

Returning to Commonsense: The US Section 232 Tariffs Are Not Security Measures under WTO Law

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Abstract: The increasing number of investigations and tariffs on imports of important goods into the United States (US) under Section 232 of the Trade Expansion Act of 1962 deeply bothered the world. One of the most controversial legal issues concerns whether the US Section 232 tariffs are national security measures as argued by the US or safeguards as claimed by some other members. The panels in DS544 and DS558 adopted and applied the overly formalistic standard of “pursuant to” in the context of Article 11.3(c) of the Agreement on Safeguards, leading to easy circumvention of WTO obligations, or contradictory and counterintuitive results, because a measure that does not fall within the scope of Article XXI of the GATT 1994 can be said to be sought, taken, or maintained pursuant to the same provision. Each of the three approaches to the legal characterization of a measure under WTO law derived from WTO dispute settlement system, that is Full Compliance Standard, Substantial Standard and Formalistic Standard, all has its own shortcomings. It is suggested that WTO adjudicators should adopt a “Fall within the Scope or Applicability Standard” when assessing the nature of a measure within the WTO legal framework. Based on this standard, the US Section 232 tariffs are in no way security measures within the meaning of Article XXI(b) of the GATT 1994, because they don’t fall within the scope of one of subparagraphs (i)–(iii).

Keywords: US Section 232 Tariffs, WTO Law, Security Measures, Safeguards, Applicability Standard

I. INTRODUCTION

A. Increasing Number of Section 232 Investigations and Tariffs Deeply Bothered the World

During the era of Trump 1.0, the United States (US) initiated six national security investigations against imports of steel, aluminum, uranium, titanium sponge, automobiles and automobile parts, and vanadium under Section 232 of the Trade Expansion Act of 1962. The investigations into steel and aluminum

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resulted in 25% and 10% Section 232 tariffs respectively in March 2018. The investigation into automobiles and automobile parts formed the basis of 25% Section 232 tariffs in March 2025.

Beyond various tariffs under the International Emergency Economic Powers Act (IEEPA), such as trafficking tariffs against imports from Canada, China and Mexico as well as reciprocal tariffs targeted at all imports into the US, and one investigation into six unfair trading practices by Brazil under Section 301 of the Trade Act of 1974, the Trump 2.0 Administration has increasingly initiated Section 232 investigations and imposed Section 232 tariffs. By the end of 2025, the United States Department of Commerce (USDOC) had launched eleven Section 232 investigations into imports of timber and lumber, copper, semiconductors and semiconductor manufacturing equipment, pharmaceuticals and pharmaceutical ingredients, processed critical minerals and derivative products, trucks, commercial aircraft and jet engines and parts for commercial aircraft and jet engines, polysilicon and its derivatives, unmanned aircraft systems (UAS) and their parts and components, wind turbines and their parts and components, personal protective equipment, medical consumables, and medical equipment, respectively. Meanwhile, the US increased the Section 232 tariffs on aluminum from 10% to 25% and removed all the country-specific exemptions in February 2025 and then increased the Section 232 tariffs on steel and aluminum to 50% in June 2025. A 25% tariff on automobiles and automobile parts as well as a 50% tariff on semi-finished copper products and intensive copper derivative products were also imposed under Section 232 of the Trade Expansion Act of 1962 in March and July 2025 respectively. In September 2025, the US imposed a 10% 232 tariff on softwood lumber, 25% 232 tariffs on certain upholstered furniture as well as kitchen cabinets and vanities. In October 2025, the US imposed a 25% 232 tariff on medium- and heavy-duty trucks and truck parts, a 10% 232 tariff on buses. In January 2026, the US imposed a 25% 232 tariff on certain advanced computing chips and certain derivative products, such as the NVIDIA H200 and AMD MI325X. As for processed critical minerals and their derivative products (PCMDPs), in January 2026, the President Trump only ordered the US Secretary of Commerce and the US Trade Representative to jointly negotiate agreements with trading partners to address the threatened impairment of

national security with respect to imports of PCMDPs from any country and no additional tariffs were imposed on PCMDPs for now.

Based on the expectation that the US courts are likely to veto the President's unlimited tariff powers under the IEEPA in the next months, the Trump 2.0 Administration will probably launch more Section 232 investigations and levy more Section 232 tariffs based on the results of the ongoing and future Section 232 investigations.

The US Section 232 investigations and tariffs deeply bothered all countries except the US and economic operators all around the world. Looking into the future, they will disturb the fragile and unbinding deals or agreements made between the US and a few economies in the shadow of "reciprocal tariffs" taken under the IEEPA. Imports from every sector or industry and from every economy are still under the threat of the US Section 232 tariffs. Uncertainty continues.

