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Rethinking United States - Certain Measures on Steel and Aluminum Products: Rebalancing Should be Allowed for the Section 232 Measures

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RETHINKING *UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS*: REBALANCING SHOULD BE ALLOWED FOR THE SECTION 232 MEASURES

By Michiru Ishihara and Hiroaki Chiba-Okabe[*]

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ABSTRACT

In 2018, the United States introduced additional tariffs on steel and aluminum imports, leading to a series of retaliatory tariffs from numerous other WTO members including the European Union and China. These nations predicated their rebalancing measures on Article 8 of the Agreement on Safeguards, based on the view that the United States' measures are safeguard measures. However, recent WTO panel decisions have ruled that the United States' measures are not safeguard measures, thereby rejecting the legitimacy of retaliatory tariffs by China. This article offers a critical analysis of these determinations and, contrary to the panels' conclusions, advances an argument that the United States' measures could be construed as safeguard measures, making the retaliatory tariffs by affected WTO members justifiable. In the course of the analysis, this article examines (1) the constituent elements of a safeguard measure, (2) the interpretation of Article 11.1(c) of the Agreement on Safeguards and (3) circumstances under which rebalancing measures are permissible.

I. INTRODUCTION

In March 2018, under the Trump administration, the United States instituted additional tariffs of 25% on steel products[1] and 10% on aluminum products[2] imported into the United States. These measures were taken based on Section 232 of the Trade Expansion Act of 1962 ("Section 232 Measures"), which authorizes the President of the United States to impose import adjustment measures on goods that are imported into the United States "in such quantities or under such circumstances as to threaten to impair national security."[3] The measures applied to imports from all over the world, with certain countries receiving exemption.

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1 Proclamation No. 9705, 83 Fed. Reg. 11,625 (March 15, 2018).
2 Proclamation No. 9704, 83 Fed. Reg. 11,619 (March 15, 2018).
3 19 U.S.C § 1862.

The measures prompted swift reaction from multiple affected World Trade Organization (WTO) members. Several Members turned to the WTO dispute settlement procedures, arguing that the additional tariffs are inconsistent with some provisions of the WTO agreements, such as Articles I:1 of the General Agreement on Tariffs and Trade ("GATT"), which prohibits WTO members from imposing tariffs higher than the levels they have committed to in their GATT.

Schedules, and Article II:1 of the GATT, which essentially binds WTO members to provide equal tariff treatment to all other Members.

Additionally, some Members, including the European Union ("EU")[4] and China,[5] imposed additional tariffs on certain products imported from the United States. Their actions relied on the view that the Section 232 Measures are safeguard measures, emergency tariffs to protect domestic industries from import surges, as sanctioned under Article XIX of the GATT. Article 8 of the Agreement on Safeguards allows for affected WTO members to take so called "rebalancing measures," which are counter-tariffs to offset the impact of safeguard measures.

In a statement made in response to these measures, the United States Trade Representative ("USTR") described the rebalancing measures adopted by the countries as a "blatant disregard for WTO rules," asserting that other Members are not entitled to take rebalancing measures "because the United States has not taken a safeguard measure."[6] According to the statement, "[t]he President's actions here were taken under a U.S. national security statute – not

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[4] European Union, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards*, WTO Doc. G/L/1237, G/SG/N/12/EU/1 (May 18, 2018).

[5] China, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Article 8.2 of the Agreement on Safeguards*, WTO Doc. G/L/1218, G/SG/N/12/CHN/1 (April 3, 2018).

[6] USTR, "Statement by Ambassador Robert E. Lighthizer on Retaliatory Duties," https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/statement-ambassador-robert-e (June 26, 2018).

under the separate U.S. statute for safeguard measures", and "[i]n fact, there is no credible basis for the EU's legal theory."[7] As the USTR points out, for the rebalancing measures taken by the countries affected by the Section 232 Measures to be consistent with WTO rules, the Section 232 Measures must first be safeguard measures.[8]

The stance of the United States was scrutinized in the panel decision of *United States – Certain Measures on Steel and Aluminum Products*,[9] released in December 2022. The panel identified inconsistencies of the Section 232 Measures with Articles II:1 and I:1 of the GATT and, notably, concluded that the Safeguard Agreement did not apply to the tariff measures taken by the United States. A prominent aspect of this dispute is the invocation of the national security exception under Article XXI(b) of the GATT, which was pivotal in the WTO panel's reasoning to deny the applicability of the safeguard provisions. Referring to this decision, the panel of *China – Additional Duties on Certain Products from the United States*,[10] whose decision was published recently in August 2023, determined that the additional duties levied by China on certain products originated in the United States, as a counteraction to the Section 232 measures, could not be justified by Article 8.2 of the Safeguard Agreement and Article XIX:3(a) of the GATT on the ground that the Section 232 measures are not safeguard measures.

The panels' findings contrast sharply with the reactions of numerous WTO members. These members viewed the Section 232 measures as safeguard measures, the view is shared by many who participated as third countries in the panel proceedings. How can we bridge this gap in perspectives? Was the panel's methodology sound? Given that the Section 232 alludes to national security concerns, the Section 232 measures potentially fall under the purview of national security exception of Article XXI(b) of the GATT – a defense presented by the United States during panel proceedings – which

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[7] *Id.*

[8] Article 8.2 of the Agreement on Safeguards.

