

A PROPOSAL FOR A COMMITTEE ON NATIONAL SECURITY AT THE WTO

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World Trade Organization (WTO) committees meet regularly to monitor and oversee the implementation of the WTO agreements. It rarely makes the news, but this work is nonetheless an important supportive function of the organization. The committees cover a wide range of topics, and some have been added from time to time. In this Article, we propose a Committee on National Security to address the growing challenge to the trade regime presented by national security measures. WTO litigation has a limited ability to handle these sensitive issues, and there would be great value in a committee designated to provide oversight of these measures. This would include the following components: a forum for regular discussion and coordination of approaches on trade-related aspects of national security matters; a monitoring mechanism to increase transparency on the use and application of national security measures; a Technical Group for developing recommendations and guidelines; and a process for immediate rebalancing, either through compensation or retaliation, where such measures have been imposed and their impact on trade can be demonstrated.

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I. INTRODUCTION

World Trade Organization (WTO) litigation is often high-profile and receives many of the headlines relating to the organization's work. Legal rulings that one country may impose billions of dollars in trade sanctions on another, or that an environmental law has been found to violate international trade obligations, grab people's attention. But there is lesser-known administrative work of the WTO, where various committees¹ meet regularly to monitor and oversee the implementation of the WTO agreements. It rarely makes the news, but this work is nonetheless an important supportive function of the organization.

Like other parts of the WTO, the committees are member-driven and are composed of country delegates from either the missions in Geneva or from the capitals. While they do not make decisions that have binding legal effect, they can serve a variety of functions, such as sharing best practices, developing guidelines for technical cooperation activities, or providing a forum for Members to discuss trade actions another Member has taken. This last function covers a range of different measures: tariffs, rules of origin, anti-dumping measures, environmental protection measures, and other domestic regulations, such as anti-obesity food labeling rules, to name a few. It is important to note that not all matters discussed in committees are covered directly by WTO obligations.

The committees cover a wide range of topics, but these generally fit into two broad categories: those that focus on specific obligations in the WTO agreements, such as the Committee on Technical Barriers to Trade, the Committee on Agriculture, and the Committee on Safeguards; and those that focus on broader systemic issues, such as the Committee on Trade and Environment, Committee on Trade and Development, and the Committee on Regional Trade Agreements.

But there is no reason for the current list to be set in stone. Committees have been added from time to time, such as the Working Group on Trade, Debt, and Finance and the Working Group on Trade and Transfer of Technology, which were established pursuant to the Doha Mandate, and more recently, the Committee on Trade Facilitation.² If additional areas would benefit from oversight, new committees should be formed. The

1. The term "committee" is used here to describe the work of councils, specific committees and working groups.

2. See *Working Group on Trade, Debt and Finance*, WTO, https://www.wto.org/english/tratop_e/devel_e/dev_wkgrp_trade_debt_finance_e.htm; *Working Group on Trade and Transfer of Technology*, WTO (June 16, 2014), https://www.wto.org/english/tratop_e/devel_e/dev_wkgrp_trade_transfer_technology_e.htm; *Trade Facilitation*, WTO (Feb. 22, 2017), https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm - V.

political decision-making bodies of the WTO, the Ministerial Council and the General Council, have the authority to establish new committees, and set their terms of reference, that is, the scope of what the committee covers. In this Article, we propose a Committee on National Security to address the growing challenges to the trade regime³ presented by national security measures. WTO litigation has a limited ability to handle these sensitive issues,⁴ and there would be great value in a committee designated to provide oversight of these measures. As described in more detail below, this would include the following components: a forum for regular discussion and coordination of approaches on trade-related aspects of national security matters; a monitoring mechanism to increase transparency on the use and application of national security measures; a Technical Group for developing recommendations and guidelines; and a process for immediate rebalancing, either through compensation or retaliation, where such measures have been imposed and their impact on trade can be demonstrated.

II. THE FUNCTIONS OF WTO COMMITTEES

The WTO is made up of a number of standing and ad hoc bodies with various roles.⁵ The Ministerial Conference, which serves as the highest executive body and is composed of minister-level representatives from each country, meets at least every two years. The Ministerial Conference can make binding decisions on all WTO matters. The General Council, which meets regularly throughout the year, has the same authority as the Ministerial Conference when the latter is not in session, and is made up of ambassador-level diplomats. Representatives to the General Council also sit on the Dispute Settlement Body (DSB), which meets every month, and the Trade Policy Review Body (TPRB).