B. The Nature of the US Section 232 Tariffs Was Highly Controversial and Is Still Unresolved

From the WTO law perspective, a major legal issue was hotly debated and is still to be solved. Are the US Section 232 tariffs security measures under Article XXI(b) of the GATT 1994? If not, are they safeguards under Article XIX of the GATT 1994 and the Agreement on Safeguards? In the context of Section 232 tariffs on steel and aluminum, the US insisted that the Section 232 tariffs are security measures under Article XXI(b) of the GATT 1994 and cannot be reviewed by WTO adjudicators. The EU, China and some other members argued that the US Section 232 tariffs are safeguards and they can legally take rebalancing or retaliatory measures against imports from the US under Article 8.2 of the Agreement on Safeguards.

The US Section 232 tariffs on steel and aluminum and retaliatory responses from seven members resulted in sixteen WTO litigations and six panel reports, with four reports ruling against the US Section 232 tariffs on Steel and Aluminum as well as two reports also making unfavorably rulings on rebalancing tariffs imposed on certain imports from US by China and Turkey.¹ All the six panels did not explicitly say a word on the question of whether the

¹ It is noted that the four panels reviewing US measures were composed of the same three panelists and the two panels reviewing rebalancing tariffs were composed of the same but other three panelists.

US Section 232 tariffs on steel and aluminum are security measures under Article XXI of the GATT 1994 or safeguards under Article XIX of the GATT 1994 and the Agreement on Safeguards. All the six panel reports were “appealed into the void” in the context of the continuing paralysis of the WTO Appellate Body.

The controversies surrounding the nature of the US Section 232 tariffs continued. At the WTO Council for Trade in Goods meeting held in July 2025, the United States and four WTO Members, the European Union, India, the United Kingdom and Japan, heatedly debated on the nature of Section 232 tariffs and also the so-called reciprocal tariffs.²

This paper will critically analyze this issue, mainly based on the rulings of two WTO panel reports issued in *United States — Certain Measures on Steel and Aluminum Products* (DS544)³ and *China — Additional Duties on Certain Products from the United States* (DS558)⁴ as well as other relevant WTO panel and Appellate Body reports. The DS544 was brought by China against the US 2018 Section 232 tariffs on steel and aluminum and the DS558 was initiated by the US targeted at China’s retaliation measures under the assumption that the US Section 232 tariffs are safeguards. It is argued that the US Section 232 tariffs are neither security measures nor safeguards.

II. THE WTO PANELS’ RULINGS ON THE US SECTION 232 TARIFFS ON STEEL AND ALUMINUM

A. Relevant Texts of the WTO Covered Agreements

The relevant part of Article XXI of the GATT 1994 read as follow:

Article XXI Security Exceptions

Nothing in this Agreement shall be construed

...

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

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

² WTO, Report (2025) of the Council for Trade in Goods, G/L/1616, December 4, 2025, paras. 12.1–12.2.

³ Report of the Panel, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS544/R, Circulated on December 9, 2022 (hereinafter referred to as “Panel Report, US – Tariff Measures (China)”).

⁴ See Report of the Panel, *China – Additional Duties on Certain Products from the United States*, WT/DS558/R, Circulated on August 16, 2023 (hereinafter referred to as “Panel Report, China – Additional Duties (US)”).

are derived;

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

...

The relevant part of Article 11 of Agreement on Safeguards reads as follow:

Article 11 Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of the GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

...

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of the GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of the GATT 1994.

Based on Article 11.3 (c) of the Agreement on Safeguards, if the Section 232 tariffs were “sought, taken or maintained” by the US “pursuant to” Article XXI(b) of the GATT 1994, the Agreement on Safeguards does not apply and other members including China cannot justify their retaliatory measures against the US under Article 8 of the Agreement on Safeguards.

B. WTO Panel Rulings under Article XXI of the GATT 1994

Regarding the US’ defense under Article XXI of the GATT 1994, the Panel of DS544 concluded:

... the measures at issue were not “taken in time of war or other emergency in international relations”. within the meaning of Article XXI(b)(iii) of the GATT 1994. The Panel therefore finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994.⁵

⁵ Panel Report, *US – Tariff Measures (China)*, para. 8.1(e).

This ruling makes no determination as to whether the measures at issue are security measures under Article XXI of the GATT 1994, but it shows that the measures at issue are outside of the scope of Article XXI of the GATT 1994, as they did not meet the essential threshold requirement of being “taken in time of war or other emergency in international relations”. Regardless of the nature of the US Section 232 steel and aluminum tariffs under its domestic law, it is safe to say that these tariffs are not security measures under Article XXI of the GATT 1994.