[9] Panel Report, *United States - Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/R (adopted December 9, 2022).

[10] Panel Report, *China – Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS558/R (adopted August 16, 2023).

arguably offers a wide margin of discretion to WTO members in adopting trade-restrictive measures based on national security reasons.[11] While the importance of the carve-outs for WTO members under Article XXI(b) of the GATT should not be diminished, we should also not compromise the functions of rebalancing measures, which were introduced to realize a Member's right to "unilaterally restore equilibrium in the trade relationship"[12] and provide deterrence to abuse of safeguard measures.[13] Carelessly ruling out the applicability of the safeguard discipline could pave the way for disguised *de facto* safeguard measures.

Addressing both legal and practical concerns in this regard, this article delves into the issue of the legal characterization of the Section 232 measures. We argue that these measures might be viewed as safeguard measures, thereby justifying the lawful adoption of rebalancing measures. Through a comprehensive analysis of key legal considerations, the article critiques the panel's methodology and proposes a practical and legally sound alternative.

II. WHAT IS A SAFEGUARD MEASURE?

Should a measure qualify as a safeguard measure, it would fall under the purview of Article XIX of the GATT and the Agreement on Safeguards, outlining the conditions and procedures for its adoption.[14] Notably, neither Article XIX of the GATT nor the Agreement on Safeguard provide a definition of a safeguard measure. The title of Article XIX of the GATT is "Emergency Action on Imports of Particular Products", and the same Article stipulates certain conditions under which a Member "shall be free" to take a measure, as well as the permitted extent of such measures. This context suggests that the Article concerns a measure that a Member is allowed to take under

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[11] Tsai-fang Chen, *To Judge the 'Self-Judging' Security Exception Under the GATT 1994 – A Systematic Approach*, 12 (2) Asian J. of WTO & Int'l. Health L. and Pol'y 311, 314 (2017).

[12] Michael J. Hahn, *Balancing or Bending? Unilateral Reactions to Safeguard Measures*, 39 (2) J. of World Trade 301, 311 (2005).

[13] Fernando Piérola, *The Challenge of Safeguards in the WTO* 358 (Cambridge: Cambridge University Press 2014).

[14] Article 1 of the Agreement on Safeguards.

limited circumstances and within a limited scope that would be otherwise not be permitted, and supports the Appellate Body's finding in *Indonesia - Iron or Steel Products* regarding the phrase "shall be free" that "those words simply accord to a Member the 'freedom' to exercise its right to impose a safeguard measure by suspending a GATT obligation or withdrawing or modifying a GATT concession if the conditions set out in the first part of Article XIX:1(a) are met."[15] The Appellate Body has correctly concluded that a measure could not qualify as a safeguard measure without such suspension, withdrawal or modification, based on this finding.[16]

The Appellate Body has also correctly pointed out that a distinction shall be made between the factors concerning the applicability of the safeguard-related provisions and the factors concerning the consistency with the provisions.[17] In this connection, it should be noted that Article 8.3 of the Agreement on Safeguards restricts the adoption of rebalancing measures against a safeguard measure for the first three years that the 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." If one were to argue that a measure can only constitute a safeguard measure if it fully complies with safeguard-related provisions, then the meaning of the part of this Article, which delays the adoption of rebalancing measures against compliant safeguard measures, would be lost. Therefore, requiring conformity to all safeguard-related provisions in order for a measure to qualify as a safeguard measure would contradict the effective interpretation of the relevant provisions.[18]

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[15] Appellate Body Report*, Indonesia — Safeguard on Certain Iron or Steel Products (Indonesia — Iron or Steel Products),* WT/DS490/AB/R, WT/DS/496/AB/R (adopted August 27, 2018), footnote 188 to para. 5.55.

[16] Cases cited *id*, para. 5.55.

[17] Cases cited *id*, para. 5.57.

[18] The Appellate Body has acknowledged the principle of effectiveness as an "internationally recognized principle" and that it provides guidance in interpreting the WTO Agreement (Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act of 2000 (US — Offset Act (Byrd Amendment))*, WT/DS217/AB/R, WT/DS234/AB/R 8 (adopted January 27, 2003), para. 271. See also Panel Report, *Argentina — Measures Affecting the Importation of Goods*, WT/DS438/R, WT/DS444/R,

