

A Proposal for “Rebalancing” to Deal with
“National Security” Trade Restrictions

Simon Lester*

Huan Zhu†

*

†

ESSAY

A PROPOSAL FOR “REBALANCING” TO DEAL WITH “NATIONAL SECURITY” TRADE RESTRICTIONS

Simon Lester & Huan Zhu**+*

I.	INTRODUCTION	1451
II.	HISTORY OF THE GATT/WTO “SECURITY” EXCEPTION	1452
III.	THE TRUMP ADMINISTRATION’S AGGRESSIVE USE OF SECTION 232.....	1455
	A. Overview of Section 232.....	1455
	B. The Section 232 Actions on Steel and Aluminum .	1457
IV.	THE THREAT TO THE WTO DISPUTE SETTLEMENT MECHANISM.....	1461
V.	REBALANCING UNDER THE SAFEGUARDS AGREEMENT	1466
VI.	A REBALANCING PROPOSAL FOR NATIONAL SECURITY	1469
VII.	CONCLUSIONS	1473

I. INTRODUCTION

National security and trade policy have frequently intersected, but over the past several years, conflict has grown. After decades of careful avoidance of invoking national security in disputes at the GATT/WTO, there has been a recent proliferation of these cases. And most controversially, the Trump administration has adopted an expansive

* Associate Director, Herbert A. Stiefel Center for Trade Policy Studies, Cato Institute.

** Research Associate, Herbert A. Stiefel Center for Trade Policy Studies, Cato Institute.

+ The Authors wish to thank Kathleen Claussen, Ben Heath, and the other participants in the *Fordham International Law Journal* symposium where this Essay was presented, as well as Andrew Mitchell, Joost Pauwelyn, and Tania Voon, for their comments on the Essay. All errors remain our own.

interpretation of “national security” to justify imposing tariffs and quotas on steel and aluminum products (which it may soon apply to automobiles). Many US trading partners responded immediately with tariffs of their own, and both the US tariffs and the retaliatory tariffs are the subject of litigation that will test the limits of the WTO dispute settlement process and the trading system itself.

A WTO panel ruling in a different case involving national security has just been published, but it is not clear that any legal ruling can satisfy the parties to disputes where national security has been invoked. This Essay describes the problems with litigation on such matters, and suggests an alternative mechanism to handle these issues. Instead of litigation, a “rebalancing” process like the one used in the context of “safeguard” tariffs and quotas should be utilized for national security trade restrictions. Where such measures are taken, governments should offer compensation (such as lowering trade restrictions in other areas); if compensation cannot be worked out, these governments must accept equivalent trade restrictions imposed by affected trading partners. In this way, the overall balance in the system can be preserved, permanent damage to the WTO dispute system avoided, and a potentially destructive loophole kept closed.

II. HISTORY OF THE GATT/WTO “SECURITY” EXCEPTION

From the earliest post-World War I proposals for international trade agreements, it was clear that there would be some sort of exception for “security” concerns. Exception provisions for security and military issues were included in the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions,¹ and were also part of the reciprocal trade agreements signed in the 1930s and early 1940s.² During the negotiations on the International Trade Organization and the General Agreement on Tariffs and Trade (“GATT”), similar exceptions were part of the initial US proposal, referred to as the Suggested Charter.³ The specific wording evolved during the negotiations, but in the final text of the GATT, Article XXI said the following:

1. Convention for the Abolition of Import and Export Prohibitions and Restrictions art. 4, Nov. 8, 1927, 46 Stat. 2461.

2. *See, e.g.*, Agreement between the United States of America and Mexico Respecting Reciprocal Trade art. XVII, U.S.-Mex., Dec. 23, 1942, 57 Stat. 833.

3. U.S. DEP’T OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, art. 32 (1946).

Security Exceptions

Nothing in this Agreement shall be construed

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

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

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

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

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

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁴

When the WTO was created in 1995, and trade rules were expanded to cover trade in services and intellectual property, a similar security exception was included in these areas as well.⁵

The original negotiators recognized the political difficulties that would arise with such an exception and the potential for abuse. As one of the lead US negotiators put it:

It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. 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.⁶

4. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

5. See GATS art. XIV bis; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 73, Apr. 15, 1994, 33 I.L.M. 1197, 1869 U.N.T.S. 299.

6. U.N., Econ. & Soc. Council, Second Session of the Preparatory Comm. of the U.N. Conf. on Trade & Employment, Thirty-Third Meeting of Commission, U.N. Doc.

Determining the true purpose of a measure can be difficult, and the negotiators recognized the possibility that protectionist measures could be disguised as national security measures. As another GATT negotiator put it:

In defence of the text, we might remember that it is a paragraph of the Charter of the ITO and when the ITO is in operation I think the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention.⁷

Over most of the history of the GATT/WTO, governments kept these concerns in mind and the atmosphere cool, and, for the most part, were careful to invoke national security only where it was genuinely applicable. In one of the most comprehensive articles on this exception, written in 2011, legal scholar Roger Alford noted that “Member States have exercised good faith in complying with their trade obligations,” as “invocations of the security exception have only been challenged a handful of times, and those challenges have never resulted in a binding GATT/WTO decision.”⁸ Alford then recounts the few instances where tensions over Article XXI rose to the surface, including over Cold War conflicts, the Falklands War, and the US embargoes on Nicaragua and Cuba.⁹ As a result of governments’ good faith efforts, the GATT/WTO system has been able to avoid major conflict over this issue and having to decide on the precise boundaries of Article XXI.

Unfortunately, the long period of relative peace and harmony over Article XXI seems to be ending, as a WTO dispute between Ukraine and Russia has recently provided the first WTO panel interpretation of the provision. But a dispute between the Ukraine and Russia is not likely to undermine the world trading system. The more serious national security/trade policy controversy taking place is the dispute

E/PC/T/A/PV/33, p. 21 (July 24, 1947), available at <https://docs.wto.org/gattdocs/q/UN/EPCT/APV-33.PDF> [<https://perma.cc/VF47-WPAK>].

