁶⁸

The Russia-Ukraine conflict is largely attributed to Ukraine’s 1991 decision to sever ties with the Soviet Union.¹⁶⁹ Prior to its exit, Ukraine was a cornerstone of the Soviet Union, responsible for much of the union’s agricultural production and military development.¹⁷⁰ As an independent state, Ukraine has largely sought to align itself with the EU and NATO but the country faces deep internal division on the matter.¹⁷¹ Russia has viewed Ukraine’s exit as a threat to its power.¹⁷²

4, 7.27 (arguing that regardless of the claims made by Ukraine, the panel does not have jurisdiction over the dispute, as the measures in question were taken pursuant to Russia’s national security concerns).

165. *Id.* ¶ 7.29.

166. *Id.* ¶¶ 1.2–1.6.

167. *Id.* ¶¶ 7.122–126. *See* Kho, et al., *supra* note 139, at 377 (“ . . . the WTO has issued only one decision on the application of the security exception.”).

168. *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.122–126.

169. *See* Jonathan Masters, *Ukraine: Conflict at the Crossroads of Europe and Russia*, COUNCIL ON FOREIGN RELATIONS (Feb. 14, 2023), <https://www.cfr.org/background/ukraine-conflict-crossroads-europe-and-russia> (tracing the history of the conflict all the way back to Ukraine’s decision to declare independence in 1991).

170. *See id.* (“Behind only Russia, [Ukraine] was the second-most-populous and -powerful of the fifteen Soviet republics, home to much of the union’s agricultural production, defense industries, and military, including the Black Sea Fleet and some of the nuclear arsenal.”).

171. *See id.* (writing that Ukrainian-speaking populations in western Ukraine generally support greater integration with Europe, while Russian-speaking populations in the east have favored closer ties with Russia).

172. *See id.* (noting that in addition to a loss of political standing, Russia was threatened by lost access to its dominant maritime force, its largest trading partner,

In 2014, Russian armed forces and Pro-Russia separatist forces began an attempted annexation of Crimea and Ukraine launched the “Anti-Terrorist Operation” to combat the invasion.¹⁷³ In 2015, Russian President Vladimir Putin and Ukrainian President Petro Poroshenko met in Minsk, Belarus to negotiate a cease-fire.¹⁷⁴ However, following the agreement, conflict along the Eastern Ukraine border remained constant.¹⁷⁵ As of 2016, the conflict had claimed the lives of nearly 9,500 people and injured more than 22,000 people, including armed forces and civilians.¹⁷⁶

Overall, this history of conflict indicated that an emergency in international relations was present.¹⁷⁷ The panel specifically referenced the history and presence of armed conflict between the two countries, the fact that the Russia-Ukraine conflict had become a matter of concern to the international community, and the fact that a number of countries had imposed sanctions against Russia in response to the conflict as particularly strong evidence that the national security exemption applied.¹⁷⁸ Additionally, the panel noted that it did not need to determine which actor bore international responsibility for the emergency to issue such a verdict.¹⁷⁹

iii. Saudi Arabia-Qatar Trade Dispute (2018-2020)

In October 2018, Qatar requested WTO consultations, claiming that

and a significant number of gas pipelines).

173. *Ukraine Says Donetsk ‘Anti-Terror Operation’ Under Way*, BBC (Apr. 16, 2014), <https://www.bbc.com/news/world-europe-27035196>.

174. *See* Laura Smith-Spark, *Ukraine Ceasefire Deal Reached After Marathon Minsk Talks*, CNN (Feb. 13, 2015), <https://edition.cnn.com/2015/02/12/europe/ukraine-conflict/> (detailing the key points of the negotiated ceasefire agreement).

175. *See* Nick Thompson, *Ukraine: Everything You Need to Know about How We Got Here*, CNN (Feb. 3, 2017), <https://www.cnn.com/2015/02/10/europe/ukraine-war-how-we-got-here/index.html> (stating that “the fragile ceasefire is pierced daily by violations.”).

176. *Id.*

177. *See* *Russia — Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.122–126 (“As of 2014, there has existed a situation in Russia’s relations with Ukraine that constitutes an emergency in international relations”).

178. *See id.* ¶ 7.122 (identifying both U.N. recognition of the war as an armed conflict and the presence of sanctions as being indicative of an emergency).

179. *Id.* ¶ 7.121 (noting that “it is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation”).

Saudi Arabia had failed to “provide adequate protection of intellectual property rights held by or applied for entities based in Qatar” and had therefore violated the TRIPS Agreement, an agreement for trade-related aspects of intellectual property rights that mirrors GATT 1994.¹⁸⁰ A dispute settlement panel was requested and composed in 2018 and the panel circulated its report in 2020.¹⁸¹ Saudi Arabia argued that the restrictions were necessary to protect essential security interests.¹⁸² The panel decided that Saudi Arabia had met the requirements to invoke the TRIPS security exception in all but one of the claims brought by Qatar.¹⁸³

The panel concluded that the Saudi Arabia-Qatar dispute had reached the level of an “exceptional and serious crisis in the relations between two or more States.”¹⁸⁴ The critical piece of evidence cited by the panel was Saudi Arabia’s severance of diplomatic and economic ties with Qatar, particularly when viewed in the context of similar actions taken by other countries and the two countries’ complex history of conflict.¹⁸⁵

For more than ten years, security in the Middle East North Africa (MENA) region has been unstable, with wars and terrorism causing significant loss of life and instability in the area.¹⁸⁶ The panel wrote that this WTO dispute must be understood in the context of the serious deterioration of the relations between Saudi Arabia, Qatar, and other MENA countries.¹⁸⁷ Further, the panel concluded that a country’s severance of all diplomatic and economic ties with another country could be considered the “ultimate State expression of the existence of an emergency in international relations” given that there are “few circumstances in international relations short of war that constitute a

180. Request for Consultations by Qatar, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶¶ 1–2, WTO Doc. WT/DS567/1 (June 16, 2020).