However, the demarcation between provisions related to the applicability of the safeguard discipline and those concerning the conformity with the discipline is not apparent. First of all, it is not necessarily clear from a plain reading of the text of XIX:1(a) of the GATT that a measure must be designed to pursue the objective of preventing or remedying serious injury to a Member's domestic industry to be qualified as a safeguard measure. This is because the word "to" directly relates to the "extent" of a safeguard measure, rather than to the phrase "suspend the obligation in whole or in part or to withdraw or modify the concession." In this respect, the Appellate Body asserted that the word "to" in the Article preceding the phrase "prevent or remedy such injury" in the same Article indicates that the suspension, withdrawal or modification should be designed to pursue the objective of preventing or remedying serious injury.[19] In light of the absurdity of the conclusion that any suspension of GATT obligation, or withdrawal or modification of a GATT concession would be subject to the safeguard discipline, it is reasonable to emphasize the link, albeit somewhat remote, between the suspension, withdrawal or modification and the prevention or remedy of injury to avoid such a conclusion. On the other hand, it would also be absurd to think that a measure does not constitute a safeguard measure and thus is not subject to the safeguard discipline unless all conditions provided in Article XIX:1(a) of the GATT, including unforeseen development, increased imports and serious injury, are met. This would allow too much room for a measure to sidestep the safeguard discipline.[20] Rather, it can be concluded from the plain reading of the text that these conditions provide the situation under which taking a

WT/DS445/R, (adopted January 26, 2015) para. 6.437 ("the Appellate Body has repeatedly stated that all WTO agreements are part of the same treaty (i.e., the Marrakesh Agreement) and thus, in the light of the principle of effective treaty interpretation, all WTO provisions should be interpreted harmoniously and cumulatively whenever possible").

[19] Cases cited *supra* note 17, para. 5.56.

[20] First Written Submission of the European Union, Indonesia — Iron or Steel Products, WT/(applicable number) (October 19, 2017), https://circabc.europa.eu/ui/group/cd37f0ff-d492-4181-91a2-89f1da140e2f /library/eb05a1ae-f96a-4e65-87ae-a4b968251d8a/details.

safeguard is permitted, and thus they merely concern the conformity issue.

On the constituent elements of a safeguard measure, the Appellate Body summarizes:

> . . . in order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.[21]

It further noted that a panel is to "assess the design, structure, and expected operation of the measure as a whole" and "identify all the aspects of the measure that may have a bearing on its legal characterization, recogniz[ing] which of those aspects are the most central to that measure."[22] Also, the Appellate Body noted that a panel should consider, among other things, "the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards."[23]

From this, it can be understood that for a measure to constitute a safeguard measure, it requires: (i) the suspension of a GATT obligation or withdrawal or modification of a GATT concession and (ii) the measure being designed to prevent or remedy serious injury to the domestic industry due to increased imports. The objective features, such as the design, structure, and expected operation will be holistically evaluated while the characterization under the domestic law as well as

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21 Cases cited *supra* note 17, para. 5.60.

22 *Id.*

23 *Id.*

the procedural aspects of the measure will also be taken into account. The United States, as a third participant in *Indonesia — Iron or Steel Products*, emphasized the relevance of notifications to the Committee on Safeguards.[24] The Appellate Body acknowledged such notifications as factors to be considered in analyzing the applicability issue.[25] Although the content of such notifications may provide useful information in analyzing the design of the relevant measure,[26] a mere lack of such notifications shall not prevent the applicability of the safeguard-related provisions. This is because the purpose of the notifications, which is to provide "transparency and information," allowing the Members "through the Committee on Safeguards to review the measures."[27] It indicates that the notifications are required for ensuring the procedural rights of Members, which in turn indicates that the notification requirements concern the matter of conformity to the safeguard provisions rather than the applicability of these provisions.

III. ARE THE SECTION 232 MEASURES SAFEGUARD MEASURES?

A. The Panel's Findings

To challenge the Section 232 measures, several countries including China requested to establish a panel (*United States – Certain Measures on Steel and Aluminum*). On December 9, 2022, the panel issued its decision.[28] Although several different reports were issued, this paper's analysis relies on a dispute between China and the United States (DS544). In the panel proceedings, the interpretation Article 11.1(c) of the Agreement on Safeguard, which apparently precludes application of the Agreement on Safeguard to certain measures,[29]

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[24] *Id.*

[25] Cases cited *supra* note 17, para. 5.51.

[26] *See e.g.*, Article 12.2 of the Agreement on Safeguards.

[27] Panel Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R (adopted January 12, 2000), para. 7.126.

[28] Case cited *supra* note 11.

[29] Article 11.1(c) of Agreement on Safeguard states "This Agreement does not apply to measures sought, taken or maintained by a Member **pursuant to** provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreement in Annex 1A other than this Agreement, or pursuant to protocols and agreements or

emerged as a central legal issue. On the interpretation of the phrase "pursuant to" in the same article, the panel held as follows:

> The panel considers that interpreting the terms "pursuant to" in Article 11.1(c) to refer to measures sought, taken, or maintained under the purview of another provision of the GATT 1994, without entailing consistency with the requirements of such other provision, accords with the specific context in which those terms appear.[30]

According to the panel, China claimed that "pursuant to" language is a requirement of conformity to "provisions of GATT 1994 other than Article XIX."[31] Meanwhile the United States believes the expression "pursuant to" serves the function of "direct[ing] the Panel to the other GATT 1994 provision pursuant to which the measure in question was attempted or tried."[32] Noting the breadth of meaning of the phrase "pursuant to," the panel compared "pursuant to" in Article 11.1(c) and terms used elsewhere in the Agreement on Safeguards, concluding that:

> . . . the nature of the relevant inquiry under Article 11.1(c) does not relate to another provision of the GATT 1994 as a legal exception or justification for inconsistencies with the Agreement on Safeguards. Rather, the relevant inquiry under Article 11.1(c) corresponds to the threshold issue of applicability and leaves as a separate inquiry whether a measure is consistent with the requirements of such other provision "pursuant to" which the measure was sought, taken, or maintained. [33]

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arrangements concluded within the framework of GATT 1994." [emphasis added by the authors].