7. *Id.*

8. Roger P. Alford, *The Self-judging WTO Security Exception*, 2011 UTAH L. REV. 697, 699 (2011).

9. *Id.* at 706-725. See also Tania Voon, *The Security Exception In WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45, 45-50 (2019), available at <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/security-exception-in-wto-law-entering-a-new-era/CF8C3DCDF2CD924CAEEDD147840668F9> [<https://perma.cc/WQZ4-4Z8P>].

over the tariffs recently imposed by the Trump administration on imports of steel and aluminum. Nine governments have brought WTO complaints against these measures, and many of these governments have also retaliated with tariffs of their own.¹⁰ This litigation and subsequent retaliation threatens to do serious damage to the system.

III. THE TRUMP ADMINISTRATION'S AGGRESSIVE USE OF SECTION 232

A. Overview of Section 232

As part of the Trade Expansion Act of 1962, and building on legislation passed in 1955, Congress included in Section 232 of the statute a provision for trade restrictions based on national security. This was in the midst of the Cold War, when national security concerns were at their height. Congress believed it was appropriate to delegate some of its constitutional power over trade to the President in case quick action was necessary.¹¹

Section 232 gives the President the authority to “adjust imports” on national security grounds, in other words, to impose trade restrictions.¹² A decision to impose these restrictions is based on an investigation by the Commerce Department, which must involve consultations with the Secretary of Defense. The Commerce Department investigation can be self-initiated, or it can take place upon request of any US department or agency, or the domestic industry. During the investigation, the Commerce Department considers a number of factors when evaluating the impact of imports on national security, including the following: domestic production needed for national defense requirements, the capacity of domestic industries to meet such requirements, and how the importation of goods affects such industries and the capacity of the United States to meet national security requirements. The Department must also take into

10. RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (2018), available at <https://fas.org/sgp/crs/misc/R45249.pdf> [<https://perma.cc/89ZN-9U3A>].

11. *Id.*; David Knoll, *Section 232 of the Trade Expansion Act of 1962: Industrial Fasteners, Machine Tools and Beyond*, 10 MD. J. INT'L L. & TRADE 55, 56-57 (1986), available at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1274&context=mjil> [<https://perma.cc/CHG9-H9S2>].

12. 19 U.S.C. §1862 (2012).

consideration the impact of foreign competition on the economic welfare of individual domestic industries.

The investigation shall last no longer than 270 days, and the Secretary of Commerce is required to submit a report to the President and include recommendations of action or inaction.¹³ Within ninety days of receiving the report, the President will make a decision, and may either follow the recommendations of the Commerce Department or take other actions.¹⁴ Generally speaking, these actions will be in the form of tariffs or quotas, but many variations are possible.

To date, there have been thirty-one Section 232 investigations, twenty-six prior to Trump and five during his term in office. The first seven cases covered a wide range of products (including watches, anti-friction bearings, and power circuit breakers).¹⁵ Six resulted in a negative determination, and one was withdrawn by the petitioner.¹⁶ Then during the oil crisis of the 1970s, there were a number of cases involving petroleum products, including the first case in which the Commerce Department reached a positive determination.¹⁷

Overall, in sixteen cases the Commerce Department determined that the goods did not threaten to impair national security; and in eleven cases, the Commerce Department found the imported goods threatened to impair national security, and provided recommendations to the President.¹⁸ One case was terminated at the petitioner's request before a conclusion was reached. Three investigations are still pending.¹⁹

The first twenty-four cases were from 1963 to 1994.²⁰ After that, the mechanism fell into disuse. There were cases in 1999 and 2001, but then nothing for sixteen years.²¹ Since President Trump took office in January 2017, there have been five Section 232 investigations, on steel, aluminum, autos and auto parts, uranium, and titanium sponges.²²

13. 19 U.S.C. §1862(b)(3) (2012).

14. 19 U.S.C. § 1862(c) (2012).

15. FEFER ET AL., *supra* note 10.

16. FEFER ET AL., *supra* note 10.

17. FEFER ET AL., *supra* note 10.

18. FEFER ET AL., *supra* note 10. In eight of these eleven cases, the President took action.

19. FEFER ET AL., *supra* note 10.

20. FEFER ET AL., *supra* note 10.

21. FEFER ET AL., *supra* note 10.

22. FEFER ET AL., *supra* note 10.

B. The Section 232 Actions on Steel and Aluminum

As a candidate, Trump vowed to bring jobs in the steel and aluminum sectors back: “We are going to put American steel and aluminum back into the backbone of our country,” Trump said to his supporters in a former steel town in Pennsylvania.²³ Steel and aluminum were at the center of his America First trade policy. Soon after Trump took office, in April 2017, he instructed the Commerce Department to initiate investigations on the national security threat posed by steel and aluminum imports.²⁴ The Department immediately initiated Section 232 investigations on steel and aluminum and sought public comments.²⁵

In January 2018, the Department issued its report. It concluded that certain types of steel and aluminum products imported into the United States threaten to impair the national security of the United States. The Department recommended that the President reduce imports through tariffs or quotas, suggesting three options. For steel, it recommended: (1) a tariff of 24% on all steel imports, or (2) a tariff of 53% or more for steel imports from twelve countries plus a quota for all other nations that equals their exports to the United States in 2017, or (3) a quota of 63% of each country’s 2017 steel exports to the United States. For aluminum, it recommended: (1) a tariff of 7.7% on all aluminum imports, or (2) a tariff of 23.6% for aluminum imports from five countries plus a quota for all other nations that equals their exports to the United States in 2017, or (3) a quota of 86.7% of each country’s 2017 aluminum exports to the United States.²⁶

23. Susan Jones, *Trump: ‘Put American Steel and Aluminum Back Into the Backbone of Our Country’*, CNS NEWS (June 29, 2016), <https://www.cnsnews.com/news/article/susan-jones/trump-put-american-steel-and-aluminum-back-backbone-our-country> [https://perma.cc/5LY5-YAW7].

