Trade Wars are Easy to Win?

National Security and Safeguards as the New Weapons

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A. Introduction

On 8 March 2018, President of the United States ('US'), Mr. Donald Trump proclaimed that he would raise *ad valorem* tariffs by 25 % on imports of steel products into the United States and by 10 % on imports of aluminium products ('2018 US steel and aluminium tariffs'). These tariffs entered into force on 23 March 2018.[1] These measures appear to be part of a much-dreaded broader protectionist policy of President Trump and might infringe the American tariff concession obligations under the

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1 *US President*, Presidential Proclamation on Adjusting Imports of Steel into the United States, 8 March 2018, para. 8; *US President*, Presidential Proclamation on Adjusting Imports of Aluminum into the United States, 8 March 2018, para. 7. For the economic background of the tariffs, see *Felbermayr/Sandkamp*, Trumps Importzölle auf Stahl und Aluminium, 2018.

law of the World Trade Organization ('WTO'). Hence, a breach of Art. II of the General Agreement on Tariffs and Trade, 1994 ('GATT') is at stake.

Through negotiation, the European Union ('EU') together with some other WTO contracting parties has achieved at least a temporary exception from the 2018 US steel and aluminium tariffs, first until 1 May[2] and later until 1 June.[3] However, the legal question of conformity of the 2018 US steel and aluminium tariffs and the European reaction towards it with WTO law remains, as the United States has taken the view that its tariffs are justified as national security measures whereas the European Union together with other WTO members consider the tariffs as safeguard measures.

In this regard, the European Union and other WTO members have not only requested the US for consultations under the Dispute Settlement Understanding (DSU) but have additionally announced that they seek to levy certain tariffs on US products as a response to the potential entry into force of the 2018 US steel and aluminium tariffs against their products on 1 June 2018. On the other hand, the People's Republic of China ('China') as the world's biggest steel producer, is immediately affected by the American measures and has already introduced corresponding tariffs as a reaction.

The 2018 US steel and aluminium tariffs, therefore, bear the risk of a real trade war. From a legal point of view, the diverging opinions of the United States and the European Union on the classification of the tariffs and the respective consequences, could as a final consequence undermine the rule-based system of the World Trade Organization if the current disputes cannot be solved on the basis of trade negotiations or under the WTO dispute settlement system. This article focuses on the legal issues that the 2018 US steel and aluminium tariffs and the international reactions towards it have raised.

2 Australia, Argentina, South Korea and Brazil have negotiated similar suspensions; cf. *US President*, Presidential Proclamation Adjusting Imports of Steel into the United States, 22 March 2018; *US President*, Presidential Proclamation Adjusting Imports of Aluminum into the United States, 22 March 2018. Mexico and Canada as NAFTA contracting parties have been granted general permanent exceptions from the 2018 US steel and aluminium tariffs; *US President*, Presidential Proclamation on Adjusting Imports of Steel into the United States, 8 March 2018, para. 8; *US President*, Presidential Proclamation on Adjusting Imports of Aluminum into the United States, 8 March 2018, para. 7. Argentina, Australia, Brazil and South Korea have achieved to negotiate permanent exceptions from the tariffs on steel imports until the 1 May 2018; cf. *US President*, Presidential Proclamation Adjusting Imports of Steel into the United States, 30 April 2018, No. 1. Argentina, Australia and Brazil also achieved a permanent exception for the tariffs on aluminum imports; cf. *US President*, Presidential Proclamation Adjusting Imports of Aluminum into the United States, 30 April 2018, No. 1.

3 Canada, Mexico (although already exempted from the US measures in the first Presidential Proclamations) and the EU were only able to negotiate a further suspension of the entry into force of the 2018 US steel and aluminium tariffs until 1 June 2018; cf. *US President*, Presidential Proclamation Adjusting Imports of Aluminum into the United States, 30 April 2018, No. 1.

B. The Steel and Aluminium Tariffs as National Security Exceptions

The 2018 US steel and aluminium tariffs, at least according to the US President, are 'necessary and appropriate to address the threat that imports of steel articles pose to the national security'.[4] In contrast to the 2002 US steel tariffs under President Bush, which were explicit but illegal safeguard measures,[5] the United States has now decided to justify its measures for national security reasons under Art. XXI GATT that, despite some state practice, is still one of the most 'obscure' provisions in the GATT.[6]

The primary question, of course, is whether the requirements of Art. XXI GATT were substantially met when the US imposed the present steel and aluminium tariffs. Due to a limited access to the facts of whether the prerequisites of the provision were met in substance, the following sections will focus in more detail on the issues emerging from the special structure and the diverging interpretations on the provision. Has the United States failed to notify its measures to the WTO? Can the US' decision on the tariffs being necessary for its essential security interests be challenged before the Dispute Settlement Body ('DSB')?

I. Substantial Elements

The much-discussed Art. XXI GATT is considered as a 'vital interests' clause and contains the national security exception in the GATT.[7] This clause allows the parties to the treaty to derogate from their obligations under the treaty under exceptional situations.[8] Art. XXI GATT can justify the imposition of trade barriers against any or all contracting parties by a member state in derogation from its obligations under GATT.[9] The measures can be imposed without any formal proceedings and are thus considered as unpredictable.[10] The member states agreed to impose certain limitations on the use of the provision,[11] but in any case, it was considered as a measure that allowed unilateral and possibly destabilising action.[12]

4 *US President*, Presidential Proclamation on Adjusting Imports of Steel into the United States, 8 March 2018, para. 8. Verbatim to aluminium articles *US President*, Presidential Proclamation on Adjusting Imports of Aluminum into the United States, 8 March 2018, para. 7.
5 Cf. Final Report of the Panel, 11 July 2003, WT/DS/248/R et al. ('*United States – Definitive Safeguard Measures on Imports of Certain Steel Products*').
6 *Yoo/Ahn*, Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?, Journal of International Economic Law 2016, pp. 417 ff.
7 *Hahn*, Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception, Michigan Journal of International Law 1991, p. 561.
8 *Schill/Briese*, 'If the state considers': Self-Judging Clauses in International Dispute Settlement, in: von Bogdandy/Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Vol. 13, 2009, p. 89.
9 *Ravikumar*, The GATT Security Exception: Systemic Safeguards against its misuse, NUJS Law Review 2016, p. 324.
10 Ibid.
11 GATT, Decision concerning Art. XXI of the General Agreement, 30 November 1982, L/5426.
12 *Ravikumar*, (fn. 9), p. 324.

Up to now, the United States has not yet explained publicly to which exact provision of Art. XXI GATT it refers, when justifying the measures as national security exceptions. Therefore both Art. XXI(b)(ii) and (iii) GATT have to be taken into consideration. They state: 'Nothing in this Agreement shall be construed […] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (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 […]'.

The US repeatedly points out that its tariffs are based on Section 232 of the Trade Expansion Act of 1962 ('Section 232'),[13] which aims at protecting the United States against 'threats to impair the national security'. Section 232 does not explicitly refer to 'Art. XXI GATT' in the text nor does it require a 'concrete threat' to national security but rather an 'abstract threat' scenario, which could possibly lead to a concrete threat in the future.[14] It is questionable if this abstract danger is sufficient to justify 'any action' under the exception, which the member state considers necessary for the protection of its essential security interests. On the other hand, Art. XXI GATT grants a wide scope of discretion to the acting member states concerning the determination of the 'necessity' and the 'essential security interests' that finally could even allow the member states to classify abstract dangers as necessary for essential security interests.[15] However, due to the absence of jurisdiction on the concrete scope of Art. XXI GATT, it will remain an open question.