30 Case cited *supra* note 11, para 7.79.

31 Case cited *supra* note 11, para 7.72.

32 *Id.*

33 Case cited *supra* note 11, para 7.79.

On the interpretation of the word "other than" in Article 11.1(c), China argued that a measure would not be "pursuant to" other GATT provisions as long as it possesses objective features of a safeguard measure.[34] The panel took this argument to mean that "the Agreement on Safeguards could still be applicable to a measure notwithstanding its characterization as being pursuant to another provision of the GATT 1994" and rejected such argument, finding that "the Agreement on Safeguards does not apply" when "a measure is 'pursuant to' such other relevant provision."[35]

The panel analyzed the text of Section 232 as well as relevant policy documents, acknowledging that national security considerations underpin the measure. It also notes that the measures' national security basis is evident in their application, including the scope of products and countries affected. Furthermore, the United States consistently highlighted its national security rationale for these measures in various WTO meetings and official communications.[36] In conclusion, the panel declined applicability of safeguard measures to the United States' measures because:

> . . . the Panel considers that a central aspect of the design and application of the measures at issue is their relation to the United States' determination of a threat to its national security under the relevant domestic laws. The national security considerations of the United States are manifest in the application, modification, and removal of the additional duties, quotas, and exemptions discussed above. Moreover, this aspect of the measures was emphasized and explicitly linked to Article XXI of the GATT 1994 by the United States in a series of notifications and statements to various official bodies of the WTO. The Panel considers significant the indications at both the domestic and multilateral levels that the measures at issue related to the United States' determination of a threat to its national security and the explicit references

[34] Case cited *supra* note 11, para 7.80.
[35] Case cited *supra* note 11, para 7.80-81.
[36] Case cited *supra* note 11, para 7.87-95.

> to Article XXI of the GATT 1994 as the legal basis under the covered agreements pursuant to which the measures were sought, taken, or maintained.[37]

China pointed out that the findings of injury to the United States' domestic steel and aluminum industries due to increased imports in the Steel and Aluminum Reports resemble to factors typically examined under Article 4.2(a) of the Agreement on Safeguards.[38] The panel viewed such findings in the Steel and Aluminum Reports "[as] an element of the United States' determination of a threat to its national security under the relevant domestic laws." Then "[t]he Panel considers that it would be improper to assess such factors in isolation from the threat to national security that was determined to exist under Section 232 on the basis of those and other factors."[39]

B. Evaluation of the Analysis by the Panel

The panel's interpretation of Article 11.1(c) of the Agreement on Safeguard led them to essentially preclude the possibility of the application of the Agreement on Safeguard, once they have found that the Section 232 measures were taken under the purview of Article XXI(b) of the GATT. However, the soundness of the panel's approach is dubious. Measures can be multifaceted, designed for varied purposes. The possibility that a measure could both be a safeguard measure designed to remedy the domestic industry and aim for policy objectives relevant to either general exception stipulated in Article XX of the GATT or national security exception under Article XXI of the GATT cannot be dismissed altogether. If we strictly adhere to the panel's methodology, we might encounter a scenario where a measure, deemed as taken "pursuant to" a GATT exception provision, loses the chance of justification under the Agreement on Safeguard, only to later face denial of justification by the exception clauses themselves. Moreover, WTO members impacted by measures that serve dual purposes—both as safeguard actions and as pursuits for policy objectives listed in exception clauses—would be barred from

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37 Case cited *supra* note 11, para 7.96.

38 Case cited *supra* note 11, para 7.97.

39 Case cited *supra* note 11, para 7.99.

implementing rebalancing measures, even if the measure ultimately fails to be justified under exception clauses.

There are two possible prescriptions that reconcile characterizing the Section 232 measures with the text of Article 11.1(c) of the Agreement on Safeguard. One is to understand that the carve-out only applies to measures that are not safeguard measures. However, this option is relatively difficult to reconcile with the plain reading of the text of Article 11.1(c). Also, a counter argument might be made that non-application of the Agreement on Safeguard to non-safeguard measures is made clear enough in Article 1 of the Agreement on Safeguard. The other option is to interpret "pursuant to" more narrowly than the panel. One might construe "pursuant to" to mean that Article 11.1(c) simply clarifies that measures in conformity with the GATT by virtue of other provisions of the GATT (such as the exception clauses) must not be subject to the Agreement of Safeguard, and hence not subject to the safeguard discipline. Under this interpretation, WTO members implementing measures justified on grounds other than safeguards would not face the extra burden of complying with safeguard provisions. Meanwhile, a multifaceted measure that embodies the essential elements of a safeguard measure will remain subject to safeguard discipline unless justified by other GATT provisions. This approach strikes a balance between the policy space afforded to WTO members under the GATT and the need to prevent the circumvention of safeguard-related provisions.