C. The WTO Panel Rulings under Article 11.3(c) of the Agreement on Safeguards

The Panel of DS544 also found:

... the relevant measures at issue were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX, namely Article XXI of the GATT 1994, within the meaning of Article 11.1(c) of the Agreement on Safeguards. The Panel therefore finds that the Agreement on Safeguards does not apply to the measures at issue.⁶

The Panel of DS558⁷ also arrived at the same conclusions.⁸ Both panels did not clearly state that the US 232 steel and aluminum tariffs are security measures under Article XXI of the GATT 1994. Their statements can be understood in two ways. Firstly, they just considered that as long as a measure was sought, taken, or maintained by a defending member pursuant to Article XXI of the GATT 1994, even if it as a matter of fact did not fall within its scope and therefore cannot be considered as a security measure, it can still preclude the application of the Agreement on Safeguards. In other words, different legal standards apply to Article 11.3(c) of the Agreement on Safeguards and Article XXI of the GATT 1994. Under Article XXI of the GATT 1994, a measure must meet all the requirements in Article XXI to be justified under it. In contrast, under Article 11.3(c) of the Agreement on Safeguards, it is enough that a member subjectively considered and argued a measure is sought, taken, or maintained under Article XXI of the GATT 1994, and objectively did something, such as

⁶ *Ibid*, para. 8.1(d).

⁷ Although the two cases essentially involved the same Section 232 tariffs on steel and aluminum, the three Panelists in DS544 are totally different from the Panelists in DS558.

⁸ Panel Report, *China – Additional Duties (US)*, paras. 102–119.

conducting an investigation and taking or maintaining a measure according to its chosen domestic law relating to national security, or not notifying the measure to WTO as a safeguard, or objecting the characterization of the measure as a safeguard by other WTO Members. This kind of legal standard only takes into account what the defending member did and no elements of Article XXI. Therefore, it is very easy for the defending member to abuse security exceptions and circumvent WTO obligations. Secondly, both panels implicitly considered that if a measure was sought, taken, or maintained pursuant to Article XXI of the GATT 1994, it is a security measure under it. If understood in this way, it seems that the above rulings of the Panel of DS544 are contradictory or counterintuitive, because a measure that does not fall within scope of Article XXI of the GATT 1994 cannot be considered a security measure under it.

To be clear, both panels only said the Agreement on Safeguards does not apply to the US Section 232 steel and aluminum tariffs because they were sought, taken, or maintained by the US pursuant to Article XXI of the GATT 1994. Both panels did not further consider whether these tariffs are safeguards. As discussed in III.C, due to the lack of formal features of a safeguard, these Section 232 tariffs cannot be regarded as safeguards within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards.

III. THREE APPROACHES TO CHARACTERIZING A MEASURE WITHIN THE WTO LEGAL FRAMEWORK DREVIEWED FROM WTO DISPUTE SETTLEMENT PRACTICES

Based on the WTO dispute settlement practices, including the panel and Appellate Body reports as well as arguments put forward by disputing parties, we can identify three approaches to the legal characterization of a measure under the WTO law.

A. Full Compliance Standard

For a measure to be considered having the nature of an invoked provision under an applicable WTO covered agreement, the Full Compliance Standard requires

the measure to fully meet all the elements and requirements of the invoked provision, including complying with the core obligations embodied in the invoked provision, regardless of it a rule or an exception or exemption.

In DS544, regarding the terms “pursuant to” in Article 11.1(c) of the GATT 1994, China argues that this phrase means that the measure are in conformity with or consistent with provisions of the GATT 1994. As a consequence, China considers that the measures sought, taken or maintained by a member must satisfy the conditions of “provisions of the GATT 1994 other than Article XIX” to be excluded from the scope of the Agreement on Safeguards. However, the Panel did not accept China’s approach based on the Full Compliance Standard.⁹ China submitted the same argument to the Panel of DS558 and was also rejected.¹⁰

This standard not only sets high threshold, but also confuses the nature or constituent elements of a measure and its legality under the invoked provision. In the case where a measure has the nature of the invoked provision and is stricken down on the basis of being not consistent with the core obligations in it, such as requirements of necessity or no disguised trade restrictions, the Full Compliance Standard will veto the very nature of this Measure, such as public health measures, and signal wrong messages to WTO Members or other stakeholders. In so doing, it will have some chilling effects on WTO Members. It will also contradict with the fact that the member concerned can remedy the defects in this measure in the course of implementation of DSB rulings and recommendations based on the premise that the measure is, for instance, a public health measure.

B. Substantial Standard

Under the Substantial Standard, for a measure to have the nature of an invoked WTO covered agreement or a provision of it, the measure needs to present the constituent features derived from the invoked provision or even agreement, or the measure needs to have the purpose of achieving specific legitimate public goals. For instance, the Appellate Body in *Indonesia — Iron or Steel Products* found:

... in order to constitute one of the “measures provided for in Article

⁹ Panel Report, *US – Tariff Measures (China)*, paras. 7.72–7.79.

¹⁰ Panel Report, *China – Additional Duties (US)*, paras. 7.86–7.98.