Since the national security exception of Art. XXI GATT is designed as an exception to the whole GATT (cf. Art. XXI GATT: '*Nothing* in this Agreement shall be construed […]' (emphasis added)), the respective measures justified under Art. XXI GATT do not have to comply with the most favoured nation principle.[16] Consequently, in case the 2018 US steel and aluminium tariffs would substantially be justified under Art. XXI GATT, their selective application[17] would not infringe the most favoured nation principle.

13 E.g. *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, 17 April 2018, WT/DS544/2: 'tariffs on imports of steel and aluminum articles imposed by the President of the United States pursuant to Section 232 […]'; Communication from the United States in Response to the European Union's Request, 19 April 2018: 'The President issued the Steel and Aluminum Proclamations pursuant to Section 232 […]'.

14 Cf. Section 232 (b) Trade Expansion Act of 1962: '[…] so that such imports will not so threaten to impair the national security'.

15 For the scope of discretion, see *Mitchell*, Sanctions and the World Trade Organization, in: van den Henrik (ed.), Research Handbook on UN Sanctions and International Law, 2017, pp. 292 ff.

16 Cf. *Alford*, The Self-Judging WTO Security Exception, Utah Law Review 2011, p. 701; *Bhala*, National Security and International Trade Law: What the GATT says and what the United States Does, University of Pennsylvania Journal of International Economic Law 1998, p. 266.

17 Cf. (fn. 2).

Notwithstanding these questions, it is more than doubtful if the protected steel and aluminium products can be considered as 'materials as is carried for the purpose of supplying a military establishment' or if the current 'substantial chronic global excess steel and aluminium production'[18] can be considered as an 'other emergency in international relations'. The latter alternative in fact has been interpreted broadly by the member states[19] as well as by some legal scholars[20] and could therefore even cover the international overproduction as an 'emergency situation'. However, this element has to be interpreted systematically in conjunction with the alternative 'in time of war'. Consequently, it covers only situations comparable to situations of war.[21] It seems to be far-fetched to classify the current situation of worldwide overproduction of steel and aluminium as a situation 'comparable to times of war'.[22] This means that the substantial compliance of the 2018 US steel and aluminium tariffs with Art. XXI(b)(ii) or (iii) GATT is rather unlikely, at least when it comes to the narrow requirements in the subparagraphs (ii) and (iii). In actual fact, only the DSB as the judicial authority of the WTO could ultimately decide on these questions.

II. Invocation

Until now, the US has not notified the 2018 US steel and aluminium tariffs on the WTO level, neither as national security exceptions, nor as 'general tariffs', although *prima facie* the tariffs would fall within the list of notifiable measures.[23] This raises the question if national security exceptions have to be notified at all or at least have to be invoked explicitly in order to enable the affected member states to be aware of the classification.[24] Seeking to answer this question, the member states of the GATT '47 in 1982 decided that '[subject] to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Arti-

18 *US Department of Commerce*, The Effect of Imports of Steel on the National Security, 11 January 2018, p. 55; *US Department of Commerce*, The Effect of Imports of Aluminum on the National Security, 17 January 2018, p. 104.

19 For an overview over the relevant state practice in detail, see *Hahn*, Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie, 1997, pp. 350 ff., referring *inter alia* to the Swedish boots case (*Sweden – Import Restrictions on certain Footwear*, 17 November 1975, L/4250, p. 3); cf. *Mitchell*, (fn. 15), p. 302.

20 Cf. *Lindemeyer*, Schiffsembargo und Handelsembargo, 1975, pp. 506 ff.; *Kuyper*, Community Sanctions against Argentina: Lawfulness under Community and International Law, in: O'Keeffe/Schermers (eds.), Essays in European Law and Integration, 1982, p. 152.

21 *Mitchell*, (fn. 15), p. 302; *Balan*, The Latest United States Sanctions Against Iran: What Role to the WTO Security Exceptions, Journal of Conflict and Security Law, 2013, p. 387; *Hestermeyer*, in: Wolfrum/Stoll/Hestermeyer (eds.), WTO-Trade in Goods, 2010, Art. XXI GATT, para. 34.

22 *Tietje/Sacher*, Stahl und Whiskey – Transatlantischer Handelskrieg als Bedrohung der Welthandelsordnung, 2018, p. 5 describes the application of Art. XXI(b)(ii) or (iii) GATT on the 2018 US steel and aluminium tariffs as 'almost grotesque'; from the economic perspective similarly *Felbermayr/Sandkamp*, (fn. 1), p. 1.

23 Cf. Annex to the Decision on Notification Procedures, adopted by the Trade Negotiations Committee on 15 December 1993 and 14 April 1994.

24 *Hahn*, (fn. 7), p. 604.

cle XXI'.[25] This decision implements at least a comprehensive recommendation ('should') to inform the contracting parties about the implementation of the exception as such, which can be defined as invocation, as well as the facts on which the decision is based. However, a recommendation to inform does not stipulate any obligations, either to invoke the exception unambiguously at an early stage, or to notify measures taken under the national security exception of Art. XXI GATT. On the other hand, the national security exception does not prohibit such a notification either.[26]

Since Art. XXI GATT does not provide for any procedural obligations,[27] the member states referring to the exception usually do not invoke Art. XXI GATT explicitly, but refer to the 'spirit of Art. XXI GATT'[28] or state that the measures were taken 'on the basis of their inherent rights of which Art. XXI of the General Agreement is a reflection'.[29] These ambiguous hints must be seen as implicit invocations of the national security exception. Regarding the 2018 US steel and aluminium tariffs, the United States has invoked Art. XXI GATT in order to justify its tariffs as 'necessary for the protection of essential security interests, as is reflected in the text of Art. XXI of the GATT 1994'.[30]

III. Art. XXI GATT as a Self-Judging Clause?

As the compliance of the 2018 US steel and aluminium tariffs with Art. XXI GATT can be disputed, the question emerges, whether the legal issues of substantial compliance with WTO law can be judged by the DSB. In other words, does the DSB have jurisdiction over Art. XXI(b) GATT or is the provision rather a self-judging norm? Consequently, can an adversely affected member state challenge national security exceptions as such before the DSB? Since the establishment of the GATT '47 and the later GATT '94, the unchanged provision of national security exceptions has resulted in dissenting state opinions on its scope, but a 'judicial' decision has never been reached on the above-mentioned questions.

Art. XXI(b) GATT grants a wide scope of discretion to the respective member states to take actions 'which it considers necessary' for the protection of its essential national security interests. This scope of discretion has been partly interpreted as 'unfettered

25 GATT, Decision concerning Article XXI of the General Agreement, 30 November 1982, L/5426.

26 Nevertheless, until now, only one notification on Art. XXI GATT was made by Nicaragua on its measures against Honduras and Colombia on maritime issues; *Council for Trade in Goods*, Notification pursuant to Article XXI of the GATT 1994 and Article XIV bis of the GATS, 21 February 2000, G/C/4, p. 1.

27 *Mitchell,* (fn. 15), p. 302.

28 Cf. the statements of Sweden in the case *Sweden – Import Restrictions on Certain Footwear*; *Council*, Minutes of Meeting, 10 November 1975, C/M/109, p. 9.

29 Cf. the communication of the EC, Australia and Canada in the case 'Trade Restrictions Affecting Argentina' Council, Communication, 18 May 1982, L/5319/Rev. 1.