The panel did not explicitly analyze whether the Section 232 measures equip the constituent elements of safeguard measures set forth by the Appellate Body in *Indonesia — Iron or Steel Products*, as a consequence of its finding that the measures were "pursuant to" Article XXI of the GATT and its understanding that therefore the application of the Agreement of Safeguard is precluded. If we deploy standards ("objective feature of measure" test) demonstrated in *Indonesia — Iron or Steel Products,* the Section 232 Measures can be labeled as Safeguard Measures.

The Section 232 Measures seem to satisfy the first requirement for a measure to be considered a safeguard measure, as the United States can be said to have suspended its GATT obligation or

withdrawn or modified its GATT concession, at least by imposing either "ordinary custom duties" or "all other duties" in excess of those permitted under the Article II:1(b) of the GATT.

As for the design, the relevant provisions of the national law authorizes the President to take import adjustment measures if the Secretary of Commerce, charged with the investigations for determining whether the import of the article concerned threatens to impair national security, provides recommendations to the President based on the result of the investigation, "finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security"[40] while not providing the definition of "national security". However, Section 232 of the Trade Expansion Act of 1962 stipulates that, in operation, "the close relation of the economic welfare of the Nation to our national security" shall be recognized, and "the impact of foreign competition on the economic welfare of individual domestic industries" shall be taken into account.[41] The Secretary of Commerce interprets the phrase "national security" in Section 232 of the Trade Expansion Act of 1962 to include "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government."[42] In light of the previous interpretation, although Section 232 of the Trade Expansion Act of 1962 is not included in the United States' notification to the Committee on Safeguards pursuant to Article 12.6 of the Agreement on Safeguards,[43] it could still be argued that Section 232 of the Trade Expansion Act of 1962 allows the President to take import adjustment measures of

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40 19 U.S.C § 1862(c).

41 19 U.S.C § 1862(d).

42 United States Department of Commerce ("USDOC"), "The Effect of Imports of Steel on the National Security", at 1, https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf (last visited September 20, 2023).

43 United States, "Notifications of Laws, Regulations and Administrative Procedures Relating to Safeguard Measures," WTO Doc. G/SG/N/1/USA/1, April 6, 1995.

which the objective as well as the essential nature being protection of a domestic industry that is important to national security.

Section 232 Measures were taken based on the finding that the import quantities of steel and aluminum products were such as to weaken the internal economy of the United States, which in turn would threaten to impair its national security, and the imposition of tariffs was required to reduce the imports and keep the steel and aluminum industries affected by the imports viable.[44] It could be said that the Section 232 Measures were "designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product,"[45] and thus the measures constitute safeguard measures. Although the United States did not make the required notifications to the Committee on Safeguards at the time of the initiation of the investigation,[46] finding of serious injury or threat thereof[47] or application of the Section 232 Measures[48], the lack of the notifications shall not preclude the possibility of characterizing the Section 232 Measures as safeguard measures.

IV. REBALANCING MEASURES CAN BE TAKEN AGAINST THE SECTION 232 MEASURES

The Section 232 Measures can be characterized as safeguard measures. One of the important consequences of allowing panels to classify an action claimed to be justified under Article XXI(b) of the GATT as a safeguard measure is that, if the action is a safeguard measure, the Members affected by the safeguard measure would be able to take rebalancing measures against the action, whether or not the action is consistent with the Agreement on Safeguards.

A. What is a Rebalancing Measure?

Articles 8.2 and 8.3 of the Agreement on Safeguards provides:

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44 *Supra* note 45, at 55-61.
45 Cases cited *supra* note 17, para. 5.60.
46 Article 12.1(a) of the Agreement on Safeguard.
47 Article 12.1(b) of the Agreement on Safeguard.
48 Article 12.1(c) of the Agreement on Safeguard.

> 2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.
>
> 3. 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. [49]

Under the Agreement on Safeguards, the Member taking a safeguard measure is mandated to "endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure," and Members can agree on compensation to achieve this objective (Article 8.1 of the Agreement on Safeguards). If the Members concerned cannot agree on such compensation within the prescribed period of time, Members affected by the safeguard measure are allowed to suspend substantially equivalent GATT obligation, commonly referred to as Rebalancing Measures.

The history of Rebalancing Measures dates back to negotiations for the Charter for the International Trade Organization. The Parties to the negotiation agreed that the rebalancing mechanism[50]

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[49] Articles 8.2 and 8.3 of the Agreement on Safeguards.

[50] Fernando Piérola-Castro, WTO Agreement on Safeguards and Article XIX of GATT A Detailed Commentary 380 (Cambridge University Press, 2022). United States Department of States, "Suggested Charter for an International Trade

would serve as a deterrent to potential abuses of safeguard measures.[51] The issue of Rebalancing Measures was also a point of discussion during the Uruguay Round, particularly whether retaliation under Article XIX 3(a) could deter the abusive use of safeguards.[52] Throughout the round, several draft agreements on safeguards were circulated, providing notable clarifications, including that the Committee on Safeguards would review any potentially abusive Rebalancing Measures.[53] The final draft became what is now known as the Agreement on Safeguards.