3. See generally J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. (forthcoming 2020) (discussing the impact of national security policies on trade law and investment flows).

4. The value of WTO litigation on these issues is uncertain at this point. National security litigation could harm the WTO as an institution if Members do not comply with rulings, as it would undermine confidence in the system more broadly. On the other hand, there may be instances where a government wants a national security restriction adjudicated simply for the moral force a ruling provides. A full evaluation of the impact of this litigation will have to await the outcomes of several ongoing cases. See generally Simon Lester & Huan Zhu, *A Proposal for 'Rebalancing' to Deal with 'National Security' Trade Restrictions*, 42 FORDHAM INT'L L.J. 1451 (2019) [hereinafter, Lester & Zhu, *Proposal for Rebalancing*] (discussing the recent increase in litigation involving WTO concerns); Simon Lester & Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST. POL'Y ANALYSIS (June 25, 2019) [hereinafter Lester & Zhu, *Closing Pandora's Box*] (discussing the Trump Administration's expansion of the WTO's national security rationale clause).

5. *WTO Organizational Chart*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf (last visited Apr. 6, 2020).

Below the General Council are numerous administrative bodies, including specialized councils, committees, working groups, and working parties that support the work of both the General Council and the Ministerial Conference. Notably, these bodies operate with high degrees of independence, as their work tends to be highly technical.⁶ The committees and working groups operate below the political or executive arm of the WTO, with some reporting to the Council for Trade in Goods and the Council for Trade in Services.

The WTO's committees are responsible for what is known as the "regular work" of the organization—they oversee the day-to-day implementation of the agreements, as well as discuss a number of systemic issues. Some of this work is focused on developing specific or general guidelines, recommendations, decisions, and principles that can help facilitate the implementation of the agreements. It is important to note that this function does not change the text of the agreements, but rather serves as the "building blocks" to establish best practices.⁷ For instance, principles developed in the TBT Committee have shaped a number of obligations in regional trade agreements.⁸ Furthermore, these knowledge exchanges are vital in preventing trade friction from arising between Members in the first place through increasing transparency, for example, by establishing clear guidelines on when a Member should notify a potentially trade impacting measure, and what that notification should include.

Another important aspect of some committees is the "specific work," which provides an opportunity for members to raise what can be referred to as "specific trade concerns" on measures that other Members have taken or may be planning to take that could cause trade friction.⁹ These concerns are sometimes based on official notifications from Members, actions that may warrant a notification, or counternotifications from other Members. Specific trade concerns are raised by one or more Member (the Members concerned) to another Member (the Member maintaining the measure).

A number of scholars and experts have noted that the specific function has been especially beneficial in providing a forum to resolve disagreements

6. PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 135 (4th ed. 2017).

7. ERIK N. WIJKSTRÖM, INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV. [ICTSD], *THE THIRD PILLAR: BEHIND THE SCENES*, WTO COMMITTEE WORK DELIVERS 3 (Aug. 2015).

8. Devin McDaniels et al., *A Closer Look at WTO's Third Pillar: How WTO Committees Influence Regional Trade Agreements*, 21 J. INT'L ECON. L. 815, 830 (2018).

9. WIJKSTRÖM, *supra* note 7, at 4. Not all committees refer to these as specific trade concerns, but they exist in many committees under different categories of issues discussed, and can be raised, for example, as separate agenda items, and in more limited cases as "Other Business."

before they can become disputes.¹⁰ However, others have pointed out that the outcome of resolutions is often limited, with regulatory adjustments only at the margins.¹¹ What many agree on is that the committees provide an essential forum for Members to openly discuss concerns, particularly giving voice to smaller country Members that do not always have the resources to travel between capitals to find clarification or resolution on an issue. In addition, the committees also provide Members the opportunity to identify other Members that are similarly impacted by a measure and to coordinate a response.¹²

While the committees vary greatly in all of these functions, with the technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) committees often identified as models of success, all provide similar basic functions that are vital to the organization's daily operation. Thus, there is room to learn from how different committees that address a wide range of issues, sometimes cross-cutting, are able to manage a balance between the right of Members to take certain actions and the overall maintenance of an open multilateral trading system. In the next sections, we examine recent concerns over the role of national security in the trading system and explore how a specialized committee might be of value in this area.