181. Saudi Arabia Panel Report, *supra* note 140, ¶¶ 1.2–3, 1.7–8.

182. *Id.* ¶¶ 2.27, 7.229–230, 7.232–233 (featuring three separate invocations of the national security exception by Saudi Arabia).

183. *Id.* ¶ 8.1(c).

184. *Id.* ¶¶ 7.259–262.

185. *See id.* ¶¶ 7.259–60, 7.262 (considering “the context of similar actions taken by several other nations and the relevant history recounted in this Report”).

186. *Id.* ¶¶ 2.19–20 (reflecting Saudi Arabia’s view of the situation).

187. *Id.* ¶¶ 2.16–17.

more serious state of affairs.”¹⁸⁸

2. National Security Exceptions Interpreted Broadly

As identified during the drafting and negotiations of Article XXI, a key concern when applying the national security exception is to not allow such a broad exception that would effectively invalidate the purpose of the overall agreement.¹⁸⁹ GATT 1994, similar to other multilateral trade agreements, was established to promote stability through fair and established global rules of trade.¹⁹⁰ A greater ability to break an agreement for national security reasons has the potential to create global trade instability.¹⁹¹ Prior conflicts, including the Russia-Ukraine trade dispute, the Saudi Arabia-Qatar trade dispute, and the global disagreement over 5G Network restrictions, indicate that as long as the national security exception is not applied to mere political conflicts and the restrictions are plausibly related to the national security threat, the exception can be interpreted quite broadly.¹⁹²

i. Russia-Ukraine Trade Dispute (2016-2019)

The panel in *Russia - Measures Concerning Traffic In Transit* held that under the obligation of good faith, Members are prohibited from

188. *Id.* ¶ 7.259.

189. See *Analytical Index of the GATT*, *supra* note 136 (quoting a drafter’s statement: “On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose”).

190. See BOWN, *supra* note 92, at 11 (“The goal was to create an agreement that would ensure postwar stability and avoid a repeat of the mistakes of the recent past . . . which had been a contributor to the devastating economic climate that culminated in the death and destruction of the Second World War.”).

191. See JAMES BACCHUS, *THE BLACK HOLE OF NATIONAL SECURITY* (CATO Inst. 2022) (arguing that the expansion of the national security exception could undermine the foundation of the global trading system in general).

192. See *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.75–76 (defining a difference between armed conflict and mere political disputes in the context of the national security exception); see also Reuters Staff, *China Warns Australia at WTO about 5G Restriction*, REUTERS (Apr. 12, 2019), <https://www.reuters.com/article/us-huawei-australia-china-wto/china-warns-australia-at-wto-about-5g-restriction-idUSKCN1RO20H> (expressing that the use of the exception was “taboo” for fear of its negative potential, but noting that, “the first ever WTO ruling clarified the use of the national security exemption and set a clear test for its use.”).

using the exceptions in Article XXI as a way to circumvent their obligations under GATT 1994.¹⁹³ The panel provided an example, stating that a Member would not be allowed to abandon its trade obligations “simply by re-labelling” what it considers its essential security interests.¹⁹⁴ The panel also wrote that it is expected that WTO Members will experience political or economic conflicts that do not meet the definition of an emergency in international relations as referred to in subparagraph (b)(iii).¹⁹⁵ These conflicts do not meet the standard unless “they give rise to defense and military interests, or maintenance of law and public order interests.”¹⁹⁶

Additionally, the panel held that it was required to review the measures that Russia had implemented to ensure that they were not “so remote from, or unrelated to” the ongoing conflict between the two countries that it would have been “implausible” for Russia to have implemented the measures for the protection of its essential security interests arising from the conflict.¹⁹⁷ Thus, implementing a “plausibility requirement” for GATT 1994 national security exceptions.

ii. Saudi Arabia-Qatar Trade Dispute (2018-2020)

The panel report in Saudi Arabia – Measures Concerning The Protection of Intellectual Property Rights reaffirmed many of the standards identified in Russia - Measures Concerning Traffic in Transit.¹⁹⁸ In particular, the panel cemented the plausibility requirement when it applied the requirement and noted that both the parties involved and third-party countries were in favor of the

193. *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.132–133 (“Rather, the discretion of a Member to designate particular concerns as ‘essential security interests’ is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.”).

194. *Id.* ¶ 7.133.

195. *Id.* ¶¶ 7.75–76.

196. *Id.* ¶ 7.75.

197. *Id.* ¶¶ 7.139, 7.145.

