Article 8 of the WTO Safeguards Agreement: Reforming the Right to Rebalance

Matthew R. Nicely

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ARTICLE 8 OF THE WTO SAFEGUARDS AGREEMENT: REFORMING THE RIGHT TO REBALANCE

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INTRODUCTION

On March 5, 2002, U.S. President George W. Bush imposed definitive safeguard measures on imports of certain steel products pursuant to his authority under Section 203 of the Trade Act of 1974 ("Trade Act"). The U.S. steel safeguard measure entailed the application of *ad valorem* tariffs ranging from 8% to 30% on various types of steel products. The President's decision came following the recommendation of the U.S. International Trade Commission ("ITC"), which conducted an investigation concluding that such steel products were "being imported . . . in such increased quantities as to be a substantial cause of serious injury . . . to the domestic industry." The safeguard measure was intended to thereby provide what the President and the ITC viewed as appropriate and necessary relief to the U.S. steel industry. The safeguard measure went into effect on March 20, 2002, and was to remain in place for a period of three years and one day.

The adverse effects of the safeguard measure on steel exporting nations made an international trade war all but inevitable. As a WTO Member, the United States is obligated to impose safeguard measures only within the legal parameters of the General Agreement on Trade Tariffs of 1947 ("GATT") and the WTO Agreement on Safeguards ("Safeguards Agreement"). From the outset, the President defended the safeguard measure

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3 See Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. 10,593 (Mar. 5, 2002) [hereinafter Section 203 Action] (citing safeguard measures showing individual *ad valorem* tariff increases ranging from 8% to 30%).


5 See Steel Products Proclamation, supra note 2, at 10,554–56 (noting the concern about addressing "the serious injury, or threat thereof, to the domestic industries"); Press Release, White House Office of the Press Secretary, President Announces Temporary Safeguards for Steel Industry (Mar. 5, 2002) [hereinafter Press Release], available at http://www.whitehouse.gov/news/releases/2002/03/20020305-6.html (claiming that the President considered section 203 of Trade Act, 19 U.S.C. 2252(e), and ITC supplemental report in his determination of safeguard measures).

6 Steel Products Proclamation, supra note 2, at 10,555 (stating that tariff rate quotas on imports would last for 3 years plus 1 day).


as "expressly sanctioned" by those agreements. Nevertheless, just two days after the President's decision, the European Union requested dispute settlement consultations with the United States, pursuant to the Dispute Settlement Understanding ("DSU") on the grounds that the measure violated those agreements. Other Members similarly affected by the safeguard measure immediately followed suit. As expected, the consultations failed to reach a compromise. Accordingly, exporting Members affected by the safeguard measure waged their first attack by requesting the establishment of a dispute panel pursuant to the DSU. In accordance with Articles 6 and 9 Press Release, supra note 5.


11 See Request for Consultations by the European Communities, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/1 (Mar. 13, 2002) ("The EC considers that these US measures are in breach of the US obligations under the provisions of GATT 1994 and of the Agreement on Safeguards . . . ").

12 Request for Consultations by Japan, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS249/1 (Mar. 26, 2002); Request for Consultations by Korea, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS251/1 (Mar. 26, 2002); Request for Consultations by China, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS252/1 (Apr. 2, 2002); Request for Consultations by Switzerland, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS253/1 (Apr. 8, 2002); Request for Consultations by Norway, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS254/1 (Apr. 10, 2002); Request for Consultations by New Zealand, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS258/1 (May 21, 2002); Request for Consultations by Brazil, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS259/1 (May 23, 2002).


14 Request for the Establishment of a Panel by the European Communities, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/12 (May 8, 2002); Request for the Establishment of a Panel by Japan, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS249/6 (May 24, 2002); Request for the Establishment of a Panel by Korea, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS251/7 (May 24, 2002); Request for the Establishment of a Panel by China, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS252/8 (May 27, 2002); Request for the Establishment of a Panel by Switzerland, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS253/5 (June 4, 2002); Request for the Establishment of a Panel by Norway, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS254/5 (June 4, 2002); Request for the Establishment of a Panel by New Zealand, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS258/9 (June 28, 2002); Request for the Establishment of a Panel by Brazil, United States - Definitive Safeguard Measures on
9.1 of that agreement, the DSB granted their requests and established a single dispute panel to address the complaints of each exporting Member.\textsuperscript{15}

Concurrently, affected exporting Members prepared for a second attack from another front. Under Article 8.2 of the Safeguards Agreement, an exporting country subject to an improper safeguard measure may "suspend . . . the application of substantially equivalent concessions or other obligations" upon proper notice submitted to the WTO Council for Trade in Goods ("Council"). Under Article 8.3, an improper safeguard measure is defined as one that is taken without an absolute increase in imports or otherwise inconsistent with the Safeguards Agreement. Furthermore, the affected exporting Members must suspend concessions "not later than 90 days after the [safeguard] measure is applied."\textsuperscript{16} Accordingly, in May and June of 2002, the EU, Japan, Switzerland, Norway, and the People's Republic of China exercised the right embodied by Article 8.3, and notified, as required under Article 8.2, the Council of their intent to implement such rebalancing measures within the ninety-day period.\textsuperscript{17} Simultaneously, Brazil, Korea, Australia, New

\textit{Imports of Certain Steel Products, WT/DS259/10 (July 22, 2002).}

\textsuperscript{15} On June 14, 2002, the DSB granted the request for the establishment of a dispute panel submitted by the E.C., Japan and Korea. In doing so, the DSB established a single panel under DSU Article 9.1. \textit{WTO Steel Safeguard Panel Report, supra note 13, ¶ 2.7(b).} On June 24, 2002, the requests of China, Switzerland, and Norway were granted by the DSB and the matter was referred to the panel already established for the E.C., Japan and Korea. \textit{Id. ¶ 2.7(c).} Subsequently, the importing countries entered into an agreement with the U.S. to shorten the sixty-day period for consultations under DSU Article 4.7 and allow New Zealand to pursue its claim with the established dispute panel. \textit{Id. ¶ 2.8.} In turn, the complainants agreed not to seek the appointment of panelists before July 15, 2002 and agreed on longer time limits for submissions. \textit{Id.} Similarly, Brazil and the U.S. concluded an agreement that allowed the former's claims to be addressed by the established panel. \textit{Id. ¶ 2.11.} Furthermore, Canada, Taiwan, Cuba, Malaysia, Mexico, Thailand, Turkey and Venezuela reserved their respective third party rights to participate in the proceedings. \textit{Id. ¶ 2.15.}

\textsuperscript{16} Safeguards Agreement, \textit{supra note 8, art. 8.2 (stating time parameters for which Members must suspend concessions).}

\textsuperscript{17} European Communities, \textit{Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/C/10 (May 15, 2002); European Communities: Supplement, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/C/10/Suppl.1 (June 20, 2002); Japan, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/C/15 (May 21, 2002); Japan, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions
Zealand, and Taiwan, while falling short of preparing for a full-scale assault, each issued a joint communication with the United States that reserved their reciprocal rights under Article 8.2 and extended the ninety-day time limit to implement rebalancing measures to March 20, 2005. The proposed rebalancing measures had the potential to inflict far-reaching economic harm on the United States by exposing billions of dollars worth of its key exports to tariffs purportedly equivalent to those of the U.S. steel safeguard measure.

While considerable attention was given to the adjudication of the safeguard measure’s legality, the second battle entailed a smaller yet more significant legal dispute that brought to light the stark procedural defects of the Safeguards Agreement.

and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/C/15/Suppl.1 (June 18, 2002); Norway, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/C/16 (May 21, 2002); China, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/C/17 (May 21, 2002); Switzerland, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/C/18 (May 22, 2002). The term “rebalancing measures” connotes the suspension “of substantially equivalent concessions or other obligations” as stated under Article 8.2 of the Safeguards Agreement. Use of the term “rebalancing measures” is not to suggest that the type of action contemplated under Article 8.2 is distinct conceptually from the right “to suspend the application . . . of concessions or other obligations” under Article 22.2 of the DSU. The term does, however, signify that suspension of concessions or other obligations carried out by an affected exporting country is conducted pursuant to Article 8.2 of the Safeguards Agreement to offset the adverse effects of an allegedly inconsistent safeguard measure. The term “retaliation” is generally used to refer to the suspension of concessions by a WTO Member under Article 22.2 of the DSU.

18 Joint Communication from the United States and Korea, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Products, G/C/12 (May 16, 2002); Joint Communication from the United States and Brazil, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Products, G/C/11 (May 16, 2002); Joint Communication from the United States and Australia, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Products, G/C/14 (May 17, 2002); Joint Communication from the United States and New Zealand, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Products, G/C/13 (May 17, 2002); Joint Communication from the United States and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Products, G/C/21 (June 14, 2002). The referenced notifications illustrate the alternative approach taken by Brazil, Korea, Australia, New Zealand, and Taiwan to second prong of attack.
Central to the dispute was the right of a WTO Member to impose rebalancing measures under Article 8. Specifically, the question was whether an affected exporting country may reserve its right to impose rebalancing measures beyond the ninety-day period set forth in Article 8, pending resolution of the dispute by the DSB. An analysis of this issue also leads to questions regarding the relationship between the DSU and the Safeguards Agreement and the right of affected exporting Members to unilaterally determine under Article 8.3 that a safeguard measure is improper—questions that remain central to the continued validity of the Safeguards Agreement.

For better or worse, the second battle was never waged. The dispute settlement process and the threat of retaliation ultimately prompted the retreat of the United States. On July 11, 2003, the dispute panel established to address the claims instituted by the steel exporting Members issued its final report, which found the U.S. steel safeguard measure inconsistent with GATT Article XIX:1(a) and Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement. On November 10, 2003, the WTO Appellate Body affirmed the key findings of the dispute panel. Much of the attention during the weeks following the Appellate Body decision was focused on how the parties would react to the dispute settlement finding rather than the legal questions outlined above.

In the face of mounting threats of retaliatory tariffs from the exporting Members and domestic pressure from U.S. steel-consuming manufacturers, the President lifted the steel safeguard measure on December 4, 2003—approximately 15 months prior to the earliest date of expiration set by the measure—pursuant to his authority under Section 204 of the Trade Act. In the end, significant issues raised by the potential application of rebalancing measures were effectively evaded by the parties.

19 See generally WTO Steel Safeguard Panel Report, supra note 13, art. XI (noting the conclusions developed by various Members).


21 Proclamation No. 7741, 68 Fed. Reg. 68,483, 68,484 (Dec. 4, 2003) (demonstrating the President’s belief that safeguard measures were not effective in the current economic circumstances).
and the WTO. Critical analysis of those issues reveals the weaknesses of the WTO safeguard mechanism and the need to fill the gaps left open by the negotiators of the Safeguards Agreement.

I. THE GATT-WTO SAFEGUARDS SYSTEM

A. GATT Article XIX

i. Framework of GATT Article XIX

Although a safeguard measure is not expressly defined by the WTO agreements, the term is used in the context of GATT Article XIX:1(a), which provides the fundamental basis for imposing such a measure. Under that article:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party . . . any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product . . . to suspend the obligation in whole or in part or to withdraw or modify the concession.

Accordingly, the remedy that Article XIX provides, i.e., the suspension of obligations, is the so-called safeguard measure. It allows a country to temporarily depart from an agreed-upon tariff concession to protect a particular industry from an unexpected and harmful surge of fairly imported products. The protection

23 GATT, supra note 7, art. XIX (emphasis added).
24 As stated by Kenneth Dam, safeguard measures “can thus be analogized more directly to the doctrine of ‘changed circumstances’ in international law than can the provisions of Article XXVII [Modification of Schedules].” DAM, supra note 22, at 99. GATT Article XIX is often referred to as the “escape clause.” Id.
25 See RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 898 (1998) (asserting that the escape clause in GATT Article XIX was not completely original by citing similar clause of temporary effect in earlier 1943 United States-Mexico Agreement); see also DAM, supra note 22, at 100 (explaining tariff schedules should be suspended as long as necessary to prevent or cure injury).
is generally understood to provide relief to the industry and allow it to adjust to competition from abroad.\textsuperscript{26}

As a result of its unique features, a safeguard measure is broader in scope than other trade remedies. First, the measure applies on a non-discriminatory basis.\textsuperscript{27} This concept, termed as most-favored nation ("MFN") treatment under WTO law, requires any safeguard measure to be applied to all exporting Members without regard to the level of importation.\textsuperscript{28} Second, a single safeguard measure can sweep across numerous products with a broad brush by applying to various classes or kinds of the product at issue.\textsuperscript{29} Third, because Article XIX:1(a) permits an affected exporting Member to "sustain [in whole or in part],' 'withdraw,' or 'modify'" the concession, a wide range of measures may be taken once the conditions of that article are met.\textsuperscript{30} As stated by one scholar, such an authorization "is a testament to the relative potential potency of Article XIX."\textsuperscript{31} In contrast to safeguard measures, other trade remedies are typically targeted toward select countries, individual firms, and narrower product categories, and limited to the imposition of \textit{ad valorem} duties.\textsuperscript{32}

\textsuperscript{26} See DAM, supra note 22, at 100 (noting that Article XIX provides balancing mechanism for industries, allowing them to remain competitive in international marketplace).

\textsuperscript{27} "Safeguard measures shall be applied to a product being imported irrespective of its source." Safeguards Agreement, supra note 8, art. 2.2. Prior to the Safeguards Agreement, however, it was not entirely clear that the language of GATT Article XIX alone mandated the application of safeguard measures on a non-discriminatory basis. DAM, supra note 22, at 104–05. Contracting parties reached an interpretive agreement at the Havana ITO Conference following the conclusion of the GATT agreeing that safeguard actions under Article XIX must be applied in a non-discriminatory way. Youngjin Jung & Ellen Jooyeon Kang, Toward an Ideal WTO Safeguards Regime – Lessons from U.S. – Steel, 38 INT'L LAW. 919, 934 (2004).

\textsuperscript{28} As an exception to this general rule, Article 9.1 of the Safeguards Agreement allows Members imposing a safeguard measure to exempt, under certain conditions, a developing country whose share of imports is \textit{de minimis}. Jung & Kang, supra note 27, at 935. Also, the Agreement arguably allows safeguard-imposing Members to exempt FTA and customs union partners. Id. at 935–36.

\textsuperscript{29} See MARC BACCHETTA & MARION JANSEN, SPECIAL STUDIES 7 – ADJUSTING TO TRADE LIBERALIZATION, THE ROLE OF POLICY, INSTITUTIONS AND WTO DISCIPLINES 49 (2003), available at http://www.wto.org/english/res_e/booksp_e/special_study_7_e.pdf (arguing the broad scope of Article XIX application under the definition of "domestic industry"); see also DAM, supra note 22, at 100 (stating Article XIX can be applied to entire industries).

\textsuperscript{30} See BHALA & KENNEDY, supra note 25, at 901 (noting Article XIX:1(a) authorization allows for broad range of measures to be taken including the ability to suspend, withdraw or modify concessions); see also DAM, supra note 22, at 105 (presenting interpretive note under which suspensions, withdrawals or modifications under Article XIX:1(a) may not be applied in discriminatory fashion).

\textsuperscript{31} BHALA & KENNEDY, supra note 25, at 901.

\textsuperscript{32} The breadth of safeguard measures was much more extensive under GATT because
With all of this in mind, the potential effects of a safeguard measure on an affected exporting Member can be extraordinary.