III. THE LIMITS OF NATIONAL SECURITY LITIGATION

After decades of careful avoidance of WTO disputes over national security measures, there has been a proliferation of such disputes in recent years.¹³ But can the WTO litigation process resolve these disputes?

10. See Kateryna Holzer, *Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee 2–3* (WTO, Econ. Research & Statistics Div. Staff, Working Paper ERSD-2018-11, 2018), https://www.wto.org/english/res_e/reser_e/ersd201811_e.pdf; Henrik Horn et al., *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees 1* (Columbia Univ. Law Sch., The Ctr. for Law & Econ., Working Paper No. 494, 2013) (discussing how STCs can serve as informal mechanisms for resolution of trade conflict); WIJKSTRÖM, *supra* note 7, at 4–5 (discussing the effectiveness of STCs). See generally Robert Wolfe, *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life* (WTO, Staff Working Paper, No. ERSD-2013-03, 2013) (discussing the merits of the WTO's dispute settlement system).

11. Tim Dorlach & Paul Mertenskötter, *Interpreters of International Economic Law: Corporations and Bureaucrats in Contest Over Chile's Food Warning Label*, (forthcoming); Inveer Manak, *Enforcing International Trade Law in the World Trade Organization's Committees: Courting Third Party Opinion 147* (Nov. 24, 2019) (unpublished Ph.D. dissertation, Georgetown University) (on file with Georgetown University Graduate School of Arts and Sciences).

12. See Manak, *supra* note 11 (“The committees are not a cold call, and not an exercise in general learning about a measure—they are primarily targeted at learning about the responses of the broader membership.”).

13. Recent cases with a national security element are as follows: Eight complaints in *United States—Certain Measures on Steel and Aluminum Products* filed in 2018 (DS544, 547, 548, 550, 551, 552, 554, 556); five complaints involving Qatar as a complainant or a respondent, two filed in 2019

The first WTO panel report interpreting the GATT Article XXI national security exception was issued in 2019 in the *Russia—Traffic in Transit* case.¹⁴ In the coming months and years, there will likely be several additional rulings in ongoing cases, including the highly contentious litigation over the Section 232 steel/aluminum tariffs imposed by the United States under the Trump administration. But the prospects of such rulings providing a resolution to those cases are limited.¹⁵ To some extent, a Member's declaration that a measure is for national security purposes could be taken as a statement that it will not change the measure even in the face of a WTO DSB ruling against it. As a result, there may be limits to the effectiveness of litigation in this area.

Of course, DSB rulings and subsequent compliance through modification or withdrawal of the measure are not the only ways to resolve trade conflict. Article 3 of the DSU refers to “mutually agreed solutions,” and a variety of such agreements have been reached over the years. As long as it does not violate a specific WTO obligation, any such solution is permitted. One solution that is always available is to rebalance the obligations as between the parties involved in the conflict, in the form of compensation and suspension of concessions or other obligations as temporary measures.

In the context of disputes, rebalancing takes place pursuant to the provisions of DSU Article 22. But there are other possibilities for rebalancing, such as the special procedures of Article 8 of the Safeguards Agreement, which allow for compensation and retaliation without going through a dispute settlement process.¹⁶ Making rebalancing available in these circumstances is a political and policy decision. Traditionally, immediate rebalancing has only been available for safeguards, but the case could be made for rebalancing in other contexts too.

There is a strong case for immediate rebalancing in the context of national security.¹⁷ Where national security is mentioned, formally or informally, as a justification for a measure, a violation is often assumed and not even contested, although where litigation eventually arises, a responding

(DS567, 576), one filed in 2018 (DS526), two filed in 2017 (DS527, 528); four disputes between Russian and Ukraine, one filed in 2020 (DS499), one filed in 2019 (DS512), two filed in 2017 (DS525, 532); and a complaint, filed in 2019, by South Korea against Japan (DS590).

14. Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

15. Lester & Zhu, *Proposal for Rebalancing*, *supra* note 4, at 1451–52; Lester & Zhu, *Closing Pandora's Box*, *supra* note 4, at 1.

16. Lester & Zhu, *Proposal for Rebalancing*, *supra* note 4, at 1468; Lester & Zhu, *Closing Pandora's Box*, *supra* note 4, at 7.

