World Trade Review (2025), 1–29
doi:10.1017/S1474745625101274

ORIGINAL ARTICLE

The Case for WTO Collective Action

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(Received 19 May 2025; revised 19 August 2025; accepted 26 August 2025)

Abstract
This article considers whether Members of the World Trade Organization (WTO) can develop a collective response to a globally welfare-damaging situation that impacts individual Members differentially. We conclude that collective action remains within the letter and spirit of the WTO Agreements. We set out the enabling procedures for collective action in a WTO dispute setting, in particular, the use of the rarely used situation complaint. We were motivated by the United States' move to redraw its trade relations and break from its international trade commitments through bilateral negotiations in which it holds asymmetric leverage, buttressed by a pre-emptive announced escalation in response to any attempt by counterparties to join in forging a collective response. We conclude that, if undertaken, collective action can raise each Member's voice into a countervailing choir and, more importantly, it can reinforce the mutual benefits derived from the multilateral trading system. Collective action thus serves a double purpose in engaging domestic concerns *and* the collective interests of those intending to preserve the multilateral system on which each Member depends.

Keywords: WTO; collective action; dispute settlement; situation complaint; MFN

JEL Codes: F13; F51; F53; F55; K33; K34; H12

1. Introduction and Motivation

Since Donald Trump's second inauguration as president of the United States, his administration has attempted to reset US trade relations with its trading partners.[1] Blurring economic[2] and non-economic objectives,[3] the evolving efforts have included higher, discretionary tariffs, heightened

[1]I. Manak (2025) 'No, Trump Is Not Ushering in a New Global Trading Order', *Financial Times*, 19 August. Unless clarified otherwise, we refer to the United States' 'tariff strategy' throughout the paper as encompassing trade actions by Executive Order, Proclamation, Fact Sheets, Announcements, and all Federal Register notices. For an up-to-date overview of all US tariffs see, C.P. Bown (2025) 'Trump's Trade War Timeline 2.0: An Up-to-Date Guide', Peterson Institute of International Economics (updated 29 August 2025), www.piie.com/blogs/realtime-economics/2025/trumps-trade-war-timeline-20-date-guide (accessed 5 September 2025).

[2]Principally, the reversal of an alleged de-industrialization of the US economy, see J. Greer (2025) 'Trump's Trade Representative: Why We Remade the Global Order', *The New York Times*, 7 August.

[3]For example, punitive tariffs were levied on Brazil for the 'politically motivated persecution' of the former Brazilian President and on India for its purchase of Russian energy and military equipment, see S. Dorn (2025) 'Trump Says He Won't Extend Tariff Pause Past Aug. 1 – Sets 25% Rate for India', *Forbes*, 30 July; The White House, 'Fact Sheet: President Donald J. Trump Addresses Threats to the United States from the Government of Brazil' (30 July), www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-president-donald-j-trump-addresses-threats-to-the-united-states-from-the-government-of-brazil/.

customs scrutiny of inputs incorporated in traded products,[4] removing preferential access for least developed countries,[5] and removing duty-free entry under various US import programs.[6] The reset remains volatile, with the Trump administration encouraging partners 'to buy down' the tariff rates with, for example, promises to invest in the United States, mirror US measures for economic security alignment, grant more favourable treatment for US products, procure US energy products, or implement new customs rules and enforcement strategies.[7] Though the United States raised tariff rates beyond its bindings, it has made no effort to consider the renegotiation of tariffs through the institutions and procedures of the World Trade Organization (WTO).[8] The United States has promised swift retaliation should a partner challenge the United States or collaborate with others to confront the United States.[9] The actions of the United States fit into the classic case of bullying – the use of unilateral sanctions to impose a state's will.[10]

All of this may, or may not, fit within a grand narrative constructed by the United States to remake the trading system, to acknowledge the heavier role non-economic issues play in the net policy mix, or to assert that coercive power-oriented diplomacy must govern international trade.[11] Regardless, within a globalized economy governed by multilateral trade rules, interconnected trade agreements, and complex supply chains, the impact of these tariffs stretches beyond a single government deal, with cascading consequences from trade diversion due to the US tariff strategy. WTO Members face an unprecedented conundrum: how to respond to US demands while protecting their interests in an unequal contest, *and*, at the same time, maintaining their WTO commitments and preserving the

[4]L. DePillis (2025) 'New Tariffs on "Transshipped" Goods Mystifies Importers', *The New York Times*, 8 August.

[5]See J. Wingrove and M. Ralengau (2025) 'Trump Tariffs to Supersede US Congress-Backed Africa Trade Pact', *Bloomberg*, 4 April; J. Keane, B. Arce, and P. Agarwal (2025) 'Trump Reciprocal Tariffs: Penalizing Vulnerable Economies', *TESS Forum*, 4 April, https://tessforum.org/latest/trump-reciprocal-tariffs-penalizing-vulnerable-economies (accessed 5 September 2025).

[6]For example, the elimination effective 29 August 2025 of the *de minimis* shipment exemption for certain Canadian- and Mexican-origin goods and all other goods of global origin; see The White House (2025) 'Suspending Duty-Free De Minimis Treatment for All Countries' Executive Order', 30 July, www.whitehouse.gov/presidential-actions/2025/07/suspending-duty-free-de-minimis-treatment-for-all-countries/. The Executive Order also imposed obligations on 'transportation carriers delivering shipments to the United States through the international postal network, or other parties if qualified in lieu of such transportation carriers' to collect and remit duties to the US authorities.

[7]For the reference to 'buy down', see D.J. Trump (2025) 'Truth Social Post', 20 July, https://truthsocial.com/@realDonaldTrump/posts/114943927434273211; see European Commission (2025) 'Q&A: EU–US Trade Deal Explained', 29 July, https://ec.europa.eu/commission/presscorner/detail/en/qanda_25_1930; see M. Paulsen (2025) 'Bound Rates and Stakes of the Cambodia Trade Deal,' *International Economic Law and Policy Blog*, 31 October, https://ielp.worldtradelaw.net/2025/10/bound-rates-and-the-stakes-of-the-cambodian-trade-deal.

[8]WTO Members organize the results of negotiations in their schedules of concessions, which include tariffs and non-tariff concessions, as well as commitments concerning agriculture and domestic support, see Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994), arts XI, XII [hereinafter Marrakesh Agreement or WTO Agreement]; see further agreements annexed to the Marrakesh Agreement, including concessions and commitments specific to individual Members: the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, the Agreement on Government Procurement, and the Agreement on Trade Facilitation, all available on the WTO website, www.wto.org/english/docs_e/legal_e/schedlegal_e.htm. The United States may not apply higher tariff rates than those reflected in its tariff bindings, see Articles II and XXVIII of the General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948), 55 UNTS 194 [hereinafter the GATT], and the World Trade Organization, Procedures for Modification and Rectification of Schedules of Tariff Concessions, L/4692 (28 March 1980) [hereinafter 1980 Procedures for Modification and Rectification of Tariff Schedules].

[9]E. Giordano (2025) 'Trump Threatens EU and Canada with even Bigger Tariffs as Trade War Snowballs', *Politico*, 27 March 2025, www.politico.eu/article/trump-threatens-eu-and-canada-with-more-tariffs-if-they-cooperate-against-the-u-s/.

[10]C. Chinkin (2000) 'The State that Acts Alone: Bully, Good Samaritan or Iconoclast?', *European Journal of International Law* 11, 31–32 (explaining: 'It is the act of the bully – the state that imposes its own standards and priorities, disregarding the interests and needs of others and using its power to pursue its goals through threats of deprivation of values of the targeted community').

[11]Greer, supra n. 2; see also J.H. Jackson (1997) *The World Trading System: Law and Politics of International Economic Relations* (2nd edn), MIT Press, 109 (explaining the shift from power-oriented trade governance to rules-based).

https://doi.org/10.1017/S1474745625101274 Published online by Cambridge University Press

foundational principles to avoid a wholesale unravelling of the system of international commerce on which they depend?

This question motivates our investigation into whether a heterogeneous group of economies with varying interests should nevertheless draw upon the mutual benefits they gain from the multilateral system to respond collectively to certain issues. Some governments have emphasized defensive trade diversification measures through enhanced strategic partnerships[12] or the negotiation of trade agreements with other partners.[13] Some Members have brought disputes to the WTO.[14] Some have proceeded with immediate retaliation: for example, Canada's response to the US tariffs on Canadian steel and aluminium products.[15]

Conspicuous by its absence is a formal effort to mobilize a collective response to the United States' divide-and-conquer approach, notwithstanding calls to that effect.[16] Commentators explain this in terms of the adverse incentive structure facing individual states, which militates against the sustained cooperation required for successful collective responses.[17] Thus, even when faced with a common threat, states tend to prioritize their domestic interests, finding it difficult to foster trust and to organize a collective response.[18] States would require considerable incentives to act in the collective interest.[19] Nevertheless, we argue that before evaluating what could influence Members to take collective action, considering the political realities they face, it is worthwhile asking what WTO institutions and legal procedures are available.

[12]Emphasizing a 'strategic partnership between the European Union and Canada', see Prime Minister of Canada (2025) 'Joint Statement: Enduring Partnership, Ambitious Agenda', 23 June, Paragraph 1, www.pm.gc.ca/en/news/statements/2025/06/23/joint-statement-enduring-partnership.

[13]Department for Business and Trade, 'UK–India Trade Deal: Conclusion Summary' (updated 24 July 2025), www.gov.uk/government/publications/uk-india-trade-deal-conclusion-summary/uk-india-trade-deal-conclusion-summary (accessed 5 September 2025).

[14]See Request for Consultations by Canada, *United States – Additional Import Duties on Goods from Canada*, WT/DS634/1 (5 March 2025).

[15]See Department of Finance Canada, 'Canada Responds to Unjustified US Tariffs on Canadian Steel and Aluminium Products', 12 March 2025. Notably, on 10 July 2025, Brazilian President Lula pledged to impose a 50% tariff on US-origin goods if the United States proceeded with its threatened tariffs, which would expand the list of retaliating countries. See, T. Phillips (2025) 'President Lula Hits Back as Trump Tariffs Threaten US–Brazil Trade Showdown', *The Guardian*, 30 July, www.theguardian.com/us-news/2025/jul/30/us-brazil-lula-trump-tariffs (accessed 5 September 2025). In the case of China, the US tariff policy reset merges with the full-blown technology war, which features, *inter alia*, wide-ranging export controls on US technology exports to China, countered by China's imposition of export controls on rare earth exports to the United States and others, see G. Baskaran and M. Schwartz (2025) 'The Consequences of China's New Rare Earths Export Restrictions', *CSIS Analysis*, 14 April, www.csis.org/analysis/consequences-chinas-new-rare-earths-export-restrictions (accessed 5 September 2025). For all countermeasures, see generally International Trade Administration, 'Foreign Retaliations Timeline', www.trade.gov/feature-article/foreign-retaliations-timeline (accessed 17 August 2025).

[16]We acknowledge some evidence of the beginnings of collective responses in the texts accompanying n. 16 and n. 200; see also J.A. Clarke (2025) 'In Time of the Breaking of Nations: Europe's Test', *Friends of Europe*, 23 April; J. Elgot (2025), 'Gordon Brown Calls for "Economic Coalition of the Willing" to Tackle Trump Tariffs', *The Guardian*, 10 April, www.theguardian.com/us-news/2025/apr/10/gordon-brown-calls-for-economic-coalition-of-the-willing-to-tackle-trump-tariffs (accessed 5 September 2025).

[17]S. Nagy (2025) 'Middle Power and the Prisoner's Dilemma', *WGI World*, 22 July. As one foreign diplomat put it, 'I can't be the last one to reach a deal with Trump, because if I'm the last one, then I'm the one who's going to get screwed.' (Reported in N. Toosi, (2025) 'Why Trump May Get Away with His Tariff Trauma', *Politico*, 5 April, www.politico.com/news/magazine/2025/04/05/compass-trump-tariffs-00273410 (accessed 5 September 2025)).

[18]For a discussion of the free rider problem, manifested by the self-harm caused by tariff retaliation, see M. Olson (1965) *The Logic of Collective Action: Public Goods and the Theory of Groups*. Harvard University Press, 1–3, 48; for the transaction costs of organizing a collective response during a crisis, see D. Drezner, (2025) 'The Painful Logic of Collective Action in the Global Political Economy', *Drezner's World* (10 April); on the lack of trust among states, see Toosi, supra n. 17 (reporting: 'Each government has its own national interest and doesn't trust others won't stab them in the back, said one foreign diplomat').

[19]M. Olson (1971) 'Increasing the Incentives for International Cooperation', *International Organization* 25(4), 873–874. That said, we could focus on how states' engagement with the rules of the multilateral trading system fosters collective interests in the international trading community; see A. Wendt (1994) 'Collective Identity Formation and the International State', *The American Political Science Review* 88(2), 384, 391.

https://doi.org/10.1017/S1474745625101274 Published online by Cambridge University Press

Our thesis is that WTO institutions provide recourse for Members to pursue collective action, should they wish to do so. Collective interests are inherent in the spirit of the GATT/WTO architecture, with the history of pragmatic interpretation and implementation of foundational principles providing inspiration and guidance. The article draws on economic theory and revives past contributions to the rules-based multilateral trading system to assess institutional processes that respect the inherent asymmetries of Members and still create a community invested in transparent, reciprocal, non-discriminatory trade. In the concluding section, we return to collective action problems to identify a roadmap for future research.