It is important to emphasize from the outset that "a safeguard remedy is not designed to redress unfair competition such as dumping, illegal subsidization, or intellectual property infringements. Indeed, sometimes it is the failure to obtain relief under one of the unfair import competition laws that prompts an interested party to seek a safeguard remedy." 33 Thus, because a trade violation is unnecessary to induce a safeguard action, it is reasonable to perceive the remedy as the most protectionist one available in the GATT-WTO system.34 "After all, companies producing imported products are behaving lawfully in accordance with free market principles, and yet they are victimized by a safeguard remedy." 35

Article XIX of GATT sets forth various procedural requirements to further the policies of a rule-based trading system. Under Article XIX:2, a safeguard-imposing Member must give notice to affected exporting Members and an opportunity to consult with the Member regarding the proposed safeguard measure. The purpose of this notice and consultation provision is to promote the guiding principle of cooperation that was crucial to an international institution characterized by a frail dispute resolution system.36 Moreover, these requirements promoted the multilateral trading system's goals of stability and transparency.37 Thus, Article XIX:2 implicitly affords affected exporting Members time to readjust to the imposition of a safeguard measure.

GATT Article XIX:3(a) embodies the notion of tariff bindings that serves as a crucial pillar of the GATT-WTO system. Under Article XIX failed to set forth specific rules in imposing a safeguard measure. "Under the previous regime, if the prerequisites were established, governments were allowed to go beyond simply slowing down the liberalization process or just reverting to the pre-liberalization situation." Bacchetta & Jansen, supra note 29, at 52.

33 Bacchetta & Kennedy, supra note 25, at 897. "[A]nti-dumping actions are justified on the ground that dumping is an 'unfair' practice that results in 'unfair' trade while safeguards are justified for imports that are perfectly 'fair.'" Bacchetta & Jansen, supra note 29, at 55.

34 See Bacchetta & Kennedy, supra note 25, at 897 (stating that safeguard actions are one of the most protectionist remedies allowed under the GATT-WTO system).

35 Id.

36 See Bacchetta & Kennedy, supra note 25, at 925 ("GATT Article XIX: 2 sets forth an exception to the rule against taking an escape clause action without affording an opportunity for prior consultations.").

37 See id. (describing how the procedural requirements "ensure transparency").
that paragraph, a contracting party affected by a safeguard measure is

[F]ree, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action . . . of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.38

Stated differently, the affected contracting party is free to retaliate in response to a safeguard measure by imposing rebalancing measures. In practice, retaliation will not occur if agreement can be reached on appropriate compensation.39 By allowing such measures, GATT Article XIX:3 protects the agreement’s principles of balanced concessions and tariff bindings by discouraging use of safeguard measures and promoting agreement on compensation. In other words, the threat of retaliation is intended to deter the abuse of safeguard measures under the guise of necessary relief.40 Despite the provision’s criticisms, it keeps the protectionist exception embodied by Article XIX from swallowing the principle of liberalized trade – the hallmark of the GATT-WTO system.41 Indeed, the need for such a protective measure is particularly acute in light of the extraordinary nature of safeguard measures.

ii. The Purpose Underlying GATT Article XIX

The remedy provided under Article XIX is not unique.42 It “is only one of five provisions in GATT that fall under the rubric of

38 GATT, supra note 7, art. XIX: 3(a) (emphasis added).
39 See BHALA & KENNEDY, supra note 25, at 932 (explaining that the prospect of retaliation promotes agreements on compensation); see also DAM, supra note 22, at 100 (stating that “the balance of concessions will be reestablished by the retaliatory suspension of substantially equivalent concessions”).
40 See BHALA & KENNEDY, supra note 25, at 932 (positing that one purpose of the prospect of retaliation is that it deters the use of the escape clause).
41 See Report by the Chairman of the Council to the Fortieth Session of the CONTRACTING PARTIES, Safeguards, ¶ 8, MDF/4 (Nov. 23, 1984) [hereinafter 1984 Report of the Council Chairman] (“[T]he threat of retaliation could have a deterrent effect against the application of safeguard actions [and] . . . promote agreement on compensation.”).
42 BHALA & KENNEDY, supra note 25, at 897 (“While Article XIX of GATT is the famous ‘escape clause,’ it should not be seen as wholly unique.”).
Similarly, safeguard measures are not new to international trade law. The first ever safeguard remedy was contained in a 1943 trade agreement between the United States and Mexico, and it consisted of much of the same language currently reflected by GATT Article XIX:1(a). At that time, inclusion of a safeguard measure was prompted by the fear in Congress "of injury to domestic industry through concessions granted in trade treaties." At the behest of the United States, incorporation of a safeguard measure thereafter became the rule rather than the exception.

In light of the protectionist undertone of safeguard measures, determining their object and purpose goes a long way towards understanding their role within the GATT-WTO regime. Indeed, the ability to temporarily renege on trade concessions is seemingly inapropriate to the goal of trade liberalization, begging the question of why it was welcomed by the CONTRACTING PARTIES. Given the scant history available regarding GATT Article XIX, discerning the object and purpose of a safeguard measure is also critical to understanding how it should be applied today. Notwithstanding the long-standing existence of Article XIX, the question of purpose remains unresolved. Nevertheless, several possible answers may shed some light.

First, Article XIX allows for the restoration of competitiveness: By providing temporary protection, an Article XIX action

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43 Id. For further detail on the other safeguards mentioned, refer to GATT, supra note 7, art. XII (Restrictions to Safeguard the Balance of Payments), art. XVIII (Governmental Assistance to Economic Development), art. XXV (Joint Action by the Contracting Parties), and art. XXVIII (Modification of Schedules).


45 BHALA & KENNEDY, supra note 25, at 898 (quoting the escape clause in the 1943 United States-Mexico agreement).

46 Id. ("Escape clauses were the answer to congressional complaints: the '[l]egislative history of the 1945 congressional debate on the law that authorized the United States to join GATT is replete with congressional complaints of injury to domestic industry through concessions granted in trade treaties.'" (quoting JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE AGREEMENT ON TARIFFS AND TRADE 553 (1969) [hereinafter JACKSON 1]))

47 See BHALA & KENNEDY, supra note 25, at 898 ("In February 1947, President Truman issued an Executive Order that required an escape clause to be included in every United States trade agreement negotiated under the authority of the 1934 Act.").

48 RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 1118 (2d ed. 2001) [hereinafter BHALA].
allows an ailing industry to generate profits, and reinvest these profits in factors of production ... and thereby regain its competitive edge once protection is removed. The international trade community – particularly consumers in different countries – benefit because efficient competitors re-emerge.49

A corollary to this argument is the possibility that such relief provides for the orderly contraction of industries by allowing the domestic industry "to adjust positively to import competition."50 In this context, the industry does not necessarily restore competitiveness but seeks to lessen the "shock to factors of production, most notably labor, by slowing the rate of contraction in an import-sensitive industry."51 In essence, Article XIX is considered a means of allocating the costs of market adjustment between both the importing and exporting country.52

Of course, political considerations played a key part in the creation and adoption of Article XIX.53 In this sense, Article XIX

49 Id. at 1119.
50 Id. at 1120.
51 Id.
52 Id. Both of these possibilities are supported by the text of Article 5 of the Safeguards Agreement, which states that safeguard measures shall be applied only to the extent "necessary to prevent or remedy serious injury and to facilitate adjustment[,]" and reinforced by the negotiating history of that agreement. Safeguards Agreement, supra note 8, art. 7.1. Evidence of adjustment is necessary to justify extending a measure. Id. art. 7.2. Progressive liberalization is intended to facilitate adjustment in cases of measures originally imposed for longer than one year. Id. art. 7.4.

According to a WTO study conducted in 2003, however, the type of relief intended by Article XIX and the Safeguards Agreement is more accurately identified as the restoration of competitiveness rather than the contraction of the affected industry:

[T]he kind of adjustment the drafters of the Agreement wished to facilitate is the restructuring of industries hurt by import competition, rather than the reallocation of resources released by the contraction of the import competing sectors. If a government prevents or remedies an impairment in the position of import competing industries, factors of production have no incentive to move and thus there is no reallocation of resources from less efficient to more efficient activities.

BACCHETTA & JANSEN, supra note 29, at 50. The study argues that the prevailing intent of restoration was confirmed by current WTO practice and reflected by the language used by various Members in their safeguard legislation. Id. at 50–52. As illustrated by the WTO study, criticism regarding these two possible purposes continue to linger. See id.

Of course, the ability of safeguard measures to truly restore the domestic industry's competitiveness or contract the domestic industry has been extensively argued. For instance, one commentator notes that a safeguard measure "relies on the questionable assumption that governments can accurately identify and protect only those industries that can become "competitive" and "even if governments were competent to identify appropriate candidates for assistance and would properly exclude poor candidates, protection is not necessarily the best way to provide such assistance." Alan O. Sykes, Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations, 58 U. CHI. L. REV. 255, 264 (1991).

53 See supra note 52 and accompanying text.
is a rent-seeking measure intended to appease protectionist sentiment in exchange for their endorsement of GATT. While this argument does not entirely reconcile Article XIX with the WTO's goal of trade liberalization, it nevertheless promotes that policy by serving as the least restrictive alternative when viewed against the potential backlash of broad protectionist legislation that may be adopted as a result of import surges. Indeed, a safeguard remedy "affects only a single industry in one case, and perhaps just a few firms in that industry" but "[p]rotectionist legislation can affect an entire sector of an economy, and have reverberations throughout many other sectors." Thus, absent safeguard measures, "the pressures may be manifest in more – maybe far more – protectionist ways than [a safeguard] action."

Most importantly, Article XIX promotes the WTO's goal of trade liberalization by encouraging "WTO Members (like the GATT contracting party before them) to enter into a greater number of tariff bindings than they otherwise would." In other words, a safeguard measure serves as the eternal safe harbor that WTO Members can rely upon in persuading themselves and their domestic constituencies to accept certain concessions, thereby relieving "a WTO Member of the fear that the commitments into which they enter are irrevocable." As stated by an American delegate to the GATT negotiations, Article XIX:

"[G]ive[s] more flexibility to the commitments undertaken .... Some provision of this kind seems necessary in order that countries will not find themselves in such a rigid position that they could not deal with situations of an emergency character."

54 DAM, supra note 22, at 106–07 ("One may conclude that the GATT escape clause is a useful safety valve for protectionist pressures and does not undercut in any serious way the advantages of the GATT tariff negotiating system.").

55 BHALA, supra note 48, at 1120–21 ("When a politically powerful industry in a country complains of injury from a substantial increase in imports resulting from a trade-liberalizing agreement, an escape clause allows the government to alter unilaterally the agreement with respect to the affected industry.").

56 Id. at 1121.

57 Id.

58 Id; see BACCHETTA & JANSSEN, supra note 29, at 48 ("The general view is that without the safety-valve provided by safeguards, governments might be reluctant to liberalize in sectors where there is uncertainty concerning the adjustment process that will follow the liberalization."); see also DAM, supra note 22, at 99 ("Its justification is that the presence of [GATT Article XIX] encourages cautious countries to enter into a greater number of tariff bindings than would otherwise be the case.").

59 BHALA, supra note 48, at 1122.
Therefore, the Article . . . would provide for a modification of commitments to meet such temporary situation [sic].

B. The WTO Safeguards Agreement

i. Background

Despite the existence of Article XIX, the remedy that it provides was rarely invoked by WTO Members. This phenomenon is rather surprising in light of the article's apparent effectiveness and flexibility in relieving Members of their obligations. The inability of Article XIX to live up to its expectations is explained by several factors.

As an initial matter, some contracting parties simply found the injury standard of Article XIX too high. No less significant was the ability of Members to rely on other trade remedies as effective, unilateral relief from threatening imports. Also, "recourse to Article XIX by most developing countries [were] not . . . necessary because those countries have had few tariff bindings and thus could raise their tariffs without violating their

60 BHALA, supra note 48, at 1121 (quoting U.N. Doc. EPCT/C.II/PV.7, at 3 (1946)); see GATT, GATT ACTIVITIES 1988: AN ANNUAL REVIEW OF THE WORK OF GATT 44 (1989) [hereinafter GATT ACTIVITIES] ("The GATT's draftsmen, in the 1940s, realized that governments would be unwilling to accept far-reaching obligations to reduce and stabilize obstacles to trade unless they were allowed certain limited 'escapes' from its general principles. Article XIX is one such 'escape clause . . .'.")

61 DAM, supra note 22, at 99 (explaining that since the escape clause has been used so seldom, that it will be hard to argue getting rid of it); BHALA, supra note 48, at 1123 ("Throughout the GATT era, Article XIX safeguards have not been the instrument of choice by GATT members to impose import protection for various reasons." (quoting JEFFREY J. SCHOTT, SAFEGUARDS, IN THE NEW TRADING SYSTEM: READINGS 113-15 (Organisation for Economic Co-operation and Development ed., 1994)).

62 BHALA, supra note 48, at 1123 (quoting SCHOTT, supra note 61, at 113-15) (claiming that one reason why article XIX safeguards have not been the instrument of choice by GATT is that some countries find the serious-injury threshold to be too high); see Cletus C. Coughlin, U.S. Trade-Remedy Laws: Do They Facilitate or Hinder Free Trade?, 73 FED. RES. BANK OF ST. LOUIS REV. 3, 12 (1991) ("The underlying criteria for a successful petition . . . have deterred the use of escape clause petitions and induced industries to seek protection using other trade-remedy avenues.").

63 See BHALA, supra note 48, at 1123 ("Most major trading countries, however, have been deterred from invoking Article XIX less by its requirements than by the availability of less onerous and more flexible channels of protection . . . ." (quoting SCHOTT, supra note 61, at 113-15)); see also Coughlin, supra note 62, at 12 (positing that despite the "requirement' that anti-dumping and countervailing duty actions can be invoked only to counteract the specific unfair trade practices of dumping and export subsidies, industries have increasingly resorted to these trade-remedy laws rather than use the escape clause route").
Significantly, the implicit requirement to pay compensation to affected exporting parties, and the unilateral right of rebalancing absent compensation, served as a potent deterrent in invoking a safeguard measure. Because Article XIX’s retaliation provision is premised on the concept of balanced rights and obligations, the article allows for compensation or rebalancing regardless of material harm. This obligation was absolute and applied without regard to the adequacy of the safeguard measure at issue. Despite the requirement to consult with affecting exporting nations, most contracting parties implemented safeguards without consultation. As such, the rights of compensation and rebalancing were immediately triggered.