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. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole.¹¹

According to the Substantial Standard, regardless of its appearance or whatever the defending member did under its domestic law or claimed in the context of international stage, as long as the measure has all the constituent features of the alleged type of measure, it can be so characterized. Therefore, the Section 232 tariffs can be characterized as safeguards, because they presented the two substantial constituent features of safeguards within the meaning of the Agreement on Safeguards.

In DS544 and 558, China argued that, if a measure is “objectively” a safeguard measure, that measure could not have been sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX within the meaning of Article 11.1(c) of the Agreement on Safeguards. The Panel of DS558 understood China’s argument to mean that the assessment of whether a measure was sought, taken, or maintained pursuant to provisions of the GATT 1994 “other than Article XIX” must include consideration of whether the measure has certain features of safeguard measures. The Panel was not persuaded by this argument. The Panel found:

An examination of measures under Article 11.1(c) of the Agreement on Safeguards must proceed on the basis of the specific terms of that provision, which provide for the inapplicability of the Agreement on Safeguards to measures adopted “pursuant to” another provision of the GATT 1994. In this respect, the Panel understands that, in referring

11 Report of the Appellate Body, *Indonesia – Safeguard on Certain Iron or Steel Products* WT/DS490/AB/R, WT/DS496/AB/R, Circulated on August 15, 2018 (hereinafter referred to as “AB Report, *Indonesia – Iron or Steel Products*”) para. 5.60.

to provisions of the GATT 1994 “other than Article XIX”, the terms of Article 11.1(c) call for determining whether another provision of the GATT 1994 is the legal basis in the covered agreements by virtue of or under which a Member has sought, taken, or maintained a measure.¹²

The Panel of DS544 considered that, China’s interpretation of the terms “provisions ... other than” amounts to meaning provisions that are exclusively other than Article XIX of the GATT 1994. The Panel understood this interpretation 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. The Panel did not find in the text of Article 11.1(c) the imposition of an additional requirement or limitation of being exclusively pursuant to such other provision.¹³ Both Panels didn’t consider whether the measures at issue are also safeguards under Article XIX and the Agreement on Safeguards.

The Substantial Standard is necessary but not sufficient. Firstly, for a measure to have a specific nature, it must have the necessary constituent features,¹⁴ or it must have the purpose to achieve specific legitimate public goals. For example, for a measure to qualify as a public health measure under Article XX(b) of the GATT 1994, there must have real public health concerns, and the measure is at least “to protect” the public health involved. Secondly, the Substantial Standard is not always sufficient. For example, the two core criteria of safeguards articulated by the Appellate Body can cover numerous types of measures, such as Section 232 tariffs or even anti-dumping or countervailing duties.

In addition, it may be difficult to establish appropriate or operational substantial standards for some kinds of measures. Even if some substantial standards are established in the abstract, in practice, it is very hard to have a real check on what the defending member argues in its defense. To take as

12 Panel Report, *China – Additional Duties (US)*, para. 7.99.

13 Panel Report, *US – Tariff Measures (China)*, paras. 7.80–7.81.

14 Substantial Standard played a key role in striking down Indonesia’s measures involved in DS490/496 as not constituting a safeguard within the meaning of Article 1 of the Agreement on Safeguards, because it did not suspend any GATT obligation or withdraw or modify any GATT concession. See AB Report, *Indonesia – Iron or Steel Products*, paras. 6.6–6.8.

an example, WTO adjudicators have articulated to some extent the concepts of “public moral” or “essential security interests” under Article XX(a) or XXI of the GATT 1994 respectively. However, when the responding member invoked something as “public moral” or “essential security interests”, such as fair market competition or industrial interests, WTO adjudicators were wholly forced to accept whatever the responding member said beyond examining the existence of the alleged “public morals” or emphasizing the *bone fide* obligations. WTO adjudicators’ approach is understandable and also reasonable due to sovereignty concerns. Nonetheless, in order to avoid sliding into the quagmire of protectionism and maintain the balance of rights and obligations for all WTO Members, there must be some other check and balances. For some paragraphs under Article XX of the GATT 1994, the necessity requirement plays a very important role.¹⁵ For Article XXI(b) of the GATT 1994, it is the subparagraphs (i)–(iii) that effectively control the abuse of the so-called “national security measures”.¹⁶

C. Formalistic Standard

Beyond adopting the Substantial Standard, it also needs to meet the Formalistic Standard for a measure to have a specific nature under an invoked WTO covered agreement or a provision of it. The Formalistic Standard requires that the measure at issue ostensibly or formally presents the features of the asserted

15 The majority of measures invoking Article XX(a), XX(b), or XX(d) of the GATT 1994 met the requirements of “protecting public morals”, “protecting human, animal, or plant life or health”, or “ensuring compliance with laws or regulations not inconsistent with the provisions of this Agreement...”. However, the majority of these measures were stricken down by virtue of the “necessity” test. The chapeau of Article XX of GATT1994 also played an important part in controlling the abuses of general exceptions. There is no chapeau or similar language in Article XXI. The three cases that invoked Article XX but failed on “to protect” or “design” test are: DS246, DS583, DS431/432/433.