We use the idea of *collective* in a broad sense, appreciating that it speaks to integration – a concert or a chorus, a blending of actions that does not distinguish one from another.[20] We distinguish between collective and coordinated actions (or inactions). For example, Members may bring separate but identical disputes against one respondent Member's allegedly WTO-inconsistent actions to the WTO. We associate our inquiry with a classic definition of collective security that refers to 'a system, regional or global, in which each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace'.[21] Notwithstanding the rationalist scepticism about the viability of collective action, we root our procedural inquiry in collective interests, as in the advancement of 'shared interests' and even a positive connection with the welfare of others through multilateral processes.[22]

In connecting such ideas to the WTO, GATT Article XXV:1 confirms that Members may take joint action to operationalize the Agreement's norms and principles.[23] Further, we note the similarity of coalition and collective, as Members may form coalitions through committee deliberation of a specific regulation or build collective responses through joint statement initiatives. Although we acknowledge that the global situation encompasses heterogenous states and complex economic, technological, and geopolitical conditions, we rely on the concept of collective action to focus on shared interests and community convergence to a solution for a discrete situation. Whether considering the development of rules or responses to a situation that impairs the objectives of the multilateral trading system, we acknowledge that each Member acts through specific incentives to participate. Nevertheless, their reciprocal cooperation can foster mutual benefits and expectations that feed into a community-based identity.[24]

The article is organized as follows: Section 2 assesses the heightened relevance of state heterogeneity in terms of size and openness in trade governance. Though collective action is best undertaken by the largest possible group of WTO Members, we consider how smaller economies are most vulnerable to economic coercion, and how their relative size and economic potential power dictate their capacity to retaliate effectively. Put simply, the asymmetry in the global economy, reflected in the heterogeneity of states in terms of size and market power, matters when conceptualizing rules-based trade. Accordingly, Section 2 underscores the stakes for smaller economies within the WTO community.

Section 3 begins by evaluating WTO procedures for renegotiating tariff rates (i.e., modifying or withdrawing concessions in Members' schedules) under GATT Article XXVIII. Article XXVIII of the GATT 1994 is an efficient rule designed to facilitate the adjustment of schedules.[25] While all Members have the right to modify or withdraw a concession, there is an inherent presumption that they will

[20] See also J. Pauwelyn (2000) 'Enforcement and Countermeasures in the WTO: Rules are Rules toward a More Collective Approach', *The American Journal of International Law* 94(2), 335–347.

[21] V. Lowe et al. (eds) (2008) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*. Oxford University Press, 35.

[22] R.D. Congleton (2015) 'The "Logic of Collective Action" and Beyond', *Public Choice* 164(3), 217, 228; Wendt, supra n. 19, 386, 389–392 (explaining formation of collective identity by examining rising interdependencies and social convergences across states engaged in institutionalized collective action).

[23] Throughout the paper, we use *collective* as an adjective, and refer to *joint* action owing to WTO nomenclature and the principled acceptance of collective action as embodied in Article XXVI:1 as 'joint action'.

[24] See generally Wendt, supra n. 19.

[25] GATT, supra n. 8, Article XXVIII.

https://doi.org/10.1017/S1474745625101274 Published online by Cambridge University Press

abide by WTO procedures. Renegotiation of tariff bindings defined in Article XXVIII operates in tandem with other governing principles, including good faith, reciprocity, and the most-favored-nation (MFN). However, we find limits to the procedures when confronted with the kind of overhaul the United States seeks to accomplish, and inevitably fail many small, open economies that do not fit into identified groupings under Article XXVIII. The United States shows no intention of compensating its trading partners, let alone those with a substantial interest in the sectors affected by the uncertainty and proliferation of tariffs. There is the added element that the United States' blanket claim to security threatens the transparency of information needed to negotiate or consult with other trading partners. Thus, we argue that the existing renegotiation procedures would inevitably produce an inequitable remedy for most WTO Members.

Thereafter, Section 3 considers recourse to a situation complaint as a WTO-consistent pathway to achieve collective action in a dispute setting. A situation complaint, pursuant to GATT Article XXIII:1(c) and DSU Article 26.2, allows for public, collective negotiation concerning the current inequitable situation created by the United States' trade actions that would nullify the objectives of a rules-based multilateral trading system. We further distinguish this little-used form of complaint from the more commonly understood violation and non-violation complaints.

No solution is perfect. We acknowledge that situation complaints lack established WTO practice, leaving open the possibility for a muddled solution. Moreover, a panel report must be adopted by consensus, leaving the possibility for a United States block. Yet there is reason to note that the existing Decision of 12 April 1989, which currently guides situation complaints, does not explicitly prohibit collective remedies, which may, at this time, be a legitimate approach to supporting rules-based trade governance. As we emphasize in our conclusion in Section 4, the practical reality is that a sufficiently large coalition will have a greater chance of preserving the WTO system. It is time to strip back procedures that no longer align with contemporary challenges and retain the normative pressures that shaped the GATT.[26]

2. The Economic Case for Collective Action

Heterogeneity of economies based on size and openness has now become a crucial distinction for the governance of the rules-based multilateral trading system. This newfound importance of heterogeneity reflects the emergence of great power rivalry to capture economic rents accruing to new general-purpose technologies.[27] In addition, this heterogeneity accounts for the associated rise in economic security concerns, due in no small part to the weaponization of interdependence as part of the strategic contest over said rents.[28]

[26]We draw upon Hudec's emphasis on the informal normative pressures driving the diplomatic techniques underscoring GATT practice, see R.E. Hudec (1990) *The GATT Legal System and World Trade Diplomacy* (2nd edn). Butterworth Legal Publishers, 30–35.

[27]On the role of economic rents in incentivizing strategic behaviour by firms and countries, see generally D. Ciuriak (2020) 'Economic Rents and the Contours of Conflict in the Data-driven Economy', Centre for International Governance Innovation, www.cigionline.org/publications/economic-rents-and-contours-conflict-data-driven-economy; and D. Ciuriak (2024) 'Technological Conditions and the Rise and Fall of the Rules-Based System', *Journal of Global Trade, Ethics and Law* 2(1), 1–28.

[28]For assessment of the role of power in the trading system and an explanation of the weaponization narrative to capture control over supply chains, see J. Bacchus (2018) 'Might Unmakes Right: The American Assault on the Rule of Law in World Trade', Centre for International Governance Innovation; A.O. Hirschman (1980) *National Power and the Structure of Foreign Trade*. University of California Press, 175; H. Farrell and A.L. Newman (2019) 'Weaponised Interdependence: How Global Economic Networks Shape State Coercion', *International Security*, 42–79; A.L. Newman (2019) 'US and China Are Weaponizing Global Trade Networks', *Financial Times*, 1 September; W.A. Reinsch (2021), 'Weaponizing Trade', *Centre for International Governance Innovation*, 7 December.

https://doi.org/10.1017/S1474745625101274 Published online by Cambridge University Press

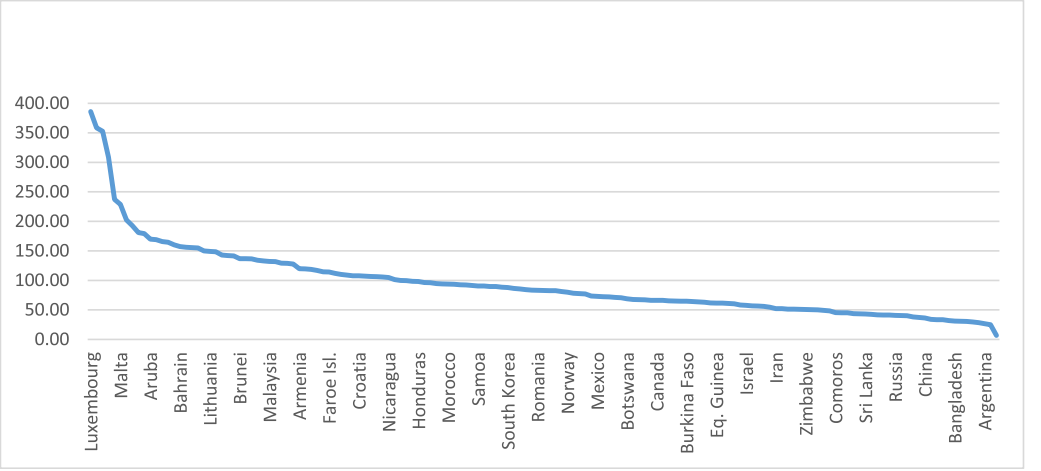

Figure 1. Trade openness (exports plus imports as % of GDP), WTO Member economies, 2023.
Source: The Global Economy, www.theglobaleconomy.com/rankings/trade_openness/1000/.

The degree of openness to trade – expressed as the sum of exports plus imports as a share of GDP[29] – varies widely across the WTO membership (Figure 1), with observations ranging from the 300–400% range for entrepots such as Singapore and Hong Kong to as low as the 20–30% range for large continental economies such as the United States and China, which feature massive internal markets that absorb potential trade before it reaches an international border, and even lower for isolated economies such as Sudan.

As a general rule, smaller economies tend to be relatively more open to trade because of their smaller production palette, which makes them more dependent on imports for economic security. Also, because of the smaller size of their domestic markets, they are more dependent on exports for economic efficiency.[30] More subtly, small open economies tend to have much greater gains from trade,[31] which makes them vulnerable targets for exploitation through coercion[32] – they have more

[29]See World Bank, *Trade (% of GDP),* World Development Indicators, https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS.

[30]The quintessential example is Iceland. With a population of 391,000 and a national GDP of US$35 billion, Icelanders enjoy a per capita GDP of over US$90,000. Iceland sells a limited range of products to the world, including aluminium (utilizing its geothermal power), fish and fish products, niche high-tech products, and eco-tourism (such as whale watching). It buys from the world the full range of products, from fresh fruit to pharmaceuticals to shoes and cosmetics. Iceland cannot approach the idea of economic security through autarky; trade is essential.

[31]Arkolakis et al. show that across a range of established quantitative trade models, the welfare gains from trade can be calculated from the import penetration ratio (the share of imports in domestic consumption), and the trade elasticity. Since small, open economies have much higher import penetration ratios than large, quasi-closed economies such as the United States, their welfare gains from trade are commensurately higher, see C. Arkolakis, A. Costinot, and A. Rodriguez-Claire (2012) 'New Trade Models, Same Old Gains?', *American Economic Review* 102(1), 94–130; Ralph Ossa (2015) shows that the gains from trade using this approach are much higher when account is taken of cross-industry variation in trade elasticities since imports in some industries are critical to the functioning of the economy, see R. Ossa (2015) 'Why Trade Matters after All', *Journal of International Economics* 97(2), 266–277.

[32]The WTO Agreements do not define economic coercion. The G7 Leaders Statement cautioned that economic coercion 'infringes upon the international order centered on respect for sovereignty and the rule of law, and ultimately undermines global security and stability', see Council of the European Union (2023) 'G7 Leaders' Statement on Economic Resilience and Economic Security', 20 May, 3, www.consilium.europa.eu/media/64501/g7-statement-on-economic-resilience-and-economic-security.pdf. Such a definition focuses on the goals and means of economic coercion. For the European Commission, economic coercion constitutes situations 'where a third country interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State by applying or threatening to apply measures affecting trade or investment', see Regulation (EU),

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to lose and thus more to transfer in a zero-sum exchange. While countries diversify greatly as they grow, as Ricardo Hausmann has shown through his Atlas of Complexity,[33] even a G7 country, such as Canada, cannot seriously contemplate an approach to economic security based on its own production.[34]

Accordingly, the mechanisms for collective action within the WTO framework may be most valuable for smaller economies, whose size comes into play since the gains from cooperation in collective action relative to the costs of organizing collective action rise as the relative size of the economy falls. As shown in Figure 1, the vast majority of the smaller WTO Members have higher gains from trade than larger Members, such as the United States and China, which can afford to frame policy as if they were effectively closed economies. They are, by the same token, also more dependent on the vitality of the rules-based system and more vulnerable to strategic behaviour based on alleged economic security grounds, to economic coercion, and to divide-and-conquer tactics (selective use of sticks and selective use of carrots to achieve political objectives).[35]

Considering a collective response to the United States' volatile trade strategies, the larger the group, the louder the choir, and the better the outcome for the participating states in a context where relative economic power determines the division of the gains from trade. Which leads us directly to the question: how do WTO institutions and practices accommodate and facilitate such collective action?

3. Grounding Collective Action in Law

Section 3 makes two contributions. First, section 3.1 argues that the normal recourse to negotiations and consultations concerning the modification or withdrawal of concessions would be an unlikely solution for the United States' interests in taking back all, or a significant part, of its bound rate concessions. Article XXVIII procedures are effective when one Member seeks to provide quid pro quo for modifying or withdrawing concessions. It can accommodate the threat of retaliation, but it does not offer this counterweight to all Members – only to defined groups.

While the United States could utilize Article XXVIII procedures to overhaul its tariff bindings, evaluating these procedures leads us to conclude that implementing this process would only produce inequitable outcomes in our current context. GATT Article XXVIII procedures result in the exclusion of some Members. Though Members are left with alternatives to renegotiation, including making complaints, implementing safeguards, or using trade remedies, none afford united responses to the United States' unilateral actions. Although implementation of renegotiation may not help all Members protect their interests in today's unequal conundrum, the principles of mutual gains and reciprocity can guide collective responses.

Our second contribution is procedural. In Section 3.2, we design a pathway for Members with shared interests to work together through a situation complaint to challenge a complex situation of economic uncertainty and volatility. This approach creates legal distance between the situation

2023/2675 of the European Parliament and of the Council of 22 November 2023. For an assessment of the international legality of economic coercion, see D.W. Bowett (1976) 'International Law and Economic Coercion', *Virginia Journal of International Law* 16, 245.

[33] R. Hausmann, C.A. Hidalgo, S. Bustos, M. Coscia, A. Simoes, and M.A. Yıldırım (2013) *The Atlas of Economic Complexity: Mapping Paths to Prosperity*. MIT Press.

[34] D. Ciuriak and P. Goff (2021) 'Economic Security and the Changing Global Economy', Centre for International Governance Innovation Series: Reimagining a Canadian National Security Strategy Report No. 8, 13 December, www.cigionline.org/publications/economic-security-and-the-changing-global-economy/.

[35] A group of small and medium-sized WTO Members have moved to bolster rules-based trade through a new grouping, the Future of Investment and Trade Partnership, or 'FIT-P', which counts New Zealand, Singapore, and the UAE as core founding members and is expected to grow, see P. Foster, O. Walker, and C. Cornish (2025), 'Singapore, UAE and Other Small Nations to Launch Trade Partnership', *Financial Times*, 29 August, www.ft.com/content/d233de0d-ad0b-4483-9c7f-25d24a7b973a (accessed 5 September 2025).