As stated by one scholar, however, “[w]hile the concept of a balance of rights makes sense since no unfair trade practice is alleged, it also made a country’s use of the safeguard right very difficult regardless of the state of extremis being faced by the domestic industry seeking relief.” Most Members were simply

64 BHALA, supra note 48, at 1123 (quoting SCHOTT, supra note 61, at 113–15).
65 See DAM, supra note 22, at 104 (stating that the right to retaliate may tend to temper the protectionist fervor); see also TERENCE P. STEWART, 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) 1725 (Terence P. Stewart ed., 1993) [hereinafter STEWART 1] (explaining why countries have often avoided the use of Article XIX in search of bilateral solution); BHALA, supra note 48, at 1123 (“Throughout the GATT era, Article XIX safeguards have not been the instrument of choice by GATT members to impose import protection . . . .” (quoting SCHOTT, supra note 61, at 113–15)); 1984 Report of the Council Chairman, supra note 41, ¶ 8 (“There is a convergence of views that contracting parties should retain the right given to them in the General Agreement to re-establish the balance of rights and obligations under the Agreement . . . .”).
66 See GATT ACTIVITIES, supra note 60, at 44 (“Article XIX requires that the imports should be causing actual damage to the domestic industry concerned or, at least, threatening it. In these circumstances, the country affected may either increase tariffs or introduce quantitative restrictions.”); see also Terence P. Stewart et al., Essay: Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs Are Addressed, 24 FORDHAM INT’L L.J. 652, 655–56 (2000) [hereinafter Stewart 2] (“Article XIX of GATT 1947 contains the concept of a balance of rights and obligations after any action by a Member, meaning either compensation to trading partners affected by a safeguard action or the potential for retaliation against exports for the country taking action.”); see also 1984 Report of the Council Chairman, supra note 41, ¶ 8 (echoing the concept of “the balance of rights and obligations”); see also GATT, supra note 7, art. XIX:3(a) (omitting any requirement of material harm).
67 See GATT, supra note 7, art. XIX:3(a) (describing the obligations of each party in full detail).
68 J. MICHAEL FINGER ET AL., ANTIDUMPING AS SAFEGUARD POLICY 3 (Dec. 2001) [hereinafter FINGER 1] (“The GATT asked the country taking emergency action to consult with exporting countries before, but allowed the action to come first in 'critical circumstances.' In practice, the action has come first most of the time.”).
69 Stewart 2, supra note 66, at 656.
unwilling to pay compensation. In addition, "as the general average of tariffs has declined to a very low point... it has become increasingly harder for countries invoking safeguard measures to be able to effectively compensate affected countries by way of granting alternative concessions." Finally, the ability of a contracting party resorting to a safeguard measure to pay compensation was beleaguered by the very same burden that prompted the adoption of Article XIX: the domestic industry. Because compensation results in losses to certain domestic constituencies and a corresponding backlash by legislators, the ability to live up to such obligations became unrealistic. Accordingly, as of 1987, offers of compensation declined significantly and incidents of rebalancing correspondingly increased.

Because of the inherent burdens that flourished in invoking Article XIX, safeguard measures were eclipsed by more flexible "grey-area" measures that were equally, if not more, effective in protecting Members from unexpected surges in imports. A form

70 See Jung & Kang, supra note 27, at 937-938 (discussing the impracticality and costliness of compensation practice).
72 See Gary Clyde Hufbauer & Ben Goodrich, Next Move in Steel: Revocation or Retaliation?, INT'L ECON. POLY BRIEFS No. PB03-10, Oct. 2003, at 6 (explaining that countries in both the GATT and WTO disputes rarely use the compensation option because of the possibility that it will create severe domestic political problems); see also DAM, supra note 22, at 104, 369 (discussing the shortfalls of compensation and retaliation).
73 See BHALA, supra note 48, at 1123 (quoting SCHOTT, supra note 61, at 113-15) (commenting on countries' preference in invoking grey-area measures).
74 GATT Secretariat, Drafting History of Article XIX and its Place in GATT, art. 40.2(a), MTN.GNG/NG9/W/7 (Sept. 16, 1987) (explaining the rebalancing process); see GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 486 (6th ed. 1994) [hereinafter GUIDE TO GATT LAW AND PRACTICE] ("With the declining incidence of compensation, there had been an increasing incidence of invocation of Article XIX:3.").
75 See THE URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. Rep. No. 103-316, at 656, 956 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4105 [hereinafter SAA] (describing new sets of measures); see also BHALA, supra note 48, at 1123 (quoting SCHOTT, supra note 61, at 113-15 (posing that most major trading companies have backed away from invoking Article XIX because of the availability of "less onerous and more flexible channels of protection including... so-called 'grey-area' measures"); see also Stewart 2, supra note 69, at 656-57 ("When due to political ramifications, the use of Article XIX is impractical, Contracting Parties have resorted instead to the use of 'grey-area' measures"); see also FINGER 1, supra note 68, at 3-4 (stating that around the 1960's the formal use of Article XIX began to wane); see also J. MICHAEL FINGER, GATT EXPERIENCE WITH SAFEGUARDS: MAKING ECONOMIC AND POLITICAL SENSE OF THE POSSIBILITIES THAT THE GATT ALLOWS TO RESTRICT IMPORTS 5-6 (1998) [hereinafter FINGER 2], available at http://ideas.repec.org/p/wbk/wbrwps/ 2000.html ("In GATT's first decade and a half the renegotiation and emergence action
of managed trade, grey-area measures are negotiated on a voluntary basis and outside the rubric of GATT rights and obligations. Many Members found such measures much easier and less costly to negotiate and apply. Indeed, grey-area measures can be applied on a discriminatory basis and imposed for longer periods than safeguard measures. As a practical matter, they also immunized affected exporting Members from compensation and rebalancing.

Voluntary export restraints ("VERs") were the most notorious form of such measures. As stated by one observer, VERs "were arguably the most pernicious form of protection in the 1970s and 1980s, as well as most other discriminatory import relief actions." As of 1991, only 24 Article XIX actions were in force, while 284 grey-area agreements were known to exist. Although grey-area measures provide benefits unavailable under a safeguard measure, they are universally criticized as counter to the ideals of a liberal, rule-based trading regime by, *inter alia*, skirting established concessions, existing outside of the rubric of GATT rules, undermining the GATT’s policy of transparency, and endorsing unfair bargaining tactics. Indeed, by the time of the Uruguay Round, grey-area measures were universally viewed as violative of GATT principles.

provisions served, for countries that had reduced and bound their tariffs through GATT, as the procedures through which the countries would adjust their trade policy to troublesome imports."); see also GATT Secretariat, "Grey-Area" Measures, MTN.GNG/NG9/W/6 (Sept. 16, 1987) (noting grey-area measures as an alternative option).

76 See *Jackson 2*, supra note 71, at 203–209 (describing grey-area measures).

77 *Bhala*, supra note 48, at 1123 ("Many countries find it easier and less costly to target their trade restraints on specific exporters rather than all foreign suppliers." (quoting *Schott*, supra note 61, at 113–15)).

78 See *Stewart 2*, supra note 66, at 656 (stating that for many countries it became imperative to find ways to get relief without having to pursue formal safeguard procedures and remedies, which thus resulted in countries turning increasingly to use of "grey-area" measures).

79 *Id.* ("One of the other perceived ‘advantages’ of grey-area measures is the lack of compensation or retaliation with grey-area measures.").

80 *Schott*, supra note 61, at 113–15.

81 *Stewart 2*, supra note 66, at 657.

82 See *Jackson 2*, supra note 71, at 203–204 (describing that grey-area measures "have been extremely troublesome and have been the subject of considerable criticism from GATT bodies as well as from economists and government officials"); see also *Stewart 1*, supra note 65, at 1727 (1993) (explaining why grey-area measures have been criticized); see also *Guide to GATT Law and Practice*, supra note 74, 493–95 (stating that "voluntary restraint agreements were often forced upon the weaker members").

83 *Stewart 1*, supra note 65, at 1756–57; see *Saa*, supra note 75, at 286 (describing the Uruguay Round Agreements Act); *Finger 2*, supra note 75, at 6 ("The Uruguay Round
The proliferation of grey-area measures arguably supports the conclusion that Article XIX failed to fulfill its intended purposes. This observation is reinforced by the genesis of the Safeguards Agreement during the Uruguay Round. The agreement sets forth specific rules for the application of a safeguard measure pursuant to GATT Article XIX. While GATT Article XIX imposed the general framework for a safeguard measure, the Safeguards Agreement sets forth more detailed conditions in which such a measure may be imposed. And while its creation was an implicit recognition that a safeguard measure is a legitimate and well-accepted tool in the pursuit of trade liberalization, it represented the deficiencies of GATT Article XIX. As such, the drafters of the Safeguards Agreement sought to improve and strengthen the remedy available under that article and thereby encourage the use of relief available under, rather than peripheral to, the GATT system.

ii. The Negotiating History of the Safeguards Agreement

During the Uruguay Round, the need to reform the safeguards system was unanimously recognized by the entire spectrum of negotiating parties. Developed countries led the effort, recognizing the ability of an effective safeguard mechanism to reduce trade barriers and minimize international trade conflicts. Similarly, developing countries acknowledged the need for a modified safeguards regime that set out clear and precise rules. To that end, all parties were unanimous in the agreements changed things.

84 GATT Secretariat, Meeting of 25 and 27 May 1987, ¶ 7, MTN.GNG/NG9/2 (June 25, 1987) ("An upsurge of 'grey-area' measures from 1975 to the present had robbed Article XIX of its meaning and value.").
85 See Safeguards Agreement, supra note 8, art. 11 (describing the prohibition and elimination of certain measures under the Safeguards Agreement).
86 See id. art. 1 ("[The Safeguards Agreement] establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.").
87 See id. pmbl. (stating the need to improve and strengthen the international trading system based on GATT); see also SAA, supra note 75, at 286 (describing the Uruguay Round Agreements Act, and why it was created).
88 See STEWART 1, supra note 65, at 1745 ("GATT members have for many years sought to clarify and strengthen provisions of Article XIX.").
89 See id. ("[The] effort toward trade liberalization would be greatly enhanced if there were a good safeguard system in place because it would reduce trade barriers and manage many international trade conflicts.").
90 Id. (noting that developing countries felt that clear and modified GATT safeguards were needed for full trade liberalization to occur).
campaign to curb the unilateral right to impose safeguards and rebalancing measures.

Beyond simply strengthening safeguard measures, the Safeguards Agreement is the product of diverse aims and interests, the identification of which is critical to understanding both the Agreement and Article XIX. The primary objective of developing countries was to establish the mandatory application of the MFN principle to safeguard measures. "In their view, they did not have the political or economic leverage, such as a credible threat of retaliation, to deter arbitrary action against them." By sanctioning selectivity, the developing countries argued that their lack of bargaining power would allow developed countries to target their exports. This result, according to the developing countries, went against the grain of fair trade by allowing harmed nations to target the most efficient exporters. The EC, on the other hand, was a strong supporter of allowing discriminatory safeguard measures. It perceived such an approach as a valid trade-off with grey-area measures. The

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91 GATT Secretariat, Work Already Undertaken in the GATT on Safeguards, ¶¶ B.17, C.22, MTN.GNG/NG9/W/1 (Apr. 7, 1987) (explaining that countries were much more likely to move toward trade liberalization if "there were adequate provisions for safeguard action"); see, e.g., Communication from Brazil, ¶ 7, MTN.GNG/NG9/W/5 (July 2, 1987) (stating that Article XIX's scope should be expanded to give legal coverage to future safeguard actions in selective form of VERs or OMAs and move to ban bilateral and selective actions in favor of precise and lucid rules); see also STEWART 1, supra note 65, at 1762 (commenting that the main goal of developing countries was to have a safeguard system that prohibited action that could threaten their "trade, financial, and development needs").

92 STEWART 1, supra note 65, at 1762.

93 See id. (noting the concern of developing countries that by allowing selective actions it would send message that similar actions in future were condoned and thus creating "a step backward for the trading system").

94 See id. at 1768 (explaining that developing countries feel they need to be protected from border measures that would hurt their exports because of their weak bargaining power).

95 Id. at 1748 (stating that a part of the EC's effort to see the development of a selective safeguard system can be attributed to them suffering from recession and them being aware that there would be pressure to resort to import restrictive measures).

96 See id. (describing the EC's position); see also id. at 1764 (claiming that the U.S. position on selectivity was not as uncompromising); see also id. at 1764-65 (listing as its primary objectives: "1) to improve rules and procedures covering safeguard measures; 2) to ensure that safeguard measures are transparent, temporary, degressive, and subject to review and termination when no longer necessary; and 3) to require prior notification and monitoring of import relief actions." (quoting Oversight of 1988 Trade Act: 1990: Hearings Before Subcomm. on Oversight and Investigations of the Finance Comm., 101st Cong., 1st Sess. (1990) (testimony of Ambassador Carla A. Hills, U.S. Trade Representative))); see also id. at 1765 (positing that the U.S. believed that incentives were necessary to encourage contracting parties to safeguard themselves through GATT rules rather than outside of them).
negotiations naturally turned into a delicate balancing act by forcing negotiating parties to incorporate features that encouraged the use of safeguard measures without endorsing the principles that made grey-area measures problematic - the very reasons for negotiating a new agreement.97

Because the issues of compensation and retaliation were critical barriers to the effectiveness of GATT Article XIX, they were unsurprisingly a pressing topic of debate during negotiations of the Safeguards Agreement. As stated by one observer:

One of the key objectives of the Safeguards Agreement negotiated during the Uruguay Round was to “re-establish multilateral control over safeguards” by striking a balanced set of disciplines both on safeguards measures and on retaliation imposed in response to safeguard measures. One of the ways the Uruguay Round negotiators accomplished this goal was to limit the right of retaliation.98

While most negotiating parties advocated the curtailment of compensation and retaliation rights, other parties acknowledged such rights as useful deterrents against unjustified safeguard measures.99 Yet, parties understood that the threat of unilateral retaliation drove governments towards grey-area measures.100 Thus, parties realized that limitations on the right of compensation and retaliation were required in order to increase the effectiveness of safeguard measures. Nevertheless,

97 GATT Secretariat, Synopsis of Proposals, ¶ 3, MTN.GNG/NG9/W/21 (Oct. 31, 1998) (“The Uruguay Round Negotiating Group on Safeguards is faced with two fundamental, somewhat contradictory challenges: (i) to provide clearly-elaborated rules and disciplines governing safeguards measures, while (ii) making the GATT safeguard provision sufficiently dynamic and credible so that nations will act under it, rather than outside it.”).


99 See, e.g., GATT Secretariat, Work Already Undertaken in the GATT on Safeguards, ¶ 25, MTN.GNG/NG9/W1 (Apr. 7, 1987) (explaining that the threat of retaliation could deter the application of safeguard actions); see also STEWART 1, supra note 65, at 1773 (noting that some participants in the Uruguay Round negotiations have insisted that compensation and retaliation rights should be maintained).

100 SAA, supra note 75, at 656 (describing some provisions of the Uruguay Round Agreement); see STEWART 1, supra note 65, at 1725 (claiming that “due to political ramifications, the use of article XIX is impracticable, contracting parties have resorted instead to the use of ‘grey-area’ measures”).
disagreement remained on the method of accomplishing that task.

Developing countries were acutely aware of the extensive damage that could be inflicted on their economy as a result of a safeguard measure. As a result, they naturally "viewed compensation as an obligation of developed countries." Developed countries, as expected, were adverse to the idea of mandatory compensation. "The United States, for example, argued that the principle of compensation conflicted with the temporary nature of the safeguard action." Japan, however, favored the unlimited right of compensation and retaliation as it existed under GATT Article XIX because, in its view, such obligations "had a positive effect on the decision-making process of nations considering safeguard actions." In other words, compensation and retaliation served as a check on the use (or abuse) of safeguards, ensuring that the remedy was relied upon only in exceptional and legitimate circumstances. Resolution of the compensation and retaliation issues required a balance between these diverging interests. Eventually, discussion on this issue became inextricably intertwined with the issue of selectivity, further jeopardizing the likelihood of agreement.

While subsidiary to the issues of selectivity and retaliation, the issues of notification and consultation also attracted substantial attention by the negotiating parties given the extreme nature of safeguard remedies. The need to concentrate on such issues seems obvious, as they contribute to the wider goals of stability,
cooperation and transparency, all of which are indispensable to the successful operation of the multilateral trading system. In general, all of the participants agreed on the need for greater transparency in invoking safeguard actions. However, while developed countries argued that consultation and notification prior to imposing safeguard measures should not be required because use of those measures is a sovereign right, developing countries favored the retention and enhancement of such obligations as they existed under GATT Article XIX. Ultimately, "most delegations want[ed] to see the final safeguard agreement contain stricter notification and consultation requirements."  