The long history of Rebalancing Measures reveals that the parties to the negotiation consistently viewed these measures as a vital deterrent to the potential abuse of Safeguard Measures. This preparatory work of the treaty and the circumstances of its conclusion shed some light on the extent to which Rebalancing Measures should be permitted.

B. Can Other Members Take Rebalancing Measures?

1. Can Other Members Unilaterally Characterize the Measures?

Members, other than the one that has taken an action claimed to be justified under Article XXI of the GATT, are not prevented by Article 23.2 of the Dispute Settlement Understanding ("DSU")[54] from determining that such action constitutes a safeguard measure that can be subject to rebalancing measures, as determining that a particular

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Organization of the United Nations.", 22-23, September 1946. The draft charter included "Article 29 Emergency Action on Imports of Particular Products" which stipulates rules for safeguard measures and the rebalancing mechanism.

[51] UN Doc. E/PC/T/C. II/PRO/PV8 (November 8, 1946), UN Doc. E/PC/T/C. II/PV/7 (November 1, 1946).

[52] *Supra* note 53. GATT Doc. MTN.GNG. /NG9/W/1, para 17 (April 7, 1987).

[53] GATT Doc. MTN.GNG.NG9/W/25/Rev.3, para 39 (October 31, 1990).

[54] Article 23.2 of the DSU stipulates that the Members shall not "make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding."

measure constitutes a safeguard measure does not necessarily imply a determination that the measure is inconsistent with the WTO Agreements. This is because a safeguard measure itself is justified under the GATT.[55]

2. Unilateral Determination of the Conditions Set Forth in Article 8.3 of the Agreement on Safeguards

With respect to the timing of the adoption of rebalancing measures, Article 8.3 of the Agreement on Safeguards stipulates that a rebalancing measure shall not be taken for the first three years after a safeguard measure is in effect if the safeguard measure (i) has been taken as a result of an absolute increase in imports and (ii) conforms to the provisions of the Agreement on Safeguards.[56] On its face, this provision seems to allow Members to take a rebalancing measure if either condition (i) or (ii) is not met. However, whether Members are allowed to take rebalancing measures immediately, without waiting for the three-year period to pass, is less clear, in light of Article 23.2 of the DSU.

It has been argued that, for both conditions (i) and (ii), Members cannot decide whether these conditions are met on their own, as a determination that no absolute increase was present could amount to a unilateral finding that the industry definition employed by the Member that had adopted a safeguard measure was in violation of the Agreement on Safeguards.[57] However, as the determination of the absence of an absolute increase does not necessarily lead to a conclusion that the safeguard measure is unlawful, since an absolute increase is not a necessary condition for adopting a safeguard measure. It should be said that Members can make findings at least on the sufficiency of the condition (i).

On the other hand, some argue that Members are able to decide on their own the sufficiency of both conditions (i) and (ii), pointing out among other factors, the historical context of Article 8.3

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55 Article XIX:1(a) of the GATT.

56 Article 8.3 of the Agreement on Safeguards.

57 Alan O. Sykes, *The WTO Agreement on Safeguards: A Commentary* 248 (New York: Oxford University Press 2006).

of the Agreement of Safeguards and that the 90-day period in which the Members are required to adopt rebalancing measures[58] would most likely pass before a panel or the Appellate Body determines the sufficiency of these conditions.[59] Based on this view, in 2001, in response to Slovakia's safeguard measure, Poland notified the Committee on Safeguards of its intent to immediately adopt a rebalancing measure.[60] However, there seems to be no conclusive textual basis in the current text of the Agreement on Safeguards for taking this view, despite the explicit prohibition of unilateral determination of WTO-inconsistency under Article 23.2 of the DSU and the reference to DSU in the Agreement on Safeguards.[61]

When the United States adopted a safeguard measure against iron and steel products in 2002 *("US — Steel Safeguard")*, Japan[62] and the European Communities ("EC")[63] notified their intent to adopt rebalancing measures to the Committee on Safeguards. On this occasion, they seemed to have adopted an intermediate approach. Under this approach, an individual Member can decide on the sufficiency of the condition (i), while the sufficiency of the condition (ii) must be referred to the DSB.[64] This approach should be supported

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58 Article 8.2 of the Agreement on Safeguards.

59 Matthew R. Nicely and David T. Hardin, *Article 8 of the WTO Safeguards Agreement: Reforming the Right to Rebalance*, 23 (3) J. of Civil Rights and Economic Development 699, 727-35 (2008); Hahn, *supra* note 14, at 320-25.

60 Piérola, *supra* note 15, at 362.

61 Article 14 of the Agreement on Safeguards, Article 2 of the DSU.

62 Japan, "Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards", WTO Doc. G/C/15, G/SG/44 (May 21, 2002).

63 European Communities, "Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards" WTO Doc. G/C/10, G/SG/43 (May 15, 2002).