24. Donald J. Trump, Memorandum on Steel Imports and Threats to National Security, 2017 DAILY COMP. PRES. DOC. (Apr. 20, 2017), available at <https://www.govinfo.gov/content/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf> [https://perma.cc/2ACV-5NTU]; Donald J. Trump, Memorandum on Aluminum Imports and Threats to National Security, 2017 DAILY COMP. PRES. DOC. (Apr. 27, 2017), available at <https://www.govinfo.gov/content/pkg/DCPD-201700284/pdf/DCPD-201700284.pdf> [https://perma.cc/Z4VV-DHFU].

25. See Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19205 (Apr. 26, 2017); Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, 82 Fed. Reg. 21509 (May 9, 2017).

26. U.S. Dep’t of Com., *Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House*, U.S. DEP’T OF COM. (2018), <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination> [https://perma.cc/8ESX-GLMR].

On March 8, 2018, President Trump issued two proclamations, imposing a twenty-five percent ad valorem tariff on steel products and a ten percent ad valorem tariff on aluminum products, taking effect on March 23, 2018. Some countries negotiated export quotas to avoid the tariffs, and others received temporary tariff exemptions, but as of June 1, 2018, the tariffs were being imposed on most US trading partners.²⁷ The tariffs have been estimated to apply to US\$44.9 billion worth of steel and aluminum imports.²⁸

In terms of the actual purpose of the actions, there were reasons to doubt the claimed national security justification, as the Defense Department was skeptical of the value of these tariffs. Then-Secretary of Defense James Mattis expressed concern about the “negative impact” of the tariffs “on our key allies.”²⁹ He also acknowledged that the military’s requirements for steel and aluminum can be satisfied with about three percent of domestic production, casting doubt on the concerns about the impact of imports and on the justification of the Section 232 actions.³⁰

Beyond national security, a number of explanations have been offered by President Trump to justify the tariffs. At times, he has emphasized that tariffs would protect the US economy and jobs.³¹ He has also linked the tariffs to trade negotiations, suggesting that these tariffs have forced US trading partners to the negotiating table.³² A further explanation is that the tariffs are being used to combat unfair trade practices.³³ Ultimately, we do not know the true motivation of

27. FEFER ET AL., *supra* note 10.

28. Sherman Robinson et al., *Trump’s Proposed Auto Tariffs Would Throw US Automakers and Workers Under the Bus*, PETERSON INST. FOR INT’L ECON. (May 31, 2018), <https://piie.com/blogs/trade-investment-policy-watch/trumps-proposed-auto-tariffs-would-throw-us-automakers-and> [<https://perma.cc/WRV9-HT6V>].

29. Ellen Mitchell, *Trump Tariffs Create Uncertainty for Pentagon*, THE HILL (Mar. 11, 2018), <https://thehill.com/policy/defense/377697-trump-tariffs-create-uncertainty-for-pentagon> [<https://perma.cc/MF8Z-JPYP>].

30. *Id.*

31. Donald J. Trump, (@realDonaldTrump), TWITTER (Mar. 2, 2018, 5:01 AM), <https://twitter.com/realDonaldTrump/status/969558431802806272> [<https://perma.cc/GT6Y-AE6W>] (“We must protect our country and our workers. Our steel industry is in bad shape. IF YOU DON’T HAVE STEEL, YOU DON’T HAVE A COUNTRY!”).

32. Andrew Mayeda, *Trump Turns Steel Tariffs Into NAFTA Bargaining Chip*, BLOOMBERG (Mar. 6, 2018), <https://www.bloomberg.com/news/articles/2018-03-06/steel-tariffs-transform-into-nafta-chip-as-trump-plays-dealmaker>.

33. A White House fact sheet explained: “President Donald J. Trump is addressing global overcapacity and unfair trade practices in the steel and aluminum industries by putting in place a 25 percent tariff on steel imports and 10 percent tariff on aluminum imports.” *President Donald*

President Trump for these tariffs—it should be noted that Trump often makes it clear that he simply likes tariffs³⁴—and views may vary within the administration.

Many US trading partners responded quickly to the imposition of the Section 232 tariffs by imposing retaliatory tariffs. Normally, governments would have to bring a WTO complaint first and get a ruling that tariffs violate WTO rules before proceeding with retaliatory tariffs.³⁵ But here, governments argued that the Section 232 measures are not really about national security, and are in fact more like a “safeguard” measure designed to protect domestic industries from injury caused by imports.³⁶ As a result, the special “rebalancing” provisions of the Safeguards Agreement (discussed in more detail below) apply here, and justify immediate retaliation.³⁷

In addition to these retaliatory tariffs, over the period from April 2018 to August 2018, nine governments requested consultations at the WTO, which is the first step in WTO litigation. WTO litigation can take several years, though, and no one was expecting a quick ruling, which is why they retaliated pursuant to the safeguards rebalancing

J. Trump is Addressing Unfair Trade Practices That Threaten to Harm Our National Security, WHITEHOUSE (Mar. 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-addressing-unfair-trade-practices-threaten-harm-national-security/> [<https://perma.cc/F75W-6TKD>].

34. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2018, 7:03 AM), <https://twitter.com/realDonaldTrump/status/1069970500535902208> [<https://perma.cc/CG45-C7RF>]:

I am a Tariff Man. When people or countries come in to raid the great wealth of our Nation, I want them to pay for the privilege of doing so. It will always be the best way to max out our economic power. We are right now taking in \$billions [sic] in Tariffs. MAKE AMERICA RICH AGAIN.

35. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

36. *Panels established to review US steel and aluminum tariffs, countermeasures on US imports*, WORLD TRADE ORG. (Nov. 21, 2018), https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm [<https://perma.cc/Z4VJ-79XM>].