17. Lester & Zhu, *Closing Pandora's Box*, *supra* note 4, at 1.

party may put forward arguments contesting that assumption. If the national security justification is upheld in the context of litigation, there is little hope of inducing compliance with WTO obligations. As noted, a government's declaration of national security as the reason for a measure is essentially a statement that it will not comply with a ruling against it. Thus, moving on to the rebalancing stage immediately where national security has been formally cited as the justification for the measure is appropriate.

For rebalancing to work, however, there needs to be a set of rules that define the scope of measures covered¹⁸ and a body to oversee them. A Committee on National Security can be helpful here, and can also serve additional functions related to conflict over trade restrictions related to national security.

IV. THE ROLE OF A COMMITTEE ON NATIONAL SECURITY

In response to the Trump administration's Section 232 steel/aluminum tariffs, which were imposed in 2018, many countries latched on to the Safeguards Agreement rebalancing process as a way to retaliate. That approach was of questionable legality,¹⁹ given that the United States had not purported to be taking safeguard measures, but as a matter of principle it was understandable. What is missing is a legal and orderly process for achieving a similar outcome, with an option of compensation rather than retaliation as the means of rebalancing. A Committee on National Security could take on this role and guide the issue of national security trade restrictions more generally.

The General Council can establish a Committee on National Security (NS) and set out its terms of reference. Given the cross-cutting nature of national security issues (affecting goods, services, intellectual property, and various systemic issues), the NS Committee should report directly to the General Council. The precise scope of the committee would have to be

18. If all measures justified by national security were subject to rebalancing, the system would be overwhelmed, so it is only a subset of national security measures that are covered. One approach would be to apply this process to new measures that upset the existing negotiated balance, but other possibilities could also be explored.

19. The United States challenged the retaliatory actions of six Members. See Request for Consultations, *Canada—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS557/1 (Sept. 11, 2019); Request for Consultations, *China—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS558/1 (Sept. 11, 2019); Request for Consultations, *European Union—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS559/1 (Sept. 11, 2019); Request for Consultations by the United States, *Mexico—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS560/1 (Jul. 19, 2018); Request for Consultations, *Turkey—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS561/1 (Sept. 11, 2019); Request for Consultations, *Russian Federation—Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS566/1 (Sept. 11, 2019).

defined through discussions at the level of the Ministerial Conference or the General Council. In general terms, it should serve as a focal point for the discussion and coordination of approaches to national security matters and trade in the WTO, as well as be open to the participation of any Member. Bringing these discussions to a permanent committee at an early stage, with a clear process for addressing them, could be useful in reducing the sometimes adversarial nature of exchange on these issues in the General Council when they occasionally burst onto the agenda.²⁰

In developing the scope of the NS committee's work, the following should be considered for the terms of reference:

- To have the Committee elect its own Chair and meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to trade and national security.
- To keep measures taken for national security reasons that have an impact on trade under continuous review. This can include, but is not limited to, notifications, counternotifications, and annual reviews of the committee's work, reported to the General Council. Formal invocation of GATT Article XXI, GATS Article XIV, or TRIPS Agreement Article 73 is not required for a measure to be considered.
- To provide guidelines and recommendations for, and to review periodically, technical cooperation activities as they relate to national security measures. This can include, for example, guidance on notification requirements and how sensitive information should be handled.
- To establish an open-ended Technical Group and working parties or other bodies as may be appropriate, including ad hoc consultation bodies, to allow for off-the-record discussions on specific matters between interested parties.
- To provide guidance on the rebalancing process, including, for example, general principles and guidelines for ad hoc consultations.

20. For example, China put the United States' Section 232 Investigations and Measures on Steel and Aluminum Products on the General Council agenda on May 8, 2018. *See* WTO General Council, *Minutes of the Meeting*, ¶ 4.1, WTO Doc. WT/GC/M/172 (July 6, 2018). China elicited the following response from U.S. Ambassador to the WTO, Dennis Shea: "the United States finds it curious that China has asked to place this item on the agenda for today's meeting . . . we are perplexed that China now asserts its status as a victim . . . [w]e note the attempt by some Members to cast the President's actions in terms that suit their desire to pursue a particular WTO recourse. These attempts are without valid foundation and we will not entertain them." U.S. Mission Geneva, *Ambassador Dennis Shea's Statement at the WTO General Council*, U.S. MISSION TO INT'L ORG. IN GENEVA (May 8, 2018), <https://geneva.usmission.gov/2018/05/08/ambassador-dennis-sheas-statement-at-the-wto-general-council/>.