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assessment and a remedy that seeks to prompt a respondent Member to comply with its WTO commitments. We draw on historical practice to flesh out the contours of a situation complaint that could foster means to mitigate harm caused by a complex set of circumstances, enabling a group of Members to protect their interests while concurrently upholding WTO principles. Indeed, we speculate that a situation complaint could have been an appropriate pathway for the United States in addressing its accumulating trade deficit concerns. For those who wish to move straight to the proposal for a situation complaint brought in response to the chain reaction of global economic uncertainty initiated with the United States' 2025 measures, see Section 3.2.4.

3.1 Evaluating Multilateral Renegotiation Procedures

One of the defining features of the postwar trading system was the decision to negotiate in periodic rounds to lower tariff rates over time – a feature that distinguishes tariffs from quantitative restrictions. Article XXVIII of the GATT addresses situations in which Members must raise tariffs, requiring that such actions occur within a renegotiation process to balance the competitive conditions between Members. Members aspire to negotiate rather than take unilateral action, and they all agree to this approach, based on principles of reciprocity and non-discrimination. Withdrawal of concessions (or the threat of withdrawal) is possible, but, as detailed below, the procedure is calibrated to negotiation over unilateral action. However, Article XXVIII does not involve a multilateral negotiation, such that many WTO Members may not be included in the renegotiation under Article XXVIII. Deciding which parties are included in a particular renegotiation depends on interpretation and diplomacy, as there are no clear boundaries regarding which Members would have a 'substantial' interest in the changes in the context of today's geopolitical and highly interdependent global markets.[36] Let us first begin by outlining the procedure of Article XXVIII before turning to the defined parties that may use it.

3.1.1 Types of Article XXVIII Renegotiations

Article XXVIII procedures have undergone significant changes over time, with the addition of new procedures and interpretive notes in the GATT period.[37] Trading partners that use tariff renegotiation procedures have sought to improve them by clarifying the eligible parties and the timelines that shape various routes to renegotiating tariff concessions, beginning with the initial period negotiated when the GATT was first signed as a provisional agreement in 1947.[38]

Each renegotiation throughout the GATT period was case-dependent. For example, Brazil comprehensively renegotiated its entire schedule in 1956 to redress the 'obsolete nomenclature' and change the specific rates that failed to provide 'reasonable' protection.[39] Other times, renegotiation

[36]See text accompanying, supra n. 52–54; see generally A. Hoda (2001) *Tariff Negotiations and Renegotiations under the GATT and the WTO* (1st edn). Cambridge University Press 2001.

[37]See Hoda, supra n. 36, 83–88; see Interpretive Note, 'Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994'; World Trade Organization, 'Procedures for Negotiations under Article XXVIII', BISD 27S/26–38, C/113 and Corr 1 (10 November 1980); Procedures for Modification and Rectification of Schedules of Tariff Concessions, supra n. 8; Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, S/L/84 (Council for Trade in Services, 18 April 2000); Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules), S/L/80 (Council for Trade in Services, 29 October 1999).

[38]Hoda, supra n. 36, 84.

[39]Working Party on Brazilian Tariff and Schedule, 'Brazilian Tariff Reform: Report of the Sub-Group to the Working Party' W.11/21 (6 November 1956), 1. The Brazilian representatives spoke to the GATT Contracting Parties about the country's cited concerns with protecting domestic production, controlling prices, and balance of payments concerns. As detailed in Hoda, supra n. 36, 87, Brazil negotiated with 17 other Contracting Parties to devise a new schedule that accommodated those with 'principal supplying interests' or 'substantial interests' to negotiate and secure the right to withdraw 'substantially equivalent concessions initially negotiated'. The Brazilian delegation questioned whether GATT Article XXVIII procedures were appropriate for a complete revision and also proposed a waiver as per GATT Article XXV:V. GATT, 'Eleventh Session of the

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could lead to informal agreements, tariff rate quotas, safeguards, or new schedules.[40] The early GATT experience depended on governments finding a way to negotiate and avoid the unilateral withdrawal of obligations, thereby sustaining the balance of reciprocity between trading partners.[41] Yet, as Hudec observed, the law was an instrument to exert diplomatic pressure, but only if used when the community itself was confident that they shared the same values and understandings of consensus.[42]

Article XXVIII procedures encompass three types of negotiations, with different time limits prescribed: three-year 'open season' renegotiation that occurs in defined time periods (sub-paragraph 1), authorized renegotiation that occurs at any time when examining 'special circumstances' (sub-paragraph 4), and reserved renegotiations (which have no time limits), if the applicant Member elects to reserve the right to renegotiate before the end of the three-year period introduced in paragraph 1 (sub-paragraph 5).[43] Per GATT Article XXIV, another negotiation can occur that is an exception to MFN, as Members can negotiate preferential trade arrangements on a regional basis or through a customs union – with a key commitment being that these smaller groupings liberalize 'substantially all the trade' between them.[44]

A central requirement of GATT Articles XXVIII:2 and XXVIII *bis* is that negotiations are held on a reciprocal and mutually advantageous basis. Renegotiation for the withdrawal and modification of tariff bindings aims to achieve mutually advantageous arrangements, requiring reciprocal reductions in tariff bindings (a 'balance of concessions').[45] All tariff concessions, including those modified or withdrawn, must be extended to all other Members on a non-discriminatory basis.[46] Hence, all Members have an 'effective opportunity' to benefit from mutual contractual preferences.[47] The Appellate Body Report in *EC–Poultry*, cautioned against using the Article XXVIII procedures to create preferential treatment and afford a 'loophole' in the multilateral trading system.[48]

In economic theory terms, Kyle Bagwell and Robert Staiger described the function of reciprocity and multilateral participation as aiming to help 'weaker' Members avoid 'exploitation' to 'mitigate the influence of power asymmetries on negotiated outcomes' by guiding governments toward a 'political optimum'.[49] The exchange of concessions establishes equilibrium, for trading partners only take on the risks accompanying trade liberalization if they know their main trading partners are undertaking comparable risks.[50]

Contracting Parties – New Brazilian Customs Tariff: Statement by H.E. Mr. Julio Augusto Barboza-Carneiro Leader of the Brazilian Delegation', GATT/313 (24 October 1956); Eleventh Session, Brazilian Tariff: Declaration Made by Mr Valladão on 25 October 1956 in the Working Party', Spec/183/56 (31 October 1956), 4.

[40] Hoda, supra n. 36, 91–95.

[41] Hudec, supra n. 26, 198.

[42] R.E. Hudec (1975) 'Retaliation against Unreasonable Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment', *Minnesota Law Review* 59(3), 480–81.

[43] Hoda, supra n. 36, 11, 15, 85–88; see GATT, 'Arrangements for Negotiations under Article XXVIII in 1957: Note by the Executive Secretary', L/635 (31 May 1957); see Analytical Index of the GATT (pre-1995), 965–966, www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art28_gatt47.pdf.

[44] GATT, supra n. 8, art XXIV:8.

[45] See GATT, supra n. 8, Preamble, Article XXVIII *bis*; Article XVIII:2.

[46] Hoda, supra n. 36, 18.

[47] Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products (EU–Poultry Meat (China))*, WR/DS492/R (adopted 19 April 2017), para. 7.216.

[48] Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* WT/DS69/AB/R (adopted 23 July 1998), paras. 100-1 (confirming there was 'nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994').

[49] K. Bagwell and R.W. Staiger (2004) *The Economics of the World Trading System*. The MIT Press 2004, 69–70. The authors explain that a political optimum represents an efficient outcome for mutual changes in tariff selections, ibid. 67.

[50] R. Vernon (1954) *America's Foreign Trade Policy and the GATT*. Princeton University Press, 3–4; Bagwell and Staiger, supra n. 49, 68. See also A.O. Sykes (2023) *The Law and Economics of International Trade Agreements*. Edward Elgar Publishing 2023, 167–168 (discussing the MFN obligation and principle of reciprocity in multilateral negotiations).

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3.1.2 Defining the Parties in Article XXVIII Procedures

Negotiations regarding the modification or withdrawal of tariff concessions are conducted with carefully defined categories of Members: first, Members that hold 'initial negotiating rights' (or INRs); second, any Member that it considers has a 'principal supplying interest' in the changes.[51] Paragraph 14 of Note *Ad* Article XXVIII defines 'principal supplying interest' as those Members that have had, over the course of a 'reasonable period of time prior to the negotiations [last three-year period], 'a larger share in the market of the applicant [Member]'.[52]

Applicant Members must additionally *consult* with Members that have a 'substantial interest' in the tariff changes – such as those that have reasonable expectations concerning the relevant market, or those where the modified concession would affect a major part of that Member's total exports.[53] There is no formal definition of 'substantial interest' found in Article XXVIII of GATT 1994.[54] Indeed, the Interpretive Note accompanying Article XXVIII confirms this.[55] In committee discussions and dispute settlement panel reports, most refer to a general acceptance of a 10% import share benchmark to determine 'substantial interest' for 'methodological ease and consistency'.[56] However, as there is no precise formula, it is unclear whether the definition of a substantial supplier can account for economic security in markets or other non-economic features.

For developing economy Members, the concept of non-reciprocity was embodied in Article XXXVI:8 (effective 27 June 1966), with an interpretive note confirming its application to GATT Article XXVIII.[57] The renegotiation of concessions for establishing particular industries, of interest to developing economies, is outlined separately. Paragraph 7 of Article XVIII confirms that certain Members can modify or withdraw concessions to promote industries 'with a view to raising the general standard of living of [their] people'.[58] However, to do so, these Members must negotiate with those Members that have INRs or 'substantial interest' in the concession, requiring 'agreement' on 'compensatory adjustments'. Without agreement, the General Council would assess the adequacy of the agreement and determine whether reasonable efforts were made to offer compensation. If the Council finds this is the case, then the applicant Member may proceed to modify or withdraw, and other affected Members are free to modify or withdraw substantially equivalent concessions. A 2023 Secretariat report confirmed the process had not been invoked by developing country Members.[59]

[51] See GATT, supra n. 8, Article XXVIII; see 'Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994' (1994), 33 ILM 1164, para. 1.

[52] Ibid., paras. 1, 4. The Understanding on Article XXVIII further defines the concept as the Member 'which has the highest ratio of exports affected by the concession … to its total exports shall be deemed to have a principal supplying interest if it does not already have an [INR] or a principal supplying interest as provided for in paragraph 1 of Article XXVIII'.

[53] GATT, supra n. 8 art XXVIII:1; General Agreement on Tariffs and Trade 1994, art XXVIII 'Modification of Schedules' and Interpretative Note *Ad* art XXVIII, paras. 1.5, 1.7 provide that the concept of 'substantial interest' is meant to cover those Members 'which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the [Member] seeking to modify or withdraw the concession', https://goods-schedules.wto.org/sites/default/files/file/2019-10/Legal%20provisions%20-%20GATT%20Article%20XXVIII.pdf (accessed 9 September 2025).

[54] C. Carmody (1997) 'Of Substantial Interest: Third Parties Under GATT', *Michigan Journal of International Law* 18(4), 626 (discussing the issue of Brazil with a substantial interest arose in the EC regulations of bananas).

[55] Interpretative Note *Ad* Article XXVIII, supra n. 53, Annex I, para. 7; Hoda, supra n. 36, 14.

[56] GATT, Committee on Tariff Concessions, Minutes of the Meeting Held in the Centre William Rappard on 19 July 1985 TAR/M/16 (4 October 1985), para. 5; Panel report, *European Union–Measures Affecting Tariff Concessions on Certain Poultry Meat Products (EU–Poultry Meat (China))*, WT/DS492/R (adopted 19 April 2017), para. 7.321; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/R/ECU (report circulated to Ecuador, 22 May 1997, notice of appeal 11 June 1997), paras. 7.83–85; see also Hoda, supra n. 36, 14.

[57] GATT, supra n. 8, art XXXVI:8.

[58] Those Members whose economies are in 'early stages of development' and 'can only support low standards of living'.

[59] Note by the Secretariat, Committee on Trade and Development, Special and Differential Treatment Provisions in WTO Agreements and Decisions WT/COMTD/W/271 (16 March 2023), 8; see further, Hoda, supra n. 36, 14.

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3.1.3 Retaliation and Rebalancing in Tariff Renegotiations

Although Members commit to good faith efforts to negotiate and consult with defined parties, the right to change tariffs is absolute and not dependent on an agreement being reached.[60] As such, the applicant Member seeking to make a change is free to implement the proposed changes. To counterbalance this right, the defined trading partners have corresponding rights to withdraw 'substantially equivalent concessions initially negotiated'.[61] Retaliatory withdrawal is not a product of negotiation; it is the process initiated when the relevant Members cannot agree on compensation. However, the 'price' for non-agreement is set to substantially equivalent concessions initially negotiated.[62] Any compensation or withdrawal of concessions must comply with the non-discrimination principle.[63]

Article XXVIII:3 does not require the defined trading partner to seek permission or multilateral authorization to withdraw concessions, mirroring the fact that the applicant does not seek permission for the modification or withdrawal from impacted trading partners. The procedures facilitate adjustment with 'compensatory concessions to affected trading partners'.[64] That said, two timelines condition the retaliation process: the withdrawal must take place within six months of the initial change to the concession (extension is available), and the retaliating partner must allow for a 30-day period after negotiation.[65]

During the GATT period, the retaliatory withdrawal of concessions in renegotiations was rare.[66] Anwarul Hoda concluded the limited use of retaliation, as set out in Article XXVIII:3, was due to the 'desire to avoid a chain of retaliatory withdrawals by other trading partners affected by the initial withdrawal'.[67] The drafting history of Article XXVIII has suggested that there was careful consideration of the non-discriminatory retaliation action (withdrawal to adjust the balance) against the nullification and impairment clause (suspension of concessions) in the GATT.[68] Consideration of a 'negotiation in reverse' arose during the drafting of the procedures.[69] Any other trading partner impacted by a counteraction (the withdrawal of equivalent concessions) against the initial change could bring a dispute and claim nullification or impairment of benefits. As such, Article XXVIII:3 was not meant to create 'widening ripples' from the initial tariff change/retaliation outcome.[70]

Article XXVIII:3 retaliatory withdrawal of concessions can occur under two circumstances. First, when the trading partners cannot reach an agreement concerning the tariff change and the applicant 'freely' modifies or withdraws concessions, then the 'principal supplying interest' partner and the 'substantial interest' partner may retaliate – that is, to 'withdraw … substantially equivalent concessions initially negotiated with the applicant [Member]'.[71] Second, when a defined

[60] See GATT, supra n. 8, art XXVIII:3; Hoda, supra n. 36, 16.