30 *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, 17 April 2018, WT/DS544/2. Similarly to the invocation of Art. XXI GATT, *Tietje/Sacher*, (fn. 22), p. 9.

discretion', which would exclude any judicial review (self-judging clause).[31] This sovereignty-friendly approach has been the state practice of many states. It was seen in 1949, when the US imposed export restrictions on Czechoslovakia, and the United Kingdom expressed that 'every country must have the last resort on questions relating to its own security'.[32] Twelve years later, when Ghana imposed an embargo against Portugal, Ghana stated, 'under this article each contracting party was the sole judge of what was necessary in its essential security interests'.[33]

On the occasion of the Falklands War between Argentina and the United Kingdom in 1982, the European Economic Community (EEC), Canada and Australia implemented a comprehensive imports embargo against Argentina. In the subsequent discussion in the GATT-Council, the US expressed its opinion that '[the] General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The Contracting Parties had no power to question that judgment'.[34] In this context, the EEC highlighted, although not solely with regards to Art. XXI GATT, that 'the practice in GATT over the years had been that each contracting party was the sole judge of the exercise of its rights and obligations'.[35]

The most relevant state practice concerning the question of Art. XXI GATT as a 'self-judging clause' was exercised in the long-lasting dispute between the United States and Nicaragua. For the first time in the case *United States – Trade Measures Affecting Nicaragua*, member states did not only discuss the discretion of the parties but also the relation between Art. XXI GATT and the dispute settlement system.[36] In 1985, the United States had introduced a comprehensive trade embargo against Nicaragua, justifying it with a clear reference to national security.[37] The US pointed out that 'the United States had seen no basis for contracting parties to question, approve or disapprove the judgement of each contracting party as to what was necessary to protect its essential security interests […]. It was not for GATT to approve or disapprove the judgement made by the [US]'.[38] The US further clarified 'that Article XXI applied to any action which the contracting party taking it considered necessary for the protection of its essential security interest. This provision, by its clear terms, left the validity of the security justification to the exclusive judgement of that con-

31 See the interpretation of the ICJ in contrast to provisions of other treaties in its Nicaragua decision, ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*), Judgment, 27 June 1986, para. 222; Similarly e.g. *Bhala*, (fn. 16), p. 279; *Wang*, CFIUS under Review: National Security Review in the US and the WTO, Journal of World Trade 2016, pp. 216 f.

32 *Contracting Parties*, Summary Record, 8 June 1949, GATT/CP.3/SR22, p. 3.

33 *Contracting Parties*, Summary Record, 21 December 1961, SR.19/12, p. 196.

34 *Council*, Minutes of the Meeting, 10 August 1982, C/M/159, p. 19; 'Trade Restrictions Affecting Argentina'.

35 Ibid., p. 21.

36 *Hahn*, (fn. 19), p. 340.

37 *United States – Trade Measures Affecting Nicaragua*, 9 May 1985, L/5803, p. 2.

38 *Council*, Minutes of Meeting, 28 June 1985, C/M/188, pp. 4 f.

tracting party taking the action'.[39] Although some states expressed concerns that an abusive utilisation of Art. XXI GATT could never be sanctioned,[40] the European Communities supported the US opinion and said 'GATT had never had the role of settling disputes essentially linked to security. Such disputes had only rarely […] been examined in the context of the General Agreement, which had neither the authority nor the competence to settle matters of this type […]'.[41]

Even though a Panel was formed to decide on the dispute, this panel only had a restricted jurisdiction on the case, as the US had pushed through its condition that 'the panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States'.[42] In fact, there was a panel report on the dispute in which the US measures were found to be non-compliant with GATT, but according to its restricted jurisdiction, there was no decision on the scope of Art. XXI GATT and on its relation to the dispute settlement system.[43] Another panel formed in a trade dispute between the EEC and Yugoslavia in 1991 to decide on these issues was unable to do so since the Council had decided to suspend Yugoslavia's rights due to the legal uncertainties about its successor.[44] Additionally, in the case of US trade sanctions against Cuba in 1996, the so called 'Helms-Burton Act', in which national security was at stake, a panel, established on the request of the European Communities (EC), did not finalise the proceeding as the panel suspended its work – again – on the request of the EC in 1997 and its mandate lapsed one year later.[45]

In a third-party statement in the current case *Russia – Measures Concerning Traffic in Transit*, which will probably lead to the first decision of the panel on this issue by the end of this year,[46] the US stated that 'once a WTO Member has invoked the essential security exception under Article XXI(b)(iii) of the GATT 1994, there is no basis for the Panel to review that invocation or to make findings on the claims raised

39 Report of the Panel (unadopted) 13 October 1986 (L/6053), *United States – Trade Measures affecting Nicaragua*, para. 4.6.

40 Cf. e.g. the Czechoslovak statement in *Council*, (fn. 38), p. 10: '[Any] contracting party wanting to justify introduction of certain trade measures against any other contracting party could simply refer to Article XXI and declare that its security was threatened [… and if] such unilateral, arbitrary actions were not opposed, any small contracting party could find itself in the same situation as Nicaragua'.

41 *Council*, (fn. 38), p. 13.

42 *Council*, Minutes of Meeting, 2 April 1986, C/M/196, p. 7.

43 Report by the Panel, 13 October 1986, L/6053 ('*United States – Trade Measures Affecting Nicaragua*').

44 *Council*, Minutes of Meeting, 10 July 1992, C/M/257, p. 3; *Council*, Minutes of Meeting, 14 July 1993, C/M/264, p. 3.

45 *WTO*, United States – The Cuban Liberty and Democratic Solidarity Act, Lapse of the Authority for Establishment of the Panel, 24 April 1998, WT/DS38/6.

46 *Russia – Measures Concerning Traffic in Transit*, Communication from the Panel, 21 November 2017, WT/DS512/5.

in the dispute'.[47] Additionally, the US requested the Panel to refuse jurisdiction[48] and expressed that 'Article XXI is a self-judging provision, and its invocation is not subject to review by the DSB'.[49] On similar lines, in its statements on the 2018 US steel and aluminium tariffs, the United States argued that '[issues] of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement'.[50]

Many legal authors, however, have disputed this approach, and lately the EU has followed this opinion in its state practice in the case *Russia – Measures Concerning Traffic in Transit*. Firstly, the GATT has to be interpreted in the light of the good faith principle (Art. 26 and Art. 31.1 Vienna Convention on the Law of Treaties);[51] therefore, the discretion of the member states cannot be exercised arbitrarily.[52] In other words, the question of an arbitrary use of the national security exception can be reviewed by the DSB.[53] Additionally, the national security exception is not designed as a jurisdictional defence, but as an exception to the GATT, since it is situated immediately after the Art. XX GATT exceptions, is titled 'exception' and is systematically not situated in the DSU.[54] Furthermore, Art. XXI GATT does not state any opportunity for retroactive remedies and financial compensation in the case of WTO law infringements of the acting member state;[55] therefore, a judicial review of the utilisation of the provision is of high political importance. In the case *Russia – Measures Concerning Traffic in Transit*, the EU has now adopted the view of a restricted jurisdiction of the DSB by highlighting that '[if] Article XXI of GATT 1994 was interpreted as a non-justiciable provision, a WTO Member, rather than WTO dispute set-

47 *Russia – Measures Concerning Traffic in Transit* (DS512), Third-Party Oral Statement of the United States of America, 25 January 2018, p. 1.

48 Letter from the US to the Chairperson, WTO Panel in *Russia – Measures Concerning Traffic in Transit* (DS512), 7 November 2017, https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.Re.GATT.XXI.fin.%28public%29.pdf (28/05/2018).

49 *Russia – Measures Concerning Traffic in Transit* (DS512), (fn. 47), p. 2. For the historical consistency of the American opinion, see *Russia – Measures Concerning Traffic in Transit*, Third Party Executive Summary of the United States of America, 27 February 2018, p. 3.