Even more far-reaching was the support that was garnered for "the establishment of a mechanism for multilateral surveillance that would provide for regular monitoring of safeguard actions." As a result, a Safeguard Committee was created to formally monitor actions taken under GATT Article XIX. Nevertheless, other countries pressed for the formation of another permanent body that would have "establish[ed] rules for consultation, outline[d] standards for the determination of injury, and set guidelines for the application of differentiated treatment for developing countries."  

iii. The Provisions of the Safeguards Agreement  

In creating a single agreement encompassing safeguard measures, the drafters codified rules and procedures that further

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107 See STEWART 1, supra note 65, at 1781, 1786 (explaining that establishing "a safeguards committee" to oversee greater transparency among contracting parties to ensure notification and consultation would serve to balance the interests of developing and developed countries).
108 Id. at 1751 (describing why the issue of multilateral notification and consultation prior to the initiation of safeguard action was had some disagreement).
109 Id. at 1781.
110 Id. at 1798 (furthering that the committee would oversee that the parties not only consult with one another but also provide "all relevant information including the precise description of the product in question, the proposed measure and the reason for measure").
111 Id. at 1751; see GATT Secretariat, Work Already Undertaken in the GATT on Safeguards, ¶ 9, MTN.GNG/NG9/W/1 (Apr. 7, 1987) (describing two different approaches that have been made with respect to the various conditions that could be attached to the application of Article XIX measures); Japan, Proposal on Safeguards, ¶ 9(2), MTN.GNG/NG9/W/11 (Oct. 13, 1987) (positing that a subcommittee under the Safeguard Committee should be establish which would be in charge of dispute settlement).
discipline the unilateral right to impose safeguard measures and secure the efficacy that was so elusive under Article XIX. To that end, the Safeguards Agreement contains provisions that clarify and reinforce the principles embodied by that article. As stated by the WTO itself, the Safeguards Agreement “reduces the size of the loophole to allow only for measures that are really designed to facilitate adjustment.”

The most significant achievement of the Safeguards Agreement is the requirement that safeguard measures be applied on an MFN basis. Another notable but expected accomplishment is the explicit prohibition of grey-area measures. In addition, under the Safeguards Agreement, a WTO Member must conduct a thorough and fair investigation of the imported product prior to applying a safeguard measure, and limit the duration of the safeguard measure to four years absent further investigation by the appropriate domestic authority. The Safeguards Agreement also provides more detailed notification and consultation requirements in the event that a Member seeks to impose a safeguard measure.

While the language and negotiating history of the Safeguards Agreement demonstrates that the provisions were drafted with an eye toward making Article XIX an attractive alternative for domestic relief, the actual success of the drafters in doing so remains to be seen. Although the figures undoubtedly reveal the success of the Safeguards Agreement in achieving its primary goal of encouraging Members to resort to that article for relief,
the experience of WTO safeguards under that agreement warrants a mixed reaction, as demonstrated by various safeguard disputes discussed in this article.

In particular, it remains uncertain whether the new retaliation and compensation provisions, which are discussed in further detail below, achieved the balance that was sought between limiting the right of rebalancing and serving as a check on the use of safeguards. Equally ambivalent is whether the ends sought by the drafters were negated by procedural deficiencies that surfaced from the compensation and retaliation provisions. As anything in the law, the devil is in the details and the Safeguards Agreement is no exception. As demonstrated below, the small yet significant oversights of the drafters leave the right to impose rebalancing measures in a precarious state.

II. THE PROVISIONAL RELIEF MECHANISM OF THE SAFEGUARDS SYSTEM

A. GATT Article XIX:3(a), Article 8 of the Safeguards Agreement, and the Right of Retaliation

Article 8 of the Safeguards Agreement sets forth the procedural requirements for implementing a safeguard measure once the substantive prerequisites of that agreement and GATT Article XIX are satisfied. Under Article 8.1:

A Member proposing to apply a safeguard measure... shall endeavour to maintain a substantially equivalent level of concessions and other obligation to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of

the Safeguards Agreement went into effect. See Jung and Kang, supra note 27, at 931. While safeguard notifications and measures have somewhat declined in recent years, they increased exponentially between 1995 and 2002. For an example, check safeguard statistics available on the WTO website available at http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited Apr. 11, 2008). Those statistics indicate that Members relied more on safeguard measures as opposed to grey-area measures.
the measure on their trade.\textsuperscript{120}

As reiterated by a WTO dispute panel, "Article 8.1 imposes an obligation on Members to 'endeavour to maintain' equivalent concessions with affected exporting Members."\textsuperscript{121} Thus, the animating principle of Article 8 is the balance of rights and obligations.\textsuperscript{122}

In pursuit of this objective, GATT Article XIX:3(a) and Article 8.2 of the Safeguards Agreement allow a WTO Member affected by a safeguard measure to implement rebalancing measures to offset the adverse economic effects of a safeguard measure. In effect, these provisions provide the basis for retaliation that is unique in the context of safeguards. Under Article 8.2 of the Safeguards Agreement, if consultations regarding the proposed safeguard measure do not lead to agreement within thirty days:

\[T]\text{he affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.}\textsuperscript{123}

The procedures set forth under that article are a mirror image of those contained in GATT Article XIX:3(a). GATT-WTO practice illustrates that Members have frequently resorted to bilateral agreements to extend the ninety-day period.\textsuperscript{124}

The purpose of Article 8.2's consultation and notification requirements is to promote the basic GATT-WTO policies of

\textsuperscript{120} See Safeguards Agreement, supra note 8, art. 8.1.


\textsuperscript{122} See Safeguards Agreement, supra note 8, art. 8.1 ("A member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations . . . .")

\textsuperscript{123} See id. art. 8.2.

\textsuperscript{124} See id. art. 12.3 ("A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned . . . .")
stability, transparency, and cooperation. In particular, the time limitations set forth in that article are tailored toward alleviating harm arising from a sudden imposition of a rebalancing measure.

The right of rebalancing permitted under Article 8 is also subject to certain substantive requirements. Under Article 8.3, the right to rebalance:

[S]hall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

By developing substantive legal criteria for rebalancing, the negotiating parties sought to discourage the use of inconsistent safeguard measures while aiming to assuage the fears of unregulated rebalancing. While the rebalancing right in Article 8.2 deters the application of inconsistent safeguard measures, the substantive requirements of Article 8.3 curtail the unlimited right to rebalance. Hence, Article 8.3 represents the balance negotiating parties struck between the need for a strengthened safeguard mechanism and the continued right of affected exporting Members to rebalance against illegal safeguard measures. Thus, Article 8.3 is central to a safeguard measure's renewed viability.

Although the negotiating parties preserved the rebalancing right, the procedural deficiencies of Article 8 raise questions regarding the ability of Members to exercise that right. First, Article 8 fails to establish whether a Member's Article 8.3 determination—i.e., whether the safeguard measure was imposed as a result of an absolute increase in imports or is otherwise inconsistent with the Safeguards Agreement—is unilateral. Second, according to some commentators, Article 8 seemingly

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125 See STEWART 1, supra note 65, at 1786, 1798 (speaking about how the notification and consultation requirements of Article XIX promote greater transparency).

126 See Safeguards Agreement, supra note 8, art. 8.3.

127 See STEWART 1, supra note 65, at 1786 ("A contracting party deciding to take a safeguard measure would be required to give parties potentially affected by the measure an opportunity for prior consultations.").

128 See id. at 1745, 1773–74, 1786, 1798 (describing the balance in further detail).

129 Id. at 1773 (giving reasons why the safeguard measure gained momentum towards renewed viability).
cuts off an affected exporting Member's right to rebalance if it first relies upon the DSU to challenge the underlying legality of a safeguard measure. Finally, the language of Article 8.2 prohibits the application of rebalancing measures "not later than 90 days after the [safeguard] measure is applied," serving as an impediment to a Member's right to rebalance. Close examination of these issues reveals weaknesses of the rebalancing mechanism that contribute to the chorus for reform of the Safeguards Agreement.

B. Speak Softly and Carry a Big Stick: The Unilateral Right of Retaliation

At initial glance, both DSU Article 23 and Article 14 of the Safeguards Agreement seem to require an affected exporting Member to resort to the DSU prior to rebalancing. This proposition is reinforced by the absence of Article 8 of the Safeguards Agreement from Article 1.2 of the DSU, which exhaustively lists provisions in certain agreements that conflict with, but prevail over, those of the DSU. None of those articles, however, should be interpreted to require an affected exporting Member to resort to the DSU before applying rebalancing measures pursuant to Article 8. Stated differently, based on the language of Article 8.3, it appears that an affected exporting Member may unilaterally impose rebalancing measures by independently determining that a safeguard measure is not based on an absolute increase in imports or is otherwise inconsistent with the Safeguards Agreement.

130 DSU, supra note 10, art. 8.2.
131 Several of the agreements identified in DSU Article 1.2 contain qualifying language stating that the provisions of the DSU apply "subject to[;]" implicitly acknowledging that certain provisions of those agreements supersede those of the DSU. No such language exists in the Safeguards Agreement.
132 See Vienna Convention on the Law of Treaties arts. 31–32, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT] (stating that Articles 31 and 32 of the Vienna Convention on the Law of Treaties will be applied in analyzing the issues contained in this article, which WTO adjudicative bodies frequently resort to as the authoritative source of law and adhere to its interpretive rules). See generally DSU, supra note 10, art. 3.2 ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."); Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, ¶¶ 61–62, WT/DS213/AB/R (Nov. 28, 2002) (emphasizing that according to WTO case law, the principles codified in Articles 31 and 32 of the Vienna Convention on
i. The WTO Agreement and GATT: The Relationship between Safeguards and Dispute Settlement

The WTO Agreement makes a distinction between the DSU and the Safeguards Agreement, but declares both as integral instruments of the WTO regime. Moreover, DSU Article 3.5 contemplates the use of consultation and remedial mechanisms available in other WTO agreements by stating that “[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements . . . shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements . . . .” Thus, full legal effect should be accorded to both the DSU and Article 8 of the Safeguards Agreement.

The mere existence of GATT Article XIX:3(a), which explicitly provides a rebalancing mechanism to affected exporting Members, is equally relevant to the independently operational nature of Article 8. Unlike the DSU, the language of GATT Articles XXII and XXIII – GATT’s dispute settlement provisions – do not explicitly state that such provisions are the exclusive means of settling GATT disputes. Because GATT Article XIX:3(a) makes no mention of GATT Articles XXII and XXIII, rebalancing was never intended to be executed according to those provisions. And according to the language of GATT Articles XXII and XXIII, reliance on GATT’s dispute settlement mechanism is discretionary. Because Article 8 virtually mirrors the language contained in GATT Article XIX:3(a) and makes no mention of the DSU, that intent should persist today. Although the DSU is...
now the exclusive means to redress violations of WTO rules, the operation of rebalancing measures under GATT should be relevant to the independent validity and operation of Article 8.

ii. GATT-WTO Practice

The use of rebalancing measures outside the purview of the DSU is further supported by GATT-WTO practice. Under GATT, affected exporting parties did not invoke rebalancing measures in the context of GATT Articles XXII or XXIII.\(^\text{136}\) To be sure, GATT Articles XXII and XXIII were implicated in several safeguard disputes, but solely to address the legality of the underlying safeguard measure\(^\text{137}\) or the appropriateness of the rebalancing measures.\(^\text{138}\) Despite this known practice, negotiating parties enacted Article 8 without any reference to dispute settlement provisions, indicative of their implicit approval of rebalancing outside the context of the DSU.

Hence, the practice of unilateral rebalancing has extended to the WTO. In each instance that rebalancing measures were applied, affected exporting Members did so without resort to the DSU.\(^\text{139}\) For instance, in *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("U.S. - Wheat Gluten"), the European Community unilaterally imposed rebalancing measures in response to the United States' allegedly inconsistent safeguard measure — without resort to the DSU. Rather than taking issue with the and dispute settlement provisions of the covered agreements... shall be consistent with those agreements...".


\(^\text{138}\) See Minutes of Council Meeting, at 4, C/M/186 (Apr. 19, 1985) (regarding the *Canada – Article XIX Action on Imports of Footwear* discussion).

\(^\text{139}\) See supra note 135 for a list of retaliation requests in which the DSU was not invoked.
European Community's failure to follow DSU procedures, the United States challenged the European Community's failure to place the measure on the agenda of the Council and consult with the United States on the appropriate level of rebalancing. Ultimately, resolution of that issue was avoided because the U.S. safeguard measure expired, forcing the European Community to lift its rebalancing measures.

Poland followed the same approach in Slovakia – Safeguard Measures on Imports of Sugar. In that case, however, Slovakia directly objected to the unilateral application of Poland's rebalancing measures. Nevertheless, Poland had:

[S]erious doubts as to whether the DSU mechanism should be invoked in the context of [Article 8.3] since the objective to be sought by the Member concerned under this provision differed from the one referred to in Article 23 of the DSU. Once more, if a Member considering the application of suspension followed the procedure proposed by Slovakia and waited for the DSB ruling on the conformity of this safeguard measure with the Agreement, that would eventually result in granting the importing Member a bonus in case of the DSB's declaration of non-conformity of the measure. So, even though that approach would be in full accord with the DSB, it would, nevertheless, effectively deprive the affected Member, in the light of paragraph 2 - imposed time limit, of its right to suspend concessions even in the situation where the safeguard measure was finally declared by the DSB as non-conforming to the provisions of the Agreement.

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140 Request for Consultations by the United States, European Communities – Tariff-Rate Quota on Corn Gluten Feed from the United States, WT/DS223/1 (Jan. 30, 2001) (“The EC . . . never placed the measure on the agenda of the Council for Trade in Goods. In addition, the EC at no point consulted with the United States on how measures imposed by the EC might meet the requirement to maintain substantially equivalent levels of concessions and other obligations to that existing under the GATT 1994.”).

141 See Notification of Mutually Agreed Solution, Slovakia – Safeguard Measure on Imports of Sugar, WT/DS235/2 (Jan. 16, 2002) (outlining the approach used for the safeguard measure in imports of sugar in Slovakia); see also Communication from the European Commission, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/L/251 (Aug. 3, 1998) (describing the proposed suspension of concessions and other obligations).

142 Draft Minutes of the Regular Meeting Held on 29 October 2001, ¶ 79, G/SG/M/18 (Feb. 11, 2002).
Resolution of that issue was avoided due to a mutual agreement regarding the underlying safeguard measure.\textsuperscript{143} Likewise, in \textit{United States – Definitive Safeguard Measures on Imports of Certain Steel Products}, affected exporting Members notified the Council of their intent to apply rebalancing measure and did so without resort to the DSU.\textsuperscript{144} The issue of unilateral application, although lingering, was never formally raised in that dispute.

iii. The Impracticability and Unfairness of Relying on the DSU

No less significant, forcing a Member to rely on the DSU as a prerequisite to rebalancing is simply impracticable. As stated above, a safeguard action is a temporary remedy that may be imposed for up to four years.\textsuperscript{145} Under the DSU, however, the ability of an aggrieved Member to retaliate cannot be achieved for a minimum of approximately two years.\textsuperscript{146} Therefore, in many cases, resort to the dispute settlement mechanism fails to timely redress the harms that result from unlawful safeguard measures. By the time an affected exporting Member is accorded the right to retaliate under the DSU, the safeguard measure is likely to have been lifted or expired, as demonstrated in both \textit{U.S. – Wheat Gluten} and \textit{U.S. – Steel Safeguards}. On the other hand, alternative trade remedies are imposed for an indefinite time period and, thus, are more adequately redressable under normal DSU procedures.\textsuperscript{147} Timing considerations were particularly acute under GATT because Article XXIII of that agreement did not set forth defined time limits for the adjudication of disputes, allowing them to last indefinitely.\textsuperscript{148} Indeed, some GATT

\textsuperscript{143} Notification of Mutually Agreed Solution, \textit{Slovakia – Safeguard Measure on Imports of Sugar}, WT/DS235/2 (Jan. 16, 2002) (explaining the terms of the agreement between the Slovak Republic and the Republic of Poland).