37. Canada imposed 10 to 25 percent tariffs on approximately US\$12.05 billion of US exports. Mexico imposed tariffs ranging from 7 to 25 percent on US\$3.7 billion of US exports. The European Union imposed 10 to 25 percent duties on US\$2.91 billion worth of US exports. China imposed 15 to 25 percent tariffs on US\$2.52 billion worth of US exports. India, Russia, and Turkey also imposed tariffs on selected US products, ranging from 4 to 140 percent. FEFER ET AL., *supra* note 10; see also *Current Foreign Retaliatory Actions*, INT’L TRADE ADMIN. (Apr. 5, 2019), https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp [<https://perma.cc/E8CW-FF9Q>].

theory. The complaining governments represent a wide range of the WTO Membership, including both big and small, and developed and developing: Canada, China, the European Union, India, Mexico, Norway, Russia, Switzerland and Turkey.³⁸

During the course of November 2018 to January 2019, dispute settlement panels were established to hear all of these cases. In late January, the panels were appointed, and litigation will soon begin.³⁹ The panelists are Elbio Rosselli of Uruguay, Esteban Conejos of the Philippines, and Rodrigo Valenzuela of Chile.⁴⁰ All have served on WTO panels before, but their task in handling this case will nevertheless be a difficult one.

The complainants' legal claims are fairly straightforward, focusing on GATT Article I (MFN treatment) and GATT Article II (tariff commitments).⁴¹ But as discussed in the next section, it is the US defense that will be a challenge to the system, as the United States has invoked GATT Article XXI. As repeatedly stated by the United States at the relevant DSB meetings, in the US view, after Article XXI is invoked the panel cannot even hear the case. In the context of the EU complaint, the United States described its position as follows:

Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised by the European Union. Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States. . . . If the EU maintains its misguided request for a panel to make findings that the United States has not acted consistently with WTO rules in this dispute, there is no finding a panel could make other than to note that the United States has invoked Article XXI.⁴²

While the steel and aluminum tariffs have already caused great friction, an even bigger Section 232 test lies ahead: President Trump is

38. FEFER ET AL., *supra* note 10.

39. Simon Lester, *Panels Composed in the Section 232/Retaliation Cases*, INT'L ECON. L. & POL'Y BLOG (Jan. 28, 2019), <https://worldtradelaw.typepad.com/ielpblog/2019/01/panels-composed-in-the-section-232retaliation-cases.html> [<https://perma.cc/YUP6-FUZD>].

40. *Id.*

41. *See, e.g.*, Request for Consultation by the European Union, *United States - Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/1 (June 1, 2018).

42. *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, 16, WT/DS184/15/ADD.189 (Nov. 21, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_.Stmt_.as-deliv.fin_.public.pdf [<https://perma.cc/5T5E-CVKY>].

considering taking action against imports of automobiles. If the case for trade restrictions on steel and aluminum is a stretch, the case for trade restrictions on automobiles bends the rules even further. The value of trade potentially affected would be much larger than is the case with steel and aluminum. It is estimated that the Section 232 auto tariffs could cover over US\$200 billion of auto and auto parts imports.⁴³ Some US trading partners have already warned that they will retaliate if tariffs are imposed.⁴⁴ It was reported that the Commerce Department submitted its report to President Trump in February 2019.⁴⁵ President Trump has ninety days from that date to make a decision.

IV. THE THREAT TO THE WTO DISPUTE SETTLEMENT MECHANISM

The administration's use of Section 232 presents a challenge to the WTO dispute settlement system, and even to the WTO itself, due to the invocation of GATT Article XXI. WTO dispute settlement has had good success over the years in adjudicating core trade issues such as ordinary tariffs, trade remedy tariffs, and regulatory trade barriers. It cannot induce governments to remove the measures that violate WTO rules in every case, but it has a fairly good record of pushing governments to comply at least partially. However, there are limits to what can be achieved, and it is clear that some sensitive measures cannot be dealt with through WTO litigation, just as domestic constitutional law cannot resolve every political issue effectively. National security measures pretty clearly fall into this category, and thus litigation of these measures has been carefully avoided over the years. But after decades of restraint over litigating the scope and meaning of Article XXI, the Section 232 measures threaten to undermine the system by creating a WTO litigation outcome that either one side or the other cannot live with.

Article XXI is not like most other WTO provisions, for two reasons. First, its legal interpretation is particularly difficult.

43. Robinson, et al., *supra* note 28.

44. Doug Palmer & Megan Cassella, *U.S. Allies Warn of Retaliation if Trump Imposes Auto Tariffs*, POLITICO (July 19, 2018), <https://www.politico.com/story/2018/07/19/trump-auto-tariff-commerce-hearing-698100> [<https://perma.cc/YKK3-DBPB>].

45. David Lawder & David Shepardson, *U.S. agency submits auto tariff probe report to White House*, REUTERS (Feb. 17, 2019), <https://www.reuters.com/article/us-usa-trade-autos/us-agency-submits-auto-tariff-probe-report-to-white-house-idUSKCN1Q706C> [<https://perma.cc/AR9C-ZGNB>].

Interpretation always presents challenges, but the unique wording of Article XXI is a special problem. And second, the sensitivity of the issues involved is greater than for any other provision. Protecting the environment is serious, but protecting your citizens from possible war or similar armed conflict rises to another level.

In terms of the law, there is no simple answer on the question of the provision's meaning. The use of the word "considers" in subparagraphs (a) and (b) of Article XXI gives the provision a degree of "self-judgment", but the question is how far to take this. Alford describes the interpretive possibilities as follows:

According to one interpretation, a Member State can decide for itself whether a measure is essential to its security interests and relates to one of the enumerated conditions. Another interpretation would recognize a Member State's prerogative to determine for itself whether a security exception is applicable, but would impose a good faith standard that is subject to judicial review. Under a third interpretation, a Member State can decide for itself whether "it considers" a measure to be "necessary for the protection of its essential security interests," but the enumerated conditions are subject to judicial review.⁴⁶

Questions about the scope of the exception were raised during the GATT negotiations, but they are not easy to resolve as an interpretive matter.⁴⁷ There is no obvious and clear correct answer to the degree of scrutiny that is appropriate based on the language of Article XXI.