50 *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, 17 April 2018, WT/DS544/2.

51 Critically towards the application of 'reasonableness' on Art. XXI(b)(iii) GATT 1947; *Hahn*, (fn. 7), p. 601.

52 Cf. the EC's statement in the case *Nicaragua – Trade Measures Concerning Nicaragua*; see *Council*, (fn. 38), p. 13: '[the discretion under Art. XXI GATT has to] be exercised in a spirit of responsibility, discernment, moderation, ensuring above all that discretion did not mean arbitrary application'.

53 *Delimatsis/Cottier*, Article XIV bis GATS: Security Exceptions, 2008, p. 2; *Schill/Briese*, (fn. 8), pp. 105 ff.; *Schloemann/Ohlhoff*, 'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence, The American Journal of International Law, 1999, p. 443; *Hahn*, (fn. 7), pp. 610 ff. Also the ICJ applies the good faith principle to self-judging clauses, see ICJ, Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v. France*), Judgment, 4 June 2008, para. 145; *Hestermeyer*, (fn. 21), Art. XXI GATT, para. 20.

54 *Schloemann/Ohlhoff*, (fn. 53), p. 439; *Hestermeyer*, (fn. 21), Art. XXI GATT, para. 20; *Mitchell*, (fn. 15), p. 295.

55 *Delimatsis/Cottier*, (fn. 53), p. 2.

tlement institutions, would be deciding the outcome of a dispute, and this unilaterally. This would not only run counter to the objectives of the DSU […], but it would also question the "rule-based" approach to international trade. […] Yet, the jurisdiction over the question whether a Member remained within its discretion when applying [Art. XXI GATT …] unequivocally rests with the DSB'.[56] With this statement, the EU has changed its state practice compared to prior declarations in the Falklands Islands dispute[57] and the *United States – Trade Measures Affecting Nicaragua*[58] case.

As state practice on the question of reviewability of Art. XXI GATT shows, the United States supports the exclusion of the jurisdiction of the DSB in entirety, i.e. it follows a sovereignty-friendly interpretation of the provision. In contrast, the European Union supported by a significant part of literature opines a rather progressive and rule-based approach by admitting a jurisdiction to the DSB restricted to the question of whether the acting member state has acted arbitrarily. According to this favourable approach, the European Union as an affected party can challenge the 2018 US steel and aluminium tariffs before the DSB. Maybe the expected decision in the case *Russia – Measures Concerning Traffic in Transit* will shed light on this issue, but in the meantime the question of Art. XXI GATT as a self-judging clause and its reviewability remains an open question.[59]

C. The American Steel and Aluminium Tariffs as Safeguard Measures 'in Disguise'

China together with India, the Russian Federation, Thailand, Hong Kong and the European Union have requested consultations with the United States under Art. 4 DSU, Art. XXII GATT and Art. 14 Agreement on Safeguards (SGA) in order to challenge the 2018 US steel and aluminium tariffs judicially.[60] Hereby, these WTO members claim *inter alia* an infringement of the 'bound tariffs' (Art. II:1(a) and (b)

56 *Russia – Measures Concerning Traffic in Transit* (DS512), Third Party Oral Statement by the European Union, 25 January 2018, p. 2.

57 *Council*, (fn. 34), p. 21.

58 *Council*, (fn. 38), p. 13.

59 On this see, *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 2017, p. 620; *Matsushita et al.*, The World Trade Organization – Law, Practice and Policy, 3rd ed. 2015, p. 550; *Mitchell*, (fn. 15), p. 297; *Chen*, To judge the 'self-judging' security exception under the GATT 1994 – A systematic approach, Asian Journal of WTO & International Health Law and Policy 2017, p. 350.

60 *United States – Certain Measures on Steel and Aluminium Products*, Request for Consultations by China, 9 April 2018, WT/DS544/1, G/L/1222, G/SG/D50/1; *United States – Certain Measures on Steel and Aluminium Products*, Request to join consultations, Communication from India, 18 April 2018, WT/DS544/3; *United States – Certain Measures on Steel and Aluminium Products*, Request to join consultations, Communication from the Russian Federation, 19 April 2018, WT/DS544/4; *United States – Certain Measures on Steel and Aluminium Products*, Request to join consultations, Communication from Thailand, 19 April 2018, WT/DS544/5; *United States – Certain Measures on Steel and Aluminium Products*, Request to join consultations, Communication from Hong Kong, China, 23 April 2018, WT/DS544/6; *United States – Certain Measures on Steel and Aluminium Products*, Request to join consultations, Communication from the European Union, 23 April 2018, WT/DS544/7.

GATT), the most favoured nation principle (Art. I:1 GATT) and Art. X:3(a) GATT.[61] Within the Request for Consultations, the above-mentioned contracting parties challenge the tariffs as not justifiable under the national security exception of Art. XXI GATT.

But in addition to challenging the tariffs as not being covered under Art. XXI GATT, the requesting parties put forth an inconsistency with Art. XIX:1(a) and Art. XIX:2 GATT and articles of the SGA. This means that at least China, India, Russia, Thailand, Hong Kong and the EU consider the tariffs in question as unlawful safeguard measures. This classification finds no support in the US' invocation, but was made unilaterally by the affected states. Is such a unilateral classification as safeguard measures in compliance with WTO law? In order to answer this question, the legal framework of safeguard measures will be examined and the concept of safeguard measures 'in disguise'[62] will be discussed.

For now, the US has accepted the request for consultations and has entered into consultations '[without] prejudice to the US view that the tariffs imposed pursuant to Section 232 are issues of national security not susceptible to review or capable of resolution by WTO dispute settlement, and that the consultations provisions in the *Agreement on Safeguards* is not applicable […]'.[63]

I. Legal Framework of Safeguard Measures

The legal regime of safeguard measures is an individual system of trade defence instruments – independent from the category of national security measures – that allows WTO contracting parties to increase tariffs on certain goods, which are imported into the respective member state in such increased quantities as to cause serious injury to domestic producers. Against these safeguard measures, affected parties are allowed to suspend concessions towards the safeguarding member state in order to rebalance the trade deficit caused by the safeguard measures ('compensatory measures').

The safeguard measures system is stated in both Art. XIX GATT and the SGA, which specify and modify Art. XIX GATT to a large extent.[64] Unlike the countervailing duties against subsidies and the anti-dumping measures, which both are ap-

61 Cf. *United States – Certain Measures on Steel and Aluminium Products*, Request for Consultations by China, 9 April 2018, WT/DS544/1, G/L/1222, G/SG/D50/1, p. 2.

62 *Tietje/Sacher*, (fn. 22), p. 9 uses the term 'hidden safeguard measure'.

63 *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, 17 April 2018, WT/DS544/2.