16 The *bone fide* obligations derived from general international law and treaty law as well as the necessity requirement can also play some or even critical role. For example, based on its interpretation of “necessary” in Article 73(b)(iii) of TRIPS Agreement which is almost identical to Article XXI(b)(iii) of GATT1994, the Panel of DS567 found that the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia’s non-application of criminal procedures and penalties to beoutQ, because the non-application of criminal procedures and penalties to beoutQ does not have any relationship to Saudi Arabia’s policy of ending or preventing any form of interaction with Qatari nationals. See Report of the Panel, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, Circulated on June 16, 2020 (hereinafter referred to as “Panel Report, *Saudi Arabia – IPRs*”), paras. 289–293, 8.1(c)(ii).

measures, such as safeguards or security measures. The formalistic features of a measure may embody in its domestic legal basis or procedures through which it was adopted, or in what the defending members say or do internationally.

According to the Formalistic Standard, if a measure ostensibly or formally presents no feature of safeguards, in no event can it constitute a safeguard within the meaning of Article 1 of the Agreement on Safeguards. It is for this reason that the US Section 232 tariffs are not safeguards under the Agreement on Safeguards. It is also for this reason that the EU unduly considered the reciprocal tariffs imposed by the US in 2025 to be safeguards and then adopted rebalancing measures under the Agreement on Safeguards.¹⁷

However, Formalistic Standard cannot independently determine the nature of a measure under WTO law. In *Indonesia — Iron or Steel Products*, the litigants all had proceeded on the assumption that the specific duty was in fact a safeguard measure, but the Panel, later supported by the AB, held that it could depart from this characterization and did so by holding that the duty was not a safeguard measure because it did not suspend a GATT obligation or withdraw or modify a tariff concession. The facts that Indonesia had conducted an administrative investigation under its safeguards' legislation, that the measure was characterized as a safeguard measure under Indonesian domestic law, and that it had made all relevant notifications to the WTO Safeguards Committee, all factors considered relevant (although not dispositive) by the AB, did not detract from this conclusion.¹⁸

IV. A NEW APPROACH TO CHARACTERIZING A MEASURE WITHIN THE WTO LEGAL FRAMEWORK

A. Formalistic Standard Plus Substantial Standard Still Has Its Defects in Some Cases

As discussed above, Full Compliance Standard improperly confused the

17 Commission Implementing Regulation (EU) 2025/1564 of July 24, 2025 on Commercial Rebalancing Measures concerning Certain Products Originating in the United States of America and Certain Products Exported from the Union to the United States of America, and Repealing Implementing Regulations (EU) 2018/724, (EU) 2018/886, (EU) 2020/502 and (EU) 2025/778, *Official Journal of the European Union*, L series, 24.7.2025, Recitals (6)–(8).

18 Thomas J. Prusa and Edwin A. Vermulst, *Indonesia – Safeguard on Certain Iron or Steel Products: If It Looks like a Duck, Swims like a Duck, and Quacks like a Duck, Then It Is Not a Duck*, *World Trade Review*, Vol. 19, No. 2, 2020, p. 159.

constituent elements of a measure and its compliance with WTO rules. Substantial Standard or Formalistic Standard have its own shortcomings.

Applying both Substantial Standard and Formalistic Standard will appropriately address the legal characterization of a measure under WTO law in most cases. However, even if a measure meets both the Substantial Standard and the Formalistic Standard, it's still problematic whether we can correctly classify it into the category under a provision of the WTO covered agreement.

In DS544, the United States claimed that the expression “pursuant to” is different from the terms “in compliance with” or “consistent with”, and serves the function of “directing the Panel to the other GATT 1994 provisions pursuant to which the measure in question was attempted or tried”.¹⁹

The Panel of DS544 found:

... 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. The terms “pursuant to” in Article 11.1(c) form part of a provision governing the applicability of the Agreement on Safeguards rather than the consistency of measures with the rules and requirements of that agreement. Accordingly, 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 provisions “pursuant to” which the measure was sought, taken, or maintained.²⁰

The Panel of DS558 found:

The expression “pursuant to” in Article 11.1(c) of the Agreement on Safeguards links “measures sought, taken or maintained by a member” to “provisions of the GATT 1994 other than Article XIX”. Depending on the context in which it is used, “pursuant to” may have

¹⁹ Panel Report, *US – Tariff Measures (China)*, para. 7.72.

²⁰ *Ibid*, para. 7.79.

different meanings. A measure could be “pursuant to” a provision in the sense that it is consistent or in conformity with that provision. A measure could also be “pursuant to” a provision when it is adopted by virtue of or under that provision, regardless of whether it is consistent with that provision.