This legal uncertainty is reflected in a political divide. Two leading powers, the United States and Russia, take one view of the provision's interpretation, while much of the WTO membership takes another. The different sides to the issue were brought out in the parties'

46. Alford, *supra* note 8, at 704.

47. Simon Lester, *The Drafting History of GATT Article XXI: The U.S. View of the Scope of the Security Exception*, INT'L ECON. L. & POL'Y BLOG (Mar. 11, 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/03/drafting-history-of-gatt-article-xxi.html> [<https://perma.cc/7L38-VFEH>]; Simon Lester, *The Drafting History of GATT Article XXI: Where Did 'Considers' Come From?*, INT'L ECON. L. & POL'Y BLOG (Mar. 13, 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/03/draft-of-gatt-security-exception-considers.html> [<https://perma.cc/VDM5-XKRU>]; Simon Lester, *More GATT Article XXI Negotiating History*, INT'L ECON. L. & POL'Y BLOG (May 1, 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/05/more-gatt-article-xxi-negotiating-history.html> [<https://perma.cc/NEN7-JD6C>].

and third parties' submissions in a WTO case referred to as *Russia - Traffic in Transit*.⁴⁸ On one side, the United States and Russia argue that the WTO "security" provisions are completely self-judging. In their view, once a party has invoked Article XXI, the WTO panel can no longer hear the case. Russia states that "neither the Panel nor the WTO as an institution has a jurisdiction" over the dispute;⁴⁹ and the United States argues that:

The text of Article XXI, establishing that its invocation is non-justiciable, is supported by the drafting history of Article XXI. In particular, certain proposals from the United States during that process demonstrate that the revisions to what became Article XXI reflect the intention of the negotiators that the defence be self-judging, and not subject to the same review as the general exceptions contained in GATT 1994 Article XX.⁵⁰

In contrast, other Members believe that WTO panels must engage in some degree of scrutiny of measures for which Article XXI has been invoked. For instance, the European Union argues that "Article XXI of GATT 1994 is a justiciable provision and that its invocation by a defending party does not have the effect of excluding the jurisdiction of a panel."⁵¹ And Australia states that, "[T]his deference to Russia does not preclude the Panel from undertaking *any* review of Russia's

48. The WTO panel report in this case was circulated on April 5, 2019, while this article was in the publication process, so we do not discuss it in depth here. WTO Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019). The panel's reasoning establishes that WTO panels have the authority to scrutinize measures for which a national security justification is claimed, and sets out a legal standard for doing so. *Id.* In this case, the panel found that the Russian measures at issue were justified under Article XXI. *Id.* The panel report was not appealed and was adopted by the DSB on April 26, 2019. *Members adopt national security ruling on Russian Federation's transit restrictions*, WORLD TRADE ORG. (Apr. 26, 2019), https://www.wto.org/english/news_e/news19_e/dsb_26apr19_e.htm [<https://perma.cc/PXD2-VH3R>]. The absence of an Appellate Body ruling on these issues leaves some uncertainty as to the definitive scope of the provision.

49. European Union Third Party Written Submission, *Russia - Measures Concerning Traffic in Transit*, ¶ 10, WT/DS512 (Nov. 8, 2017), http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf [<https://perma.cc/KF8W-9B3A>].

50. U.S. Responses to the Panel's and Russia's Questions to Third Parties, *Russia - Measures Concerning Traffic in Transit*, ¶ 3, WTO Doc. WT/DS512/R (Feb. 20, 2018), [https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.\(public\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.(public).pdf) [<https://perma.cc/52JG-GPWW>].

51. European Union Third Party Written Submission, *Russia - Measures Concerning Traffic in Transit*, ¶ 21, WT/DS512 (Nov. 8, 2017), http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156602.pdf [<https://perma.cc/SZ4W-ATMX>].

invocation of Article XXI(b) or dispense with the Panel’s obligation to undertake an objective assessment of the matter before it, including an objective assessment of the facts of the case.”⁵²

The *Russian - Traffic in Transit* case and the *Section 232* cases are not the only WTO disputes involving national security right now. In *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (DS 526),⁵³ the UAE has argued that the measures at issue were adopted for national security reasons, and thus the UAE’s measures are allowed by Article XXI, Article XIVbis of the GATS, and Article 73 of the TRIPS Agreement. The WTO DSB, according to the UAE, does not have the jurisdiction nor the capacity to adjudicate national security issues.⁵⁴ And in *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights* (DS567),⁵⁵ Saudi Arabia argued that the national security exemption means the WTO has no jurisdiction to hear the dispute, noting that “the WTO is not, and cannot be turned into, a venue to resolve national security disputes.”⁵⁶ After decades of peace in GATT/WTO dispute settlement with regard to the national security issue, we are suddenly experiencing a proliferation of litigation.

Making the issue even more complicated for WTO dispute settlement is the state of the Appellate Body reappointment process. Currently, the United States is blocking the appointment of new

52. Australia’s Third Party Executive Summary, *Russia-Measures Concerning Traffic in Transit*, ¶ 30, WT/DS512 (Feb. 27, 2018), <https://dfat.gov.au/trade/organisations/wto/wto-disputes/Documents/ds512-australian-third-party-executive-summary-270218.pdf> [<https://perma.cc/P6HU-NHD2>].

53. Request for the Establishment of a Panel by Qatar, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/DS526/2 (Oct. 6, 2017).

54. Dispute Settlement Body, Minutes of Meeting – Held in the Centre William Rappard, ¶ 4.4, WT/DSB/M/403 (Oct. 23, 2017) (“The system was simply not equipped to adjudicate the national security issues raised . . . , nor was there any support for the notion that it was intended to adjudicate such issues. . . . there was clear language . . . that excluded such national security matters from the jurisdiction of the WTO.”) [hereinafter DSB Minutes].

55. Request for the Establishment of a Panel by Qatar, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/3 (Nov. 9, 2018).

56. *Panels Established to Review India, Swiss Complaints Against US Tariffs*, WORLD TRADE ORG. (Dec. 4, 2018), https://www.wto.org/english/news_e/news18_e/dsb_04dec18_e.htm [<https://perma.cc/7RHD-P5NH>] [hereinafter WTO Panel Established] (“[N]othing can require any government to engage in dispute settlement procedures in such circumstances of national security. A panel has no power to make a finding in this matter, and the WTO is not, and cannot be turned into, a venue to resolve national security disputes, Saudi Arabia said”).