64 Cf. Appellate Body Report of 12 December 1999, WT/DS121/AB/R ('*Argentina – Safeguard Measures on Imports of Footwear*'), para. 81; Appellate Body Report of 10 November 2003, WT/DS248/AB/R et al. ('*United States – Definite safeguard measures on imports of certain steel products*'), paras 275-208; *Lee*, Agreement on Safeguard Measures, in: Macrory/Appleton/Plummer (eds.), The World Trade Organization: Legal, Economic and Political Analysis, Volume I, 2005, pp. 784 ff.

plicable in the case of 'unfair' trade policies of third countries, the safeguard measures act against 'fairly' traded goods imported from other member states.[65]

The SGA and Art. XIX GATT grant the opportunity to implement *inter alia* temporary tariffs in order to protect the domestic industry against the relative or absolute increase of imports, which causes or at least threatens to cause 'serious injury to domestic producers in that territory of like, or directly competitive products' as a result of 'unforeseeable developments' (Art. XIX:1(a) GATT).[66] Safeguard measures are clear protectionist measures and appear as alien elements in the WTO system, which intends to reduce trade barriers instead of introducing them. Nevertheless, the safeguard measure system plays an integral role in the WTO and balances political and economic needs and demands vis-à-vis the ongoing trade liberalisation.[67]

As safeguard measures are subject to the most favoured nation principle (Art. 2.2 SGA), they cannot be taken as targeted actions against specific member states but against all member states.[68] Furthermore, the acting member state has to notify the measures 'as far in advance as may be practical' (Art. 12.1 SGA and Art. XIX:1(a) GATT) and it has to initiate consultations with the contracting parties 'having a substantial interest as exporters of the product concerned' (Art. 8.1 SGA and Art. XIX: 1(a) GATT). These consultations aim to reach an agreement on 'any adequate means of trade compensation for the adverse effects of the measure on their trade', i.e. on rebalancing the trade deficit caused by the safeguard measures.[69]

The safeguard measure system is not 'self-judging'. Instead, it is formulated objectively and requires 'objective evidence' pursuant to Art. 4.2(b) SGA.[70] Due to this objective design of the safeguard measure system, unlike the restricted jurisdiction of the DSB regarding the review of national security exceptions, affected contracting parties can challenge the safeguard measures comprehensively before the DSB (Art. 14 SGA).[71]

65 Cf. Appellate Body Report of 15 February 2002, WT/DS202/AB/R ('*United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea*'), para. 80; *Matsushita et al.*, (fn. 59), p. 409.

66 This increase in imports must be 'recent enough, sudden enough, sharp enough, and significant enough […] to cause or threaten the "serious injury"'; Appellate Body Report of 14 December 1999, WT/DS121/AB/R ('*Argentina – Safeguard Measures on Imports of Footwear*'), para. 131. For a closer view on the terms injury and the causation standard in safeguard investigations *Nedumpara*, Injury and Causation in Trade Remedy Law, 2016, pp. 195 ff.

67 *Matsushita et al.*, (fn. 59), p. 410; *Müller*, Schutzmaßnahmen gegen Warenimporte unter der Rechtsordnung der WTO, 2006, pp. 21 ff. and pp. 40 ff.

68 *Van den Bossche/Zdouc*, World Trade Organization, 4th ed. 2017, p. 649.

69 Cf. Art. 8.1 Sentence 2 SGA.

70 *Hahn*, Balancing or Bending? Unilateral Reactions to Safeguard Measures, Journal of World Trade 2005, pp. 301 ff.

71 *Lester/Mercurio/Davies*, World Trade Law, 3rd ed. 2018, pp. 299 f.; *Hahn*, (fn. 70), pp. 305 f.

II. The Concept of Safeguard Measures 'in Disguise'

As already mentioned above, the US has classified its steel and aluminium tariffs as being justified as a national security measure by invoking Art. XXI GATT. However, the European Commission has, in particular, rejected this interpretation from the outset.[72] Commissioner Malmström said, 'We suspect that the US move is effectively not based on national security considerations but an economic safeguard measure in disguise'.[73] This statement supposes and presumes that the European Union has the right to determine unilaterally the nature of the 2018 US steel and aluminium tariffs as safeguard measures. Subsequently, China, the European Union, India, Russia and Turkey stressed explicitly at WTO level that they consider the 2018 US steel and aluminium tariffs as safeguard measures 'in disguise'.[74] Whether or not such unilateral classification is in conformity with WTO law is questionable.

Certainly, all unilateral determinations bear the overall risk of unilateral misclassification and abuse and potentially undermine the rule-based WTO law system. Additionally, the existence of notification requirements for safeguard measures in Art. 12.1 SGA could indicate a right of the acting member state to determine the nature of the measure on its own.[75] Furthermore, in the case *United States – Imports of Sugar from Nicaragua* where the United States did not invoke Art. XXI GATT,[76] the panel deciding the case did not review the US measure regarding the national security exception, i.e. did not determine the measure unilaterally.[77] In other words, the panel has accepted the unilateral non-classification of the acting member state. Referring to the 2018 US steel and aluminium tariffs, the jurisprudence in *United States – Imports of Sugar from Nicaragua* could be interpreted as if the acting member states would have the exclusive competence to determine the legal nature of its measures in question. However, distinguishing it from the present situation, the decision solely

72 Cf. the statement of the President of the European Commission Juncker of 1 March 2018, STATEMENT/18/1484: 'We strongly regret this step, which appears to represent a blatant intervention to protect US domestic industry and not to be based on any national security justification'.

73 *European Commission*, Statements by Vice-President Katainen and Commissioner Malmström at the European Parliament plenary debate, 14 March 2018, SPEECH/18/1961.

74 Imposition of a Safeguard Measure by the United States on Imports of Steel, Request for Consultations under Article 12.3 of the Agreement on Safeguards by China, 26 March 2018, G/SG/162 and Imposition of a Safeguard Measure by the United States on Imports of Aluminium, Request for Consultations under Article 12.3 of the Agreement on Safeguards by China, 26 March 2018 with the same wording: 'China takes the view that the above-mentioned measure of the United States is safeguard measure although it's in the name of national security measure'. Cf. similar statements by the European Union (G/SG/173), India (G/SG/177 and G/SG/176), the Russian Federation (G/SG/181) and Turkey (G/SG/183).

75 *Tietje/Sacher*, (fn. 22), p. 10.

76 *United States – Imports of Sugar from Nicaragua*, Report of the Panel, 13 March 1984, L/5607 – 31S/67, para. 3.10.

77 Ibid., para. 4.4: 'The Panel noted that the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua's quota could be justified under any such provision'.

dealt with the question of whether a panel can determine the nature of a measure unilaterally and not the question if a member state can do so, as in the concept of safeguard measures 'in disguise'. Furthermore, the Nicaragua case was on the non-invocation of the potentially self-judging Art. XXI GATT and not on the non-invocation of a fully reviewable safeguard measure.

On the other hand, the adversely affected WTO members might be interested in unilateral determination and classification of measures in order to exercise their rights to rebalance potential trade deficits with compensatory measures under Art. 8.2 SGA and Art. XIX:3(a) GATT.[78] Apart from that, the whole WTO system relies on and is designed for unilateral determinations *bona fide* by the member states in conjunction with *ex post*-reviews of its legality by the DSB.[79] With that said, member states have the obligation but also the right to classify both, their own and foreign measures, on their own responsibility. Consequently, the EU, China, India, Russia, Hong Kong and Thailand have the competence to determine the legal nature of the 2018 US steel and aluminium tariffs unilaterally.

However, if these contracting parties want to classify these tariffs as safeguard measures 'in disguise', there at least has to be some objective indications for this classification in order to avoid all misuse. As examined by the DSB in the case *Japan – Taxes on Alcohol Beverages*, one can refer to the design, architecture and structure of a measure[80] to make such a determination.

The following indications speak against the 'design, architecture and structure' of the 2018 US steel and aluminium tariffs as safeguards. First of all, US safeguard measures usually are based on the domestic provisions of 'Sections 201-204 Trade Act of 1974' and not on 'Section 232 Trade Expansion Act of 1962' as the current steel and aluminium tariffs.[81] Secondly, although the application and interpretation of domestic law provisions should not play the leading role in public international law relations, Section 232 Trade Expansion Act of 1962 clearly serves the overall purpose of protecting national security even from abstract dangers.