...

the Panel considers that Article 11.1(c) excludes from the scope of the Agreement on Safeguards measures that are sought, taken, or maintained by virtue of or under provisions of the GATT 1994 other than Article XIX. In the Panel’s view, Article 11.1(c) is not concerned with the consistency of such measures with the provisions of the GATT 1994 pursuant to which they are sought, taken, or maintained.²¹

Both Panels correctly distinguished the applicability and consistency under an invoked WTO covered agreement or a provision of it. However, although putting forward the standards “under the purview” or “by virtue of or under”, the Panels didn’t articulate detailly what this standard means to the required relationship between the measures at issue and the invoked provision other than Article XIX of the GATT 1994.

In reviewing the measures at issue under Article 11.3(c) of the Agreement on Safeguards in light of its legal standards “under the purview” or “by virtue of or under”, the Panel of DS544 and the Panel of DS558 both asserted themselves focusing on the applicability of and not the consistency with Article XXI of the GATT 1994. However, both Panels mainly considered what the US did domestically and internationally, paying little or no regard to the elements of Article XXI of the GATT 1994 beyond emphasizing the national security objectives of Section 232 measures. For example, the Panel of DS544 found:

... a central aspect of the design and application of the measures at issue is their relation to the US determination of a threat to its national security under the relevant domestic laws. The national security considerations of the US 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

²¹ Panel Report, *China – Additional Duties (US)*, paras. 7.90–7.98.

by the US 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 US determination of a threat to its national security and the explicit references 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 ... the features of the measures outlined above indicate that the US determination of a threat to its national security under Section 232 is a central aspect of the measures with respect to their legal characterization as being sought, taken, or maintained pursuant to Article XXI of the GATT 1994.²²

The Panel of DS558 followed the same approach and found:

The domestic legal basis for the US measures was Section 232 of the Trade Expansion Act of 1962 ... The US national security objectives are reflected both in the application (tariffs, quotas) and non-application (exemptions, exclusions) of the Section 232 measures ... The US also outlined its national security objectives relating to the Section 232 measures in its communications to WTO councils and committees, linking them to Article XXI of the GATT 1994.

Faced with China's argument that "domestic legal basis, domestic procedures, and notifications to the WTO are not determinative for the characterization of a measure under the covered agreement", the Panel only repeated the legal standard "by virtue of or under" and then considered that the domestic legal basis and procedures as well as notifications concerning the adoption of the measures are relevant evidence of the legal basis under the covered agreement pursuant to which the Section 232 measures were sought, taken, or maintained.²³

It's clear from both Panels' application of Article 11.3(c) of the Agreement on Safeguard to the US Section 232 tariffs that, when they mentioned legal standards "under the purview" or "by virtue of or under", they only required the measures at issue to substantively have national security objectives and ostensibly or formally be taken under relevant domestic law as well as be

²² Panel Report, *US – Tariff Measures (China)*, paras. 7.87–7.96.

²³ Panel Report, *China – Additional Duties (US)*, paras. 7.104–7.113.

linked to Article XXI of the GATT 1994 in its notification or statements. Both Panels ignored the other elements in Article XXI(b) of the GATT 1994 that determine the applicability of Article XXI(b) to a measure. This approach unduly focused on what the defending member said and did. Substantially, both Panels only emphasized the asserted national security objectives. As mentioned above, WTO adjudicators cannot impose any real limits when the defending member invokes a legitimate public policy objective, especially the goals of public morals, public order or essential national interests. Both Panels just accepted what the US did domestically and internationally. Both Panels' approach is reasonable if the sole legal standard of Article 11.3(c) of the Agreement on Safeguards in relation to Article XXI of the GATT 1994 is to ostensibly or formally ascertain whether the measures at issue had national security objectives. However, this approach will lead to easy circumvention or the contradictory or counterintuitive results as mentioned in II.C. In practice, this approach sends the wrong impression to the world that the US Section 232 tariffs are national security measures under the WTO law. Based on this undue characterization or cognition, the US can initiate investigations and impose tariffs on EVERY industry or product under Section 232 of the Trade Expansion Act of 1962 without any moral pressure. It's absolutely absurd and counter-common sense.

B. "Fall within the Scope or Applicability Standard"

The above analysis reveals that the application of Substantial Standard plus Formalistic Standard is incapable of correctly characterizing certain types of measures under the WTO law. A new approach is needed. It is suggested by this paper that, for a measure to have the nature of an invoked WTO covered agreement or a provision of it, this measure should fall within the scope of it or meet the Applicability Standard. This new approach is applicable to the legal characterization of all measures under the WTO law.