Appellate Body Members (i.e., judges) which has created a backlog of appeals and the possibility that by the end of the year there will not be enough people on the Appellate Body to hear cases.⁵⁷ The result could be a WTO panel ruling on one of the national security cases that gets appealed and sent into limbo. Until the status of the Appellate Body going forward is clarified, a great deal of uncertainty will remain.

However, there is a larger problem than figuring out the proper interpretation of the provision: if a WTO panel or the Appellate Body were to rule that Article XXI did not justify the US steel and aluminum tariffs, would the United States comply with that ruling? Given the US rhetoric on this issue, this seems unlikely.⁵⁸ And in the event of non-compliance, the only remedy is for the DSB to authorize a suspension of concessions under which the complainants could impose tariffs or other retaliation of their own, but most of the complainants have already retaliated, relying on the legal theory that the US measures are safeguard measures and that “rebalancing” under Safeguards Agreement Article 8 is permitted immediately.⁵⁹ As a matter of law, such an assertion has little basis, and further undermines confidence in the system. The Section 232 measure was not taken pursuant to the US domestic safeguards law; it was not notified to the WTO as a safeguards measure; and its design, structure, and architecture makes clear that it is not a safeguard measure.⁶⁰ Responding to violations of the rules with other violations of the rules leaves everyone wondering if the rules have any value. As a result, it is not clear how WTO dispute settlement can help in this case. With such a broad loophole being

57. James Bacchus, *How to Solve the WTO Judicial Crisis*, CATO AT LIBERTY (Aug. 6, 2018), <https://www.cato.org/blog/how-solve-wto-judicial-crisis> [<https://perma.cc/5NAD-Z962>].

58. In a recent DSB meeting, the United States reiterated that its invocation of Article XXI should not be reviewed by the panel: “[A WTO review] would undermine the legitimacy of the WTO’s dispute settlement system and even the viability of the WTO itself.” WTO Panel Established, *supra* note 56.

59. For an overview of rebalancing under the Safeguards Agreement, see Matthew R. Nicely & David T. Hardin, *Article 8 of the WTO Safeguards Agreement: Reforming the Right to Retaliate*, 23 ST. JOHN’S J. LEGAL COMMENT 699 (2008).

60. Simon Lester, *How To Determine if a Measure Constitutes a Safeguard Measure*, INT’L ECON. L. & POL’Y BLOG, (Aug. 15, 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/08/how-to-determine-if-a-measure-constitutes-a-safeguard-measure.html> [<https://perma.cc/4392-ZWKW>]. For more discussion on the issue, see Steve Charnovitz, *EU Can Retaliate Immediately Against Trump’s Metal Tariffs*, INT’L ECON. L. & POL’Y BLOG, (Mar. 9, 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/03/eu-can-retaliate-immediately-against-trumps-metal-tariffs.html> [<https://perma.cc/STF8-NVW9>].

exposed, and triggering a response that opens another loophole, there are real concerns that the system will be seriously undermined.

At the same time, while “rebalancing” as practiced by US trading partners here may not solve the problem, the concept may nevertheless offer a way forward for this kind of dispute. By adapting it for use directly in the context of national security, “rebalancing” could provide a solution to the impasse. While an attempt to expand existing safeguards rebalancing rules beyond their scope undermines the rule of law, a new rebalancing regime designed specifically for the national security context could help restore it.

V. *REBALANCING UNDER THE SAFEGUARDS AGREEMENT*

The idea of some type of “rebalancing” in response to “safeguard” measures originates in the reciprocal trade agreements negotiated by the United States and other countries in the 1930s.⁶¹ The first modern safeguard provision appeared in the US-Mexico Reciprocal Trade Agreement of 1942. It provides that where a country will “withdraw or modify a concession” as a safeguard to protect domestic industry, “it shall give notice in writing to the Government of the other country as far in advance as may be practicable and shall afford such other Government an opportunity to consult with it in respect of the proposed action”; if no agreement is reached, the other government “shall be free within thirty days after such action is taken to terminate this Agreement in whole or in part on thirty days’ written notice.”⁶² The consultations provide an opportunity for the parties to reach agreement on compensation, e.g., lowering tariffs on other products.⁶³

This idea was carried over to the GATT negotiations, where the United States proposed the initial text. At this point, “termination” was replaced with “suspension of obligations or concessions” as the response where compensation could not be agreed.⁶⁴ The provision

61. See, e.g., Reciprocal Trade Agreement of 1938 art. 19, U.K.-U.S., Nov. 17, 1938.

62. Reciprocal Trade Agreement of 1942 art. 11 ¶ 2, Dec. 23, 1942.

63. JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 565 (1969).

64. See U.S. DEP’T OF STATE, *supra* note 3, art. 29 ¶ 2:

If agreement among the interested Members with respect to the proposed action is not reached, the Member which proposes to take the action shall, nevertheless, be free to do so, and if such action is taken the other affected Members shall then be free, within sixty days after such action is taken, to suspend on sixty days’ written notice to the Organization the application to the trade of the Member taking such

was refined further during the negotiations, and the London Draft of the GATT refers to suspension of “substantially equivalent obligations or concessions.”⁶⁵ In the final version of the GATT, the relevant provisions appear in Article XIX, paragraphs two and three.⁶⁶

action, of any of the obligations or concessions under this Chapter the suspension of which the Organization does not recommend against.

65. See *London Draft of a Charter for an International Trade Organization*, art. 34 ¶ 2:

If agreement among the interested Members with respect to the action is not reached, the Member which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued the other affected Members shall then be free, not later than sixty days after such action is taken, to suspend, upon the expiration of sixty days from the date on which written notice of such suspension is received by the Organization, the application to the trade of the Member taking such action, of such substantially equivalent obligations or concessions under this Chapter the suspension of which the Organization does not oppose.