198. *See* Saudi Arabia Panel Report, *supra* note 140, ¶¶ 7.230, 7.241–254 (stating that while political and economic conflicts are sometimes considered “urgent and serious in a political sense,” such conflicts will not be emergencies in international relations within the meaning of (b)(iii) “unless they give rise to defen[s]e and military interests, or maintenance of law and public order interests.”).

requirement.¹⁹⁹ In the context of (b)(ii), these interpretations are valuable as they imply that the sub-articles may be interpreted broadly but should not be misapplied for political or financial gain.

iii. Global 5G Network Dispute (2018-Present)

In 2018, the Australian government banned Chinese companies Huawei and ZTE from providing 5G technology equipment to Australia for national security concerns, noting that companies that “are likely to be subject to extrajudicial directions from a foreign government” pose unacceptable risks.²⁰⁰ Though China has not sought WTO consultations or a panel, China has repeatedly requested that the matter be added to the WTO’s agenda for discussion during the Meetings of The Council For Trade in Goods.²⁰¹ In these discussions, China’s representative has said that Australia’s restrictions on Chinese 5G technology are “obviously discriminative” and seemingly break global trade rules.²⁰² Australia, however, has noted that other WTO

199. See *id.* ¶¶ 7.230, 7.239–240, 7.252, 7.255, 7.271, 7.277, 7.281, 7.285–86, 7.288 (“According to the panel in *Russia – Traffic in Transit*, the obligation of a Member to interpret and apply Article XXI(b)(iii) of the GATT 1994 in ‘good faith’ requires ‘that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.’”).

200. See Sherisse Pham, *Huawei’s No Good, Very Bad Year Just Got Even Worse*, CNN (Dec. 6, 2018), <https://www.cnn.com/2018/12/06/tech/china-us-huawei/index.html>; see also Huawei Australia (@HuaweiOZ), X (formerly known as TWITTER) (Aug. 22, 2018), <https://twitter.com/HuaweiOZ/status/1032411216184930304> (containing a statement from Huawei Australia regarding the Australian government’s ban).

201. See WTO, Comm. on Technical Barriers to Trade, *Minutes of the Meeting 8-10 March 2023*, ¶¶ 2.493–2.496, G/TBT/M/89 (May 11, 2023) (discussing China’s concerns surrounding risk assessment criteria and desire for international technical standards to objectively assess product security); WTO, Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods 24 and 25 November 2022*, ¶¶ 38.1–39.6, G/C/M/144 (Mar. 10, 2023) (summarizing China’s concerns and China’s demand for countries “to provide a fair, transparent, and non-discriminatory environment for Chinese companies.”); WTO, Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods 31 March and 1 April 2021*, ¶¶ 13.1–13.8, G/C/M/139 (June 16, 2021) [hereinafter *CTG Minutes, 31 Mar. & 1 Apr. 2021*] (reiterating China’s opinion that restrictions imposed upon Chinese 5G companies are “groundless, discriminatory, and inconsistent with WTO rules”)

202. Reuters Staff, *supra* note 192 (highlighting China’s belief that “measures to restrict 5G technology had a ‘great impact on international trade’ and would not address concerns about cybersecurity, but only make countries technologically

Members have made similar security-based decisions on 5G technology and asserted that its position is “country-agnostic, transparent, risk-based, non-discriminatory and fully WTO consistent.”²⁰³

Like Australia, countries including the United States, United Kingdom, Sweden, Belgium, and more have taken steps to ban Huawei and ZTE 5G technology citing national security concerns.²⁰⁴ As a result, China has similarly requested time in The Council for Trade in Goods’ meeting agenda to discuss 5G restrictions with Sweden and Belgium.²⁰⁵ China has called their policies “groundless, discriminatory, and inconsistent with WTO rules” and urged the countries to allow the technology.²⁰⁶ However, no country has rescinded their ban.

Despite the conversations China initiated during WTO meetings, China’s decision to not pursue formal proceedings with the WTO or other international organizations indicates that China does not believe that a dispute settlement panel would provide the best resolution to the conflict. While the decision could be based on China’s preference to maintain a civil relationship with the countries involved and independently resolve the issue, it could also signify that China is unsure that its argument would succeed before a panel.

isolated”).

203. *CTG Minutes, 31 Mar. & 1 Apr. 2021, supra* note 201, ¶ 40.5.

204. See Ryan Browne, *Top EU Official Urges More Countries to Ban China’s Huawei, ZTE from 5G Networks*, CNBC (June 21, 2023), <https://www.cnbc.com/2023/06/16/eu-urges-more-countries-to-ban-chinas-huawei-zte-from-5g-networks.html> (discussing the decision of the U.S. and ten E.U. countries to ban Huawei and ZTE from 5G networks).

205. See *Minutes of the Meeting 8-10 March 2023, supra* note 201, ¶¶ 2.493–496 (noting China’s demands and concerns for Belgium to apply “objective, fair, and non-discriminatory 5G equipment security standards and measures.”).

206. See *CTG Minutes, 31 Mar. & 1 Apr. 2021, supra* note 201, ¶ 13.3 (highlighting China’s deep concerns over Sweden’s measure preventing Chinese companies’ involvement in 5G construction).

C. THE THREAT OF AI AS A NATIONAL SECURITY INTEREST
UNDER GATT 1994 ARTICLE XXI

1. *Applying the Text of Article XXI*

According to the text of Article XXI (b)(ii), the United States' trade restrictions are valid expressions of the national security exception only if the restricted technology in question is exported "directly or indirectly for the purpose of supplying a military establishment."²⁰⁷ As previously established, the standard for such is met if the exporting country is satisfied that the purpose of the transaction was to immediately or ultimately supply a military establishment when considering (1) the probability of the goods reaching a military installation, (2) the sensitivity of the goods, and (3) the level of military tension between the countries.²⁰⁸

First, the United States has legitimate reasons to believe that sensitive AI-related technology would reach a military establishment if its trade were not restricted.²⁰⁹ China's MCF strategy indicates that information is regularly shared between private companies, research institutions, and the Chinese government and military.²¹⁰ If participation in MCF is mandatory as the U.S. Government has suspected, then American AI technology is thereby reaching a military establishment.²¹¹ However, even if China's government were to argue

207. GATT 1994, *supra* note 3, at art. XXI, ¶ (b)(ii).

208. *See* Ikeda, *supra* note 96, at 469 (discussing criteria and considerations for the application of the national security exception).