- To assist the committee in its monitoring function, the Secretariat shall prepare annually a factual report on the trade impact of national security measures based on notifications and other reliable information available to it.

This basic framework is by no means comprehensive, but it touches upon the key functions that the NS Committee should provide to be most useful to Members. A few specific aspects of these functions will now be discussed in greater detail.

A. Notifications & Specific Trade Concerns

In order to assist the committee with its monitoring function, Members should notify all national security restrictions having an impact on trade to the Secretariat. The notification should include: the title of the measure and its text; the government body responsible for developing the measure; a list of products or services impacted by the measure; the objective and rationale that led the Member to “consider” it necessary, including the nature of urgent problems where applicable; references to particular sub-provisions of the relevant national security provisions; and a contact point.

As things stand now, governments have the ability to impose trade restrictions for protectionist purposes and later invoke the national security exceptions during litigation. There are requirements that Members “should be informed to the fullest extent possible of trade measures taken under” GATT Article XXI and GATS Article XIV,²¹ but the notification obligation needs to be stronger. It would be desirable to have all national security trade restrictions announced at the earliest possible stage, ideally during the process of internal domestic deliberation, in order to have a proper debate and discussion. Measures that have actually been imposed should be reported immediately. Bringing these cases to light early and having WTO Members think carefully about the proper scope of the exception is of great value.

Notifications should be made available to all Members and catalogued online as part of a national security measures information management system, similar to the TBT and SPS information management systems.²² This will allow Members to search all notifications, the concerns raised in committee, the relevant enquiry points for other Members, and to make

21. Decision of 30 November 1982, *Decision Concerning Article XXI of the General Agreement*, ¶ 1, L/5426 (1982); GATT Analytical Index (pre-1995), WTO, *Article XXI Security Exceptions*, in GATT ANALYTICAL INDEX (PRE-1995) 606 (1994); WTO, *GATS Article XIV bis Security Exceptions (Practice)*, in WTO ANALYTICAL INDEX ¶ 2 (Feb. 2019).

22. See generally WTO, *Technical Barriers to Trade Information Management System* (Jun. 24, 2019), <http://tbtims.wto.org/en/> (explaining how the TBS IMS works); WTO, *Sanitary and Phytosanitary Information Management System* (Jun. 12, 2019), <http://spsims.wto.org/en/> (explaining how the SPS IMS works).

available all reports related to the committee's work. Of course, as certain aspects of national security measures must, by their very nature, be kept confidential, guidelines should be developed as to the appropriate detail provided on these measures to the public. However, this aspect of the committee should be kept as transparent as possible, along with minutes of the committee meetings, to allow for maximum participation of all Members, since not all Members are able to attend every meeting due to the small size of their delegations. This will give Members the opportunity to raise specific trade concerns (STCs) based on notifications provided, as well as a system for submitting their own counternotifications. STCs should also be recorded in an online database.

Transparency provisions in the TBT and SPS agreements have helped to facilitate non-judicial settlements through establishing best practices and also through STCs.²³ STCs enhance transparency by allowing Members to name and shame their peers, so that Members are held accountable for the measures they take. In committee, a Member that is maintaining a measure must provide a response to the Member or Members concerned, ensuring that some dialogue takes place, whether it be in clarifying the rationale for a measure, or explaining why a measure has not been notified, for instance. It thus provides a forum for Members to communicate when bilateral discussions fail. In addition, STCs also facilitate the development of coalitions so that Members can work cooperatively to push for adjustment, or to coordinate their approach if the concern develops into a dispute.²⁴

Clear guidelines for the submission of STCs to the committee should be established, based on existing practices in the TBT and SPS committees. Mainly, it is important that Members submit STCs in advance of regular committee meetings so that they may be placed on the meeting agenda and circulated at least ten days in advance of committee meetings. This provides the Member maintaining the measure an opportunity to prepare a response and to organize a private bilateral meeting with the Member concerned to speak frankly about the measure.²⁵ Advance notice also cools the temperature of discussions and facilitates technical discussion of matters, limiting political posturing.

