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INTRODUCTION

Twenty-five years after the implementation of the Marrakesh Agreement Establishing the World Trade Organization ("the WTO Agreement"),[1] international trade law and practice under the multilateral trading system (MTS) of the WTO are undergoing a fundamental transition. The "development deficits" in WTO legal disciplines, which necessitated the Doha Round, have not been bridged for over two decades.[2] The Doha Round, which was launched in 2001 to promote development agenda, became the longest peacetime multilateral negotiation without successful conclusion.[3] The proliferation of regional trade agreements (RTAs) has created regulatory fragmentation and weakened the MTS based on the principle of non-discrimination (the "most favored nation" or the "MFN" principle).[4] Recent trade restrictive measures, such as the tariffs adopted by the United States under the pretext of protecting national security, have set a new pattern of trade protectionism.[5]

This transition marks a new era for the world trading system post neoliberalism. WTO legal disciplines (or "WTO disciplines") embody neoliberalism[6] in their objectives and

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1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]. This agreement settled the multilateral legal frameworks for international trade.

2. *See* Yong-Shik Lee, Reclaiming Development in the World Trading System 270–71 (2d ed. 2016).

3. *Id.*

4. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190 [hereinafter GATT 1994].

5. See Yong-Shik Lee, Three Wrongs Do Not Make a Right: The Conundrum of the U.S. Steel and Aluminum Tariffs, 18 WORLD TRADE REV. 481 (2019) (discussing the U.S. tariffs).

6. Neoliberalism is a dominant political-economic ideology that emerged in the 1980s, which discouraged positive government interventions in the economy and promoted free market approaches, including privatization and trade liberalization. Neoliberalism is based on the "Washington Consensus," which refers to a set of policies representing the lowest common denominator of policy

substantive provisions.[7] The Uruguay Round (1986–1994), which was the last trade negotiation round of the GATT (the General Agreement on Tariffs and Trade) that established the WTO, adopted neoliberal policy prescriptions and aimed to achieve trade liberalization across the board and the expansion of the MTS.[8] The reinforced WTO disciplines, such as the Agreement on Subsidies and Countervailing Measures ("the Subsidies Agreement" or "the SCM Agreement"),[9] the Agreement on Trade-Related Investment Measures ("the TRIMs Agreement"),[10] and the Trade Policy Review Mechanism, have weakened state control and influence over trade, pursuant to the neoliberal stance. At the same time, the old GATT provisions that enabled governments to adopt trade-related measures to meet public interest, such as the promotion of economic development[11] (under Article XVIII),

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advice being advanced by Washington-based institutions, such as fiscal discipline, a redirection of public expenditure priorities toward areas offering both high economic returns and the potential to improve income distribution (such as primary healthcare, primary education, and infrastructure), tax reform to lower marginal rates and broadening the tax base, interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization of inflows of foreign direct investment, privatization, deregulation (to abolish barriers to entry and exit), and protection of property rights. John Williamson, *What Washington Means by Policy Reform*, *in* LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED 5, 7–20 (John Williamson ed., 1989).

7. *See* WTO Agreement, *supra* note 1, pmbl. The government failures to make economic adjustments in the 1970s during the periods of the oil shock and the fall of the Soviet bloc and its socialist economy in the 1980s renewed the public confidence in the market and caused the policy shift toward neoliberalism. *See supra* note 6 (explaining the neoliberal policy prescriptions).

8. For a discussion of the negotiation history, see generally THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) (Terence P. Stewart ed., 1993).

9. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

10. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement].

11. Economic development refers to the process of progressive transformation of an economy leading to higher productivity and increases in income for the majority of populations.

were neither elaborated nor reinforced by subsequent agreement in WTO disciplines.[12]

The support and confidence in neoliberalism has waned since the 1990s, shortly after the establishment of the WTO. The neoliberal policies in Eastern Europe (in the post-Soviet era), Latin America, Asia, and Africa failed to deliver the promised economic outcomes, leading to hyperinflation, massive unemployment, and a long period of economic recession.[13] Critics have cited institutional weaknesses and lack of proper moderation and policy sequencing as a cause of the failure.[14] Opponents of the neoliberal policy have also criticized trade liberalization under the new trade regime of the WTO for having concentrated economic benefits in small privileged groups, failing to lift the living standards for the majority of populations in developing countries.[15] The reinforced WTO disciplines have also deprived the state of its ability to adopt key trade measures to promote economic development, such as trade-related subsidies and tariff measures, which were adopted by the successful developing countries as listed below.[16]