209. *See* Kharpal, *Huawei*, *supra* note 77 (noting Huawei's obligation to turn over network data to the Chinese government upon request); Needham, *supra* note 85 (highlighting legitimate military and security related concerns of the U.S.); OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 86, at 5–8 (reviewing challenges in export controls and discrepancies in monitoring export control evasions); Singh & Martina, *supra* note 86 (detailing Chinese assistance to Russia for evading Western sanctions by shipping PRC state-owned equipment and technology).

210. *See* Kharpal, *Huawei*, *supra* note 77 (discussing the compulsion of companies and researchers to share information with the government and military); Needham, *supra* note 85 (highlighting links between Chinese research laboratories and the People's Liberation Army).

211. *See* Pompeo, *supra* note 84 (examining China's MCF policy, which mandates Chinese companies and researchers to share technology and information with the Chinese government); McMaster, *supra* note 84 (writing that China's MCF policy "fast-tracks stolen technologies to the army in such areas as space, cyberspace, biology, artificial intelligence, and energy.").

that participation in MCF is not required, there is still a high chance of the technology reaching a military establishment even if sharing information is only suggested because Chinese companies feel compelled to comply with government requests.²¹² Further, where several of China's laws may easily be interpreted to require the disclosure of certain information, the United States has no reason to trust China that these laws will not be enforced in this way.²¹³ This is particularly the case because China has a demonstrated interest in developing AI as fast as possible, and has a history of acquiring American technology and information by whatever means necessary.²¹⁴ China has also shown that it is willing to provide similar technology to Russia, which directly contradicts the United States' effort to disrupt Russia's international supply chains with sanctions against Russia amidst the war in Ukraine.²¹⁵ Overall, there is a very high likelihood of AI technology being supplied to a military enterprise.

Second, though not quite rising to the definition of an implement of war because of its dual-use qualities, American AI technology is still incredibly sensitive.²¹⁶ As previously discussed, AI can be used to manipulate public opinion, carry out cyberattacks, and create

212. See Kania & Laskai, *supra* note 83 (evaluating China's tactics to receive technology from companies with and without legal compulsion); Needham, *supra* note 85 (identifying concerns of top U.S. security officials over relying on Chinese tests).

213. See Kharpal, *Huawei*, *supra* note 77 (highlighting issues with Chinese legislation mandating cooperation and the sharing of information).

214. See CHINESE STATE COUNCIL, *supra* note 69 (discussing incentives for China to develop AI at the national strategic level); Cadell & Nakashima, *supra* note 76 (highlighting the practice of Chinese military research groups purchasing specialized American technology); Xue, *supra* note 76 (assessing the U.S. response to Chinese acquisition of American military technology).

215. See OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 86 (noting previous instances of China providing Russia with various technologies, circumventing sanctions); Singh & Martina, *supra* note 86 ("China is helping Russia evade Western sanctions and likely providing Moscow with military and dual-use technology for use in Ukraine, according to an unclassified U.S. intelligence report.").

216. See NAT'L SEC. TECH. ACCELERATOR, *supra* note 61 (enumerating a plethora of potential uses and possible misuses of developing AI technology); LITTMAN, ET AL., *supra* note 62, at 53-56 (discussing the foremost dangers of AI technology development); Ingram, *supra* note 63 (assessing the race to develop AI technology and the ensuing potential for volatile military repurposing thereof).

autonomous weapons capable of killing on a mass scale.²¹⁷ AI is currently being leveraged for these purposes and more by military enterprises around the world.²¹⁸ However, what is particularly sensitive about AI is its unknown potential.²¹⁹ With such an intense competition to be the first to develop new technology currently underway, it is more crucial now than ever for the United States to maintain its position as a top producer of AI technology and prevent potentially threatening enterprises such as the Chinese military from making even the slightest improvement based on American technology or information.²²⁰

Lastly, although there has not been any formal militarized violence between the United States and China,²²¹ there is a particularly high level of tension between the two countries.²²² While it is unlikely that either country would violently attack the other using physical weapons, based on China's previous actions there is the risk of national security threatening cyberattacks or illegal data breaches.²²³

217. See NAT'L SEC. TECH. ACCELERATOR, *supra* note 61 (highlighting various military uses of AI technology); LITTMAN, ET AL., *supra* note 62, at 53–56 (reviewing dangerous potential military uses of AI); Ingram, *supra* note 63 (“Some of the same advances that are powering ChatGPT may be useful for such varied geopolitical tools as large-scale propaganda machines, new kinds of cyberattacks and ‘synthetic biology’ that could be important for economic growth.”).

218. See, e.g., Goldman Sachs, *supra* note 59 (discussing global market interest and investment in AI).

219. See Villasenor, *supra* note 59 (noting the uncertain future impact of AI).

220. See *id.* (“As we move towards the middle of the 21st century, a nation’s geopolitical standing and its strength in AI will be increasingly intertwined.”); *Artificial Intelligence for the American People*, *supra* note 72 (detailing the role and importance of the United States as the world leader in AI research).