[61] GATT, supra n. 8, art XXVIII:3(a). The principle of good faith is embodied in the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, Article 31(1): ('[a] treaty shall be interpreted in good faith'), and Article 26 ([e]very treaty … must be performed [by the parties] in good faith'). The International Court of Justice in the *North Sea Continental Shelf* dispute decided that parties to international negotiations are under an obligation to conduct themselves so that the negotiations are meaningful, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), Judgment, ICJ Rep 1969 3, para. 85.

[62] W.F. Schwartz and A.O. Sykes (2002) 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', *The Journal of Legal Studies* 31(S1), S187.

[63] *EC–Poultry*, supra n. 48, para. 100.

[64] Schwartz and Sykes, supra n. 62, S186.

[65] Hoda, supra n. 36, 16.

[66] Hoda, supra n. 36, 95.

[67] Ibid.

[68] Verbatim Report, Eighteenth Meeting of the Tariff Agreement Committee Held on Friday, 12 September 1947, GATT Docs E/PC/T/TAC/PV/18 (12 September 1947), 42–43 [hereinafter Verbatim Report, Eighteenth Meeting of the TAC].

[69] Ibid., 44.

[70] Ibid.

[71] GATT, supra n. 8, art XXVIII:3(a).

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party with 'a substantial interest is not satisfied' with the agreement made, that party may retaliate by withdrawing 'substantially equivalent concessions initially negotiated with the applicant [Member]'.[72]

As mentioned, retaliation must occur within six months of the initial tariff change; however, relevant parties may extend this deadline. Members can reserve their rights to invoke sub-paragraph 3 to accommodate further (re)negotiation and consultation (pursuant to paragraphs 1, 2, and 5) to address the tighter six-month timeline.[73] A recent example concerning the withdrawal of the United Kingdom from the European Union demonstrates that the procedures under Article XXVIII:3 can be on hold, while concurrently negotiating and consulting under Article XXVIII:1, 2, and 5 – so far, the EU has extended the timelines on eight occasions, the latest publicly available extension was to July 1, 2025, to allow Members to finalise ongoing negotiations.[74]

Article XXVIII:3 is a rare occurrence where countermeasures are foreseen within the GATT architecture. However, the rules do not specify an approach to calculate equivalence. Note also that the phrase 'substantively equivalent concessions' is different from consideration of retaliation in the context of 'nullification or impairment' of benefits per GATT Article XXIII. Note 6 of *Ad* Article XXVIII:1 suggests that equivalence takes into consideration 'the conditions of trade at the time of the proposed withdrawal or modification'. In 1947, when drafting, the idea was that equivalence 'would be determined in the light of what the party concerned had paid for the concession which had been withdrawn'.[75]

In 1978, a GATT panel circulated its report concerning a dispute between Canada and the European Communities, following Canada's withdrawal of concessions on various products due to dissatisfaction with the EC's offer for an agreement on changing zinc duties from specific to ad valorem rates.[76] The EC asserted that Canada's withdrawal was inconsistent with the GATT. The panel disagreed but did not make a quantitative assessment. Instead, the panel found that the withdrawal 'should have been less than the equivalent of the total export volume of zinc to the Community as account should have been taken of the rebinding of the Community duty'.[77] Accordingly, the panel noted that the withdrawal must match the 'actual damage suffered by Canada' and, consequently, 'should have been based on the difference between the ad valorem equivalent of the specific rate calculated on imports from Canada only and the new ad valorem rate'.[78]

In a 1988 Council meeting, a discussion ensued regarding the level of retaliation following the United States' non-compliance with the *Superfund* panel's recommendations concerning petroleum taxes, which were found to be inconsistent with GATT Article III:2.[79] The Director-General's Legal Advisor attempted to clarify the principles for calculating 'appropriate' retaliatory measures under GATT Article XXIII compared to the withdrawal of tariff concessions under Article XXVIII. The

[72]GATT, supra n. 8, art XXVIII:3(b).

[73]See Hoda, supra n. 36, 16–17, 101; See Minutes of Meeting of the General Council, 28 February 2005, WT/GC/M/93 (8 April 2005); Minutes of the Meeting of the Council for Trade in Goods, 2–3 December 2024, G/C/M/150 (27 January 2025).

[74]While some documentation remains restricted, Article XXVIII procedures in connection with ongoing negotiations on the apportionment of the European Union's tariff-rate quota concessions following the withdrawal of the United Kingdom from the European Union, the European Union maintains its ongoing negotiations and consultations while extending the six-month deadlines of Article XXVIII:3, without prejudice as to whether there are rights to withdraw concessions pursuant to Article XXVIII:3(a), and (b). See Committee on Market Access, Factual Report on the Status of Renegotiations under Article XXVIII of the GATT 1994, Report by the Secretariat, G/MA/W/123/Rev.12 (25 April 2025); Council for Trade in Goods, Article XXVIII:5 Negotiations, Withdrawal of the United Kingdom from the European Union Communication from the European Union, Addendum, G/L/1385/Add.7 (25 November 2024).

[75]Verbatim Report, Eighteenth Meeting of the TAC, supra n. 68, 40.

[76]GATT Panel Report, *Canada – Withdrawal of Tariff Concessions (Lead and Zinc)*, L/4636–25S/42 (adopted 17 May 1978). I thank Amy Porges for highlighting this dispute to me.

[77]Ibid., para. 19.

[78]Ibid.

[79]GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances ('Superfund')*, L/6175 – 34S/136 (adopted 17 June 1987).

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Legal Advisor noted criteria for the withdrawal of concessions included: the amount of imports before the three-year renegotiation period, including the development 'trend', the 'size of the tariff increase being negotiated', and an 'estimate […] of the price elasticity' for the product.[80] In 1991, the GATT Secretariat further clarified that tariff negotiations require a 'focal point' for compromise, which is typically the 'relative magnitude of trade flows and the associated tariffs'.[81]

3.1.4 The United States' Current Rejection of Multilateral Negotiations

Article XXVIII procedures are far from perfect. They are 'efficient,' enabling a renegotiating country to settle with a limited group and move on.[82] After all, tariff rates are dynamic (distinguishing them from more rigid forms of quantitative restrictions) and expected to change with negotiation. However, the process can also be brutal for those kept outside the negotiation and consultation sphere. Moreover, even if changes are made on a non-discriminatory basis, the 'compensation' offered through Article XXVIII procedures may not be of interest to all other Members. Moreover, even those involved in the negotiation may not have an interest in an agreement, yet do not want to close out the negotiations.[83]

For the recent tariff overhaul, the United States has not relied on Article XXVIII procedures. For those Members that could have negotiated or consulted with the United States about the reciprocal tariffs (those that held INRs, had a principal supplying interest, or a substantial interest), the path to renegotiation through Article XXVIII does not exist. Rebalancing against the United States' increased tariffs could be permissible by imposing trade remedies, such as safeguards per GATT Article XIX and the Agreement on Safeguards, or by seeking remedies in the course of dispute settlement to redress nullification or impairment of benefits, pursuant to GATT Article XXIII.

That said, conventional remedies appear thin. With the United States' ability to block a dispute settlement panel report, the impacted trading partners could lose their ability to implement any panel report that finds US non-compliance with Article II.[84] The causation and non-attribution requirements in GATT Article XIX and the Agreement on Safeguards have produced what Alan Sykes dubbed 'fundamental deficiencies' that render the rules inutile.[85]

Members could benefit from a procedure that formalizes the middle space between a discrete dispute and new rulemaking. In the next section, we explore a lawful process that could help some Members preserve multilateral procedures (enhancing their individual and collective interests in the rules-based system) while seeking to attenuate the harm caused by a global situation of economic uncertainty. Seeking collective action through a situation complaint does not withdraw other potential complaints or negotiations with specific Members, such as the United States. However, as explained in the next section, a situation complaint could orient towards a discrete situation necessitating a collective response rather than a mutual settlement between two (or sometimes more) disputing parties.

[80] Council, Minutes of Meeting Held in the Centre William Rappard on 4 May 1988 C/M/220 (8 June 1988), 35–36.

[81] Group of Negotiations on Services, Evaluating Offers in the Services Context: Note by the Secretariat MTN.GNS/W/118 (2 July 1991), para. 6.

[82] Sykes, supra n. 50, 143; we thank an anonymous former trade negotiator for emphasizing this point too.

[83] See S. Lester, 'The WTO Gambling Dispute: Antigua Mulls Retaliation as the US Negotiates Withdrawal of its GATS Commitments' 12(5), *ASIL Insights* (8 April 2008); H. Monicken (2023) 'US: Antigua and Barbuda has made resolving WTO gambling dispute difficult', *Inside US Trade* (21 December).

[84] The United States maintains opposition to restoration of the appellate mechanism, citing WTO 'judicial activism' that seeks to prevent the United States from taking action to protect its domestic interests, see Office of the United States Trade Representative, '2025 Trade Policy Agenda and 2024 Annual Report of the President of the United States on the Trade Agreements Program' (February 2025), 5.

[85] Alan O. Sykes (2006) 'The Fundamental Deficiencies of the Agreement on Safeguards: A Reply to Professor Lee', *Journal of World Trade* 40, 979. See proposals to reassess the Safeguards Agreement, B. Hoekman and P.C. Mavroidis (2023) 'Reassessing the Safeguards Mess', Robert Schuman Centre for Advanced Studies Research Paper No. 2023/14, 2023.

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3.2 Bringing Situation Complaints

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) establishes an exclusive forum for Members to seek redress and confirms that Members should not 'take justice into their own hands'.[86] Trade commentators have theorized that the DSU presents a legalization of the GATT system, primarily 'designed to constrain unilateral punishments'.[87]

More than one Member can pursue dispute settlement proceedings against a single respondent Member regarding the same matter (Article 9 of the DSU sets out the procedures for doing so). When a Member seeks recourse to WTO dispute settlement to redress another Member's violation of its WTO obligations, a panel will determine if the measure is inconsistent with the relevant covered agreements and shall make findings to assist the Dispute Settlement Body (DSB) in making recommendations and rulings in the dispute (per Article 11 of the DSU). In the absence of a mutual settlement, Articles 3.7 and 22.1 of the DSU confirm that the first remedy is the withdrawal of measures found to be inconsistent with WTO obligations. A violation complaint is therefore only effective if the respondent Member accepts the DSB recommendations and rulings.

While complainants could demonstrate the existence of a violation, there remains a risk that the United States would appeal the panel report into the void to prevent DSB adoption.[88] While the United States may seek to justify its allegedly inconsistent actions, the shortcomings of a violation complaint are that the United States has tended, especially in the past, to justify its trade restrictions within a broader framework of economic security, arguing that its actions are based on self-judged security interests, which it claims are non-reviewable by WTO panels.[89] With the power to appeal dispute settlement panel reports deemed counter to US interests into 'the void', the dispute settlement system cannot effectively police the abuse of measures or afford oversight over compliance with recommendations made.[90]

Bringing non-violation complaints presents a similar problem for blocking the implementation of panel reports. Yet, non-violation complaints begin with a crucial presumption that there is no need for a rigorous assessment of whether the United States breached its tariff bindings. Due to past practice, winning a non-violation complaint would be challenging – unless Members agreed to a novel mechanism specifically designed for the United States.[91] The shift to a liability rule for non-violation complaints could prioritize rebalancing through compensation with the complainants.[92] This could, in turn, render other WTO rebalancing procedures obsolete, such as safeguards under

[86] Article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement, supra n. 8, [hereinafter DSU]; P.C. Mavroidis (2022) *The WTO Dispute Settlement System How, Why and Where?* Edward Elgar Publishing, 105.

[87] Mavroidis, supra n. 86, 517; see J.H. Weiler (2001) 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Journal of World Trade* 35, 191 (explaining the legalization in terms of a shift by the acceptance of compulsory adjudication with binding outcomes when creating the WTO).

[88] See W.J. Davey (2022) 'WTO Dispute Settlement: Crown Jewel or Costume Jewellery', *World Trade Review* 21, 297.

[89] See Office of the United States Trade Representative, Statement from USTR Spokesperson Adam Hodge (9 December 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge.

[90] See Davey, supra n. 88, 291–300.

[91] The United States has proposed the handling of disputes involving essential security measures with a newly designed mechanism for non-violation nullification or impairment claims. While the current tariff strategy encompasses statutory authorities that concern discrimination, unfairness, and trade imbalances, it is possible to consider the extension. Communication from the United States, 'Reflections from the United States on Handling of Disputes involving Essential Security Measures', JOB/DSB/10 (11 December 2024). See also S. Lester, (2024) 'The US Proposal on How to Handle Disputes on Essential Security Measures', *International Economic Law and Policy Blog*, 11 December.

[92] See A.O. Sykes and R.W. Staiger (2017) 'How Important Can the Non-Violation Clause be for the GATT/WTO?', *American Economic Journal* 9(2), 149; see also N. Lamp (2019) 'At the Vanishing Point of Law: Rebalancing, Non-violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars', *Journal of International Economic Law* 22, 721.

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Article XIX and renegotiation of concessions under Article XXVIII.[93] More importantly, there is a deeper question regarding the desirability of a multilateral trading system that does not hinge on accepted norms of transparency, reciprocity, equity, and non-discrimination, but rather one shaped by who holds asymmetric leverage over other Members.

In contrast, a situation complaint does not hinge on a Member's non-compliance with its WTO commitments. As elaborated below, a situation complaint pursuant to GATT Article XXIII:1(c) could foster a public, collective response for impacted Members. We draw upon GATT practice to underscore that pursuing collective enforcement is not unprecedented – the text maintains the opportunity to design an efficient and equitable mechanism for governments that lack the economic and political power to pursue a complaint alone.