Firstly, if a definition or description is found in an WTO covered agreement or a provision, a measure should meet all the elements embodied in the definition or description for it to fall within the scope of the WTO covered agreement or a provision. For example, both the WTO TBT/SPS agreements have definitions of "technical regulation", "standard", "conformity assessment

procedures” or “sanitary or phytosanitary measure”. There are also definitions of “trade in services” in General Agreement on Trade in Services (GATS) and “subsidies” in Agreement on Subsidies and Countervailing Measures (ASCM). A description of “government procurement” is found in Article 3.8(a) of the GATT 1994, that is “the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale”. The same conclusion applies to safeguards. If a measure does not meet the definition of “safeguard” under Article XIX:1(a) of the GATT 1994, it cannot be a safeguard under the WTO law. In addition, for a WTO covered agreement or a provision of it to be applicable or inapplicable to a measure, the measure should also meet all requirements of the scope provision of an invoked WTO covered agreement or even another agreement. For instance, the TBT Agreement is inapplicable to the SPS measures as defined in Annex A of the SPS Agreement on the basis of Article 1.5 of the TBT Agreement.

Secondly, for a measure to have the nature of an invoked exception or exemption of a WTO covered agreement, this measure should fall within the scope of it. In other words, the invoked exception or exemption should be applicable to this measure. In term of some paragraphs of Article XX of the GATT 1994, there must exist “public morals”, “human, animal or plant life or health” or “exhaustible natural resources” which are under threat, at risk or endangered. Besides, for a measure to have the nature of an invoked exception or exemption of a WTO covered agreement, this measure should also have a relationship with the asserted objectives. Measures with no relationship with the asserted public policy objective cannot be said to have the nature of an invoked exception or exemption which is designed to protect the invoked public policy objective.

In *EC — Preferences*, the Panel found that nothing linked the preferences to the protection of human life or health in the European Communities (EC). There was no evidence presented before the Panel suggesting that providing improved market access to some developing countries under the Drug Arrangements is aimed at protecting human life or health in drug importing countries. The policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the EC and, therefore, the

Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b) of the GATT 1994.²⁴ This Panel expressly stated that the measure as issue is not a public health measure within the meaning of Article XX(b) of the GATT 1994. In fact, providing improved market access to some developing countries by the EC had nothing to do with protecting human life or health in the EC.

The Panel of “*Turkey — Pharmaceutical Products (EU)*” found:

The stated objective of the localization requirement, i.e. meeting 60% (by value) of domestic pharmaceutical demand by domestic production, has no rational relationship to the objective invoked by Turkey in this dispute, i.e. ensuring a continuous supply of safe, effective and affordable pharmaceutical products. This is a further indication that the localization requirement is not a measure taken to protect human life or health ... Turkey has not demonstrated that the localization requirement is a measure taken to protect human, animal or plant life or health within the meaning of Article XX(b).²⁵

After concluding that the localization requirement is not a public health measure in the sense of Article XX(b), the Panel ended its review under Article XX(b). The Arbitrators upheld the Panel’s conclusion and approach on appeal.²⁶

According to the “Fall within the Scope or Applicability Standard”, for a measure to be a security measure within the meaning of Article XXI(b), it must meet the following conditions. Firstly, the measure should fall within the scope of one of the subparagraphs (i)–(iii). Secondly, there must be objective and genuine “essential security interests” that need protection or are threatened by “the war or other emergency in international relationships”. The defending member should articulate this condition in good faith. Thirdly, the measure is designed “to protect” asserted essential security interests, that is to say, it must have a relationship with the protection of asserted essential security interests. In the context of Article XXI(b) of the GATT 1994, because of the lax requirement

²⁴ Report of the Panel, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, Circulated on December 1, 2003, paras. 7.207, 7.210.

²⁵ Report of the Panel, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WT/DS583/12, Circulated on April 28, 2022, paras. 7.208, 7.211.

²⁶ Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WT/DS583/ARB25, Circulated on July 25, 2022, paras. 6.143–146, 7.6–7.9.

of necessity,²⁷ the process of judging the nature of a measure to a large extent amounts to the process of reviewing the consistency of this measure with it. Therefore, it is suggested that WTO adjudicators boldly found that the measure at issue is not a security measure in the sense of Article XXI(b) after finding the same measure is not justified under one of the subparagraphs of Article XXI(b), just as what the above two WTO Panels did in the context of Article XX of the GATT 1994.

In *Russia — Traffic in Transit*, the Panel found that Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 in relation to the measures at issue, and therefore the measures are covered by Article XXI(b) (iii) of the GATT 1994.²⁸

The Panel of “*Saudi Arabia — IPRs*” concluded:

the anti-sympathy measures “meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests”.