78 *Tietje/Sacher*, (fn. 22), p. 10.

79 In that sense *Hahn*, (fn. 70), p. 320.

80 Appellate Body Report of 04/10/1996, WT/DS8/AB/R ('*Japan – Taxes on Alcoholic Beverages*'), p. 29: 'We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products. […] its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure'; Appellate Body Report of 13/12/1999, WT/DS87/AB/R ('*Chile – Taxes on Alcoholic Beverages*'), para. 71; *Tietje/Sacher*, (fn. 22), p. 10. However, the cited decision was only on the interpretation of a measure on Art. III:1 GATT ('as to afford protection to domestic production').

81 *Wolfram*, in: Wolfrum/Stoll/Koebele (eds.), WTO-Trade Remedies, 2008, Comparative Overview of EU and US Safeguard Regulations, pp. 833 ff., para. 3. Cf. also the US statement that '[the] United States did not take action pursuant to Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures'; *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, 17 April 2018, WT/DS544/2.

Alternatively, objective indications favouring their classification as safeguard measures can be seen in Section 232,[82] the domestic US investigations[83] and the Presidential Proclamations,[84] as they all refer to imports of goods. In consequence, the 2018 US steel and aluminium tariffs were levied in order to protect the US economy from imports competition. Additionally, a clear protectionist character of the tariffs makes them comparable with trade remedies. Furthermore, the present tariffs were introduced in principle against all WTO members and were not targeted against single contracting parties, i.e. the 2018 US steel and aluminium tariff's design evokes connotations of the most favoured nation principle – which is applicable for safeguard measures. Finally, security considerations do not compel the exclusive application of Art. XXI GATT, but national security can play a role in the decision to implement safeguard measures, too.[85] These arguments speak in favour of the European interpretation. Therefore, the European Union as well as all other WTO members that requested consultations with the US can base their unilateral determination of the 2018 US steel and aluminium tariffs as safeguard measures 'in disguise' on some objective indications. Whether these indications are strong enough can only be decided by the DSB definitively.

D. Compensatory Measures against Safeguard Measures 'in Disguise'

'The EU is entitled use the WTO Safeguards Agreement to rebalance the benefits we have granted to the US in the past'.[86] With this statement, Commissioner Malmström unambiguously declared the European Commission's legal classification as 'compensatory measures' against the US safeguard measures 'in disguise' in the form of import

82 Cf. Section 232(b) sentence 2 Trade Expansion Act of 1962: 'If […] the Director is of the opinion that the said article is being *imported into the United States in such quantities or under such circumstances* as to threaten to impair the national security […] he shall take such action, and for such time, as he deems necessary to *adjust the imports of such article* […] so that such *imports will not so threaten to impair the national security*' (emphasis added).

83 *US Department of Commerce*, The Effect of Imports of Steel on the National Security, 11 January 2018, p. 55: 'The Secretary has determined that the displacement of domestic steel by *excessive imports* and the consequent *adverse impact of those quantities of steel imports* on the economic welfare of the domestic steel industry, along with the circumstance of *global excess capacity in steel*, are "weakening our internal economy" and therefore "threaten to impair" the national security […]' (emphasis added); *US Department of Commerce*, The Effect of Imports of Aluminum on the National Security, 17 January 2018, p. 104: 'The Secretary has determined that to remove the threat of impairment, it is *necessary to reduce imports* to a level that will provide the opportunity for U.S. primary aluminium producers to restart idled capacity' (emphasis added).

84 Cf. notably *US President*, Presidential Proclamation on Adjusting Imports of Steel into the United States, 8 March 2018, para. 8 and *US President*, Presidential Proclamation on Adjusting Imports of Aluminum into the United States, 8 March 2018, para. 7 with the same wording: 'In my judgment, this tariff is necessary and appropriate in light of […] the *continued high level of imports* since the beginning of the year […]' (emphasis added).

85 *Müller*, (fn. 67), pp. 21 ff. and p. 53.

86 *European Commission*, Statements by Vice-President Katainen and Commissioner Malmström at the European Parliament plenary debate, 14 March 2018, SPEECH/18/1961.

tariffs on *inter alia* bourbon whiskey, motorcycles, orange juice and clothing articles.[87] So far, the European Union has only announced that it will introduce these compensatory measures on US products and will only levy them in the case that the European Union will not receive a permanent exclusion on the tariffs after 1 June 2018. On the other hand, China has already introduced 'compensatory measures' on US goods – mainly agricultural products, certain steel products and aluminium waste – in the form of imports tariffs and has notified these measures to the Council for Trade in Goods.[88]

In the following section, the legality, especially of the announced EU 'compensatory measures' will be examined. In general, one can distinguish between two types of compensatory measures, namely general measures (Art. 8.2 SGA and Art. XIX:3(a) GATT) as well as measures against provisional safeguard measures (Art. XIX:3(b) GATT).[89]

I. Compensatory Measures against Provisional Safeguard Measures

The whole concept of safeguard measures 'in disguise' always leads to formal illegality of the state actions in question, due to the absence of all formal prerequisites including the safeguard measure notifications and especially consultations. Because of this lack of formalities, one could think about an option of implementing compensatory measures against safeguard measures 'without prior consultation' pursuant to Art. XIX:3(b) GATT.[90] As compensatory measures pursuant to this provision have never been put into practice, the provision has rarely been discussed.

Art. XIX:3(b) GATT, however, is only applicable in the case of 'action […] taken under [Art. XIX] paragraph 2 […] without prior consultation', thus only as a remedy in the case of use of provisional safeguard measures pursuant to Art. 6 SGA and

87 For more detail, see the list of potential products affected by the European compensatory measures, http://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156648.pdf (25/04/2018).

88 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 by China, 3 April 2018, G/L/12118, G/SG/N/12/CHN/1. The 'Joint Statement of the United States and China Regarding Trade Consultations' of 19 May 2018, in which China consented to 'reduce the United States trade deficit with China' did not treat the issue of the 2018 US steel and aluminium tariffs and the Chinese compensatory measures.

89 Cf. the analysis of the importance and the weak points of the obligatory consultations *Müller*, (fn. 67), pp. 295 f.

90 Art. XIX:3(b) GATT is not covered by the SGA; *Wolfram*, in: Wolfrum/Stoll/Koebele (eds.), WTO-Trade Remedies, Volume IV, 2006, Art. 8 SGA, paras 21 ff.; *Hoang*, Liberalisierung und (Notstands)Schutzklauseln im internationalen Warenhandel am Beispiel des WTO-, EG- und ASEAN-Rechts, 2007, p. 170; also *Bourgeois/Wagner*, in: Wolfrum/Stoll/Koebele (eds.), WTO-Trade Remedies, Volume IV, 2006, Art. XIX GATT, para. 22 but critically towards the inner logic of the continued existence of Art. XIX:3(b) GATT with regards to Art. 8.3 SGA.

Art. XIX:2 sentence 3 GATT by an acting state.[91] Until now, there is no objective reason to consider that the postponement of the entry into force of the US tariffs would 'cause damage which would be difficult to repair' for the American producers. Additionally, the American tariffs are not limited in time, as required in Art. 6 sentence 2 SGA.

Furthermore, unlike Art. XIX:3(a) GATT, the compensatory measures against provisional safeguard measures imply application to the same sector as the corresponding safeguard measures, as they must 'prevent or remedy the injury' and 'injury' in this context means 'serious injury […] to the domestic producers'. In other words, the compensatory measures have to be taken in order to prevent the concrete damage to the domestic producers by building up trade barriers in the same economic sector, unlike general compensatory measures that aim at rebalancing the state trade deficit and permit suspensions on all economic sectors. Additionally, unlike the general compensatory measures scheme, there is no limitation of member states against whom the measures pursuant to Art. XIX:3(b) GATT may be taken. Hence, in compliance with the most favoured nation clause, the affected member state has to take its compensatory measures *erga omnes*. It is not allowed to raise tariffs only against the safeguarding member state when compensatory measures against the actions are taken.