66. GATT, *supra* note 4, art. XIX ¶ 2 states:

Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

See also GATT art. XIX ¶ 3:

(a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall,

Practice during the time of the GATT suggests that compensation was used extensively early on. However, it tapered off over the years. As of 1987, there had been twenty instances of agreement or offers of compensation (ten cases during 1950-59, eight cases in 1960-69, one case in 1970-79 and one case in 1980-87).⁶⁷

During the Uruguay Round of trade negotiations, the specific requirements for rebalancing were discussed and debated at great length,⁶⁸ and the provision evolved over the course of the talks.⁶⁹ In the end, the GATT Article XIX requirements were elaborated further in the Safeguards Agreement. Under Article 8 of the Agreement, a government proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall try to maintain a substantially equivalent level of concessions and other obligations, and in order to achieve this objective, “the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.”⁷⁰ If compensation cannot be agreed, retaliation is permitted almost immediately where the justification for the safeguard measure is based only on a relative increase in imports, but has to wait three years if there has been an absolute increase in imports.⁷¹

where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

67. GATT Secretariat, *Drafting History of Article XIX and Its Place in GATT*, GATT Doc. MTN.GNG/NG9/W/7, ¶ 22 (Sept. 16, 1987), https://www.wto.org/gatt_docs/English/SULPDF/92020271.pdf [<https://perma.cc/ER2Y-D3SD>]; WORLD TRADE ORG., ANALYTICAL INDEX OF THE GATT 525 (1995), available at https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art19_gatt47.pdf [<https://perma.cc/MAE5-E94P>] [hereinafter GATT Index].

68. 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 1773-74 (Terence P. Stewart ed., 1993).

69. See Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25, paras. 23-25, June 27, 1989; Safeguards, Draft Text by the Chairman, Revision 1, MTN.GNG/NG9/W/25/Rev.1, paras. 25-27, Jan. 15, 1990; Chairman’s Report on the Status of Work in the Negotiating Group, MTN.GNG/NG9/W/25/Rev.2, paras. 16-18, July 13, 1990; Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3, paras. 17-19, Oct. 31, 1990.

70. Agreement on Safeguards, art. 8 ¶ 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter Agreement on Safeguards].

71. Agreement on Safeguards, art. 8 ¶ 3 states:

The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

The basic idea behind rebalancing is as follows. When countries negotiate trade agreements, the “concessions” and other obligations they take on—including commitments to reduce tariffs, to avoid certain protectionist domestic laws, and various other obligations—are part of an overall balance. Roughly speaking, each side accepts a particular degree of liberalization or other obligations, which constitutes the balance that was agreed to.

There are times when things get out of balance, however. One example is where a government believes another government has taken actions that violate the agreement. After adjudication of this matter, if a violation is found, the offending government can remove or modify the measure or offer some sort of compensation. If it does not do either one, it will be subject to trade retaliation by the complaining government in an amount equivalent to the effect of the violation. In this way, the balance is restored.

In some circumstances, adjudication is not required first. In the context of safeguards, the very nature of the measure indicates that the balance has been upset. If a government imposes a tariff or quota as a safeguard measure, with rare exceptions that measure will constitute withdrawal or modification of a tariff concession or breach of the obligation not to impose quotas. When that happens, the balance needs to be restored. Ideally, that would take place through compensation in the form of trade liberalization in other areas by the government imposing the safeguard measure. However, where compensation cannot be worked out, the affected countries are allowed to raise their own tariffs in an equivalent amount. That may not be ideal from the perspective of trade liberalization, but it acts as a deterrent against the abusive use of safeguard measures.

VI. A REBALANCING PROPOSAL FOR NATIONAL SECURITY

Under WTO rules, governments may impose tariffs and other trade restrictions beyond what was agreed for a variety of reasons, including the following: temporary protection as safeguards; as a response to dumping or subsidies; for environmental, public morals, or public health reasons; or in support of national security.⁷² It is a political and policy decision whether to make rebalancing available. Traditionally, immediate rebalancing has only been available for

72. See GATT, *supra* note 4, arts. XIX, VI, XX, and XXI.

safeguards, but the case could be made for rebalancing in other contexts too.

In thinking about the circumstances in which rebalancing should be available, the following two categories of challenged measures may help guide the analysis. The first category is measures that are alleged to violate WTO obligations, but for which consistency is contested: The complaining party claims there is a violation, but the responding party denies it (the responding party may invoke an exception as well). For these measures, if a violation is found by a WTO panel or the Appellate Body, the complaining party hopes that the measure will be brought into compliance (or at least applied in a manner that is consistent with certain core GATT principles, in the case of the Article XX chapeau).⁷³ If it is not brought into compliance, retaliation or compensation (i.e. rebalancing) are available. Thus, in these situations, compliance is the objective, but eventual rebalancing can be accepted as an alternative solution.

The second category is measures which are acknowledged to violate the rules, and there is no hope of achieving compliance as long as the conditions in an exception are satisfied. With safeguard measures, for example, there is no question that the withdrawal of a concession violates the rules, and there is no hope of compliance (unless the conditions for imposing a safeguard measure have not been satisfied, of course, in which case the measure must be withdrawn). As a result, for safeguard measures, the step involving a determination of whether the measure violates general GATT obligations such as Articles II and XI is not necessary in order to rebalance, as immediate rebalancing is available.⁷⁴

Consider the difference between a safeguard measure, on the one hand, and an environmental measure under GATT Article XX(g), on the other.⁷⁵ The main issue in a typical safeguard case at the WTO is whether the measure satisfies the conditions for being classified as a safeguard measure.⁷⁶ If it does, any inconsistency with general principles such as complying with tariff commitments is irrelevant. By contrast, for environmental measures, compliance with the obligations is almost always contested, and even if a measure is classified as an

73. GATT, *supra* note 4, art. XX.

74. *See* GATT, *supra* note 4, art. XIX; Agreement on Safeguards, *supra* note 70, art. 8.

75. GATT, *supra* note 4, art. XX(g).

76. *See, e.g.*, Agreement on Safeguards, *supra* note 70, art. 4 ("Determination of Serious Injury or Threat Thereof").

environmental measure that falls under Article XX(g), the obligations in the Article XX chapeau apply, providing another opportunity to consider whether the measure is justified.