221. See *U.S.-China Relations*, *supra* note 7 (outlining the history of diplomatic relations and tensions between the U.S. and China).

222. See *id.* (“Since 1949, the countries have experienced periods of both tension and cooperation over issues including trade, climate change, and Taiwan.”); Siripurapu & Berman, *supra* note 4 (highlighting increasing economic escalation and tensions between the U.S. and China).

223. See Cohen, *supra* note 47 (assessing the history of China and the U.S. spying on each other); *The China Threat*, *supra* note 48 (“The counterintelligence and economic espionage efforts emanating from the government of China and the Chinese Communist Party are a grave threat to the economic well-being and democratic values of the United States.”); Collier, *supra* note 50 (discussing incidents of Chinese computer intrusion to facilitate economic espionage against the U.S.); Barr, *supra* note 51 (“China’s vast hacking program is the world’s largest and they have stolen more Americans personal and business data than every other

When combined, the high likelihood of the technology reaching a military enterprise, the ability for the technology to be leveraged by military enterprises and bad actors alike for immeasurable harm, and the underlying tension between the United States and China indicates that AI technology would be supplied to a military enterprise in violation of (b)(ii) if its export is not closely restricted.

2. *Applying Prior Trade Dispute Examples*

i. *Relevance of History of Conflict*

Past uses of the national security exception have indicated that the history of conflict is particularly relevant when determining whether the use of the exception is appropriate.²²⁴ As the international response to the South Korea and Japan trade dispute demonstrated, if two countries are not aligned on a particular matter of national security and there has been a breakdown of trust because of a complex disagreement, trade restrictions may be an appropriate temporary policy.²²⁵ The decades-long history of conflict between South Korea and Japan, as well as the countries' roles as economic leaders, acts as a parallel to the United States and China.²²⁶ Like in the South Korea and Japan trade dispute, the various conflicts between the United States and China have eroded the level of trust between the two countries, particularly as it pertains to the use of AI technology and national security concerns.²²⁷ International response to the South

nation combined").

224. See Request for Consultations by the Republic of Korea, *supra* note 140, ¶ 7 (Alluding that the dispute over Japanese-South Korean export control treatments was allegedly rooted in political considerations); *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.111–126 (noting Russia's use of the exception based on concerns over a history of conflict with Ukraine); Saudi Arabia Panel Report, *supra* note 140, ¶¶ 7.244–26, 7.251, 7.256–270 (analyzing Saudi Arabia's severance of diplomatic and consular relations with Qatar as evidence of an action taken during time of war or other international relations emergency).

225. See DSB Minutes 29 July 2020, *supra* note 157, ¶¶ 6.4–6.6 (discussing the revelations that emanated from the South Korea-Japan dispute).

226. See *Japan-South Korea Trade Dispute*, *supra* note 147 (detailing the Japan-South Korea dispute, its context, and its implications); Goodman, et al., *supra* note 159, at 24–25 (exploring the impact of the Japan-South Korea trade dispute on the United States and other countries).

227. See Cadell & Nakashima, *supra* note 76 (discussing the deterioration of relations between the U.S. and China); Xue, *supra* note 76 (reviewing China's

Korea and Japan trade dispute shows that export restrictions in this case may be a reasonable invocation of Article XXI.²²⁸ However, the international community will likely still encourage a prompt resolution to the conflict if it has consequential effects on the world economy or flow of trade.²²⁹

Additionally, similar to the Saudi Arabia and Qatar trade dispute, the fact that other countries have aligned themselves with the United States in the conflict is a relevant piece of context indicating that the national security exception was properly invoked.²³⁰ Japan and the Netherlands' matching restrictions, while not outright targeting China, demonstrates the validity of the United States' security concerns as it shows that other countries have the same concerns.²³¹ Further, this third-party support makes it more challenging for China or other governments to challenge such a policy since the opposition would have to take on not one but three different policies.

ii. Applying Article XXI Broadly

As prior trade disputes have shown, Article XXI should be interpreted in favor of the country seeking to invoke it as long as the restrictions are plausibly related to the national security threat and the exception is not applied in a way that invalidates GATT 1994.²³² The

acquisitions of U.S. military technologies).

228. See DSB Minutes 29 July 2020, *supra* note 157, ¶¶ 6.4–6.6 (observing “that since the erroneous panel findings in *Russia – Measures Concerning Traffic in Transit* . . . several WTO Members had rushed to challenge national security measures.”).

229. See Haye-ah, *supra* note 159 (highlighting the United States' concerns that continued hostilities between Japan and South Korea will serve as an impediment to trilateral cooperation); Tachikawa, *supra* note 161 (examining China's position of urging Japan and South Korea to resolve the ongoing dispute through dialogue); Choi & Yoo, *supra* note 161 (discussing the U.S. tech industry's insistence for Japan and South Korea to promptly resolve the economic dispute).

230. See Saudi Arabia Panel Report, *supra* note 140, ¶¶ 7.259–260, 7.262 (assessing the Saudi Arabia-Qatar dispute in the context of similar actions taken by other nations).

231. See Toh & Ogura, *supra* note 23 (examining recent restrictions employed by Japan and the Netherlands); Sterling, et al., *supra* note 23 (analyzing the recent Dutch restrictions on semiconductors as aligned with U.S. efforts).