Briefly, when negotiating the GATT in 1947, situation complaints emerged as the multilateral trading system would comprise the International Trade Organization (ITO) legal framework (which was left stillborn by 1950) and the diplomatic 'atmosphere' of the GATT.[94] Situation complaints were initially understood to address exogenous events that could lead to circumstances where a Member might not meet its obligations.[95] The complaint underscored that the rules-based multilateral trading system would depend on a healthy global economy.[96] The Australian negotiators, who were instrumental in designing non-violation complaints, also offered examples of the circumstances contemplated for bringing situation complaints: a '*world-wide* collapse of demands' or events where 'a shortage of a particular currency places *us all* in balance-of-payment difficulties' (emphasis added).[97] A related scope emerged out of concern for those circumstances when a country faced 'devastating effects' but was unable to gain multilateral authorization to escape its multilateral trade commitments.[98]

Petros Mavroidis has remarked that situation complaints 'could be the means to eventually respond *cooperatively* to a crisis, and thus mitigate its negative implications'.[99] As such, recourse to a community-driven coalition to 'prevent disequilibrium in world trade and payments' could potentially fall within the scope of a situation complaint.[100] Situation complaints could be the WTO version of retorsion, affording breathing space for necessary political actions.[101] Thus, situation complaints

[93] See J.H. Jackson (2004) 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?', *American Journal of International Law* 98(1), 121.

[94] See M. Pinchis-Paulsen (2020) 'Trade Multilateralism and US National Security: The Making of the GATT Security Exceptions', *Michigan Journal of International Law* 41(1), 171, 176, 178–186; Hudec, supra n. 26, 30–36.

[95] UN Economic and Social Council, Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Commission A, Verbatim Report – Fifth Meeting, Palais des Nations, Geneva, 30 May 1947, GATT Documents E/PC/T/A/PV/5 (30 May 1947), 13 [hereinafter Commission A, Fifth Meeting Report].

[96] See DSU Article 26.2, supra n. 86, and GATT, supra n. 8, art XXIII(c).

[97] Commission A, Fifth Meeting Report, supra n. 95, 14.

[98] Ibid. 14–15.

[99] Mavroidis, supra n. 86, 131 (emphasis added).

[100] Addressing macroeconomic pressures was evaluated in the Review Session of 1954–1955 of the Review Working Party on Quantitative Restrictions, GATT Doc. L/332/Rev.1, and Addenda, on 2, 4, and 5 March 1955, S3/170, 175, para. 22. We hasten to add that the US tariff policy has created a global economic crisis where there was none, and its own tariff policy has plunged it into a possible economic crisis at a time when, as Martin Wolf described, its sustained prosperity was unparalleled, as was its economic dynamism. M. Wolf (2025) 'What Makes the US Truly Exceptional', *Financial Times*, 3 December. Moreover, the US dollar was riding high in currency markets because of capital inflows seeking to participate in the US technological development of artificial intelligence and international demand for the dollar as an international vehicle currency. On the latter point, see, e.g., S. Miran (2024) 'A User's Guide to Restructuring the Global Trading System', *Hudson Bay Capital* (November). Accordingly, while the US merchandise trade deficit has been characterized as a 'crisis', it is the unilateral actions taken to reduce that deficit that have caused the crisis.

[101] Pieter Kuijper had assessed the European Community's mechanism in the *EC–Commercial Vessels* dispute, arguing it constituted an act of retorsion–'unfriendly' political acts directed against another Member's 'unfriendly' acts that do not breach WTO obligations. P. Kuijper (2008) 'Does the World Trade Organization Prohibit Retorsions and Reprisals? Legitimate "Contracting Out" or "Clinical Isolation" Again?', M.E. Janow (ed.), *The WTO: Governance, Dispute Settlement, and Developing Countries*. Juris Publishing, 701–702. As James Crawford explains, retorsion is a 'freedom of action' largely unregulated

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would offer 'opportunity [for a government] to state its case to the international community and have its obligations reviewed with full international approval'.[102] The appropriate remedy for situation complaints was left open, 'as may be appropriate in the circumstances'.[103] We turn next to Uruguay's presentation of a situation complaint. Though upon review, the theory and approach to situation complaints remained unfulfilled, the experience remains critical to our discussion for demonstrating how the principle of equitableness underscored the desired use of situation complaints.

3.2.1 Uruguay's Complaint

There are a few past examples of situation complaints.[104] One example is from 1962, when Uruguay charged 15 other economies with the non-fulfillment of their obligations and expressed general concern over the 'present situation of imbalance'.[105] Ambassador Julio Lacarte, speaking for Uruguay, methodically laid out a list of hundreds of restrictive and discriminatory measures undertaken by 19 GATT Contracting Parties that closed markets for Uruguayan agricultural products, creating balance of payments difficulties.[106] The delegation identified the 'serious prejudicial effects' of the restrictions and the nullification and impairment of benefits that Uruguay should have accrued.[107] Lacarte highlighted Uruguay's situation but linked this to the shared experience of primary producer countries, urging further consideration of GATT procedures and rules.[108] Perhaps for this reason, Uruguay repeatedly emphasized the need to reevaluate a more extensive, imbalanced situation. Finding difficulty with bilateral diplomatic exchanges achieving results, it was time for action, Lacarte explained, for a 'situation of supplying countries of foodstuffs and primary commodities, having regard to the disequilibrium from which they suffer'.[109] Uruguay sought 'equitable solutions

by international law. In contrast, countermeasures are directed at inducing a state to comply with its international obligation. See J. Crawford (2013) *State Responsibility: The General Part*. Cambridge University Press, 677. See also International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts', with commentaries, Pt III, Ch. II, para. 3, p. 128; See Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels,* WT/DS301/R (adopted 20 June 2005) [hereinafter *EC–Vessels*].

[102]Commission A, Fifth Meeting Report, supra n. 95, 16.

[103]UN Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, Committee II, Sub-Committee on Procedure, Addition to Report of Sub-Committee Procedures, GATT Doc. E/PC/T/C.II/57 (20 November 1946), Article 30.

[104]See also Mavroidis, supra n. 86, 131–132.

[105]See Contracting Parties, 'Report of the Panel on Uruguay Recourse to Article XXIII', GATT Doc. L/1923 (15 November 1962) [hereinafter Panel Report of 15 November 1962]; Council, 'Meeting of Ministers: Statement by the Representative of Uruguay, H.E. Mr. J.A. Lacarte, before the Council on 27 September 1961', GATT Doc. L/1572 (3 October 1961), para. 6; GATT Council, Recourse to Article XXIII by Uruguay – Communication, from the Uruguayan Delegation (Ref. Item 8 on the Council Agenda), GATT Doc. C/W/33, 27 February 1962, paras. 5, 8 (listing restrictions in twenty countries); Contracting Parties, 'Nineteenth Session, Recourse to Article XXIII by Uruguay, Statement by the Representative of Uruguay at the Meeting of the Contracting Parties on 8 December 1961', GATT Doc. L/1679 (18 December 1961), [hereinafter Statement by Uruguay on 8 December 1961]; For an overview of the Uruguayan Recourse to Article XXIII, see Hudec, supra n. 26, 240–242.

[106]Contracting Parties, 'Delegation of Uruguay to GATT: Table Showing Certain Restrictions Applied to Imports from Uruguay by Nineteen Countries which are Contracting Parties to the General Agreement on Tariffs and Trade or Are Negotiating with a View to Acceding Thereto', GATT Doc. L/1662 (5 December 1961); Council, 'Meeting of Ministers: Statement by the Representative of Uruguay, H.E. Mr. J.A. Lacarte Before the Council on 27 September 1961', GATT Doc. L/1572 (3 October 1961), [hereinafter Statement by Ambassador Lacarte on 27 September 1961]; Contracting Parties Nineteenth Session, 'Summary Record of the Eleventh Meeting – Held at the Palais des Nations, Geneva, on Friday, 8 December 1961 at 2.30 p.m.', S.R.19/11 (19 December 1961), 185.

[107]Contracting Parties, 'Recourse to Article XXIII by Uruguay: Statement by the Representative of Uruguay on 21 November 1961', GATT Doc. L/1647 (23 November 1961), 3.

[108]Statement by Ambassador Lacarte on 27 September 1961, supra n. 106), 10–12; Panel Report of 15 November 1962, supra n. 105, 7.

[109]Statement by Ambassador Lacarte on 27 September 1961, supra n. 106, 12; Recourse to Article XXIII by Uruguay, Statement by the Representative of Uruguay on 21 November 1961, GATT Doc. L/1647 (23 November 1961), 2.

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reached in an atmosphere of equanimity'.[110] Uruguay urged the other governments to take formal steps towards its request to improve the present situation.[111]

Over the course of several years, Uruguay presented requests for review and recommendations. A convened GATT panel reported on Uruguay's recourse to Article XXIII in the twelfth session of the Contracting Parties.[112] Throughout the several rounds of review and assessment per country, the panel emphasized that Uruguay had not properly connected nullification or impairment to benefits accruing to Uruguay 'under the General Agreement'.[113] The panel acknowledged Uruguay's request to review the situation, even beyond questions of GATT consistency. However, it emphasized an obligation to present significant factual evidence to demonstrate the circumstances.[114] To show the situation was 'serious enough', the panel concluded that a Contracting Party must 'demonstrate the grounds and reasons' with '[d]etailed submissions' to make a prima facie case of nullification or impairment.[115] Overlooking the 'situation dimension', the panel acknowledged Uruguay's request to assess these restrictions as 'broader issues' concerning the GATT, but only offered recommendations for the individual trade restrictions listed by Uruguay.[116]No precise description of 'other situation' arose in the filings studied, leaving it unclear how a panel's role might change in that context.

Several panel reports were issued to evaluate the restrictive measures raised by Uruguay.[117] Uruguay continued careful documentation and consultations with other Contracting Parties concerning compliance with the panel's recommendations. Like the earlier findings, the panel (of the same composition each time) concluded that Uruguay offered detailed lists of alleged trade barriers but did not provide sufficient 'grounds' for using the GATT's nullification or impairment procedures; consequently, it found Uruguay failed to provide a basis for further discussions or the invocation of GATT Article XXIII.[118]

Uruguay struggled to build a case for remedial action. Robert Hudec later observed that Uruguay's attempts to make the GATT act as prosecutor had failed.[119] If Uruguay believed it was 'getting less than it was giving' (as Hudec explained), then the situation complaint, which seemed designed to permit Uruguay to give less owing to global pressures, was not the right form of complaint.[120] While Uruguay's efforts highlighted many trade barriers, no countermeasures were proposed, and, if anything, the legal consequence remained a fuzzy commitment to satisfactory adjustment. The episode revealed Uruguay's concerns but failed to elucidate a legal framework for redressing situation complaints.

[110]Statement by Uruguay on 8 December 1961, supra n. 105, 1.

[111]Ibid., 1–2.

[112]Panel Report of 15 November 1962, supra n. 105, para. 1.

[113]Ibid., paras, 13–19. See also Report of the Panel on Uruguayan Recourse to Article XXIII, GATT Doc. L/2074 (30 October 1963), para. 2.

[114]Panel Report of 15 November 1962, supra n. 105, para. 15.

[115]Ibid., paras. 15, 20. The panel recommended removal of measures found in contradiction with the GATT. Subsequent reports from other Contracting Parties confirmed they had withdrawn actions, rather than Uruguay seeking suspension of its GATT obligations. See e.g. Uruguayan Recourse to Article XXIII, Action Taken by Contracting Parties in Compliance with the Recommendations of 16 November 1962 – Austria, GATT Doc. L/1980 (12 March 1963). Note that Uruguay presented detailed data concerning the measures, see GATT Doc. L/1662/Rev.1 (29 June 1964).

[116]Panel Report of 15 November 1962, supra n. 105, para. 22 (the 'First Report'); see also Panel on Uruguayan Recourse to Article XXIII, GATT Doc. Spec (62)103 (23 March 1962); R.E. Hudec (2003) 'Private Anticompetitive Behavior in World Markets: A WTO Perspective', *The Antitrust Bulletin*, 1061, note 18 reflected that the 'GATT panel essentially ignored the "situation" dimension'.

[117]Report of the Panel on Uruguayan Recourse to Article XXIII, GATT Doc. L/2074 (30 October 1963) (the 'Second Report'); Report of the Panel on Uruguayan Recourse to Article XXIII, GATT Doc. L/2278 (27 October 1964), para. 12 (the 'Third Report') [hereinafter Panel Report of 27 October 1964]; GATT Council, Minutes of Meeting, Geneva on 6 July 1964, GATT Doc. C/M/21 (13 July 1964), p. 8; see also Delegation of Uruguay to GATT, Table showing Certain Restrictions Applied to Imports from Uruguay, L/1662/Rev.1 (29 June 1964).

[118]Panel Report of 27 October 1964, supra n. 117, para. 9.

[119]Hudec, supra n. 26, 242.

[120]Ibid., 240.

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3.2.2 Revisiting a Joint Proposal for Collective Action

Brazil saw Uruguay's complaint as a test case for agriculture export economies in GATT dispute settlement.[121] To Brazil and Uruguay, it was clear that industrialized, developed economies had more bargaining power to protect domestic production and defy the GATT legal system.[122] Within the Committee on Trade and Development, Brazil and Uruguay authored a joint proposal to strengthen Article XXIII procedures for developing GATT Contracting Parties.[123] Brazil explained its motivation to build up the GATT Article XXIII procedures to make them more effective for developing economies.[124]

The proposal to renegotiate GATT Article XXIII contained several divisive issues for the ad hoc working group within the Committee, including the proposal for collective action:

> Without prejudice to the provisions of the preceding paragraph, in the event that a recommendation by the CONTRACTING PARTIES is not applied within the prescribed time limit of … months, the CONTRACTING PARTIES shall decide what collective measures shall be taken to ensure compliance with the Agreement.[125]

Collective action was not the only controversial proposal to strengthen dispute settlement. Alongside this proposal was the possibility of remedial measures, pending review of allegedly GATT-incompliant measures taken by developed economies, and a proposal to automatically release developing economies from their GATT obligations when 'seriously' impaired by developed economies' measures, like the GATT Article XIX procedures for protecting domestic producers.[126] Uruguay urged attention to 'constructive remedies' where measures affected the 'essential interests' of less-developed Contracting Parties.[127]

The ad hoc group working on the legal amendments for GATT Article XXIII was divided on the scope and meaning of 'collective measures' to induce GATT compliance.[128] Some challenged the proposal, citing it as violating the 'spirit' of the GATT.[129] Others protested that the renegotiation of Article XXIII would 'undermine' the existing conciliatory approach.[130] But for Brazil, collective action was a necessity. The Brazilian representative countered by asking: Was non-compliance not as harmful to the GATT spirit?[131] The reality was that developed economies would not withdraw

[121] General Agreement on Tariffs and Trade, 'Uruguayan Recourse to Article XXIII: Statement by the Representative of Brazil', GATT Doc. L/1940 (26 November 1962), 3.