\textsuperscript{144} See \textit{Certain Steel Products}, \textit{supra} note 20, art. XII, ¶ 513. Note that resort to the DSU concerned the underlying decision to apply the U.S. safeguard measures themselves, and not the rebalancing measures proposed by the affected exporting Members.

\textsuperscript{145} This time period may extend up to another four years upon a finding by the appropriate domestic authorities that the measure is, \textit{inter alia}, "necessary to prevent or remedy serious injury." \textit{Safeguards Agreement}, \textit{supra} note 8, art. 7.

\textsuperscript{146} The amount of time that lapses before retaliation is approved by the DSB depends on various factors including the amount of time afforded to the safeguard-imposing Member to bring the safeguard measure into compliance. See DSU, \textit{supra} note 10, art. 20, 21.3, 21.4, 22.2, & 22.6.

\textsuperscript{147} See \textit{Coughlin}, \textit{supra} note 62, at 8–9 (describing an alternative trade remedy in detail).

\textsuperscript{148} See \textit{GATT}, \textit{supra} note 7, art. XXIII (failing to provide defined limits for the adjudication of disputes).
disputes were never resolved.\textsuperscript{149}

The DSU's inadequacies in protecting against unlawful safeguards are further demonstrated by the drastic scope of such measures. Because safeguards must be applied in a non-discriminatory manner, and may target a spectrum of products that fall within a general category, the economic harm such measures inflict are much more severe than those of other trade remedies. The U.S. steel safeguards, for instance, imposed tariffs ranging from eight to thirty percent on four broad categories and thirty-three subcategories of steel products, resulting in tariff revenue of nearly $650 million.\textsuperscript{150} In contrast, as stated above, antidumping measures are imposed on a country-specific basis and often on a narrower product category. For instance, a recent antidumping order imposed by the U.S. government applied an \textit{ad valorem} tariff ranging from 17.33\% to 128.59\% on only one subcategory of steel products covered by the U.S. steel safeguards.\textsuperscript{151}

The breadth of safeguard measures also imposes unparalleled costs on the economies of both exporting and importing Members. The value of lost exports alone (without accounting for exports of downstream or upstream products) in the case of the U.S. steel safeguard measure would have been worth $900 million by conservative measures.\textsuperscript{152} Of this figure, the European Union would have accounted for $561 million while Japan would have accounted for $167 million.\textsuperscript{153} Isolated to the U.S. economy, the

\textsuperscript{149} Hans-Peter Werner, \textit{Lomé, the WTO and Bananas}, 166 THE COURIER ACP-EU 59, 59 (1997), available at http://www.euforic.org/courier/166e_wer.htm? ("Under GATT, trade disputes sometimes remained unresolved in view of the consensus needed to adopt panel reports.").

\textsuperscript{150} See Steel Products Proclamation, supra note 2, at 10,553 (monitoring the developments in the steel industry); see also Steel-Consuming Industries: Competitive Conditions with Respect to Steel Safeguard Measures, USITC Pub. 3632, Inv. No. TA-32-452, vol. III, at 4–5 (Sept. 2003) [hereinafter ITC Mid-Term Review Report], available at http://hotdocs.usitc.gov/docs/pubs/332/pub3632/pub3632_vol3_all.pdf (listing tariff revenue at $649.9); see also Hufbauer & Goodrich, supra note 72, at 10 ("In the 12 months following the safeguards, the US Customs Service Collected only $581 million in duties from steel imports, which represents an increase of only $294 million (not $650 million) over the 12 months before the safeguard."").

\textsuperscript{151} Suspension Agreement on Certain Cut-to-Length Steel Plate from the People's Republic of China, 68 Fed. Reg. 60,081 (Oct. 21, 2003) (discussing termination of suspension agreement on certain cut-to-length carbon steel plate from People's Republic of China and notice of antidumping order – importantly, cut-to-length plate was considered part of broad flat-rolled steel category in steel safeguard measures).

\textsuperscript{152} Hufbauer & Goodrich, supra note 72, at 9 (providing in table 3 that the total amount of exports lost could have been worth $900 million).

\textsuperscript{153} Id.; see, e.g., Peter Wonacott & Scott Miller, \textit{China Weighs Tariffs on U.S. Goods};
safeguard affected about a quarter of all steel imports and cost the U.S. economy over $980 million in only the first year and a half that it was imposed, offsetting the corresponding increase in tariff revenue and resulting in an estimated annual GDP loss of $30.4 million. These figures still fail to capture the full extent of downstream harm on both exporting and importing Members.

The unfairness that would result from requiring an affected exporting Member to retaliate pursuant to the DSU is aggravated by the non-retroactive character of remedies under the WTO dispute settlement system. Under the DSU's remedial scheme, prevailing complainants cannot retaliate for past harms. Therefore, an affected exporting Member subject to an improper safeguard will be irreparably harmed by the time the DSB adopts a dispute panel or Appellate Body recommendation in its favor. These features make the specialized retaliatory mechanism of Article 8 a necessity, serving as a vehicle of redressability unavailable under the DSU.

Conversely, prudential concerns of fairness mandate the unilateral application of rebalancing measures pursuant to Article 8. The ability to do so is symmetrical and proportional to the unilateral right of a Member to impose a measure in circumstances where affected exporting Members are not

Tough Talk in Steel Dispute Follows U.S. Textile Curbs; In EU, Questions on Tactics, WALL ST. J., Nov. 21, 2003, at A11 (claiming that others have argued that the value of lost E.U. steel imports were as low as 200 million). But see Martin Fackler & Scott Miller, Asia and Brazil Show Restraint on Steel Tariffs; Countries Issue No Threats, Unlike the EU, but Urge U.S. to Accept WTO Ruling, WALL ST. J., Nov. 12, 2002, at A16 ("The ministry has estimated that the U.S. measures add as much as $167 million a year in tariffs on Japanese steel exports to the U.S.").

154 See ITC Mid-Term Review Report, supra note 150, at 4-2-4-5 (showing the economic and industry specific effects of the safeguards measure).

155 See DSU, supra note 10, art. 19.1, art. 22.2 (describing the consultation and dispute settlement process); see also BHALA & KENNEDY, supra note 25, at 40–41 ("Regarding the suspension of concessions, the general principle is that the complaining Member first should seek to suspend concessions with respect to the same sector in which the violation occurred."); see also JACKSON 1, supra note 46, at 184 (discussing retaliatory action); Robert Z. Lawrence, Crimes & Punishment: An Analysis of Retaliation under the WTO, EGYPTIAN CTR. FOR ECON. STUD.: DISTINGUISHED LECTURE SERIES 20, 8–13 (2003) (explaining the system as one without any retaliation at all); see also ROBERT HUDEC, BROADENING THE SCOPE OF REMEDIES IN WTO DISPUTE SETTLEMENT 15–19 (Friedl Weiss & Jochem Wiers eds., 2000), available at http://www.worldtradelaw.net/articles/hudecremedies.pdf ("[T]he prevailing view has been that the only remedy for violation of a legal obligation is a forward-looking order to directing the defendant to comply in the future."); see also Peter Lichtenbaum, Procedural Issues in WTO Dispute Resolution, 19 MICH. J. INT'L L. 1195, 1254–59 (1998) ("GATT practice was traditionally remedial and prospective in nature, with the aim of bringing Members into compliance with their commitments.").
committing an unfair trade practice.

iv. The Internal Conflict of Article 8

When viewed in light of the protracted dispute settlement process, requiring an affected exporting Member to rely on the DSU creates an inconsistency between Articles 8.2 and 8.3. Article 8.2 requires rebalancing measures to be imposed within ninety days from the time that the safeguard measure was imposed. Because the DSB is unable to adopt a panel or Appellate Body report until well after that ninety-day period, an affected exporting Member is certainly unable to meet this requirement if the Member allows the Article 8.3 determination to be made pursuant to the DSU.

v. Article 8 as Lex Specialis

Against this background, any attempt to apply the DSU's procedures in the context of rebalancing measures eviscerates the very purpose of rebalancing measures, effectively writing Article 8 out of the Safeguards Agreement. To accord full legal effect to Article 8, it should be viewed as lex specialis – an established exception to the general rules regarding dispute settlement – especially given the unique character of safeguards and the text of Article 8.2.

vi. The Role of the WTO Council

It is important to note that the right to rebalance is not completely unilateral. Although the rebalancing right should not be subject to the DSU under current circumstances, the decision to rebalance is subject to the tacit approval of the Council under Article 8. Therefore, the right to rebalance should be considered unilateral only to the extent that it is not blocked by the Council.

More unclear, however, is whether the Council applies the threshold requirements of Article 8.3 in tacitly approving rebalancing.156 Neither the Safeguards Agreement nor the

156 According to DAM, under GATT:
If agreement is not reached in the course of consultation... [T]he affected contracting parties are entitled to suspend 'substantially equivalent concessions or other obligations under [the General] Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.' No provisions specify the procedures to be followed in connection with the review by the CONTRACTING PARTIES of retaliatory
Council's rules addresses this issue. Nevertheless, the Council, as a permanent standing body of the WTO, should be guided by a set of rules in determining the adequacy of rebalancing measures. The natural default for such a task are the standards set forth in Article 8.3, especially in the absence of alternative rules in measuring the legality of proposed rebalancing measures. In addition, Article 13.1 of the Safeguards Agreement requires the Committee on Safeguards, established under the authority of the Council, “to receive and review all notifications provided for in [the Safeguards Agreement] and report as appropriate to the [Council]” and “to review . . . whether proposals to suspend concession or other obligations are ‘substantially equivalent,’ and report as appropriate to the [Council].”

C. The Non-Preclusive Effect of Resorting to the DSU

Another issue raised by the relationship between the Safeguards Agreement and DSU is whether an affected exporting Member may rebalance once it has resorted to the DSU. This issue arises from the interaction between the unilateral right of an affected exporting Member to make the Article 8.3 determination and the willingness of affected exporting Members to submit safeguard challenges to the WTO's dispute settlement system prior to rebalancing. While this question seems relatively inanimate given the mutually exclusive relationship between the Safeguards Agreement and the DSU, it serves as a significant issue surrounding safeguards and an obstacle to the continued legitimacy and effectiveness of the safeguards system.

i. The Relationship between Article 8 and the DSU

Brought to the spotlight in U.S. – Steel Safeguards, some commentators imply that preclusive effect should be accorded to the remedy available under Article 8 once an affected exporting
Member resorts to the DSU.\textsuperscript{158} This limitation, analogous to a form of \textit{res judicata} within the WTO regime, prohibits an affected exporting Member from simultaneously taking advantage of the relief available under both the Safeguards Agreement and the DSU. These commentators believe that once safeguard disputes are referred to the DSB, the DSU governs the compliance and determination inquiries that are contained in Article 8.3 of the Safeguards Agreement. An adherence to the independent authority of Article 8, however, reveals the defects of this argument.

As discussed above, the remedy that Article 8 provides is different from the one available under the DSU. Indeed, as stated above, the extraordinary nature of safeguard measures mandates a mechanism sufficient to protect affected exporting Members and that is currently unavailable under the DSU. In addition, the language and structure of the DSU and the Safeguards Agreements mandates full legal effect to be accorded to the remedial mechanism under both agreements. Therefore, while both the Safeguards Agreement and the DSU provide remedies for inconsistent safeguard measures, concurrent jurisdiction should be accorded to both agreements. Under the strict approach advocated by those commentators, however, an affected exporting Member that resorts to the DSU in the first instance possesses less than adequate means to protect itself from immediate and irreparable harm.

\textbf{ii. The Preferred Policy of Consultation and Dispute Settlement}

Moreover, an interpretation that prohibits an affected exporting Member from relying on both agreements will have the pernicious effect of discouraging Members from resorting to the WTO's dispute settlement system. The DSU was created to streamline the enforcement of GATT-WTO rules and procedures.\textsuperscript{159} Thus, submission of disputes to the DSB is an

\textsuperscript{158} See WOLFF & LIGHTHIZER, \textit{supra} note 98, at 1–2 (explaining why complaining parties in settlement proceedings challenging a safeguard measure in WTO must abide by all rules and procedures of DSU).

\textsuperscript{159} See DSU, \textit{supra} note 10, art. 3.2 ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.").
appropriate — and encouraged — reaction to an allegedly inconsistent trade measure. To promote such an approach, an affected exporting Member should be allowed to resort to the DSU in determining the legality of the underlying safeguard measure, even while retaliating in the context of the Safeguards Agreement. Indeed, the policy of encouraging affected exporting Members to resort to the dispute settlement system is legitimized by the absence of an impartial method by which to make the Article 8.3 determination. However, an affected exporting Member will naturally shy away from referring a matter to the DSU should it lose its right to rebalance upon triggering its rights under the DSU.

iii. Article 8 Viewed as Injunctive Relief

Rather than according res judicata effect to rebalancing claims, Article 8 should be viewed as an indispensable form of temporary relief analogous to a preliminary injunction under U.S. law. As in the case of claims for injunctive relief, safeguard measures have the potential to impose irreparable harm on affected exporting Members. Thus, as stated above, the ability to impose rebalancing measures, either for the purpose of forcing compliance with the substantive requirements for imposing a safeguard measure or alleviate the harms thereof, is critical as a form of relief under the safeguards system.

In this context, a plaintiff is never denied injunctive relief for simultaneously seeking permanent relief and a final legal judgment; to do so would ignore the very purpose of injunctive relief, which is to immediately redress harms resulting from acts of potential illegality. By the same token, a Member should not be denied the right to rebalance when it simultaneously challenges the consistency of the underlying safeguard; to do so would eviscerate the very purpose of Article 8, which is to immediately restore the balance of concessions that was disrupted by what an affected exporting Member views as an inconsistent safeguard measure.

D. The Ninety-Day Restriction of Article 8.2

As stated above, an affected exporting Member “shall be free, not later than 90 days after the measure is applied, to
suspend...the application of substantially equivalent concession or other obligations under GATT 1994" if the threshold requirements of Article 8.3 are met. Strictly interpreted, the language of Article 8.2 clearly precludes the application of rebalancing measures beyond the first ninety days of a safeguard measure. Close examination of this provision reveals another weakness of the safeguard mechanism and contributes to the need for reform of the Safeguards Agreement. For the reasons discussed below and until a change is made to the Safeguards Agreement, Article 8 should be functionally interpreted to accord a Member the flexibility to impose rebalancing measures beyond the ninety-day period so long as it resorts to the DSU to challenge the legality of the underlying safeguard measure.

i. The Facial Conflict between Articles 8.2 and 8.3

As an initial matter, the inability of an affected exporting Member, under Article 8.2, to impose rebalancing measures after ninety days clearly conflicts with Article 8.3, which gives an affected exporting Member the unlimited right to impose rebalancing measures after a three-year lapse of a safeguard measure. Thus, a literal interpretation of the ninety-day restriction would render the text of Article 8.3 meaningless and eviscerate the right that it embodies. This result was certainly unintended by the drafters of the Safeguards Agreement and underscores the inadequacies of that restriction.