23. Holzer, *supra* note 10, at 3; Marianna B. Karttunen, *Transparency and Dispute Settlements: Complements or Substitutes? A Study of the Agreements on Sanitary and Phytosanitary Measures and Technical Barriers to Trade 223* (Dec. 12, 2016) (unpublished Ph.D. thesis, European University Institute) (on file with Department of Law, European University Institute).

24. See Manak, *supra* note 11, at 6–7 (discussing how STCs can, *inter alia*, facilitate coalition building and increased cooperation amongst states).

25. These bilaterals generally take place on the sidelines of scheduled committee meetings.

B. Open Discussion and Closed Technical Group

In addition to the specific work of the committee detailed above, there is also great benefit in maintaining a forum for the general discussion of national security matters and trade. Any items related to systemic issues should be placed on the committee agenda in advance of meetings. Where discussion would benefit from more extensive treatment, special sessions on thematic issues should be undertaken within the same week that committee meetings are held. For example, there could be a session on the expansion of foreign investment screening for national security reasons. This will allow for a more detailed and focused discussion and coordination on these specific topics. Looking at the GATS committees, Andrew Lang and Joanne Scott have noted how sustained discussions in these committees can “help to build common conceptual frameworks and shared ideas about the fundamental objectives and limits of the GATS.”²⁶ This is what WTO Secretariat official Erik Wijkström describes as building blocks that can help develop best practices among Members and serve as the basis for more cooperative efforts to address common challenges.

While this function is prominent in a number of other committees and would be useful in this case, it does have its limitations. A particular difficulty in this context is the nature of the measures themselves. Since measures are being taken for the stated purpose of national security, there will inevitably be some topics that Members would not want to openly discuss and have documented in the minutes of the committee meetings. Therefore, we suggest that a Technical Group also be established to serve as a forum for off-the-record discussions of sensitive issues, where Members can engage in a more direct manner. The Technical Group could be composed of committee delegates and would ideally include officials from capital, not just delegates from the missions in Geneva, with specific expertise on the matter at issue (i.e. experts from government agencies). This would not only keep the discussions technical, but also provide for opportunities to develop recommendations for the committee, for example, on information that should be provided or excluded from specific notifications. Essentially, where open discussion is not practical, Members should be afforded other options.

This would also act as a temporary escape valve for discussion on a specific measure that a Member has taken, or is planning to take, which could not be resolved in the regular meetings of the committee. In effect, the Technical Group would be the second stage in discussions of a matter before

26. Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT'L L. 575, 587 (2009).

ad hoc consultations and the rebalancing process are pursued. It thus provides an additional buffer for Members before action against the Member maintaining the measure can be taken, thus serving to prevent the escalation of actions into trade conflict.

C. Ad Hoc Consultations and the Rebalancing Process

The functions detailed above are important for giving Members an opportunity and an incentive to explain their national security measures before other Members take trade actions in response, offering more time before rebalancing can be applied where measures have been notified. In the absence of litigation and when the discussions of notified measures do not generate a resolution in committee (either in regular session or through the Technical Group), a process of ad hoc consultations for rebalancing should be made available. Regarding how this rebalancing process would work, there is something to learn from the existing safeguards process. On paper at least, the Safeguards Agreement rules provide for a quick rebalancing, either through compensation or suspension. Under Articles 8.1 and 12.3, when a Member proposes to apply or extend a safeguard measure, it “shall endeavour to maintain a substantially equivalent level of concessions and other obligations” with those Members “affected by such a measure.” To achieve this, the Members concerned “may agree on any adequate means of trade compensation.” If compensation cannot be agreed to, Articles 8.2 and 8.3 govern suspensions of concessions or other obligations by the affected Members, which can be imposed under certain conditions. Under Article 13.1(e), the Safeguards Committee is to “review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are ‘substantially equivalent,’ and report as appropriate to the Council for Trade in Goods.”