232. See *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.139, 7.145 (stating that the national security exception does not apply in situations of political strife); Saudi Arabia Panel Report, *supra* note 140, ¶¶ 7.230, 7.239–240,

Russia - Measures Concerning Traffic in Transit panel report wrote that Article XXI should not be stretched to apply to purely political disputes.²³³ While much of the ongoing dispute between the United States and China is political in nature, the trade of AI technology and the current lack of trust surrounding AI technology poses a serious threat to national security with numerous military capabilities.²³⁴ With this level of threat, the dispute is no longer merely political. Instead, it warrants the use of Article XXI.

Lastly, the U.S. trade restrictions meet the requirement that they are plausibly related to the national security threat. The restrictions are designed to limit the spread of AI technology and information, which directly combats the threat of AI being used by undesired parties to enhance weapons, to invade privacy, or to otherwise harm individuals' human rights or safety.²³⁵ Accordingly, the outcomes of prior trade disputes overwhelmingly indicate that the United States has properly invoked Article XXI in a way that would be supported by the WTO should a panel ever decide on the matter.²³⁶

7.242(d), 7.252, 7.255, 7.271, 7.277, 7.281, 7.285–286, 7.288 (describing the analytical framework requiring countries to have a nexus between their restrictive actions based on the national security exception and the protection of its essential security interests); *Analytical Index of the GATT*, *supra* note 136, at 600 (summarizing the history behind the national security exception and the open-ended nature of the definition of “essential security interests”).

233. *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.75–76.

234. *See, e.g.*, NAT'L SEC. TECH. ACCELERATOR, *supra* note 61 (stating the different possible uses of AI for military purposes such as increasing battlefield effectiveness and improving recruitment tactics); LITTMAN, ET AL., *supra* note 62, at 53–56 (analyzing the negative repercussions and dangers of AI usage); Ingram, *supra* note 63 (describing the similarities in AI development for civilian and military purposes).

235. BUREAU OF INDUS. AND SEC., *supra* note 1, at 1 (explaining that the reasoning for the U.S export controls of advanced computing and semiconductor manufacturing items to China was to protect U.S national security and curtail the ability of China to produce advanced military systems).

236. Request for Consultations by the Republic of Korea, *supra* note 140, ¶¶ 1, 7; *Russia - Measures Concerning Traffic in Transit*, *supra* note 118, ¶¶ 7.75–76, 7.79, 7.81–82, 7.126, 7.138–139, 7.148–149 (concluding that Russia satisfied the conditions of the national security exception through Article XXI(b) of GATT 1994); Saudi Arabia Panel Report, *supra* note 140, ¶¶ 7.230–231, 7.262, 8.1–3 (deciding that Saudi Arabia had only partially succeeded in invoking the national security exception).

D. IMPLICATIONS

Even though these restrictions are legitimate actions under GATT 1994, they are not the best solution to alleviate the national security risks posed by AI. These restrictions do not completely address the risks of AI primarily because China is still able to continue AI development with its own and other countries' technology.²³⁷

Additionally, with a broad interpretation of Article XXI, there is the possibility for an influx of unnecessary trade restrictions on emerging technology justified by exaggerated claims of national security concerns.²³⁸ This would weaken the power of international trade agreements as it would allow more opportunities for countries to abandon the agreement for national security reasons.²³⁹ Further, the U.S. economy ultimately suffers with increased trade restrictions so it is not in the country's best interest to pursue an interpretation so broad that it opens the country up to more restrictions.²⁴⁰

Nonetheless, given that there currently exists no global restraints on the use and trade of AI, a narrow interpretation poses a much more dangerous possibility as it would potentially allow free trade of dangerous technology.²⁴¹ Therefore, these AI export restrictions should absolutely qualify under Article XXI but should be temporary measures as the United States, China, and the rest of the world pursue a system for AI oversight.

237. See Liu Zhen, *Tech War: U.S. Ban on Chip Exports to Have Little Effect on Chinese Military for Now, Analysts Say*, SOUTH CHINA MORNING POST (Oct. 29, 2022), <https://www.scmp.com/news/china/military/article/3197720/tech-war-us-ban-chip-exports-have-little-effect-chinese-military-now-analysts-say> (discussing how U.S. export controls are unlikely to have significant impacts for Chinese military developments).

238. See Ikeda, *supra* note 96, at 458-59 (describing the potential consequences of a broad interpretation of GATT 1994's Article XXI(b)(ii)).

239. See *id.*

240. See Kho, et al., *supra* note 139, at 398 (noting that export restrictions have been cited as a contributor to declining revenue in the U.S. semiconductor industry); see also Inu Manak, et al., *The Cost of Trump's Trade War with China Is Still Adding Up*, COUNCIL OF FOREIGN RELATIONS (Apr. 18, 2023), <https://www.cfr.org/blog/cost-trumps-trade-war-china-still-adding> (discussing the economic impacts of U.S. trade restrictions with China).

241. See, e.g., Communication from the United States, *supra* note 3, at 1 (indicating that the inability to apply the national security exception may lead to national security risks).

IV. RECOMMENDATIONS

The United States and China should not wait for a WTO panel to decide on their dispute to take action. After a WTO panel is requested, it may take years for it to render a verdict.²⁴² Even then, with the current state of WTO Appellate Body, there will be another substantial delay before a final report is adopted given that the report could be appealed “into the void.”²⁴³ Further, despite not fully addressing important national security and global trade concerns posed by the growth of AI, a panel report on this issue would provide binding guidance on the use of the national security exception and the trade of AI. Leaving such an important decision to a multilateral system may not provide either party with a solution it prefers. Therefore, the United States and China should ideally seek alternative means to resolving the conflict, such as a multilateral agreement, that will address the larger issue, the safe trade and use of AI technology, without sacrificing autonomy over the decision.