To be sure, the negotiating history unequivocally portrays the CONTRACTING PARTIES' intent to curtail the unilateral right to rebalance in an effort to strengthen the safeguard mechanism. On the other hand, the negotiating history equally makes clear that the parties did not intend to permanently sever that right, as the drafters understood that an effective retaliatory right is necessary to deter the potential abuse of safeguards. Article 8.3 serves as the balance struck by negotiating parties. But strict adherence to the ninety-day provision renders Article 8.3 meaningless.

160 See supra notes 89–94 and accompanying text (explaining why all parties were unanimous in their desire to curb unilateral right to impose safeguards and rebalancing measures).
161 See supra notes 95–100 and accompanying text (stating compensation and retaliation rights were useful deterrents against unjustified safeguard measures).
ii. The Futility and Frustrations of the Ninety-Day Restriction

As stated above, the procedural provisions of Article 8 are intended to promote the policies of stability, cooperation, and transparency. However, the ninety-day restriction falls short of effectively contributing to those policies. As an initial matter, Article 8's consultation and notification requirements are sufficient to ensure stability, cooperation, and transparency when a Member imposes a safeguard. When viewed against those requirements, it remains uncertain whether the ninety-day restriction even serves a valid purpose at all.

Not only is the ninety-day restriction archaic but it thwarts the policies of stability and cooperation. By forcing affected exporting Members to actually impose rebalancing measures, the ninety-day restriction compels affected exporting Members to face the choice of hastily applying such measures or foregoing that right for three years. In that situation, Members would naturally choose to apply rebalancing measures within ninety days, disrupting the balance of concessions that Article 8 seeks to preserve and causing further adverse economic consequences on the international economy. Concomitantly, in their haste to apply rebalancing measures, affected exporting Members may do so without adherence to the threshold requirements of Article 8.3. The potential effect is to frustrate ongoing – and even discourage future – negotiations regarding the underlying safeguard measure. More significantly, aware of the potential for the illegitimate application of rebalancing measures, Members may refuse to rely on safeguard measures and rely on other trade remedies – antidumping and countervailing duty measures – to counter the unexpected and harmful surge in imports. As a result, the very purpose of the Safeguards Agreement – to strengthen the safeguard mechanism – is effectively negated.

Ironically, the threat of applying rebalancing measures beyond the ninety-day period likely facilitates settlement, as the constant threat of rebalancing measures pressures Members into terminating safeguard measures.162 This theory is consistent with the modern idea that retaliation in the WTO has become an accepted tool for inducing compliance. In the same vein,

162 See BHALA & KENNEDY, supra note 25, at 932 (describing how compensatory settlement is facilitated).
extension of the ninety-day period also allows adequate opportunity for a safeguard-imposing Member to react to proposed rebalancing measures and provide alternative concessions. However, any incentive to terminate a safeguard measure or propose alternative concessions ceases to exist if the right of rebalancing is cut off after the initial ninety days of a safeguard measure. The legitimacy of these policy justifications are demonstrated in U.S. – Steel Safeguards, in which the EC’s continued threats of retaliation, which continued to be made even after the initial ninety days of the U.S. safeguard measure, served as an incentive for the United States to lift the measure.

The ability to impose rebalancing measures beyond ninety days also forces safeguard-imposing Members to narrowly tailor their measures to achieve the ends that are sought. Under Article 7.1 of the Safeguards Agreement, Members are obligated in a number of ways and throughout the life of a safeguard measure to adjust its scope. But without a perpetual right to rebalance, no incentive exists for safeguard-imposing Members to adhere to that requirement.

No less significant is the effect that the ninety-day restriction has on the WTO’s dispute settlement system. Forcing affected exporting Members to apply rebalancing measures leaves less incentive to pursue the matter under the DSU. However, the disagreements that arise from the self-proclaimed right of retaliation under Article 8.3 and the historical restraint of the Council in disapproving proposed rebalancing measures warrant increased reliance on the dispute settlement system. These policy concerns are certainly sufficient to outweigh any utility that arises from enforcing the ninety-day limitation.

Even more disconcerting is the potential proliferation of safeguard measures as a result of a strict adherence to the ninety-day restriction. An affected exporting Member unable to apply rebalancing measures because it failed to do so within the ninety-day period is more likely to resort to the implementation of its own safeguard measure as an alternative form of retaliation.163 Perhaps the effect of this has already been seen.

163 See Gary Clyde Hufbauer & Ben Goodrich, Steel: Big Problems, Better Solutions, INT'L ECON. POL'Y BRIEFS No. PB01-9, July 2001, at 11 ("[T]rade barriers have a way of inspiring 'me-too' restrictions abroad, increasing the number of years (or decades) it takes for the industry to adjust worldwide.")
For instance, as a result of the U.S. steel safeguard measure, a “domino effect” took place in which other WTO Members have instituted safeguard investigations on steel exports:

In the first nine months of 2002, there have been 116 non-US safeguard investigations (94 in the “steel and metals” industry including those by the European Union and Canada) as compared to 20 non-US safeguard investigations during the 12 months of 2001. For the first time, the worldwide number of new safeguard investigations for all products is on track to exceed the number of new [antidumping] investigations (109 through the first nine months of 2002), and the number of exporters included in a safeguard investigation is always much larger than in an [antidumping] investigation.164

Finally, the ninety-day restriction is contrary to the policy of self-restraint. Although the right to implement rebalancing measures is unilateral and the authority to do so is not derived from the DSU, self-restraint in applying rebalancing measures within ninety days is consistent with a rule-based trading system that provides rules and procedures for the orderly resolution of disputes. The condemnation of such self-restraint by strictly enforcing the ninety-day restriction only leads to more disputes and economic barriers – a result contrary to the spirit of the WTO. Indeed, WTO jurisprudence encourages parties to refrain from the unilateral erection of economic barriers that would disrupt the balance of concessions until a definitive resolution of the dispute.165 Although rebalancing is an established exception to that principle, an affected exporting Member should not be punished for justifiable self-restraint.

iii. Political and Economic Considerations

Political and economic considerations also contribute to the

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165 See Panel Report, United States – Import Measures on Certain Products from the European Communities, ¶¶ 6.13–6.14, WT/DS165/R (July 17, 2000) (stating the importance of why the DSU must be interpreted with the view to prohibiting unilateral action); see also Panel Report, United States – Sections 301-310 of the Trade Act of 1974, ¶¶ 7.88–7.90, WT/DS152/R (Dec. 22, 1999) (noting the negative impact that unilateral action could have on other Members as well as in the market-place).
practicability of imposing rebalancing measures within ninety days. From a political perspective, it is highly unlikely that Member governments can adequately determine whether and how to retaliate within that time period. Such a decision involves extensive discussions and negotiations within and outside the relevant decision-making authority. This is evidenced by the small number of occasions in which affected exporting Members under GATT and the WTO have actually applied rebalancing measures within ninety days.¹⁶⁶

Economically, the decision to withhold the application of rebalancing measures may logically flow from the universal principle that retaliation is not beneficial to the affected exporting Member because it not only harms the economy of the safeguard-imposing Member but equally encumbers the economy of the rebalancing Member.¹⁶⁷ This notion further frustrates the ability of the relevant decision-making authority to decide whether to impose rebalancing measures within ninety days. Moreover, an accurate level of "substantially equivalent concessions or other obligations" may not be easily ascertainable within that time period, particularly in a case where an affected exporting Member recently started to export goods to the safeguard-imposing country.¹⁶⁸

Accordingly, the longer an affected exporting Member delays the application of rebalancing measures, the decision to impose rebalancing measures is more likely to be based on reasoned judgment, reflect the will of the relevant domestic constituency, and constitute "substantially equivalent concessions or other obligations."¹⁶⁹

iv. Protective Measure?

Members may argue that the ninety-day restriction serves as a protective measure which discourages the unexpected and/or

¹⁶⁶ Over 100 safeguard measures were imposed under GATT. Of those, rebalancing measures seem to have been imposed within the ninety-day period on only one occasion (i.e., not beyond the ninety-day period or without mutual agreement to extend the ninety-day period). See Article XIX – United States: Increase in Duties in the Customs Tariff of the European Economic Community, L/1803 (June 22, 1962).
¹⁶⁷ See Lawrence, supra note 155, at 36–39 (explaining the effects of rebalancing and retaliation).
¹⁶⁸ Safeguards Agreement, supra note 8, art. 8.2.
¹⁶⁹ Id.
delayed application of rebalancing measures. Indeed, under U.S. law, unreasonable delay in filing for an injunction precludes provisional relief. This idea is analogous to the equitable concepts of laches and estoppel, which are recognized under international law in a number of forms. Applied to the situation at hand, those concepts would prevent an affected exporting Member from invoking its rebalancing rights on the grounds that either: 1) unreasonable delay in obtaining relief warrants the preclusion of those rights, or 2) the safeguard-imposing Member has detrimentally relied on the former Member's failure to invoke those rights within ninety days. In this context, the restriction can be viewed as a protective measure designed to discourage the delayed and/or sudden application of rebalancing measures that would give an affected exporting Member an unfair advantage. This argument, however, proves unavailing.

First, the inequities arising from a sudden application of rebalancing measures is adequately alleviated by the notification and consultation requirements. Under any scenario, a safeguard-imposing Member would be aware of the potential application of rebalancing measures well before the time of actual application, eliminating the need for applying the laches doctrine. This argument has greater force where the affected exporting Member first resorts to the DSU within the ninety-day

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170 See, e.g., Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243, 244–45 (8th Cir. 1987) (“Laches may be used to bar a lawsuit when the plaintiff is guilty of (1) unreasonable and unexcused delay, (2) resulting in prejudice to the defendant.”); Cent. Point Software, Inc. v. Global Software & Accessories, Inc., 859 F. Supp. 640, 646 (E.D.N.Y. 1994) (“[P]laintiffs' extensive delay in bringing this motion for a preliminary injunction undercuts any claim of urgency to the preliminary relief now sought.”).

171 See Iran Nat'l Airlines Co. v. United States, 17 Iran-U.S. Cl. Trib. Rep. 187, 190 (1987) (applying laches due to fairness); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 17–18 (5th ed. 1998) (“In a number of cases the principle of estoppel or acquiescence (préclusion) has been relied on by the Court, and on occasion rather general references to abuse of rights and good faith may occur.”); see also Ashraf Ray Ibrahim, Note, The Doctrine of Laches in International Law, 83 VA. L. REV. 647, 651–52 (1997) (“[D]octrine of laches and the related doctrines of acquiescence and estoppel will bar a claim from adjudication before an international tribunal.”); see also Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, ¶ 7.20, WT/DS241/R (Apr. 22, 2003) (“[T]he essential elements of estoppel are (i) a statement of fact which is clear and unambiguous; (ii) this statement must be voluntary, unconditional, and authorized; (iii) there must be reliance in good faith upon the statement . . . to the advantage of the party making the statement.”).

172 However, as explained in further detail below, this argument should not apply where a party waives any obligation of the other party to immediately impose rebalancing measures.
time period. In such a case, the safeguard-imposing Member will be put on notice of any safeguard challenges and, thus, the potential application of rebalancing measures.

Second, the delayed application of rebalancing measures is in the interest of both the safeguard-imposing Member and affected exporting Members given that rebalancing only causes additional economic harms. This is proven by the frequent extension, if not complete disregard, of the ninety-day restriction – to the point of driving it to obscurity.173

Third, WTO dispute panels have not received the estoppel argument with open arms.174 Even if they did, the safeguard-imposing Member would unlikely incur any detriment from an affected exporting Member's failure to apply rebalancing measures within ninety days, undermining the need to invoke the estoppel doctrine. This is particularly true where an affected exporting Member resorts to the DSU, as the arguments made by both sides once an affected exporting Member resorts to the DSU will be identical to those that are made under Article 8.3 of the Safeguards Agreement, with no time or legal ground lost to either side.

v. The Unfairness of the Ninety-Day Restriction

The validity of the ninety-day limitation is obviated when viewed against the prudential concern of fairness. As discussed above, the extraordinary nature of safeguard measures necessitates a defensive mechanism adequate to shield affected exporting Members from the adverse effects of such measures.

173 See supra notes 163, 166 and accompanying text.

174 See Panel Report, European Communities – Export Subsidies on Sugar: Complaint by Australia, ¶ 7.75, WT/DS265/R (Oct. 15, 2004) (“[If] [the Panel] were to conclude that the Complainants are now estopped from challenging the EC sugar regime or its alleged excessive export production of subsidized sugar, the Panel would be acting contrary to Articles 3.2 and 19.2 of the DSU . . .”); see also Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Brazil, ¶ 7.75, WT/DS266/R (Oct. 15, 2004) (repeating Australia's opinion); see also Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Thailand, ¶ 7.75, WT/DS283/R (Oct. 15, 2004) (restating Australia and Brazil's opinion); see also Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, ¶ 7.38, WT/DS241/R (Apr. 22, 2003) (claiming that estoppel can only “result from the express, or in exceptional cases implied consent of the complaining parties”); see also Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.4 of the DSU by India, ¶ 6.91, WT/DS141/RW (Nov. 29, 2002) (stating that they do not consider the question of estoppel); Panel Report, Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, ¶ 8.24, WT/DS156/R (Oct. 24, 2000) (explaining how they dealt with the arguments of estoppel).
Without the ability to counteract inconsistent safeguard measures, the right to impose them becomes unlimited. Although Article 8 places no premium on damages and focuses solely on the balance of concessions, irreparable harm is the harsh outcome of safeguard measures. The ability of an affected exporting Member to effectively deter such harm is hindered by the ninety-day restriction. Although an affected exporting Member is free to exercise its retaliatory right within ninety days, doing so is inconsistent with the policies underlying the WTO and threatens the legitimacy of the Safeguards Agreement and the DSU.

The debilitating consequence of a safeguard measure is central to understanding the need to apply rebalancing measures beyond the ninety-day period. Similarly, an understanding of its history illustrates how the ninety-day restriction is outdated and imposes an unfair limitation on affected exporting Members. When safeguard measures were originally engineered, it was uncertain whether it applied on an MFN basis. Thus, its full potential in crippling the economy of both an affected exporting Member and the international community went unrealized. This was intensified by the relative infrequency with which safeguard measures were invoked, thereby concealing the true extent of harm on the multilateral trading system. Only when safeguard measures were imposed pursuant to the MFN requirement of the Safeguards Agreement did the far-reaching effects of a safeguard measure become wholly apparent. By then, the whole-scale adoption of the boilerplate procedures contained in GATT Article XIX:3(a) had taken place.

The inability to rebalance after ninety days, however, imposes unfair restrictions on affected exporting Members, which are unable to offset the adverse effects of an inconsistent measure that is applied unilaterally. And for reasons stated above, the imposition of safeguard measures within ninety days is simply impracticable and counter to the ideals of the WTO. Simply put, the ninety-day restriction renders the remedy afforded to affected exporting Members insufficient to deter the potential harm resulting from illegal safeguard measures.