...

the non-application of criminal procedures and penalties to beoutQ does not have any relationship to Saudi Arabia’s policy of ending or preventing any form of interaction with Qatari nationals. Therefore, the Saudi authorities’ non-application of criminal procedures and penalties to beoutQ is so remote from, or unrelated to, the “emergency in international relations” as to make it implausible that Saudi Arabia implemented these measures for the protection of its “essential security interest”. As a consequence, the Panel concludes that the non-application of criminal procedures and penalties to beoutQ does not “meet a minimum requirement of plausibility in relation to the proffered essential security interests”.²⁹

Based on the above statement of the Panel, we can very reasonably draw a corollary that the measure of non-application of criminal procedures and penalties to beoutQ had no relationship with the protection of Saudi Arabia’s

²⁷ The WTO Panels developed a “not implausible” or “plausibility” standard for the “necessary” requirement in Article XXI(b) of the GATT 1994. This standard nearly amounts to “a” relationship standard.

²⁸ Report of the Panel, *Russian Federation – Measures Concerning Traffic in Transit*, WT/DS512/R, Circulated on April 5, 2019, para. 7.149.

²⁹ Panel Report, *Saudi Arabia – IPRs*, paras. 7.288, 7.293.

“essential security interests”. It is safe for the Panel to say that this measure was not a security measure within the meaning of Article 73(b)(iii) of the TRIPS Agreement.

In *US — Origin Marking (Hong Kong, China)*, the Panel found that the US has not demonstrated that the situation at issue constitutes an emergency in international relations, and therefore the origin marking requirement is not justified under Article XXI(b)(iii).³⁰ This Panel also didn’t state whether the origin marking requirement is a security measure or not in the sense of Article XXI(b)(iii).

As noted above, the Panel of DS544 adopted the same approach and found the measures at issue were not justified under Article XXI(b)(iii) of the GATT 1994, because they were not “taken in time of war or other emergency in international relations” within the meaning of the same provision. However, both Panels in the DS544 and DS558 found that the US Section 232 steel and aluminum tariffs were sought, taken, or maintained pursuant to Article XXI of the GATT 1994. According to “Fall within the Scope or Applicability Standard” suggested by this paper, the US Section 232 steel and aluminum tariffs were in no way security measures within the meaning of Article XXI(b)(iii) of the GATT 1994 because of not meeting the threshold condition “taken in time of war or other emergency in international relations”, and the Panels should have so declared.

V. CONCLUDING COMMENTS

Overall, the Panels in the DS544 and DS558 adopted and applied the overly formalistic standard of “pursuant to” in the context of Article 11.3(c) of the Agreement on Safeguards, whether it was being articulated further as still unclear standards of “under the purview” or “by virtue of or under”. The two Panels correctly distinguished the applicability of and consistency with a provision of a WTO covered agreement. However, they did not elaborate further the Applicability Standard. Instead, they just accepted what the US did domestically and internationally. This led to easy circumvention of WTO obligations, or contradictory and counterintuitive results for the Panel of

³⁰ Report of the Panel, *United States – Origin Marking Requirement*, WT/DS597/R, December 21, 2022, para. 7.360.

DS544, because a measure that does not fall within the scope of Article XXI of the GATT 1994 can be said to be sought, taken, or maintained pursuant to the same provision.

It is suggested that the “Fall within the Scope or Applicability Standard” be adopted. When considering whether a measure at issue is a security measure in the sense of Article XXI of the GATT 1994, WTO adjudicators should examine firstly whether the measure falls within the scope of one of subparagraphs (i)–(iii), secondly whether there exist asserted essential security interests which need protection or are threatened by “the war or other emergency in international relationships”, and thirdly whether the measure has a relationship with the protection of the asserted essential security interests. It is also suggested that WTO adjudicators boldly found the measure at issue is not a security measure in the sense of Article XXI(b) after finding the same measure is not justified under one of the subparagraphs of Article XXI(b), just as what the few WTO Panels did in the context of Article XX of the GATT 1994. For the sake of consistency, the above suggestions apply equally to assessment under Article XXI(b) directly and indirectly in the context of the application of Article 11.3(c) of the Agreement on Safeguards.

Based on the “Fall within the Scope or Applicability Standard”, the US Section 232 tariffs are in no way security measures within the meaning of Article XXI(b) of the GATT 1994, because they don’t fall within the scope of one of subparagraphs (i)–(iii). Any other conclusions will lead to contradictory and counterintuitive results as well as absurd and counter-common sense situations. If following the Panels’ approach in DS544 and DS558, the US can initiate investigations and impose tariffs on every industry or product under Section 232 of the Trade Expansion Act of 1962 without any legal check or moral pressure.

Looking ahead to the future, it is noted that a few Free Trade Agreements (FTAs) involving the US³¹ don’t have similar subparagraphs to Article XXI(b) (i)–(iii) of the GATT 1994. This would mean that the contracting parties will have very broad discretion to take trade restrictions in the name of national security. But more FTAs include the same or similar subparagraphs to Article XXI(b)(i)–(iii). It is the responsibility of the negotiating parties to make choices while considering their legal consequences.

31 For example, Article 32.2 of USMCA and Article 29.2 of CPTPP.