In practice, however, this system has not worked very well. Compensation is a challenge, in part because of the most-favored nation (MFN) requirement, which places practical limits on what the imposing Member can offer. And suspension is not allowed for three years unless specific conditions are met, which allows Members to impose their safeguard measures for a term of three years and avoid retaliation. To date, the rules and Committee functions have not been able to facilitate the safeguards rebalancing process. Issues surrounding this process are currently being litigated in the *Turkey—Air Conditioners* case, DS573.²⁷

27. See Request for Consultations by Thailand, *Turkey—Additional Duties on Imports of Air Conditioning Machines from Thailand*, WTO Doc. WT/DS573/1 (Dec. 10, 2018). The Panel has reported that it “does not expect to issue its final report to the parties before the second half of 2020.” Communication from the Panel, *Turkey—Additional Duties on Imports of Air Conditioning Machines*,

For national security rebalancing to work, it needs to account for the problems with the safeguards rebalancing process. With regard to compensation, one improvement in the national security context would be that the Committee could look across all sectors, as it is not limited to goods. Thus, if offering additional market access to other goods is too sensitive, as the least sensitive tariffs have already been lowered, a government might consider offering up liberalization of services, where only a small amount of liberalization has occurred so far. Governments might find that there are a number of areas where services liberalization would help them as well as their trading partners.

For both compensation and suspension, what is needed is a mechanism to evaluate competing claims of economic injury, as the two sides are not likely to agree on the amount of harm. Full-fledged dispute settlement would be too contentious and time-consuming, but some kind of third-party intervention may be useful. This is something the safeguards process has lacked.

The ad hoc consultation process should allow for the following:

- an opportunity for affected parties to express concern about a trade restriction and indicate the amount of economic harm;
- an opportunity for the opposing party to counter with its own harm estimates and offers of compensation;
- an expedited mediation/arbitration process when the parties cannot reach agreement on compensation, in order to determine the amount of harm (the process could be overseen by the chair of the committee or some other appointee agreed to by the parties),²⁸ and
- a deadline for the imposing party to offer compensation, after which retaliation in the designated amount, as determined by consultations, is authorized.

The committee, perhaps through a special working group, can track and monitor the outcome of these ad hoc consultations, gathering data, evaluating the effectiveness, and proposing modifications. Working groups established for this purpose should be temporary, and only include parties to the original ad hoc consultation, unless both parties agree otherwise. To

WTO Doc. WT/DS573/14 (Oct. 9, 2019).

28. This mediation/arbitration procedure is not envisioned as a replication of a procedure that was established by the SPS committee in 2014, which provided the chair of the committee to act as a third-party mediator between members on matters of concern, when requested. For the 2014 procedure, see Committee on Sanitary and Phytosanitary Measures, *Procedures to Encourage and Facilitate the Resolution of Specific Sanitary or Phytosanitary Issues Among Members in Accordance with Article 12.2*, WTO Doc. G/SPS/61 (Sept. 8, 2014). Instead, Members should establish a procedure for choosing from a roster of potential third-party mediators or arbitrators, which do not have to be WTO delegates or staff. For example, former Appellate Body judges could be used.

ensure some transparency, Members should be obligated to notify when compensation has been agreed to, or retaliation will be taken to the committee. The details of compensation should be disclosed, although Members could decline to do so. Retaliation would have to be made public, however.

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 (although if a government is acting in a protectionist manner, expecting it to liberalize is perhaps unrealistic). 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.²⁹ Adding services to the mix 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.

That process will come with some significant challenges. It will bump up against core GATT/WTO principles such as MFN. Liberalizing trade with only the complainant undermines this principle, while liberalizing trade with everyone makes the exercise much more challenging.³⁰

29. JOHN JACKSON, *THE WORLD TRADING SYSTEM* 168 (1994); Chad P. Bown & Meredith A. Crowley, *Safeguards in the World Trade Organization* 6 (Feb. 2003) (unpublished manuscript) (on file with Brandeis University), http://people.brandeis.edu/~cbown/papers/bown_crowley_kluwer.pdf (“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 J. CIV. RTS. ECON. DEV. 699, 716 (2008) (discussing the impact of tariffs on concessions).

30. Direct payments to the affected foreign producers, like in the *U.S.—Cotton Subsidies* case may offer a solution, but they are not always a political possibility, and they are far from ideal as a matter of policy.

V. CONCLUSIONS

As governments continue to push forward with bilateral, regional, and multilateral trade agreements, there will be opportunities to experiment with new mechanisms. The Trump administration is unlikely to support the proposals made here (and some other countries are likely to object as well), but other governments that are concerned about the abuse of national security measures can incorporate provisions along these lines in agreements that they sign, both bilateral and plurilateral. In this way, the norm can spread, with the hope that its usefulness will be demonstrated and with the aim of eventual inclusion in a multilateral agreement.