The unfairness of the ninety-day limitation is highlighted by

175 See supra notes 91, 95 and accompanying text.
the scenario in which a Member does not export to the safeguard-imposing country but does so after ninety days from the time at which the safeguard measure was imposed. In that situation, the affected exporting Member is precluded from applying rebalancing measures. Although such a Member was theoretically availed of the opportunity to suspend equivalent concessions, it is highly unlikely that a Member would do so without some tangible harm incurred. Moreover, suspension of concessions in such a situation is most likely inconsistent with WTO rules, as no basis for suspension even exists. Thus, fairness dictates the ability to impose rebalancing measure beyond the ninety-day period.

vi. The Need for a Functional Interpretation

Although the touchstone of WTO adjudication remains subject to continuous debate, a paramount goal of the WTO’s dispute settlement system is to establish and implement legal processes that are “adapted to the subject matter and designed to resolve disputes that cannot be foreseen at the moment when those procedures are established.” Indeed, that aim is consistent with the disposition of WTO agreements as diplomatic instruments in which precise rules were unattainable as a practical matter.

Against this background, adequate consideration must be accorded to sources that speak to the validity and contribute to the interpretation of a given provision. To be sure, interpretation of a WTO rule cannot be conducted in a vacuum. Resort must be had to the historical context of applicable rules and agreements, the object and purpose emanating from applicable rules and agreement, and the structure of WTO agreements. This principle is particularly relevant where the ordinary meaning of a given provision would lead to a result that is inconsistent with its underlying purpose. Indeed, it is a well-established practice of international law to take account of alternative sources where a literal interpretation leads to an unreasonable outcome. The

176 DAM, supra note 22, at 4; See supra notes 91, 95 and accompanying text.
177 See HUDEC, supra note 155, at 17 (“[A]ttitude toward GATT law was consistent with the view of GATT law as a diplomatic instrument – a set of rules whose primary function was to aid in resolving trade disputes in consensual fashion.”).
178 VCLT, supra note 132, art. 31 (“A treaty shall be interpreted in good faith in
facial conflict between Articles 8.2 and 8.3 presents such a situation. In turn, reliance on these alternative sources contributes to the resolution of the dynamic issues that arise from interpreting an instrument regulating international economic relations such as the Safeguards Agreement.

vii. A Pragmatic Interpretation

Article 8.2 should therefore be interpreted so as to allow an affected exporting Member to impose rebalancing measures beyond the ninety-day period so long as it resorts to the DSU to challenge the legality of the underlying safeguard measure. Once a WTO dispute panel has found that the underlying safeguard measure is not based on an absolute increase in imports or is inconsistent with the Safeguards Agreement, an affected exporting Member should still be able to impose rebalancing measures. Absent resort to the DSU, however, Article 8.2 mandates an interpretation that requires an affected exporting Member to impose rebalancing measures within the ninety-day period.

Such an interpretation is in full accord with the purpose of Article 8 and absolves the deficiencies created by the drafters in failing to delineate a more impartial method by which to make the Article 8.3 determination. Moreover, it preserves the policies of stability, cooperation, and transparency underlying the DSU. Indeed, failure of an affected exporting Member to exercise its right to implement rebalancing measures within ninety days is a result of its good-faith adherence to the policy of adjudicating disputes under the DSU and its willingness to preserve the economic status quo. And only by allowing for such an interpretation will the concerns of fairness be adequately redressed. Most importantly, the interpretation yields a result that preserves the legitimacy of the safeguards system.

Although it may be argued that elimination of the restriction would lead to the unbridled application of rebalancing measures, the restriction is only a procedural mechanism that was never intended to cut off the right to rebalance.179 And as described

179 See supra note 17 and accompanying text.
above, the burdens posed by the ninety-day restriction outweigh the utility, if any, that it serves. Given that Article 8.3 was adopted as the operative provision to limit that right, concerns of unlimited rebalancing are better alleviated by addressing the weaknesses of that provision, as opposed to a literal application of Article 8.2.

III. CASE STUDY: THE U.S. STEEL SAFEGUARD DISPUTE AND THE RIGHT TO REBALANCE

The divergent approaches of the affected exporting Members in U.S. – Steel Safeguards serve as an ideal reference in addressing the interpretive dilemmas and retaliatory constraints posed by Article 8 of the Safeguards Agreement. As stated in Section I, the approach taken by the affected exporting Members in the U.S. steel safeguard dispute falls into two categories. In the first, the European Union, Japan, Switzerland, Norway and the People's Republic of China (the "EU camp") each notified the Council, within the ninety-day period set forth in Article 8.2, of their intent to implement rebalancing measures to offset the adverse effects of the U.S. steel safeguard action. In the second, Brazil, Korea, Australia, New Zealand, and Taiwan (the "Brazil camp") each issued a joint communication, within the ninety-day period set forth in Article 8.2, with the United States that reserved their reciprocal rights under that article and extended the ninety-day period from June 3, 2002 to March 20, 2005.

Affected exporting Members in other instances have taken a third approach: notification of proposed rebalancing measures within the ninety-day time period set forth in Article 8.2 of the Safeguards Agreement, but delayed implementation of those measures until expiration of the safeguard at issue or until the DSB's adoption of a finding that the safeguard is WTO-inconsistent. See Norway, Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/L/738 (Apr. 7, 2005); Turkey, Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/SG/N/12/TUR/1 (Dec. 12, 2002); European Commission, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards,
Despite the differing approaches, both camps refrained from the *de facto* application of rebalancing measures on U.S. exports. It is all but certain that the affected exporting Members were delaying retaliation until adoption by the DSB of an Appellate Body decision ruling in their favor. Consequently, each camp posed unique issues regarding the application of rebalancing measures pursuant to Article 8.2. Specifically, the question presented by the EU camp is whether an affected exporting Member that resorts to the DSU is foreclosed from imposing rebalancing measures beyond the ninety days set forth in Article 8.2. The issue surrounding the Brazil camp is whether legal validity should be accorded to a waiver agreement extending the ninety-day period set forth in Article 8.2 to allow the affected exporting Member to delay implementation of rebalancing measures until after the expiration of that time period.

In the weeks following the Appellate Body decision that vindicated the affected exporting Members, the legal issues raised by their actions were eclipsed by the more immediate and less esoteric question of compliance. In the end, the United States surrendered to threats of retaliation when it lifted the steel safeguard measure.\(^{184}\) Thus, resolution of the above issues was sidestepped. Yet, examination of these issues is essential for determining the legality of future rebalancing measures and assessing the weaknesses of the current Safeguards Agreement.

**A. The EU Camp**

As stated above, an affected exporting Member “shall be free, not later than 90 days after the measure is applied, to suspend...the application of substantially equivalent concession or other obligations under GATT 1994” once the threshold requirements of Article 8.3 are met. Strictly interpreted, the language of Article 8.2 precludes the application of rebalancing measures beyond the first ninety days of a safeguard measure. The actions of the EU camp, however, should form the basis for allowing the imposition of rebalancing measures beyond the first ninety days of the U.S. steel safeguard measure.

First and foremost, the EU camp resorted to the WTO’s dispute settlement system to challenge the legality of the U.S. safeguard measure. As discussed above, such a move is consistent with the policies of challenging disputes pursuant to the DSU and avoiding the unilateral imposition of economic barriers.

Second, although falling short of applying rebalancing measures, the EU camp notified the Council, within Article 8.2’s ninety-day time period, of its intent to impose rebalancing measures. Therefore, the EU camp’s approach was consistent with the policies of stability, transparency, and cooperation. As a result, the United States was unable to argue that it was unaware or harmed by the EU camp’s failure to impose rebalancing measures within the first ninety days of the U.S. steel safeguard measure.

The WTO should continue to accord validity to the EU camp’s approach, allowing Article 8.2 to be interpreted to allow an affected exporting Member to impose rebalancing measures after the ninety-day time period so long as it resorts to the DSU to determine the legality of the underlying safeguard measure. Although any retaliation would have been made in the context of the DSU because the DSB adopted the reports in U.S. – Steel Safeguards, the approach of the EU camp should have allowed it to impose rebalancing measures after the ninety-day period had it chosen to do so.

B. The Brazil Camp

Contrary to the question posed by the EU camp, the issue raised by the Brazil camp is more easily resolved given the mechanism that was invoked by the affected exporting Members. A joint communication is a notification of a bilateral agreement that waives certain rights and obligations between parties. As demonstrated below, the WTO agreements, as well as GATT-WTO jurisprudence, support the validity of such agreements.

i. The DSU and the Safeguards Agreements

Numerous provisions in the DSU support the use of bilateral agreements such as joint communications.185 DSU Article 3.6, for

185 See DSU, supra, note 10, arts. 3.6, 3.7, 11 (stating that DSU’s aim is to encourage mutually acceptable solutions).
instance, states that "[m]utually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto."\(^{186}\)

Indeed, as demonstrated by the following provisions and confirmed by WTO jurisprudence,\(^{187}\) the DSU goes as far as establishing a *preference* for mutually acceptable agreements over continued adjudication and retaliation:

- **Article 3.7**: Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. *A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.*\(^{188}\)

- **Article 11**: The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. . . . Panels should consult regularly with the parties to the dispute and *give them adequate opportunity to develop a mutually satisfactory solution.*\(^{189}\)

Likewise, the Safeguards Agreement itself contemplates the use of bilateral agreements:

- **Article 12.3**: A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to . . . *reaching an understanding on ways to achieve the objective set out in*

\(^{186}\) DSU, *supra* note 10, art. 3.6.

\(^{187}\) See Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea: Recourse to Article 21.5 of the DSU by Korea*, ¶ 10, WT/DS99/RW (Nov. 7, 2000) (reporting that the parties notified "the DSB of a mutually agreed solution to the matter under review"); *see also* Panel Report, *European Communities – Measures Affecting Butter Products*, ¶ 13, WT/DS72/R (Nov. 24, 1999) (noting that the parties reported they had reached "a mutually agreed solution"); *see also* Panel Report, *European Communities – Trade Description of Scallops: (Request by Canada)*, ¶ 15, WT/DS7/R (Aug. 5, 1996) ("[T]he parties notified the DSB and the relevant Councils and Committees that they had reached a mutually agreed solution . . . .").

\(^{188}\) DSU, *supra* note 10, art. 3.7 (emphasis added).

\(^{189}\) *Id.* art. 11 (emphasis added).
paragraph 1 of Article 8.  

- Article 12.5: The results of the consultations referred to in this Article, as well as the results of ... any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.  

Although the above provisions fall short of an express authorization for joint communications, it serves as an implicit recognition and endorsement of such agreements.

The language of those provisions arguably limits the WTO's endorsement of agreements to settlements of the underlying dispute. Nevertheless, given the expansive language of the provisions, the policy of recognizing bilateral agreements should apply with equal force to issues not dispositive of a dispute's merits. Put another way, the DSU's principal aim of reaching mutually acceptable solutions should also extend to issues relating to the dispute settlement process itself (i.e., procedural issues), such as deadlines, especially because resolution of such secondary issues contribute to the ultimate settlement of the dispute.

ii. GATT-WTO Practice

The validity of joint communications is reinforced by GATT-WTO jurisprudence. As a general matter, WTO adjudicative bodies have frequently recognized the validity of bilateral agreements that alter the rights and obligations of parties, particular those that extend deadlines fixed by the DSU. To date, none have been explicitly challenged under the DSU. Similarly, the DSB has never expressed any opposition toward such agreements. Rather, the WTO's attitude toward bilateral agreements has been of open acceptance.

Further contributing to the validity of joint communications are the interpretive rules on international agreements under VCLT Article 31.3(a), which mandates consideration of subsequent agreements between parties regarding the application of an agreement's provisions under certain circumstances.

For example, in United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, the DSU Article 21.3 arbitrator...
parties have often requested, and the DSB has agreed to, extensions of the "reasonable period of time," elucidating the willingness of the DSB to modify the time limits set forth in DSU Articles 21 and 22.\textsuperscript{194} Given such willingness, it should be of no surprise that the DSB allows extensions that are made between parties themselves.\textsuperscript{195}

Since the advent of GATT, a "practice has evolved of extending the ninety-day period referred to in paragraph 3(a) of [GATT] Article XIX through bilateral agreement between the contracting parties concerned with subsequent submission of a joint found it unnecessary to determine a "reasonable period of time" for compliance because a bilateral agreement was reached as to that issue, even though no DSU provision allows for such agreements. Arbitrator Report, \textit{United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea: Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes}, ¶ 9, WT/DS202/17 (July 26, 2002).


\textsuperscript{195} Other cases reflect the liberal attitude of WTO adjudicative bodies regarding time limits imposed by DSU Articles 21 and 22. In \textit{Brazil – Aircraft}, for instance, the arbitrator ignored the strict time limit contained in DSU Article 22.6 in favor of a bilateral agreement that existed between the parties regarding issues of timing. Decision by the Arbitrators, \textit{Brazil – Export Financing Programme for Aircraft: Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement}, ¶¶ 2.1–2.3, WT/DS46/ARB (Aug. 28, 2000). Article 22.6, in pertinent part, reads:

When the situation described in paragraph 2 occurs [failure to reach a compensation agreement within 20 days after the expiration of the "reasonable period of time"], the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. Decision by the Arbitrators, \textit{United States- Anti-Dumping Act of 1916: Recourse to Arbitration by the United States under Article 22.6 of the DSU}, ¶ 4.2, WT/DS136/ARB (Feb. 24, 2004) (emphasis added). Brazil terminated the bilateral agreement during the course of resolving the implementation issues under DSU Article 21.5, and subsequently argued before the DSU Article 22.6 arbitrator that the thirty-day time limit for authorizing retaliation had passed, precluding Canada's request and invalidating authorization. See id. ¶¶ 3.6, 3.9. Put another way, Brazil's interpretation of DSU Article 22.6 was that the thirty-day period was an explicit and mandatory deadline.

The arbitrator ruled that Canada's request was unaffected by the termination because it was made pursuant to the bilateral agreement prior to its termination. See id. ¶ 3.10. In a footnote, the arbitrator also observed that the interpretation of the first sentence of Article 22.6 offered by Brazil had not been strictly followed by the DSB to that time. See id. ¶ 3.9 n.22. The footnote cited the request by Ecuador to suspend concessions under Article 22.6 in the \textit{EC – Bananas}, noting that it was made several months after the adoption of the Article 21.5 panel report. See id. Thus, at a minimum, the arbitrator could identify no existing practice or jurisprudence warranting Brazil's interpretation. See id.
communication" to the CONTRACTING PARTIES.196 In 1975, the GATT Council acknowledged certain precedent supporting the validity of joint communications.197 In doing so, the GATT Council refrained from voicing any objection to the EC's request to prolong the ninety-day period by mutual agreement.198 In the view of certain representatives of the GATT Council, continuation of consultations was preferred over retaliation.199 Although in 1981 Australia challenged the validity of joint communications, the Council refrained from expressing any position.200 Finally, in 1984, the GATT Director-General expressed the sovereign right of a contracting party to extend the ninety-day period by mutual agreement.201

The validity of joint communications has similarly extended to the WTO. Since the WTO Safeguards Agreement has been in force, approximately 15 joint communications extending the ninety-day period of Article 8.2 have been filed.202 To date, none

196 GUIDE TO GATT LAW AND PRACTICE, supra note 74, at 487. Under GATT, CONTRACTING PARTIES have on numerous occasions made decisions to extend the ninety-day period. See Article XIX – Action by the United States: Specialty Steel, Extension of Time-Limit, L/5524/Add.1 (Sept. 26, 1983) (reflecting the extension agreement between Austria and the United States); see also Article XIX – Action by the United States: Specialty Steel, Extension of Time-Limit, L/5524/Add.5 (Oct. 31, 1983) (demonstrating another extension agreement); see also Article XIX – Action by the United States: Specialty Steel, Extension of Time-Limit, L/5524/Add.11 (Dec. 1, 1983) (stating that the United States and European Communities have agreed to extend the ninety-day period); see also BHALA & KENNEDY, supra note 25, at 929 (explaining how sometimes the ninety-day period is extended by agreement "between the Member invoking the escape clause and the interested Members").