A multilateral agreement for the safe trade and use of AI technology is the ultimate goal given that existing trade agreements, specifically GATT 1994, lack the ability to appropriately adjudicate modern AI matters. In addition to trade disputes sparking the need for such an agreement, AI experts have also called for a multilateral system to handle AI-related disputes.²⁴⁴ A multilateral agreement is advantageous as it allows all interested countries to give their opinion on the agreement, and in turn the agreement can hold more countries accountable. However, one downside to a multilateral agreement is the slow speed in which such agreements are written and negotiated.²⁴⁵ Multilateral agreements have been known to take years to ratify, even

242. See *Dispute Settlement System Training Module*, *supra* note 102, at Ch. 6.3, 5 (summarizing the timeline of WTO adjudication procedures).

243. *Appellate Body*, *supra* note 111 (describing the Appellate Body’s inability to review any appeals due to lack of members); see Farge, *supra* note 113 (explaining the U.S.’s objective to reform the WTO Dispute Resolution system by 2024 as cases are stuck in legal purgatory because losing parties have “appealed into a void”); Lester, *supra* note 112.

244. See, e.g., Ryan Heath, *Don’t Hold Your Breath for Global AI Rules*, AXIOS (May 30, 2023), <https://www.axios.com/2023/05/30/global-ai-regulation-catastrophe> (summarizing support from the AI industry for global regulation).

245. *Id.*

when the agreement pertains to dangerous technology.²⁴⁶

However, the groundwork for a multilateral AI agreement has already been laid by the United Nations Educational, Scientific and Cultural Organization (UNESCO).²⁴⁷ In November 2021, 193 countries adopted the first-ever global agreement on the Ethics of Artificial Intelligence, which identified the common values and principles that will guide future AI-related legal infrastructure.²⁴⁸ UNESCO stated that such an agreement was necessary because the increasing use of AI has brought higher rates of “gender and ethnic bias, significant threats to privacy, dignity and agency, dangers of mass surveillance, and increased use of unreliable [AI] technologies in law enforcement. . . .”²⁴⁹ In line with combating these threats, the agreement has defined diversity and inclusiveness, environmental protection and sustainability, human oversight and determination, transparency, accountability, and most importantly, the promotion of human rights and dignity as key values shared by the signing parties.²⁵⁰

Though far from widespread ratification, several draft agreements have already been written and proposed.²⁵¹ One example is an agreement drafted by the Council of Europe, an international organization with 46 member countries, that was released in June

246. See *id.* (emphasizing that historical regulation of weapons has indicated that countries have rarely enacted a comprehensive global solution until a major crisis has occurred).

247. UNESCO, *First Draft of the Recommendation on the Ethics of Artificial Intelligence*, SHS/BIO/AHEG-AI/2020/4 REV.2, preamble (Sept. 7, 2020) [hereinafter UNESCO Ethics of AI].

248. *193 Countries Adopt First-Ever Global Agreement on the Ethics of Artificial Intelligence*, UNITED NATIONS (Nov. 25, 2021), <https://news.un.org/en/story/2021/11/1106612>.

249. See *id.* (noting that “[u]ntil now, there were no universal standards to provide an answer to these issues”).

250. UNESCO Ethics of AI, *supra* note 247, at 6–8, 10.

251. See, e.g., COUNCIL OF EUROPE, COMM. ON ARTIFICIAL INTELLIGENCE, CONSOLIDATED WORKING DRAFT OF THE FRAMEWORK CONVENTION ON ARTIFICIAL INTELLIGENCE, HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW 5 (July 7, 2023) [hereinafter COE Comm. on AI] (describing the goals of the Council of Europe’s Framework Convention on AI, Human Rights, Democracy and the Rule of Law); Draft for Consultation, *Data Privacy Guidelines for the development and operation of Artificial Intelligence solutions*, UN SPECIAL RAPPORTEUR ON THE RIGHT TO PRIVACY, 1–2 (Nov. 2, 2020) (summarizing the purposes of the Data Privacy Guidelines for the development and operation of AI).

2023.²⁵² This agreement seeks to cement underlying democratic principles including fairness, transparency and accountability into how AI technology evolves.²⁵³ However, the Chair of the Council of Europe's AI Committee has indicated that it is unlikely that China would agree to an AI convention primarily designed for Western democracies.²⁵⁴ While China's unwillingness to join an agreement rooted in democratic values may delay the formation of a multilateral agreement, it should not completely impede such an agreement given that Western countries and China have made similar agreements in the past despite conflicting political structures.²⁵⁵

In the meantime, a bilateral agreement between the United States and China also has merit. As demonstrated in the South Korea and Japan trade dispute, a bilateral agreement offers several benefits to the parties involved including the ability to more efficiently reach a resolution, exercise complete control over the outcome, and complete negotiations in private.²⁵⁶ Such a bilateral agreement could be guided by existing rules proposed by both the countries and by bilateral agreements between other countries.²⁵⁷

252. COE Comm. on AI, *supra* note 251, at 5. See also Mark Scott, *One Treaty to Rule AI*, POLITICO (June 15, 2023), <https://www.politico.eu/newsletter/digital-bridge/one-treaty-to-rule-ai-global-politico-transatlantic-data-deal>.