[122] Ibid., 3–4; see Committee on Trade and Development, 'Ad Hoc Group on Legal Amendments to the General Agreement, Draft Decision on Article XXIII', GATT Doc. COM.TD/F/W/4/Rev.1 (13 October 1965), [hereinafter Draft Decision on Article XXIII]; Committee on Trade and Development, 'Ad Hoc Group on Legal Amendments to the General Agreement, Record of Discussions of the Meeting of the Ad Hoc Group on Legal Amendments to the General Agreement Held 11–15 October 1965', GATT Doc. COM.TD/F/3 (17 November 1965) [hereinafter Record of Discussions held 11–15 October 1965]).

[123] Committee on the Legal and Institutional Framework of GATT in Relation to Less-Developed Countries, Report of the Committee, Revision GATT Doc. L/2195/Rev.1 (13 April 1964), 20 [hereinafter Report of the Committee of 13 April 1964].

[124] Ibid., 21 (Statement by the Representative of Brazil on Article XXIII)

[125] Ibid.; see Draft Decision on Article XXIII, supra n. 122; see generally Record of Discussions held 11–15 October 1965, supra n. 122.

[126] Report of the Committee of 13 April 1964, supra n. 123, 20.

[127] Committee on the Legal and Institutional Framework of GATT in Relation to Less-Developed Countries, 'Report of the Committee – Amendments Proposed during Meeting on 16 September to Draft Chapter Contained in L/2195/Rev.1', GATT Doc. LEGAL/W/2 (17 September 1964), 2.

[128] See Ad Hoc Group on Legal Amendments to the General Agreement, 'Report of the Ad Hoc Group on Legal Amendments to the General Agreement', GATT Doc. COM.TD/F/4 (4 March 1966), paras. 15–16 [hereinafter Report of the Ad Hoc Group on 4 March 1966].

[129] Report of the Committee of 13 April 1964, supra n. 123, 21.

[130] Record of Discussions held 11–15 October 1965, supra n. 122, para. 19; General Agreement on Tariffs and Trade, 'Record of Discussions of the Meeting of the Ad Hoc Group on Legal Amendments to the General Agreement Held 27–29 April 1965', GATT Doc. COM.TD/F/2/ (2 June 1965), 9 [hereinafter Record of Discussions of 27–29 April 1965].

[131] See Ibid.; see also Record of Discussions held 11–15 October 1965, supra n. 122, para. 19.

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GATT-inconsistent measures willingly, and a single developing economy lacked the economic power to induce compliance – any retaliation would feel like a 'mosquito bite'.[132] Collective action was necessary to impose 'moral sanctions' when individual parties 'flouted decisions' by the GATT Contracting Parties.[133] The push for collective action was part of a deeper problem concerning equality among GATT Contracting Parties.[134]

When it came to explaining what 'collective action' entailed, Brazil and Uruguay had no clear answer. When asked whether it implied boycotts, the sponsors explained they did not anticipate a boycott as the answer.[135] Other delegates raised concerns that the vagueness of collective action would not allow governments to know 'beforehand' what measures were applicable.[136] There was no need to define the types of action; the GATT Contracting Parties must decide in the context of each dispute.[137] This was about inequality. Developing economies could see consultations with allegedly wrongdoer economies drag on, with the wrongdoer free to participate in GATT decision-making, including actions concerning the balance of payments concerns of developing economies.[138] Concurrent efforts to negotiate new provisions respecting trade and development in Part IV of the GATT would not address these problems respecting dispute settlement.[139]

Brazil and Uruguay explained that Article XXV:1 of the GATT was their reference point for joint action.[140] They proposed that the ad hoc group closely examine this provision to provide clearer guidance on collective action.[141] The WTO archived records show no further discussion of collective action or joint action under Article XXV, as within the Committee for Trade and Development or the ad hoc group. Article XXV commits the Contracting Parties to giving effect to provisions that 'involve joint action … with a view to facilitating the operation and furthering the objectives

[132]Report of the Committee of 13 April 1964, supra n. 123, 22–24. It is salient here to recall the implications for the stability of the WTO system of the extreme heterogeneity in the size and openness of Members. Recent economic modelling of the Trump Administration's tariff strategy highlights the scope for economic welfare gains by a Member imposing tariffs to reap the terms of trade gains predicted by optimal tariffs theory (which underscores the ever-present potential for defection from agreed commitments by a Member), but also the transformation of those gains into welfare losses with concerted retaliation by the counterparties, see, A. Ignatenko, A. Lashkaripour, L. Macedoni, and I. Simonovska (2025) 'Making America Great Again? The Economic Impacts of Liberation Day tariffs', *Journal of International Economics* 157. Effective retaliation sets up a 'lose–lose' outcome (since the retaliation inevitably involves harm to the retaliating parties), which in turn resets the table for a cooperative negotiation to recover the newly available gains from trade. This dynamic was played out in the US–China bilateral relationship when the United States escalated in response to China's initial retaliation, resulting in the two parties elevating their tariffs to, respectively, 145% (for US imports from China), and 125% (for China's imports from the United States). The mutual harm almost immediately led to a de-escalation and 'pause' to allow time for negotiations. The 'mosquito bite' of retaliation by a small, open economy would not have such leverage – even for an economy that is a G7 member as shown by the minimal impact of Canada's retaliation against a US tariff in simulations reported by D. Ciuriak and J. Xiao (2017) 'Protectionism and Retaliation', C.D. Howe Institute Working Paper, 25 January 2017.

[133]Report of the Ad Hoc Group on 4 March 1966, supra n. 128, paras. 7, 16; Record of Discussions held 11–15 October 1965, supra n. 122, para. 19.

[134]The proposal for collective measures formed one part of the broader rethinking of dispute settlement procedures between developed and less-developed economies. Record of Discussions of 27–29, April 1965, supra n. 130, 10.

[135]Record of Discussions of 27–29 April 1965, supra n. 130, 9; Record of Discussions held 11–15, October 1965, supra n. 122, para. 19.

[136]Record of Discussions held 11–15 October 1965, supra n. 122, para. 20.

[137]Record of Discussions of 27–29, April 1965, supra n. 130, para. 10.

[138]Ibid.

[139]Ibid. The GATT Secretariat studied the granting of compensation and the procedures of Article XXIII in light of the new Part IV of the GATT, see Committee on Trade and Development 'Compensation to Less-Developed Contracting Parties for Loss of Trading Opportunities Resulting from the Application of Residual Restrictions', Note by the Secretariat, GATT Doc. COM.TD/5 (2 March 1965). See also Record of Discussions of 27–29 April 1965, supra n. 130, paras. 19, 20, 25. Added in 1965, Part IV of the GATT introduced new rules concerning trade and development and differential treatment for developing countries; see also Statement Made by the Chairman of the Contracting Parties, Ambassador J.A. Lacarte, Uruguay, at the Conclusion of the Twenty-Second Session, Geneva, 25 March 1965, GATT Doc. GATT/926 (29 March 1965).

[140]Record of Discussions held 11–15 October 1965, supra n. 122, para. 19.

[141]Ibid., paras. 19–21.

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of [the GATT]'. Most experts are likely familiar with Article XXV:5, which grants waiver powers to the GATT Contracting Parties. Little is known about the scope for joint action. In a meeting of the GATT Contracting Parties, the Executive Secretary explained that a function of the GATT Contracting Parties was 'acting jointly under Article XXV, to interpret the Agreement whenever they saw fit'.[142] Decades later, the United States drew from this understanding to assert the practice of adopting interpretations of the GATT 1947 through joint actions under Article XXV of the GATT 1947, in answering a panel question in *United States–Certain Steel and Aluminium Products*.[143]

Returning to Uruguay and Brazil's proposal, a meeting of the ad hoc group for legal amendment to Article XXIII took place in February 1966. However, there are no records of the discussion. The final report from the ad hoc working group for the Committee on Trade and Development indicated the divisive views of the delegations. While noting the inclusion of the text could 'pressure' industrialized economies to comply with GATT obligations, others argued the proposal was technically unfeasible.[144]

Brazil and Uruguay continued rewriting provisions to improve GATT Article XXIII.[145] Inevitably, they compromised with the developed economies and rewrote the provision concerning collective action. The reformulated text left it to the Contracting Parties to 'consider' applicable action, remaining silent on the possibility of collective action: 'In the event that a recommendation to a developed country by the Contracting Parties shall consider what measures, further to those undertaken under paragraph 9, should be taken to resolve the matter'.[146] The report placed on record that the phrase, 'shall consider what measures', was 'intended to mean that the Contracting Parties shall consider the matter with a view to finding appropriate solution'.[147] The report indicated that the less-developed economies in the group did not find their 'fundamental concerns' were met with the draft text.[148]

In 1965, no one imagined the destruction of the multilateral trading system if developing economies were stuck in political limbo without the power to pressure other GATT Contracting Parties to comply with the trading rules. Yet, collective action was not an impossibility in the GATT. Those economies that depend on open markets, but may be unable to undertake economic security strategies without external assistance, could benefit the most from bringing a joint situation complaint. The lesson for Members today could be to build on the norm of equitable considerations and joint action to promote the least trade-distorting policies that are reasonably available for reconciling and balancing domestic exigencies and international obligations in responding to economic security concerns under the kinds of extenuating circumstances contemplated for a situation complaint.[149] For example, although one defence against weaponized dependencies is diversification, existing domestic structures could constrain how small open economies develop policies in response to international

[142]Any dispute challenging such an interpretation could take the dispute which gave rise to the interpretation to the International Court of Justice, see Contracting Parties, Nineteenth Session, 'Summary Record of the Seventh Meeting', GATT Doc. SR.19/7 (2 December 1961), 88.

[143]See United States Trade Representative, 'Responses of the United States of America to the Panel's First Set of Questions to the Parties', *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/R (14 February 2020), para. 305.

[144]Report of the Ad Hoc Group on 4 March 1966, supra n. 128, paras. 7, 16; see also Committee on Trade and Development, 'Introduction of the Report of the Ad Hoc Group on Legal Adjustments to the GATT: Statement by Mr. Kaufman, Netherlands (Chairman of the Group), on 17 March 1966', GATT Doc. COM.TD/W/22 (23 March 1966).

[145]Group on Legal Amendments to the General Agreement, 'Proposed Supplementary Decision on Procedures under Article XXIII: Joint Proposal by the Delegations of Brazil and Uruguay', GATT Doc. COM.TD/F/W/7 (21 November 1966); see also Committee on Trade and Development, 'Secretariat Note on the Seventh Session of the Committee Held in October 1966', GATT Doc. COM.TD/30 (14 November 1966).

[146]Contracting Parties, Twenty-Third Session, 'Report of the Committee on Trade and Development', GATT Doc. L/2614 (28 March 1966), 16, Annex I, Draft Decision on Article XXIII, para. 10.

[147]Ibid. 12, para. 47.

[148]Ibid. 11, para. 45.

[149]This draws on the existing commitments found in Article XX of the GATT, see GATT, supra n. 8.

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pressures.[150] We further explain how Members could pair internal efforts to attenuate harm with collective recourse through a situation complaint in Section 3.2.4.

3.2.3 The European Communities' Complaint

A second example of a situation complaint is a dispute between the European Communities and Japan in 1983. The EC requested a working party review of Japan's practices under GATT Article XXIII:2.[151] The EC did not identify any alleged violations of the GATT by Japan, but instead referred to a grave trade imbalance caused by a 'difficulty of penetrating the Japanese market'.[152] The EC argued that Japan's trade liberalization efforts were 'not commensurate with the magnitude of the problem' and demanded 'a co-ordinated series of general and specific measures'. The EC identified its desired result: 'a [future] situation … where Japan offers equal opportunities of trade expansion to its trading partners'.[153] Such a situation would meet the 'general GATT objective of "reciprocal and mutually advantageous arrangements"', the EC explained.[154]

In subsequent GATT council meetings, Japan presented measures undertaken to liberalize its market and reduce internal barriers for foreign products to convince the other Contracting Parties that a formal review was unnecessary.[155] Though contemporary commentary on the dispute observed that the EC dropped its working party review request, the GATT council records suggest that the EC continued raising its concerns about Japan's export-led development and use of protectionist measures.[156] Additionally, Japan remained attentive in reporting liberalization efforts throughout the year.[157] At the very least, raising the situation complaint highlighted the issue to the GATT community, requiring Japan to engage with the GATT Council, even though the EC never pressed for formal remedies.

3.2.4 Bringing a Situation Complaint

We have already emphasized that the WTO architecture permits Members to take joint action to facilitate the operation of the WTO Agreements.[158] We begin again with Article XXV:1 to emphasize joint action in bringing a dispute concerning a combination of circumstances that affect the development of a mutually satisfactory solution for the collective complainants, drawing on the initial impetus provided by Brazil and Uruguay's collective enforcement proposal in the 1960s, as detailed above.

Collectively, Members could bring a situation complaint to the WTO, raising concerns about a global situation of uncertainty concerning trade flows shaped by (though not necessarily exclusively caused by) the United States' attempt to unilaterally reset its bilateral trade balances. Thus far, bilateral bartering has produced self-declared 'deals' for many US trading partners (encompassing

[150] For example, consider New Zealand's comparative advantages in dairy, meat, forestry, and wool, see Alex Tan and Neel Vanvari, 'New Zealand's Economic Security Dilemma: International Pressures, Domestic Constraints', *Institute for Indo-Pacific* Affairs (5 February 2024), www.indopac.nz/post/new-zealand-s-economic-security-dilemma-international-pressures-domestic-constraints (accessed on 5 September 2025; compare K.W. Dam (2001) *The Rules of the Global Game*. University of Chicago Press, 107.