64 Hahn, *supra* note 11, at pp. 316-317; Tsuyoshi Kawase, *"Jisshitsuteki ni Tōkachi" no Jōkyo: Sēfugādokyōtei Daihachijō no Paradokkusu"* [Suspension of "Substantially Equivalent Concession": Paradox of Article 8 of the Agreement on Safeguards], in *Safeguards under the WTO Agreement: Issues and Proposals for a More Effective Mechanism*, 151-181 (Araki Ichiro and Tsuyoshi Kawase eds., Toyo Keizai Inc., Tokyo, Japan, 2004).

because of its consistency with the text of Article 8 of the Agreement on Safeguards and the Article 23.2 of the DSU.[65]

In response to the Section 232 Measures, several countries notified the Committee on Safeguards of their intent to adopt rebalancing measures. Among these countries, some countries adopted the intermediate approach. For example, the EU, expressed its view that a rebalancing measure can be taken against a safeguard measure immediately if either condition (i) or (ii) is not met. Based on this view, the EU immediately adopted part of its rebalancing measure corresponding to the part of the Section 232 Measures that was imposed on products for which imports had not increased in absolute terms, while refraining from activating the part of its rebalancing measure corresponding to the Section 232 Measures that was imposed on the rest of the products.[66] Additionally, China immediately adopted its rebalancing measure "based on the part of the measures of the United States which were not taken as a result of an absolute increase".[67] While Japan had not yet activated its rebalancing measure at the time this article was written, it has expressed its view that a rebalancing measure can be immediately adopted against a safeguard measure that is not based on an absolute increase in imports.[68] Such state practice favor the view that it is lawful to adopt a rebalancing measure immediately, at least if and to the extent the relevant safeguard is not adopted based on an absolute increase in imports.

It might appear that prohibiting unilateral determination of the conformity of a safeguard measure to the Agreement on Safeguards would weaken the deterrent effect on abuse of safeguard measures and give too much protection to WTO-inconsistent safeguard measures.

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[65] As argued by some writers, Article 8.2 of the Agreement on Safeguards should be interpreted in a practical way to allow Members to adopt rebalancing measures after the 90-day period provided in the same article has passed. *See e.g.*, Nicely and Hardin, *supra* note 61, at 737-748).

[66] *Supra* note 6.

[67] S*upra* note 7.

[68] Japan, Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, WTO Doc. G/L/1240, G/SG/N/12/JPN/4 (May 22, 2018).

Requiring determination by the DSB of conformity to the Agreement on Safeguards could significantly delay the rebalancing of the interests of the affected Members, even when there is an egregious violation of the Agreement on Safeguards. The delay is also compounded by the often criticized prolonged dispute settlement procedure under the DSU[69] as well as the current impasse surrounding the Appellate Body complicating the final resolution of WTO disputes. In addition, the deterrent effect on abuse of safeguard measures would be weakened. However, one must be aware of other considerations that weigh against expeditious adoption of rebalancing measures. Allowing the unilateral determination of the conformity would certainly lower the bar for taking rebalancing measures and could even possibly lead to abuse of rebalancing measures, such that Members adopt rebalancing measures immediately even when the safeguard measure is apparently in conformity with the Agreement on Safeguards. This situation would be at odds with the spirit of the rule-based WTO system, which prohibits unilateral actions,[70] and potentially undermines the expected function of the three-year grace period, which is to encourage compliance to the Agreement on Safeguards in taking safeguard measures.[71]

3. Reasonable Period of Time

There is another timing issue regarding the adoption of rebalancing measures that should be addressed: whether the provisions regarding a reasonable period of time for compliance and the requirement to obtain authorization from the DSB stipulated in the DSU apply when a Member takes a rebalancing measure against a safeguard measure found to be inconsistent with the provisions of the Agreement on Safeguards. When a violation of the WTO agreements by a Member is found through the dispute settlement procedure, the Member is given a reasonable period of time, usually no longer than 15 months, to comply.[72] Although the Member that has invoked the dispute settlement procedure can apply for an authorization for

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[69] *See e.g.*, Nicely and Hardin, *supra* note 61, at 731.

[70] World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, 2nd ed., (Cambridge: Cambridge University Press, 2017), at 15-16.

[71] Piérola, *supra* note 15, at 361.

[72] Article 21.3 of the DSU.

suspension of concessions or other obligations under the covered agreements, often referred to as countermeasures, when compliance is not undertaken, such applications can only occur at least 20 days after the reasonable period of time.[73] In response to such applications, a panel will be established to determine the permissible extent and form of the suspension,[74] only after which a Member can actually adopt the authorized countermeasure.

On the other hand, rebalancing measures are not bound by this timeline, and Members are allowed to take rebalancing measures immediately as soon as a violation is found. This is because rebalancing measures are specifically provided as responses to safeguard measures, which are distinct from general countermeasures to violations of the WTO agreements, and are governed by different procedures. A plain reading of the text of Article 8 suggests that Members "shall be free" to take rebalancing measures once the procedural requirements stipulated in the Article are satisfied, without any recourse to the DSU procedures.[75] However, Members would be held back from taking rebalancing measures in cases where the relevant safeguard measure is not based on an absolute increase and conforms to the Agreement on Safeguards. Although Members would be required to use the DSU procedures with regard to conformity as a consequence of the prohibition stipulated in Article 23.2 of the DSU, this does not mean that rebalancing measures must be taken in accordance with the procedures for countermeasures. Therefore, the concern regarding the protracted DSU procedures only partly applies to rebalancing measures, as Members can bypass the compliance phase and authorization phase that are required for countermeasures.