197 Minutes of Council Meeting, at 20–21, C/M/103 (Feb. 18, 1975) (claiming that continued consultation is the better course than retaliation).

198 See GUIDE TO GATT LAW AND PRACTICE, supra note 74, at 487–88 (quoting the February 1975 Council meeting which demonstrated that no objection to the extension of time had been voiced).

199 See Minutes of Council Meeting, at 20–21, C/M/103 (Feb. 18, 1975) ("A number of representatives stated that they had never encountered any difficulty in reaching agreement with the other party for an extension of the period referred to in Article XIX:3(a) in order to continue consultations rather than having recourse to retaliation.").

200 See Article XIX – Action by Australia: Certain Works Trucks and Stackers, L/5026/Add.10 (July 13, 1981) (positing that the GATT Council "had left the matter unresolved").

201 Minutes of Council Meeting, at 11, C/M/174(Feb. 24, 1984) ("The Director-General said that if the Community agreed to the US request for an extension of the date of entry into force of the retaliatory measures, this could be done.").

202 Joint Communication from Australia and the United States, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Fresh, Chilled or Frozen Lamb Meat, G/L/339 (Oct. 27, 1999); Joint Communication from Argentina and the European Communities, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning Argentina's Action in Respect of Imports of Footwear, G/L/366 (Apr. 19, 2000); Joint Communication from the United States and
have been challenged and the Council has never expressed any opposition towards such understandings. Indeed, WTO adjudicative bodies themselves have extended deadlines set by the DSU.203

iii. Policy Concerns

The unique facets of a joint communication nonetheless raise issues of its continued validity. Namely, its status as a mechanism that is not explicitly endorsed by any WTO agreement begs the question of its legality in preserving certain rights and obligations. The endorsement of such measures potentially opens the door to other actions unsanctioned by the GATT-WTO regime. Indeed, as in the case of grey-area measures, a joint communication arguably runs counter to the ideals of a rule-based trading system by allowing Members to evade their mutual commitments and a universal code of conduct.

European Communities, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Line Pipe, G/L/376 (May 3, 2000); Joint Communication from the United States and the European Communities, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Wire Rod, G/L/375 (May 3, 2000); Joint Communication from Argentina and Indonesia, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning Argentina’s Action in Respect of Imports of Footwear, G/L/378 (May 4, 2000); Joint Communication from the United States and Japan, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Line Pipe, G/L/382 (June 6, 2000); Joint Communication from the United States and Japan, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Wire Rod, G/L/381 (June 6, 2000); Joint Communication from Brazil and the European Communities, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning Brazil’s Action in Respect of Toys, G/SG/N/12/BRA/1/Add.1/Corr.1 (July 7, 2000); Joint Communication from the European Communities and Egypt, Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods Concerning Egypt’s Action in Respect of Imports of Powdered Milk, G/L/458 (July 25, 2001).

203 For example, the Article 21.3 arbitrator in Japan – Taxes on Alcoholic Beverages extended the ninety-day period with respect to completion of the arbitration. Arbitrator’s Award, Japan – Taxes on Alcoholic Beverages: Arbitration under Article 21(3)(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS8/15 (Feb. 14, 1997). Similarly, the Article 22.6 arbitrator in European Communities – Regime for the Importation, Sale and Distribution of Bananas extended the sixty-day time period for completion of their work. Arbitrators’ Decision, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB (Apr. 9, 1999). While the matters discussed above are by no means reflective of an established trend, particularly in light of the type of proceedings at issue, there clearly exists a willingness on behalf of WTO adjudicative bodies to adjust the time limits contained in DSU Articles 21 and 22 where justifiable circumstances are present, such as the existence of a bilateral agreement between the parties.
on account of convenience, thereby endorsing modifications to trade undertakings outside the rubric of the GATT-WTO system. Thus, it remains imperative to identify the policy rationales that serve as the foundation for a joint communication's legal viability.

A joint communication is an agreement voluntarily entered into by WTO Members that waives or reserves certain rights or obligations. The legal validity of such an agreement derives from the sovereign right of a nation to willingly abrogate the obligations to which it is owed rather than any specific GATT or WTO provision. As such, the arguments in opposition of grey-area measures are equally applicable to joint communications. However, several considerations outweigh the validity of those arguments in the context of joint communications. First, the concern of unfair bargaining does not strongly materialize where both parties reserve their reciprocal rights under GATT or any WTO agreement. Likewise, the concern that joint communications are negotiated outside the auspices of a rule-based trading system is negated where the parties recognize the preeminence of WTO law and the ultimate result of the joint communication is adherence to the institution’s rules and/or settlement of the underlying dispute.

Second, the validity of voluntary obligations should have greater force in the context of technical obligations, such as statutory deadlines that do not alter substantive trade concessions between Members.

Third, concerns of non-transparency are extinguished because the parties to a joint communication notify the relevant WTO body and, thus, the entire membership of the action. In the case of a safeguard measure, parties to a joint communication notify the Council of their intent to extend the time period set forth in Article 8.2. Indeed, the joint communication effectively fulfills the object and purpose of Article 8's notification provision - to put interested parties on proper notice of intended rebalancing measures - through submission of such an agreement. As a result, the argument of unreasonable delay or estoppel raised in support of the ninety-day provision has no application in the context of a joint communication.

Finally, a joint communication furthers the WTO's policy of open consultation and settlement of disputes. As stated by one
scholar, "[a]ny extension is designed to facilitate settlement on compensation to the interested Members and thereby obviate the need for retaliation." 204

These policy arguments clearly justify the continued legality of joint communications that extend the ninety-day limitation of Article 8.2. Any issues raised by the application of rebalancing measures beyond the actual ninety-day period does not provide the basis to denigrate the legitimacy of a joint communication extending that time period. Indeed, the WTO, as an institution whose legitimacy is dependent upon the mutual recognition and adherence of rights and obligations by its Members, should continue to respect the sovereign entitlement of its Members to waive certain rights.205

iv. The Validity of Joint Communications

Absent any impropriety, such an agreement should be upheld so as to allow a party to unilaterally and immediately implement rebalancing measures beyond the ninety-day period set forth in Article 8.2. In order for an affected exporting Member that reserved its right to rebalance through a joint communication to invoke that right, it must properly notify the WTO Council for Trade in Goods of its intent "to suspend . . . the application of substantially equivalent concessions or other obligations" and wait thirty days. 206 Provided that the Council does not disapprove the proposed rebalancing measures, the affected exporting measure should be free to apply rebalancing measures to exports of the safeguard-imposing Member beyond the ninety-day time period in Article 8.2.

IV. THE NEED FOR REFORM AND A REFEREE

The discussion above reflects how we think the Safeguards Agreement must be interpreted given current circumstances. In our view, the right to rebalance following imposition of a

204  BHALA & KENNEDY, supra note 25, at 929.

205  See Joost Pauwelyn, How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?: Questions of Jurisdiction and Merits, 37(6) J. OF WORLD TRADE 997, 1007 (2003) (detailing that since both the United States and Australia agreed not to appeal, they did not affect any third party rights, and therefore the Appellate Body must respect this agreement and decline jurisdiction).

206  See Safeguards Agreement, supra note 8, art. 8.2.
safeguard measure is too important not to reach our conclusion. That being said, we do not view this approach as ideal, as it does not serve the WTO's goals of furthering the security and predictability of the multilateral trading system. However, we are constrained by the current language of the Safeguards Agreement and the lack of special dispute settlement rules applicable to safeguard measures, as exist for prohibited subsidies under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). In our perfect world, the Safeguards Agreement needs to be revised to ensure maintenance of Members' rights to impose safeguard measures, impose rebalancing measures, and obtain effective relief from measures of either sort that are ultimately—but quickly—deemed inconsistent with the WTO obligations. The aim of such revisions would be to remove the instability and arguable illegitimacy of the current safeguard system caused by the imperfect text of Article 8, and establish a workable, predictable, and timely safeguard-specific method for settling safeguard disputes.

The first revision we recommend is clarification of the ninety-day time restriction set forth in Article 8.2. Obviously, for the reasons stated above, this restriction makes no sense if the right to rebalance is delayed until after three years pursuant to the first clause of Article 8.3. We recommend that the ninety-day restriction be scrapped in favor of the dispute settlement procedures set forth below.207

Article 8.3 should also be clarified to allow rebalancing measures to be imposed unilaterally. (If the drafters did not intend a unilateral right to rebalance pursuant to the last clause of Article 8.3, it must similarly say so.) We would, however, limit this right to those instances in which the Member imposing the rebalancing measures challenges the safeguard measure through the WTO's dispute settlement regime. Under these terms, if a Member chose not to challenge the underlying safeguard measure pursuant to the DSU (supplemented by the new safeguard-specific dispute settlement provisions set forth below),

207 We recognize that GATT Article XIX:3(a) provides for the same ninety-day restriction, which would therefore also need to be adjusted. This would be as simple as removing the clause "not later than 90 days after such action is taken" from Article XIX:3(a).
it would give up its rights under the second clause of Article 8.3 to rebalance sooner than the three year anniversary contemplated by the first clause of Article 8.3.

In order to accommodate this approach, and to ensure protection against unfettered use of either safeguard measures or rebalancing measures, significant additional adjustments must also be made to the Safeguards Agreement with respect to the dispute settlement procedures to be followed. Specifically, in order to ensure protection against prolonged imposition of either illegitimate safeguard or rebalancing measures, the deadlines by which certain events must occur during the course of dispute settlement must be significantly accelerated. After all, if no adjustment is made to normal dispute settlement procedures, a final decision on whether a safeguard measure conforms to the provisions of the Safeguards Agreement could take as long as two years or longer from the day on which consultations are first requested.208 This would give Members carte blanche to impose either illegitimate safeguard or rebalancing measures for two or more years. Given the clear intent of the drafters to prevent such an occurrence, the normal and relatively lengthy dispute settlement process fails to accommodate.

Adjustments to the dispute settlement timeline can be performed in the context of the Safeguards Agreement itself; they do not necessarily require amendment to the DSU. Such an approach was adopted by the drafters of the SCM Agreement for disputes involving prohibited subsidies, for which dispute settlement is significantly accelerated. Specifically, the timeframe for consultations is cut in half; the panel's report is due to the Members within 90 days from panel composition.

208 See, e.g., World Trade Law, DSC's statistics, available at http://www.worldtradelaw.net/dsc/stats.html (last visited Apr. 11, 2008). There are plenty of examples of disputes taking longer than two years to resolve. Worldtradelaw.net calculates that from the date of panel establishment to adoption of an Appellate Body decision, the average is 549 days, or about 18 months. However, this excludes the time between the consultation request and establishment of the panel, which takes at least sixty days, putting the average at twenty or twenty-one a month. Meanwhile, if this is the average, then obviously there are multiple examples of disputes taking even longer to resolve. Indeed, a recent dispute — which was never even appealed to the Appellate Body — took 1180 days (nearly 40 months, or 3.3 years) to resolve. European Communities — Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291, 292, 293 (July 27, 2004), concluded that since the European Communities failed to identify any dispositive technical or scientific issues, the EC's Final Position served as further confirmation that there would be no need or value in consulting with experts.
rather than 330 days; and the Appellate Body's report is due in thirty to sixty days rather than sixty to ninety days. Indeed, given this schedule, we could envision a wholesale adoption of the procedures used for disputes involving prohibited subsidies. Consider a comparison of the normal and prohibited subsidy timelines:
Assuming these numbers – based on averages – are fair, adoption of the prohibited subsidy schedule would appear to cut a

209 Timelines based on averages from www.worldtradelaw.net (last visited Apr. 11, 2008). Although specific deadlines are set forth in the DSU (Articles and both panel and Appellate Body working procedures, certain events have no deadlines (e.g., establishment of a panel following un-defined period for consultations; composition of panels is also undefined), and even the hard deadlines can be negotiated. Hence, the use of averages is the best estimate of the time a dispute will take to resolve.

210 Timelines here are based on a combination of SCM Agreement deadlines (Articles 4.6, 4.8, and 4.9) and averages from www.worldtradelaw.net (last visited Apr. 11, 2008).
typical schedule by half, and result in a panel decision in just over six months from the day the dispute is triggered (i.e., the day consultations are requested), compared with fifteen months for a normal schedule. Meanwhile, final adoption of a decision, including the time for an appeal to the Appellate Body, would occur in about ten months rather than an average of more than twenty months for normal cases.

However, and importantly, we would propose to go one step further. Consistent with the injunctive relief notion discussed in the previous section, a panel report issued in accordance with the accelerated schedule set forth above would serve as the trigger either to justify or reject the imposition of rebalancing measures. In other words, if the panel disagreed with the challenge to the safeguard measure, the panel report would essentially serve as a ruling for injunctive relief against continued rebalancing measures. If, on the other hand, the panel’s decision confirmed the challenge — i.e., that the measure was inconsistent with the Safeguards Agreement — the rebalancing measures could remain in place. And, if the challenging Member had not yet imposed the rebalancing measures, it would permit them to be imposed immediately thereafter. The panel decision would not yet require the Member imposing the safeguard measure to remove the measure (this would be handled as it is currently), but it would confirm the validity of the rebalancing measures.

Under this approach, imposition of such measures could occur either immediately after the request for consultations (and notification of the rebalancing measures) or immediately after the panel report, which would issue approximately six months after the request for consultations. This way Members maintain their right to immediate but not unfettered rebalancing, but also have the option to delay imposition of such measures until the panel's accelerated dispute settlement schedule is completed. We think this approach accommodates the intent of the drafters as well as the interests of both Members imposing safeguard measures and those imposing rebalancing measures. It places Members on equal footing, as neither safeguard measures nor rebalancing measures would be permitted to stay in place unfettered for longer than six months. This would, meanwhile, serve to expedite the resolution of disputes.

If, on appeal, the Appellate Body reverses the panel's decision,
and finds that the safeguard measures were not inconsistent with the Agreement, then the rebalancing measures would have to be removed immediately, and could not be imposed again until the three year anniversary of the safeguard measures plus whatever amount of time the rebalancing measures were in place prior to the Appellate Body's decision. If the Appellate Body upholds the panel's decision, the rebalancing measures could remain in place until the safeguard measures are removed.

Of course, this scheme could also lead to concomitant disputes over the appropriate level of rebalancing. Rather than leave this un-policed, as is arguably the case currently, a provision could be added to Article 8 of the Safeguards Agreement that would (a) refer Members imposing rebalancing measures to the hierarchy and standards set forth in DSU Articles 22.3 and 22.4, and (b) allow the Member imposing the safeguard measure to challenge the rebalancing measures before an arbitrator under the procedures set forth in DSU Article 22.6.

CONCLUSION

Though the intent of Article 8, as currently written, makes sense to us and can be maintained as is—assuming our interpretation is adopted—we think the safeguard mechanism will be improved dramatically if the adjustments we suggest are adopted. By clarifying the manner in which Members can rebalance, accelerating the dispute settlement process for challenging safeguard measures, and creating a formal injunctive relief device, the application of safeguard and rebalancing measures would prove more predictable and the entire system would become more legitimate. Whether this increases or decreases the extent to which the safeguard mechanism is used is not our concern; the point is to better meet the overarching WTO goal of providing security and predictability in the multilateral trading system.