[151] Communication from the European Communities, 'Japan–Nullification or Impairment of the Benefits Accruing to the EEC under the General Agreement and Impediment to the Attainment of GATT Objectives', GATT Doc. L/5479 (8 April 1983).

[152] Ibid., 2.

[153] Ibid., 3.

[154] Ibid.

[155] See GATT Council, 'Minutes of Meeting, Held in the Centre William Rappard on 20 April 1983', GATT Doc. C/M/167 (6 May 1983), 9; GATT Council, 'Minutes of Meeting, Held in the Centre William Rappard on 26 May 1983', GATT Doc. C/M/168 (14 June 1983), 19.

[156] See GATT Council, 'Minutes of Meeting, Held in the Centre William Rappard on 12 July 1983', GATT Doc. C/M/169 (10 August 1983), 4; see also Mavroidis, supra n. 86, 132.

[157] GATT Council, 'Minutes of Meeting, Held in the Centre William Rappard on 1 November 1983', GATT Doc. C/M/172 (16 November 1983); Permanent Mission of Japan, 'Further opening of the Japanese Market', GATT Doc. L/5570 (1 November 1983).

[158] GATT, supra n. 8, art XXV:1.

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aspirational commitments with no legally binding obligations), or newly signed economic security agreements with less developed economies that establish (higher) bound rate concessions in exchange for, among other things, their alignment with US economic security-justified trade restrictions and prohibitions.[159] All completed deals remain uncertain as to outcomes, locked in a never-ending story of emergency, with the United States even demanding re-evaluation as it sees fit.[160]

In bringing a situation complaint, some Members could clarify that the focus of the complaint is a collective response to a situation of global economic uncertainty. The situation complaint raised would engage individual and collective interests in the perseverance of equitableness, and the sustainability of rules-based trading for all Members. Two approaches are possible for situation complaints. The first is to use the situation complaint to pursue collective retaliation, and the second is to focus on attenuating harm among the joint parties in responding to a global situation. The second approach accords with the spirit of the normative guidance offered by GATT practice, but we will examine both for the sake of completeness.

The first approach would require Members to bring a situation complaint on the basis that the United States failed to use Article XXVIII procedures in modifying or withdrawing its concessions. The joint parties could argue that the United States created a situation of global inequity and instability through its tariff strategy, ignoring WTO procedures. The joint Members could seek a panel ruling on the withdrawal of substantially equivalent concessions from the United States due to the absence of a satisfactory agreement and, to the extent necessary, to reset the equilibrium established by WTO rights and obligations.[161] Each complainant could be asked to identify a substantial interest in this reset. The joint parties could, on that basis, plausibly assert a collective interest in restoring tariff renegotiation procedures owing to their economic interdependence.[162] Essentially, the joint parties could seek a determination to restore the rebalancing mechanism regardless of the United States' efforts to bypass it. Subsequent arbitration could consider the calculation of equivalence, however difficult that would be in the circumstances.

This approach does not compromise the United States' rights to withdraw or modify any, or even all, of its concessions. However, by asserting (even the threat of) selective withdrawal, the joint complaint signals to the United States that its circumvention of WTO rules will not preclude rebalancing. In this scenario, the United States remains free to use safeguards and other trade remedies and seek justification for all other trade restrictions based on the general and security exceptions in the WTO Agreements.

The second approach focuses on affording an adequate opportunity to develop a mutually satisfactory solution (per DSU Article 11) to the combination of conditions that impact the attainment of the WTO's objectives. The United States' 2025 measures would constitute part of the factual circumstances that triggered a situation of global economic instability. However, the situation complaint centers on procedures to facilitate and improve trade conditions among the collective parties. This

[159]See for example, The White House, 'General Terms for the United States of America and the United Kingdom of Great Britain and Northern Ireland Economic Prosperity Deal' (8 May 2025), www.whitehouse.gov/briefings-statements/2025/05/general-terms-for-the-united-states-of-america-and-the-united-kingdom-of-great-britain-and-northern-ireland-economic-prosperity-deal/ (accessed 5 September 2025); see also, The White House, Agreement Between the United States of America and the Kingdom of Cambodia on Reciprocal Trade,' (26 October 2025), https://www.whitehouse.gov/briefings-statements/2025/10/agreement-between-the-united-states-of-america-and-the-kingdom-of-cambodia-on-reciprocal-trade/ (accessed 31 October 2025).

[160]See J. Boak and M. Yamaguchi (2025) 'Trump Says Japan Will Invest $550 Billion in US at His Direction: It May Not Be a Sure Thing', *Fox 5 San Diego* (25 July), https://fox5sandiego.com/news/business/ap-business/ap-trump-says-japan-will-invest-550-billion-in-us-at-his-direction-it-may-not-be-a-sure-thing/amp/ (accessed 5 September 2025).

[161]The language included here refers to that found within Article XXVIII:3 GATT and Article 5.1 of the Agreement on Safeguards, which the panel could examine in evaluating the request. Note, however, that selectivity is a departure from Article XXVIII:3 requirements, which demand withdrawal of concessions on an MFN basis.

[162]For example, restoring past proposals, see further, supra n. 125.

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approach leans into the idea that situation complaints differ from violation and non-violation complaints because they address a problem 'for which no particular country is responsible'.[163] The United States could have (and arguably should have) mounted a situation complaint to seek redress for an untenable trade deficit that emerges from hundreds of bilateral surpluses and deficits, rather than attributing it to any specific bilateral relationship(s). Likewise, in response to the growing destabilization of the global economy through a domino effect of increasing bound rate concessions and trade prohibitions and restrictions, Members could bring a situation complaint to seek panel recommendations for inter-collective responses to attenuate harms to themselves and the multilateral system. The panel could set up special procedures for implementing inter-collective responses to the global situation. Such a proposal could be especially useful to the extent that the existing WTO architecture does not explicitly offer guidance on responding to the exceptional circumstances, such as further guidance on support limits on sectoral subsidies or added notifications for financial support of small businesses. There would be no commitment that such procedures would extend beyond the situation complaint. The panel could work with the joint parties to foster procedures for specific safeguards and other safety valves, including discrete forms of managed trade or investment facilitation tailored to attenuate harm to severely affected industries.[164] We further explore the scope of attenuating harm in Section 3.3.

Now, it bears emphasizing that bringing a situation complaint to pursue attenuating actions might be unnecessary. Members may coordinate in the absence of a formal complaint. For example, given material impacts on their trade and in the absence of a *bona fide* offer to negotiate or consult, per Article XXVIII procedures, Members could form a working group to discuss a solution. Members could potentially add an agreement from this working group to their scheduled commitments.[165] Such a course of action does not seek to modify WTO rules or seek to develop a new agreement.[166] This could create a presumption that failure to comply with WTO negotiation or consultation requirements with one Member is a failure that affects them all. The benefit of bringing a situation complaint, at least for the United States case study, is its incorporation of oversight and accountability mechanisms into an unprecedentedly fluid and chaotic set of circumstances. Recommendations and rulings could evaluate what legal or political actions the joint parties could adopt to respond to the situation under assessment. Therefore, the panel would support these Members in fostering mutually beneficial and equitable solutions (as Ambassador Lacarte urged) when attenuating some or all of the harms created by the situation.

Currently, without WTO practice, it is unclear what role a panel could play in situation proceedings. Though Members may wish to avoid targeting the United States in bringing a situation complaint, they may nevertheless acknowledge certain Member's contributions to the situation itself. Recall that Uruguay's complaint addressed the broader GATT failure in not improving Uruguay's exports of agricultural products, while still identifying specific respondent governments.[167] There is nothing prohibiting the use of a situation complaint to 'dramatize' the failure of the current implementation of procedures to dissect the situation and seek a remedy for it.[168] Additionally, Members could argue that the situation complaint is of systemic importance since the United States' pressure upon

[163]Hudec, supra n. 116, 1061.

[164]See G.M. Grossman and A.O. Sykes (2025) 'Industrial Policy and Subsidies: An Assessment of Current Rules and Possible Reforms', *Journal of World Trade* 59(4) 573–575; see K. Bagwell and R.W. Staiger (1990) 'A Theory of Managed Trade', *American Economic Review* 80(4), 794.

[165]See e.g., Findings of the Arbitration concerning Australia's intended modification of its Schedule of Specific Commitments under the General Agreement on Trade in Services, S/Secret/13/ARB/F (22 November 2024).

[166]A. Stoler (2021) 'Joint Statement Initiatives and Progress in the WTO System', Institute for International Trade, https://iit.adelaide.edu.au/news/list/2021/05/21/joint-statement-initiatives-and-progress-in-the-wto-system.

[167]See supra n. 108–111; see also Hudec, supra n. 116.

[168]Hudec, supra n. 116.

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other Members to deviate from their own WTO commitments in tariff buy-outs could ultimately unravel the system.

The legal operation of a situation complaint is governed by GATT Article XXIII:1(c) and DSU Article 26.2. Together, these provisions clarify that the DSU applies to a situation complaint, *up until the point of panel report adoption*. The consideration of adoption, surveillance, and implementation of panel rulings and recommendations is governed by the GATT Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures.[169] The 1989 Decision describes 'prompt compliance' with panel recommendations and rulings. Though per the second approach, Members need not focus on the United States' compliance, but rather on addressing their mutual interests through dispute settlement, while defending the collective interest in trade multilateralism. Even if the United States entices one Member to defect from this effort, with a so-called deal, Members could still commit to working with other Members to address the broader situation at hand.

Finally, according to the rules, adopting a panel report concerning a situation complaint would be subject to consensus.[170] Accordingly, the United States could block the adoption of a panel report. The concern of blocking need not spell disaster for Members bringing a situation complaint. Particularly if seeking the second approach, Members could argue that a situation complaint centers on a united approach to the inequitable equilibrium of the current situation. The focus would be on establishing a targeted, public review of the situation, requiring panel recommendations and rulings on proposed means to attenuate harm while remaining compliant with WTO rules. The parties bringing the situation complaint could argue that the goal is to encourage collective discussion under the guardianship of a panel assessment. Even if the United States were to block a dispute settlement report, Members could informally still build from the panel's recommendations. Likewise, the United States could challenge how attenuating steps impact its trade benefits. Nevertheless, there is ultimately a powerful signal in a situation complaint. Rather than trying to coerce the United States into compliance with the threat of retaliation, the situation complaint sends a 'warning shot across the bow' that abusing WTO commitments does not translate to a remake of the world trading system.[171]

3.3 Attenuating Harm and Countermeasures

We acknowledge the urgency of action while attending to the normative content of WTO law and processes. Collective action may seem a legitimate action in these circumstances, but without explicit procedures, the proposition necessarily exists in a 'grey zone' of legality.[172] Like Schrödinger's Cat, the Members cannot determine the legality of collective action channelled through a situation complaint until it is tried, or the box is opened to see the fate of the cat. Yet, we close the assessment of law by making one final argument that suggests governments may not be seen as unilaterally resolving WTO disputes by acting collectively. Or, more specifically, it is not collective action that could potentially weaken the multilateral trading system or violate Article 23.1 of the DSU. Rather, it is whether they seek to decide that a violation has occurred without recourse to dispute settlement. We argue that even without the presentation of a situation complaint, collective action that aspires to attenuate harm

[169] See GATT, Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures, BISD 36SD/61–67 (12 April 1989), G(1)–(4), www.worldtradelaw.net/document.php?id=misc/1989improvements.pdf&mode=download.

[170] Panel Report, Recourse to Article 21.5 (Antigua and Barbuda), *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW (adopted 22 May 2007), paras.6.46, 6.50, note 68.

[171] See Greer, supra n. 2; R.E. Hudec (1974) 'Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment', *Minnesota Law Review* 524 (discussing the value of the threat of retaliation).

[172] A. Roberts (2008) 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?', in P. Alston and E. Macdonald (eds), *Human Rights, Intervention, and the Use of Force*. Oxford University Press, 208–209 (conceptualizing legitimacy as a spectrum where states could use the concept to bridge a 'grey zone' between legality and illegality).

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caused by the United States' overhaul of its trade concessions remains consistent with WTO obligations. As the concessions are understood to be protected by a liability rule, then measures to attenuate harm (or what the panel described as palliative care) need not defile the WTO legal system.[173]

The Appellate Body has made clear that '[s]eeking redress of a violation is not by itself prohibited by Article 23.1' but to violate the provision, a Member must seek redress 'without having recourse to, or abiding by, the rules of the DSU'.[174] Drawing from the dispute settlement panel assessment in *EC–Commercial Vessels*, the DSU conditions *how* Members respond to what they consider to be another Member's violations of the WTO covered agreements.[175] Remedial actions, per the DSU, refer to actions intended to restore the balance of WTO rights and obligations.[176] However, the panel found that redress does *not* encompass actions 'to compensate or attenuate the harm caused to actors within the aggrieved Member as a result of the allegedly WTO-inconsistent action'.[177] Actions designed to attenuate harm were distinct from actions taken to induce cessation of the WTO rule violation.[178] Trade adjustment assistance to workers affected provides an example.[179] The panel distinguished 'palliative action' from the redress in DSU Article 23.1, finding such care would not restore the balance of rights and obligations between Members.[180] The panel did not circumscribe which approaches to take, leaving the possibility for future consideration of possible retorsions available under international law.[181]

There remains the potential argument to conceive of collective action even beyond the parameters of multilaterally authorized redress: to consider the institution of countermeasures for alleged violations of international and non-WTO norms.[182] The EU and its Member States have developed domestic instruments to deter and pursue reparations for acts of economic coercion (a concept not defined in WTO law).[183] Normative questions as to the limits of justifying anti-coercion measures based on WTO or other treaties' security exceptions remain unanswered and are a subject for future

[173]Schwartz and Sykes, supra n. 62, S179, S188, S192, S201. Using a liability rule framework, Warren Schwartz and Alan Sykes have argued that the DSU process enables 'the losing disputant to "buy out" of the violation at a price set by an arbitrator'; E. Posner and A.O. Sykes (2011) 'Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance", and Related Issues', *Michigan Law Review* 110, 253. Trade commentators have long debated whether the WTO dispute settlement system requires specific performance under a property rule or permits efficient breach under a liability rule. See J.H. Jackson (1997) 'The WTO Dispute Settlement Understanding–Misunderstandings on the Nature of Legal Obligation', *American Journal of International Law* 91(1), 60. Guido Calabresi and Douglas Melamed have explained that the property rule, entails a 'collective decision', where someone who wishes to take entitlement to private property must buy it from the holder in a voluntary transaction where the value of the property is agreed upon. In contrast, a liability rule framework rests upon a liability rule, 'an objective standard of value' used to facilitate the transfer of entitlement, G. Calabresi and A.D. Melamed (1972) 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', *Harvard Law Review* 85(6), 1089, 1092, 1105.