State practice endorses this view. For example, when the United States adopted imposed measures on imports of wheat gluten from the EC *("US — Wheat Gluten")*, the EU adopted its rebalancing measure five days after the DSB adopted the Appellate Body's finding that the United States' safeguard measure was inconsistent with the Agreement on Safeguards, while announcing its intent to pursue

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73 Article 22.2 of the DSU.

74 *Id.*

75 Article 8.2 of the Agreement on Safeguards.

countermeasures if the safeguard measure was not revoked.[76] Furthermore, in *US — Steel Safeguard*, the EU and Japan notified their intent to adopt rebalancing measures corresponding to the part of United States' safeguard measure not based on an absolute increase in imports immediately upon the decision of the DSB on the inconsistency of the measure.[77]

An analysis has suggested that, in *US — Wheat Gluten*, the credible threat posed to the United States by the availability of an immediate rebalancing measure, which would have been unavailable if the measure was not a safeguard measure, led to the expeditious withdrawal of the illegal safeguard measure by the United States.[78] This shows that rebalancing measures can have a *de facto* side effect of inducing compliance with the Agreement on Safeguards in a more timely manner than made possible by the compliance-inducing effect of countermeasures.[79]

4. Evaluation of Rebalancing Measures Against the Section 232 Measures

Considering the analysis laid out above, the EU's strategy taken in response to the Section 232 measures is worth examining. The EU's proposed tariffs, which were directly linked to an absolute surge in imports, were planned to be initiated on June 20, 2018. This was a clear response to the measures which they deemed did not result from an

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[76] Gary Clyde Hufbauer and Ben Goodrich, *Next Move in Steel: Revocation or Retaliation*, No. PB03-10 International Economic Policy Briefs (2003), at 8, https://piie.com/publications/policy-briefs/next-move-steel-revocation-or-retaliation (last visited September 22, 2023).

[77] *Supra* note 64 and 65.

[78] Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 THE GEO. WASH. L. Rev. 102 (2011), at 129-30.

[79] While the objective of the countermeasures is unclear (See Bryan Mercurio, "Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding", 8 (2) World Trade Review, at 321-24 (2009)), an empirical analysis shows that countermeasures are used for inducing compliance, rather than rebalancing (Gregory Shaffer and Daniel Ganin, "Extrapolating Purpose from Practice: Rebalancing or Inducing Compliance," in Chad P. Brown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge: Cambridge University Press, 2010), 73-85 at 85).

absolute increase in imports. Concurrently, the tariffs tied to potential non-compliance with the Safeguard Agreement were structured to be instated either three years after the Section 232 measures came into play or five days subsequent to the Dispute Settlement Body's (DSB) declaration that the Section 232 measures were inconsistent with the pertinent clauses of the WTO Agreement. The earlier of the two dates would be chosen.[80] It appears that the EU has constructed its rebalancing measures to align with the interpretations of the Agreement on Safeguards and DSU. This method by the EU might offer a reference point for other nations facing similar situations.

VI. CONCLUSION

The recent WTO panel decisions regarding the Section 232 Measures have brought to light significant contention surrounding the legal characterization of these measures. At the heart of this dispute is whether the measures are to be treated as safeguard measures. The panel's refusal to apply safeguard discipline to the Section 232 Measures, following United States' invocation of Article XXI(b) of the GATT, is debatable given the nature of trade measures, which may be guided by varied policy objectives.

This paper proposes a more nuanced approach. By adopting a narrower interpretation of "pursuant to," than that of the panel, we argue that safeguard discipline should be applicable unless the measure in question is justified under other provisions of the GATT, including exception clauses. If such justification is invoked but ultimately fails, WTO adjudicating bodies would be responsible for objectively examining the legal characterization of the relevant measure, in line with the Appellate Body's definition in *Indonesia — Iron or Steel Products*. Finding the measure to be a safeguard measure in this case is not precluded by Article 11.1(c) of the Agreement on Safeguard. Conversely, measures justified under Article XXI(b) of the GATT, or other exception clauses, would not fall under the safeguard discipline, preserving the discretion granted by the GATT to WTO members.

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[80] *Supra* note 6.

Once the applicability of safeguard discipline is established, Rebalancing Measures should be made available for Members affected by such measures to enable them to restore the balance of interests. Such Rebalancing Measures can be adopted in a timely manner as compared to countermeasures if the relevant safeguard measure is not taken as a result of an absolute increase in imports or is not in conformity with the Agreement on Safeguards. Although the timely availability of Rebalancing Measures may create an incentive to adopt a safeguard measure under the guise of a non-safeguard measure, thereby escaping from the threat of prompt retaliation from the affected Members, that is not possible unless the measure is justified by other GATT Articles.

Our approach strives to maintain a delicate balance between the policy space afforded to WTO members within the framework of the GATT and the need to prevent its misuse for protectionist purposes. This nuanced approach is crucial for maintaining the integrity and effectiveness of the multilateral trade system.