As these perceptions show, Art. XIX:3(b) GATT intends to enable the affected member states to take protectionist measures in the case, that the safeguard measures will cause the redirection of the imports into other member states and cause serious injury there. For that reason, Art. XIX:3(b) GATT rather constitutes 'counter safeguard measures' comparable to the direct application of the safeguard measure provisions by the adversely affected state itself than a special form of the general compensatory measures. Finally, Art. XIX:3(b) GATT requires a certain time pressure, thus it is only applicable if 'delay would cause damage difficult to repair' to the safeguarding party.

Since the 2018 US steel and aluminium tariffs are no 'provisional safeguard measures', the European Commission plans to levy 'compensatory measures' on all economic sectors. These suspensions will solely be targeted against US products and since it cannot be seen that the implementation of the European compensatory measures would be pressed for time, the tariffs are not covered under Art. XIX:3(b) GATT. Apparently, the EU has not considered implementing this type of compensatory measures as Commissioner Malmström, in her speech in the European Parliament, only referred to the Safeguards Agreement, which does not cover compensatory measures pursuant to Art. XIX:3(b) GATT.[92]

91 Provisional safeguard measures have to be on the basis of 'critical circumstances where delay would cause damage which […] would be difficult to repair'; Cf. Art. 6.1 SGA. *Bourgeois/Wagner*, (fn. 90), Art. XIX GATT, para. 22.

92 *European Commission*, Statements by Vice-President Katainen and Commissioner Malmström at the European Parliament plenary debate, 14 March 2018, SPEECH/18/1961. Cf. (fn. 91).

II. General Compensatory Measures

In case the prescribed consultations between the acting and the affected member state are not fruitful, according to Art. XIX:3(a) GATT and Art. 8 SGA, the affected member state can suspend 'the application to the trade of the contracting party taking such action […] of such substantially equivalent concessions'. The compensatory measures of Art. 8.2 SGA and Art. XIX:3(a) GATT can be taken against all goods of the safeguarding member state, irrespective of their economic sector. In general, these compensatory measures can be taken at the earliest 30 days after the initiation of the consultations and 30 days after the receipt of the notification by the Council for Trade in Goods, and not later than 90 days after the measure is applied (Art. 8.2 SGA). In recent practice, this 90 days period generally is extended through bilateral agreements.[93]

Art. 8.3 SGA, however, stipulates a postponement of the unilateral compensatory measures until three years after the entry into force of the safeguard measures, if there is an absolute increase of imports and the safeguard measure complies with the SGA. With reference to Art. 14 SGA and Art. 23 DSU, it is argued that compensatory measures cannot be implemented within the first three years period without a prior decision of the DSB on the question of legal conformity with the SGA. In other words, it is said that the DSB would have the sole jurisdiction to decide on the question of legal conformity and not the member states themselves. This argumentation was the state practice of both the United States and the EC in the case of the American steel tariffs under President Bush in 2002. The United States argued that 'almost all Members understand and accept the fact that an exporting Member cannot unilaterally determine for itself whether the […] criteria in Article 8.3 has been met, […] whether a safeguard measure conforms to the provisions of the Agreement. Such a unilateral determination as to whether another Member had violated the Agreement would be inconsistent with the Agreement and the DSU'.[94] The EC agreed with the US and highlighted that only the question of legality, in contrast to the question of fact whether an absolute increase in imports has occurred, has to be decided multilaterally,

93 GATT Analytical Index, 3rd ed. 2012, p. 525.

94 See *Committee on Safeguards*, Minutes of the Regular Meeting of 16 October 2002, G/SG/M/19, para. 119.

i.e. by the DSB.[95] Albeit, such a prior decision of the DSB finds no support in the *travaux préparatoires* to the SGA.[96] On the contrary, although the current WTO system provides for a dispute settlement system with a wide jurisdiction, this jurisdiction only establishes *ex post* reviews, and still, the member states have to ensure *bona fide* the legality of their own actions, i.e. also of their compensatory measures.[97]

In order to implement compensatory measures, China, the European Union, India, Russia and Turkey have requested consultations with the United States under Art. 12.3, Art. 8.1 SGA and Art. XIX:2 GATT 'with respect to the US safeguard measures'.[98] The United States has refused all requests for such consultations.[99]

95 See *Committee on Safeguards*, (fn. 94), para. 125. For further state practice on Art. 8.3 SGA with regards to the recourse to the dispute settlement body see *Hahn*, (fn. 70), p. 317. In another dispute with Poland, the Slovak Republic went even further, and argued that the implementation of compensatory measures would require a prior decision of the DSB concerning both the absolute increase in imports and the conformity with the SGA; see the argumentation of Slovakia against Polish compensatory measures in the Statement of the Slovak Republic Regarding Suspension of Concessions by Poland on Imports of Margarine and Butter from the Slovak Republic of 05 October 2001, G/C/W/312, p. 2: 'The Slovak Republic did not dispute the right of a WTO member to take actions. But general principle must be observed by the WTO Members under WTO multilateral rules, that complaining party shall first seek authorization for any retaliation actions, because unilateral approach in decision making process seriously undermines rule based system within the WTO. We would like to recall in particular on Article 23 of the DSU. […] In the view of the Slovak Republic, […] consequent unilateral action taken without prior authorization does not have any legal grounds and are not consistent with provisions of the SG Agreement (Article 8.2 and 8.3) and provisions of the DSU (Article 23)'.

96 Cf. *Hilpold*, Die Neuregelung der Schutzmaßnahmen im GATT/WTO-Recht und ihr Einfluß auf "Grauzonenmaßnahmen", ZaöRV 1995, pp. 120 ff.; *Hahn*, (fn. 70), p. 311.

97 *Hahn*, (fn. 70), pp. 320 ff.

98 Imposition of a Safeguard Measure by the United States on Imports of Steel, Request for Consultations under Article 12.3 of the Agreement on Safeguards by China, 26 March 2018, G/SG/162; Imposition of a Safeguard Measure by the United States on Imports of Aluminium, Request for Consultations under Article 12.3 of the Agreement on Safeguards by China, 26 March 2018; Imposition of a Safeguard Measure by the United States on Imports of Certain Steel and Aluminium Products, Request for Consultations under Article 12.3 of the Agreement on Safeguards by the European Union, 16 April 2018, G/SG/173; Imposition of a Safeguard Measure by the United States on Imports of Aluminium, Request for Consultations under Article 12.3 of the Agreement on Safeguards by India, 17 April 2018, G/SG/176; Imposition of a Safeguard Measure by the United States on Imports of Steel, Request for Consultations under Article 12.3 of the Agreement on Safeguards by India, 17 April 2018, G/SG/177; Imposition of a Safeguard Measure by the United States on Imports of Certain Steel and Aluminium Products, Request for Consultations under Article 12.3 of the Agreement on Safeguards by the Russian Federation, 19 April 2018, G/SG/181; Imposition of a Safeguard Measure by the United States on Imports of Certain Steel and Aluminium Products, Request for Consultations under Article 12.3 of the Agreement on Safeguards by Turkey, 20 April 2018, G/SG/183.