[174]Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R (adopted on 14 November 2008), para. 373.

[175]*EC–Commercial Vessels*, supra n. 101, paras. 7.188, 7.196.

[176]Ibid., paras. 7.196, 7.207.

[177]Ibid., para. 7.197.

[178]Ibid.

[179]Ibid.

[180]Ibid.

[181]Kuijper, supra n. 101.

[182]S. Taira (2014) 'WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures under Customary International Law', *International Community Law Review* 26, 151–186; compare L. Bartels (2002) 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights', *Journal of World Trade* 36(2), 353 (giving a compelling explanation with historical support). Briefly, lawful countermeasures under customary international law are a temporary, proportionate response to an allegedly wrongful act adopted by an injured state to induce compliance by the wrongdoing state, provided the injured state called upon the allegedly wrongdoing state to cease its harmful acts and to negotiate; see D. Azaria (2022) 'Trade Countermeasures for Breaches of International Law Outside the WTO', *International and Comparative Law Quarterly* 71(2), 400 (laying out conditions of lawfulness).

[183]See Regulation (EU), 2023/2675, supra n. 32); see W. Weiß and C. Furculita (2020) 'The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014', *Journal of International Economic Law* 23, 865–884.

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interpretation. The pursuit of collective action does not stand in direct contravention of the European Commission's redress of economic coercion; however, we posit that a collective front could improve the prospects for settling the matter within an international forum. Both economic theory and international legal theory have emphasized that collaboration among weaker powers helps counteract harms caused by stronger powers.[184]

Beyond doctrinal questions, the International Law Commission's (ILC's) codification of countermeasures raises valuable cautions that take us back to Ambassador Lacarte's warnings about an unduly rigid regime that favours the alleged wrongdoer (the powerful state) to the detriment of weaker, developing states suffering harm.[185] The experiences of smaller, emerging economies with WTO dispute settlement have exposed inequities and limitations of enforcing rulings.[186] The Charter of Economic Rights and Duties (1974), an international legal resolution from the UN General Assembly, spoke of a collective rejection of 'foreign aggression' and a 'duty' to extend assistance to Members impacted by coercive policies.[187] With careful attention to the public good and the experience of weaker Members prevailing in a dispute, Joost Pauwelyn advocated for collective enforcement to embrace the fact that the WTO *is* a collective construct.[188] We liken this to a separate argument made by Petros Mavroidis in the context of WTO remedies, when evaluating actions that try to find the limits of retaliation while 'preserving the peace for the greater good' (keeping all WTO Members participating in the system).[189]

To close this section, we can recall Clair Wilcox's assessment that ITO/GATT dispute settlement aimed to 'tame retaliation, to discipline it, to keep it within bounds'.[190] Wilcox, head of the United States' delegation that negotiated a Charter for the ITO, made clear the multilateral trading system would not outlaw the power to retaliate, but would impose a 'check' on its growth and use and would seek 'to convert [retaliation] from a weapon of economic warfare to an instrument of international order'.[191] In this light, we could understand the system as setting limits, but not anchoring those limits for all time. If anything, such limits would evolve in response to the specific circumstances at hand. The GATT's pliable techniques and experimentalism formed a 'continuous process in which there [was] usually more than one answer in the air at any one time'.[192]

[184] F.I. Paddeu and M. Jackson (2024) 'The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?', *American Journal of International Law* 118(2), 271; D. Ciuriak (2022) 'Geoeconomics in a Multipolar World: Rules of Engagement for the Small Open Economy', *Policy Perspective, Canadian Global Affairs Institute*, 1, www.cgai.ca/geo_economics_in_a_multipolar_world_rules_of_engagement_for_the_small_open_economy (accessed 5 September 2025).

[185] See text accompanying, supra n. 107; see B. Simma (1994) 'Counter-Measures and Dispute Settlement: A Plea for a Different Balance', *European Journal of International Law* 5, 102–105, 103; C. Tomuschat (1994) 'Are Counter-Measures Subject to Prior Recourse to Dispute Settlement Procedures?', *European Journal of International Law* 5, 77–88, 87. Tomuschat raised the possibility of self-defence countermeasures with procedural limits (Simma voiced support), whereby injured states can use countermeasures, which would be withdrawn when the alleged wrongdoer discontinues its harmful activities and institutes dispute settlement for any remaining issues.

[186] T. Miles (2018) 'Antigua "losing all hope" of US Payout in Gambling Dispute', *Reuters*, 22 June, www.reuters.com/article/uk-usa-trade-antigua-idUSKBN1JI0VZ/ (accessed 5 September 2025); M.L. Busch and E. Reinhardt (2007), 'Developing Countries and GATT/WTO Dispute Settlement', in G.A. Bermann and P.C. Mavroidis (eds), *WTO Law and Developing Countries*. Cambridge University Press, 195–212.

[187] UN, General Assembly Resolution 3281 (XXIX) (12 December 1974), art 16; see M. Fakhri (2014) *Sugar and the Making of International Trade*. Cambridge University Press, 166 (describing how the 1974 Charter was an attempt to capture developing countries' position); but see Kuijper questioning the 'weak' recognition of the Charter, though noting it supplies some restrictions to the otherwise lawful acts of retorsion in international law, Kuijper, supra n. 101, 701.

[188] See generally Pauwelyn, supra n. 20.

[189] Mavroidis, supra n. 86, 374.

[190] UN Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Commission A, 'Verbatim Report – Sixth Meeting of Commission A, Held on Monday, 2 June 1947 at 2.30 pm, Palais des Nations, Geneva', GATT Doc. EPCT/A/PV/6 (2 June 1947), 4.

[191] Ibid., 4.

[192] R.E. Hudec (1970) 'The GATT Legal System: A Diplomat's Jurisprudence', *Journal of World Trade Law* 4(5), 615, 665.

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4. Conclusion

This article has considered whether WTO Members can develop a collective response to a situation that is globally welfare-damaging and impacts individual Members differentially. We have set out the procedures for doing so, concluding that collective action remains within the letter and spirit of the WTO Agreements. We were motivated by the United States' move to redraw its trade relations and break from its international trade commitments through bilateral negotiations in which it holds asymmetric leverage, buttressed by a proactively announced escalation in response to any attempt by counterparties to join in forging a collective response. Our focus has been on establishing the potential for collective action within the WTO architecture. We have highlighted a path forward for counterparties that pre-empts cascading internecine harms from bilateral acquiescence in WTO-inconsistent demands that would otherwise exacerbate the erosion of the mutual benefits generated by the rules-based trading system.

We began with the economic underpinnings, namely that systems characterized by heterogeneity in the size and latent economic power potential of agents (in our case, states) can become sites of strategic contestation. Collective action that resets (or at least partially moves towards) symmetry in power can improve outcomes for the smallest actors, creating gains from cooperation that could lead to a negotiated settlement. Certainly, the larger the coalition capable of pooling interests within the multilateral trading system, the greater the chance for resetting power asymmetry. We highlighted that small open economies have the greatest gains from trade within the trading system relative to the costs of cooperation to reinforce our impetus to sharpen a WTO framework for collective action.

We then evaluated the implementation of the WTO procedures established for the express purpose articulated by the United States in overhauling its trade strategy, namely, to redress trade outcomes that it was no longer willing to tolerate, to understand the unravelling of said procedures better.

Against this background, we assessed the possibility for collective action based on the WTO procedures that facilitate joint action and encourage multilateral dialogue among Members. Specifically, we scrutinized the situation complaint within the WTO dispute settlement mechanism, arguing that the benefit of the procedure lies in the due process that unfolds, including the public review of the situation, the collective discussion thereof, the formal panel recommendations and rulings, and the signal (powerful in our estimation) that it sends of the resilience of the multilateral system. We observed that GATT Article XXV:1 endorses joint action to further the objectives of the WTO Agreements. In complement with ordinary bilateral engagement (to negotiate trade preferences, form agreements, and resolve disputes), we reviewed how the established rules enable the trading community to pursue joint action to address domestic and mutual interests in complex, cumulative circumstances. We conclude that, if undertaken, joint action, via a situation complaint, can raise each Member's voice into a countervailing choir, and, more importantly, it can reinforce the mutual benefits derived from the multilateral trading system. Joint action thus serves a double purpose in engaging domestic concerns *and* the collective interests of those intending to preserve the multilateral system on which each Member depends.

While the United States' trade strategy served as an impetus for our assessment, our novel contributions apply generally to any Member in a position to use asymmetric economic power to revise Members' mutual bargains through unilateral exploitation of economic inter-dependencies, in defiance of their WTO commitments. In laying out a potential pathway for forming collective interests and responding united, a broader implication for the article could extend to fresh thinking as to how constellations of Members can achieve progress in advancing multilateral objectives in the absence of consensus while remaining committed to, even reinforcing, WTO norms.

In using collective action as an organizing principle, we acknowledge that we only establish the possibility within the WTO system and do not shed light on the factors determining the likelihood

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of successful collective actions. When Mancur Olson challenged group theory in the 1960s, he noted common interests were *not* enough to produce a public good, for 'rational, self-interested individuals will not act to achieve their common or group interests'.[193] Indeed, if WTO membership guaranteed collective interests and global public goods, explaining why any Member must occasionally pursue domestic interests and design measures inconsistent with their WTO commitments would be difficult. But, of course, Members can, and do.

However, these considerations co-exist with others that insist, as interests evolve, that repeated acts of cooperation can foster interdependence or solidarity.[194] Connecting this insight to past GATT practice, we have observed that strategic decisions were undertaken with a keen eye towards global impact. For this reason, Ambassador Lacarte, a founding architect of the GATT/WTO system, held that equitable considerations *must* be as important when applied to trading partners as to domestic interest groups when formulating trade policies.

In a similar vein, laboratory experiments and field research on collective action have expanded new possibilities for collective action in certain contexts.[195] There are considerable open questions concerning the potential for collective action by a heterogenous community since heterogeneity extends well beyond size, economic interests, and competing strategic objectives.[196] Our emphasis here has, however, aligned with some of Elinor Olstrom's design principles for collective action by stressing that impacted Members come together for face-to-face discussion of an 'optimal' joint strategy to hopefully increase cooperation over time.[197] Further research could draw upon this work to explore credible buy-ins for WTO collective action, drawing upon different theoretical bases, including rational choice or evolutionary.[198] Future work could expand upon the outcomes of joint, palliative action to fight uncertainty with certainty, supporting growth rather than fighting over irretrievably lost gains.[199]

To conclude, whether the WTO system collapses will not be determined by rule-breaking by one Member. Rather, it will be determined by how such defections are perceived, justified, rationalized, accepted, and repeated by other Members. We acknowledge that the operation of collective action, like other joint action initiatives, may initially struggle to find its footing within the WTO.[200] At the same time, the experience of this singular defection by the United States will irrevocably change the historical data on which states base their policy choices and on which theoretical treatments of collective action will be predicated. We cannot predict what lessons Members will draw, but our proposals afford a space for a return home, if and when the time calls for it.

[193] Olson, supra n. 18, 2.

[194] Wendt, supra n. 19, 390–391.

[195] For instance, in a case study on peasants engaged in community-based projects, Mahvish Shami questioned the robustness of assumptions that hierarchical bonds deter collective action, see M. Shami (2012) 'Collective Action, Clientelism, and Connectivity', *American Political Science Review* 106(3), 588, 603.

[196] In Elinor Ostrom's words, the work suggests 'the world contains multiple types of individuals, some more willing than others to initiate reciprocity to achieve the benefits of collective action': E. Ostrom (2000) 'Collective Action and the Evolution of Social Norms', *The Journal of Economic Perspectives* 14(3), 138.

[197] Ibid., 140.

[198] See generally F.W. Mayer (2014) *Narrative politics: Stories and Collective Action*. Oxford University Press, 30–50.

[199] See D. Ciuriak (2015) 'Canada at Trade War', Centre for International Governance Innovation 20. For example, enhanced transparency requirements, and greater detailed reporting of safeguards and financial contributions for innovation systems, firms scaling up in identified sectors, re-training, research funding, coordinated permits for researchers, and technology sharing.

[200] That said, we note that New Zealand has proposed 'the formation of a rules-based trading bloc [involving the CPTPP partners and the European Union] in response to sweeping United States tariffs that threaten to hurt economies reliant on global trade.', M. Brockett (2025) 'New Zealand Proposes Trading Bloc with Canada, EU, and Pacific Allies', *Financial Post*, 9 April.

https://doi.org/10.1017/S1474745625101274 Published online by Cambridge University Press

Acknowledgements. We thank Ignacio Garcia Bercero, Kathleen Claussen, Lothar Ehring, Michael Gasiorek, Rob Howse, Andrew Lang, Simon Lester, Emily Lydgate, Inu Manak, Gabrielle Marceau, Petros Mavroidis, Krzystof Pelc, Amy Porges, and Alan Sykes for detailed comments on early versions of this work. We thank Thalia Kalai for her editing assistance.

Cite this article: M. Paulsen, and D. Ciuriak (2025) 'The Case for WTO Collective Action', *World Trade Review*, 1–29. https://doi.org/10.1017/S1474745625101274