253. COE Comm. on AI, *supra* note 251, at 5–6; Scott, *supra* note 252.

254. See Scott, *supra* note 252 (observing that while Thomas Schneider, the chair of the committee on AI, believes that the creation of the framework is important because it creates clarity and predictability, he is skeptical about Chinese implementation of such a system).

255. See Heath, *supra* note 244 (describing how catastrophic and major world events result in the creation of consensus and encourage multilateral diplomatic advances).

256. See Japan METI Circular Notice, *supra* note 150 (announcing the results of the bilateral solution to the trade dispute with the Republic of Korea).

257. Compare *Blueprint for an AI Bill of Rights*, THE WHITE HOUSE, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/> (describing U.S. priorities and concerns in the regulation of AI based on issues of individual rights), with Matt Sheehan, *China's AI Regulations and How They Get Made*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 10, 2023), <https://carnegieendowment.org/2023/07/10/china-ai-regulations-and-how-they-get-made-pub-90117> (disclosing current Chinese regulations of AI). See Suzanne Smalley, *U.S. and EU to Launch First-of-its-Kind AI Agreement*, REUTERS (Jan. 27, 2023), <https://www.reuters.com/technology/white-house-european-commission-launch-first-of-its-kind-ai-agreement-2023-01-27> (showing the bilateral cooperation between the U.S. and EU on issues of AI for the mutual benefit of both parties).

The United States-European Union agreement is an especially relevant example of what a bilateral agreement between the United States and China may entail.²⁵⁸ In this agreement, the United States noted the importance in building joint models while ensuring that American data stays in the United States and European data stays in Europe.²⁵⁹ The agreement prioritizes giving the governments greater access to detailed and data-rich AI models, which will lead to “more efficient emergency responses and electric grid management, and other benefits.”²⁶⁰ While this agreement is currently only between the United States and European Union, officials have indicated that other countries may be invited to join in the coming months.²⁶¹ Overall, a bilateral agreement like this may be the fastest and least offensive way to end tension over the export of AI technology, but it would not alleviate global AI-related security concerns.

Lastly, based on the resolution to prior trade disputes related to emerging technology, there is also the potential for other international organizations such as the Organization for Economic Co-operation and Development or the International Chamber of Commerce to weigh in and ease tension and risk.²⁶² A particularly relevant past example of this is the progression of trade restrictions on encryption technology over the past thirty years.²⁶³ Through the 1990s, the trade of encryption technology was largely restricted because of national security concerns, stifling the technological improvements that are made

258. See Smalley, *supra* note 257.

259. See *id.* (quoting a senior U.S. administration official’s opinion on what makes the agreement successful).

260. *Id.*

261. *Id.*

262. See, e.g., GENERAL USAGE FOR INTERNATIONAL DIGITALLY ENSURED COMMERCE, INT’L CHAMBER OF COM. (Nov. 18, 1997) (showing the International Chamber of Commerce’s commitment to promote efforts to make technological advances sustainable and secure in the area of information privacy); OECD GUIDELINES FOR CRYPTOGRAPHY POLICY, OECD (Mar. 27, 1997) (establishing the OECD’s activities in the regulation of information privacy issues and its flexible approach to fit member’s diversity of views).

263. See WHITFIELD DIFFIE & SUSAN LANDAU, THE EXPORT OF CRYPTOGRAPHY IN THE 20TH CENTURY AND THE 21ST (Oct. 2001) (describing the evolution of the regulation of encryption and cryptography technologies in the ‘80s and ‘90s due to the invention of the internet).

possible by collaboration.²⁶⁴ Ultimately, multiple agreements were made in an effort to increase free trade without sacrificing security.²⁶⁵ In particular, the International Chamber of Commerce released the General Usage for International Digitally Ensured Commerce and the Organization for Economic Co-operation and Development released Guidelines for Cryptography Policy.²⁶⁶ Guidance like this builds trust and understanding between countries, allowing for critical international cooperation on technological development and more reliable trade.²⁶⁷ As in this example, relevant international organizations could make significant contributions to the development of AI policy by providing research, drafting language for multilateral agreements, and synthesizing the views of the public.

Overall, most avenues to resolve the ongoing United States-China trade dispute will take years to complete and will not necessarily provide legal authority that can be applied in all future AI-related conflicts. Accordingly, the most effective way to form a strong AI policy and system for handling AI-related disputes is to simultaneously pursue multiple agreements that together will provide adequate guidance on the matter as soon as possible. A comprehensive multilateral agreement is perhaps the most essential element to this strategy, but it is crucial to have multiple sources of law that guide the international treatment of AI technology to ensure that all issues are addressed.

V. CONCLUSION

Restrictive trade measures on AI technology such as the one instituted by the United States in 2022 are legitimate actions under GATT 1994's Article XXI's security exception given the high likelihood that this technology is being supplied to a military enterprise. However, while such restrictions are permitted and may provide temporary protection, they are an inappropriate permanent solution to the United States-China trade war and the national security

264. *Id.*

265. *See* sources cited *supra* note 262.

266. *Id.*

267. *See* DIFFIE & LANDAU, *supra* note 263 (describing changes in governmental attitudes from protectionism to an export-friendly regime).

threats posed by the rise of AI technology. Instead, as this Comment has suggested, the United States and China must work together to develop a global strategy on the matter. A comprehensive multilateral agreement specifically addressing the trade and safe usage of AI is the most effective way to resolve trade and national security concerns with minimal consequences to pre-existing agreements and the multilateral trading systems. Moreover, bilateral agreements and guidance from leading international organizations should also be leveraged, if possible, to form a robust international AI policy.

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