99 Communication from the United States, 5 April 2018, G/SG/168; Communication from the United States in Response to the European Union's Request, 19 April 2018, G/SG/178; Communication from the United States in Response to India's Request, 19 April 2018, G/SG/179; Communication from the United States in Response to the Russian Federation's Request, 20 April 2018, G/SG/182; Communication from the United States in Response to Turkey's Request, 23 April 2018, G/SG/184.

Since the European compensatory measures would not be covered by Art. XIX: 3(b) GATT, they could only fall under the general compensatory measures regime. However, the Council for Trade in Goods has never received any 'written notice of such suspension' in the sense of Art. 8.2 SGA, nor have any consultations been initiated (Art. 12.3 SGA) by the US. Therefore, from a formalistic point of view, the United States could argue that the European Union cannot introduce compensatory measures according to Art. 8.2 SGA, due to the fact that the 30 days period in Art. 8.2 SGA never commenced and as a consequence never expired.

This interpretation would put too much power into the hands of the US as the alleged 'safeguarding member state' that itself refuses all consultations under Art. 12.3 SGA, Art. 8.1 SGA and Art. XIX:2 GATT. As a result of the approach of the safeguard measure 'in disguise', the United States would have acted in a contradictory manner, in as much as on the one hand, they have failed to notify its 'disguised' safeguard measures and to provide 'adequate opportunity for prior consultations',[100] but on the other hand, they would rely on the absence of this notification and consultation for their own benefit. Therefore, according to the 'clean hands principle', the American notification and consultation could be assumed to ensure that they do not benefit from their own illegal actions.[101] As a consequence, the European Union would be free to implement its compensatory measures within the 90 days period after the entry into force of the 2018 US steel and aluminium tariffs and would have to notify the compensatory measures in accordance with Art. 12.5 SGA. However, the 30 days cooling off and negotiation period stated in Art. 8.2 SGA and Art. XIX:3(a) GATT, would have to be met.

Finally, it is questionable if the European Union could introduce the compensatory measures within the first three years or if rather Art. 8.3 SGA would suspend their application. According to the Chinese notification of its suspension of concessions, the American tariffs are not based on an absolute increase in imports and consequently are not suspended.[102] Additionally, Art. 8.3 SGA does not differentiate between substantial or pure formal provisions of the SGA, but presupposes only 'that such a [safeguard] measure conforms to the provisions of this Agreement'. Therefore, notwithstanding the question of whether or not there is an absolute or a relative increase of steel and aluminium imports into the United States, one can argue, that the postponement of Art. 8.3 SGA is not applicable in the present case due to the fact that the United States has never notified the measures as safeguards to the Committee on Safeguards and has never carried out an investigation pursuant to Art. 3 SGA. In other words, the United States did not fulfil the procedures required for safeguard measure proceedings; therefore, the American measures are manifestly not in conformity with

100 Cf. Art. 12.3 SGA.

101 See *Moloo*, A Comment on the Clean Hands Doctrine in International Law, 2010.

102 *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 of 29 March 2018, G/SG/N/12/CHN/1, p. 1.

the provisions of the SGA.[103] However, in the 2002 steel dispute with the United States, the European Community had taken the position that a prior decision of the DSB regarding the conformity to the SGA would be required. Consequently, the European Union either would have to justify its 'immediate' application of compensatory measures within the three years period based on only a relative increase in imports, or would have to deviate from its own state practice in the 2002 steel case.

With regards to the financial risks of the European approach, it can be said that the implementation of illegal compensatory measures does not bear a high financial risk. In the case that the United States would challenge the European compensatory measures before the DSB and the EU would be defeated, the DSB has no jurisdiction to award damages to the United States.[104] In the end, the European approach has to face the overall political risk that the US will not accept the European determination of the 2018 US steel and aluminium tariffs as safeguard measures 'in disguise' in the concrete case, and that the US itself will, in return, classify the European suspensions of concessions as safeguard measures 'in disguise'. At the end of the day, the European Union would have to face the risk that the US could introduce compensatory measures against the European compensatory measures.[105]

E. Further Reaction

As mentioned above, the European Union together with other WTO members, has requested consultations *inter alia* under the DSU in order to start a dispute settlement proceeding. If the consultations do not lead to a consensual dispute settlement, a panel report will clarify the legal issues raised. Even if the European Union would prevail in the dispute settlement before the panel, during the years of the proceeding the European steel and aluminium industry will suffer from the American tariffs and will sustain damage that will be difficult to repair. Additionally, a dispute settlement proceeding under the DSU is not allowed to award the payment of damages.[106] That is why the economic losses caused by the possibly illegal tariffs, in the end, would not be compensated *ex post* by the United States. Therefore, the judicial solution should only be supplementary to the use of other courses of action.

In addition to the potential implementation of compensatory measures against the 2018 US steel and aluminium tariffs, the European Union has notified the initiation of its internal investigations concerning the question of implementation of standard

103 In that sense, although not explicitly, *Tietje/Sacher*, (fn. 22), p. 11.

104 Cf. for the compensation under the DSU in general *Van den Bossche/Zdouc*, (fn. 59), pp. 289 ff.

105 *Tietje/Sacher*, (fn. 22), p. 11.

106 According to Art. 22.1 DSU compensation is only provided for 'in the event that the recommendations and rulings are not implemented within a reasonable period of time' and thus only subsidiary; cf. *Van den Bossche/Zdouc*, (fn. 68), p. 204.

safeguard measures on the steel market itself.[107] These safeguard measures might be necessary to protect the domestic steel production from the redirection of the global excess production vis-à-vis 'the recent Section 232 measures by the United States of America',[108] which possibly aggravates the imports situation on the European steel market. Apparently, the European Commission does not yet expect similar deteriorations on the European aluminium market. However, as safeguard measures have to comply with the most favoured nation principle, potential European safeguard measures on the steel market cannot be targeted solely against the United States but have to be implemented *erga omnes*.

An additional option, although not for the European Union itself, is available for affected companies who could attempt to challenge 'the tariffs' before US domestic courts, as already done by a Swiss company, although until now unsuccessfully.[109]

F. Final Considerations

The United States on its part considers the 2018 US steel and aluminium tariffs as being justified under the national security exception of Art. XXI GATT. The US interpretation of the provision as a self-judging clause strengthens its position for potential consultations and negotiations with its trading partners, because according to this approach adversely affected contracting parties cannot challenge the tariffs before the DSB but rather have to negotiate the repeal of the tariffs. The European Union and some other WTO members refuse the alleged arbitrary use of Art. XXI GATT and determine the 2018 US steel and aluminium tariffs as safeguard measures 'in disguise'. The European Commission has announced its intentions to levy 'compensatory measures' on US products in case the tariffs enter into force against European goods. With this approach, the European Union also seeks the best bargaining position for current and future trade negotiation.

The two diverging opinions on the classification of the 2018 US steel and aluminium tariffs, however, could bring the international trade relations to the threshold of a much-dreaded trade war by excessive use and misuse of national security exceptions and trade defence instruments. Whether or not the world will enter into such a disaster, above all between the United States and China, depends on the results of the ongoing consultations and in particular on the containment of international overcapacity in steel and aluminium markets.

107 Notification under Article 12.1(a) of the Agreement on Safeguards on Initiation of an Investigation and the Reason for it, 27 March 2018, G/SG/N/6/EU/1; *European Commission*, Notice of initiation of a safeguard investigation concerning imports of steel products, OJ C 111 of 26/03/2018, pp. 29 ff.

108 *European Commission*, (fn. 107), pp. 29 ff.

109 Cf. case No. 18-00057 before the United States Court of International Trade New York, https://www.courthousenews.com/wp-content/uploads/2018/03/steel.pdf (29/03/2018).