National security fits much more naturally into the safeguard category. Where national security is invoked, a violation is generally assumed and not contested. If the national security justification is upheld, there is no hope of inducing compliance with WTO obligations, and thus moving on to the rebalancing stage immediately is appropriate.

Beyond the theory of these two different categories of measures, in the national security context there are several practical arguments for allowing a similar kind of rebalancing. First, retaliation is already happening. In the case of the Section 232 tariffs, as noted above, a number of governments have declared the measures to be safeguard measures and are applying retaliatory tariffs.⁷⁷ Instituting rebalancing rules here would provide an opportunity to replace retaliatory tariffs with compensatory liberalization. In addition, in circumstances where compensation is not possible, it would formalize the retaliation process and make it more orderly, limiting the possibility of a trade war that spirals out of control.

Second, as explained earlier, WTO dispute settlement probably cannot help here. A ruling that the Section 232 measures violate GATT obligations and are not justified under Article XXI is not likely to make the United States comply. In addition, retaliation is already being imposed by many countries even without authorization.

Finally, rebalancing would have an important benefit by limiting the abuse of the provisions. A full WTO dispute proceeding typically lasts between two and four years, depending on the complexity of the case. National security measures are particularly susceptible to abuse due to the vagueness of the obligation, and rebalancing would reduce the time that governments can impose import restrictions for national security purposes without any response from trading partners.

Rebalancing of national security measures can draw on principles from the safeguards arena, but would have its own characteristics and a different focus. One of its primary goals would be transparency. As things stand now, governments have the ability to impose trade restrictions for protectionist purposes but then later invoke Article XXI during litigation. There are requirements that Members “should be

77. FEFER ET AL., *supra* note 10.

informed to the fullest extent possible of trade measures taken under” GATT Article XXI and GATS Article XIV bis,⁷⁸ but the notification obligation needs to be stronger. It would be desirable to have all national security trade restrictions notified as such immediately upon their imposition, and even during the process of internal domestic deliberation, in order to have a proper debate and discussion. Bringing these cases to light early, and having WTO Members think carefully about the proper scope of the exception, is of great value. To this end, the national security rebalancing rules should encourage notification and explanation of national security tariffs by offering more time before rebalancing can be applied where measures have been notified. For example, rebalancing can be immediate where an Article XXI justification is invoked as part of litigation where there has been no notification/explanation, but must wait six months to a year where notification has been given.

To help oversee these discussions, there should be a Committee on National Security Measures formed to examine these measures and any proposed rebalancing, through which Members could meet regularly to consider the practice in this area. Committees play an important role in many policy areas covered by the WTO and could help with national security issues as well. Committee meetings provide an opportunity to resolve conflicts outside the context of litigation, which is inherently contentious and can increase tensions.

Compensation is the preferred approach to rebalancing. Ideally, governments that impose tariffs or other restrictions on specific products for national security purposes would offer to reduce tariffs or restrictions on other products or services. Adding services as a compensation option may be significant. One of the reasons compensation has not worked as well in recent years in the safeguards context is that as tariff levels have decreased, it has become harder for countries invoking safeguards to find alternative products on which they could give meaningful concessions.⁷⁹ Adding services to the mix

78. See Decision Concerning Article XXI of the General Agreement, ¶ 1, WTO Doc. L/5426 (Dec. 2, 1982), https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf [<https://perma.cc/6DB2-WZU4>]; GATT Index, *supra* note 67, at 606, available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf [<https://perma.cc/KQ3V-B35X>]; General Agreement on Trade in Services art. XIV bis ¶ 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

79. JOHN JACKSON, *THE WORLD TRADING SYSTEM* 168 (1994); Chad Bown & Meredith Crowley, *Safeguards in the World Trade Organization*, CATO INST. (Feb. 2003), http://people.brandeis.edu/~cbown/papers/bown_crowley_kluwer.pdf [<https://perma.cc/78AU->

would open a wide range of compensation possibilities, especially considering how few services commitments most countries have made and thus how much potential there is for additional liberalization.

Negotiations over the extent of this compensation will never be easy, but they can be facilitated through carefully designed rules. For example, there could be a requirement that in order to impose an import restriction for national security reasons, a government must identify three products or services for which it would consider negotiating compensatory liberalization. Forcing governments to suggest possible compensation could give the negotiating process a boost.

When compensation cannot be agreed, however, retaliation designed to restore balance is also a possibility. Retaliation is contrary to the main purpose of trade agreement, which is trade liberalization, but if it can serve as a deterrent to protectionist abuses (by creating a negative impact on producers in the imposing country), it can serve a useful role. It can also keep trade wars from spiraling out of control by establishing an agreed upon procedure for retaliatory tariffs.

VII. CONCLUSIONS

Not every dispute can be resolved through litigation. The proposals outlined here are designed to help provide a political solution to disputes over trade restrictions based on national security. They are fairly straightforward as a policy matter, although much more debate is needed on the specific details. This paper is intended to launch a discussion and is certainly not the final word.

As governments continue to push forward with bilateral, regional and multilateral trade agreements, there will be opportunities to experiment with this kind of mechanism. The Trump administration is unlikely to support the proposals made here, but other governments that are concerned about the abuse of national security measures can incorporate provisions along these lines in agreements they sign. In this way, the norm can spread, with the hope that its usefulness will be

JAHM] (“Although compensation for safeguard measures was often negotiated in the 1960s and 1970s, as tariff rates fell and more products came to be freely traded, as a practical matter, it became difficult for countries to agree on compensation packages”). See also Matthew R. Nicely & David T. Hardin, *Article 8 of the WTO Safeguards Agreement: Reforming the Right to Rebalance*, 23 ST. JOHN’S J. LEGAL COMMENT 699, 716 (2008), available at <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1044&context=jcred> [<https://perma.cc/HB9U-GZT4>].

demonstrated, and with the aim of eventual inclusion in a multilateral agreement.