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12. In contrast, the fourteen separate agreements under the WTO Agreement reinforce and elaborate the GATT provisions in other areas such as rules regulating trade-related subsidies (the SCM Agreement). For a further discussion, see LEE, *supra* note 2, at 271.

13. David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1, 6 (David M. Trubek & Alvaro Santos eds., 2006) (citing the failures of the neoliberal policies); *see also* YONG-SHIK LEE, LAW AND DEVELOPMENT: THEORY AND PRACTICE 21–22 (2019).

14. Trubek & Santos, *supra* note 13, at 6.

15. *Id.*; *see also* A. G. Hopkins, *The New Economic History of Africa*, 50 J. AFRICAN HISTORY 155 (2009). The dichotomy between developed and developing countries is not always clear, but the former are normally understood as high-income countries with advanced economic, technological, and industrial capacities. In the WTO, the developing country status is self-declared without clear definitions or guidelines by the WTO. *See Who are the developing countries in the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm [https://perma.cc/SG9N-YKTG].

16. LEE, *supra* note 2, at 14–32.

The successful developing countries in the 1960s through the 1990s, such as South Korea, Taiwan, Singapore, and more recently China, adopted strong government-led development policies. These included trade-related subsidies such as export subsidies (*i.e.*, subsidies contingent upon export) and import-substitution subsidies (*i.e.*, subsidies contingent upon the use of domestic products), as well as tariff measures, which would not be permitted under the current WTO disciplines.[17] Like the East Asian countries, developed countries in the West such as the United States and the United Kingdom also employed extensive subsidies and tariff measures during the periods of their own development, which would have been inconsistent with the WTO disciplines today.[18] The neoliberal policy requirements adopted under the WTO law have substantially reduced the policy space and increased regulatory barriers to the countries that attempt to adopt trade-related measures, as the successful developing countries did in the past, for the purpose of economic development.[19]

Ironically, a major challenge to the MTS under the auspices of the WTO has recently been raised by its very architect, the United States of America. The United States was the founding member of the GATT and a major force behind the establishment of the WTO.[20] Until recently, the

17. *Id*; *see also* Mari Pangestu, *Industrial Policy and Developing Countries, in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 153, Table 17.1 (Bernard Hoekman, Aaditya Mattoo, & Philip English eds., 2002) (discussing the evolution of industrial policies of the successful developing countries).

18. Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective 13–68 (2002).

19. Dani Rodrik commented that the current trade rules have made "a significant dent in the abilities of developing countries to employ intelligently-designed industrial policies." Dani Rodrik, *Industrial Policy for the Twenty-First Century* 34–35 (John F. Kennedy Sch. of Gov., Harvard U., Faculty Research Working Papers, RWP04–047, 2004), https://www.sss.ias.edu/files/pdfs/Rodrik/Research/industrial-policy-twenty-first-century.pdf [https://perma.cc/G6UE-9SZP].

20. Cathleen D. Cimino-Isaacs, *The World Trade Organization (WTO): U.S. Participation at Risk?*, CRS INSIGHT (July 18, 2018), https://fas.org/sgp/crs/row/

United States had initiated and promoted international negotiations for further trade liberalization, such as the Trans-Pacific Partnership (TPP) Agreement.[21] The Trump administration made a radical policy shift toward trade protectionism, evidenced by withdrawing from the TPP Agreement and demanding renegotiation of the North America Free Trade Agreement (NAFTA) and amendment of the U.S.-Korea Free Trade Agreement on threat of their terminations. It also imposed substantial tariffs on imports from China[22] in hundreds of product categories and invoked national security to impose tariffs on its steel and aluminum imports globally, excepting only a small group of countries with which it concluded quota agreements.[23] This U.S policy departs substantially from its own traditional trade practice favoring multilateralism and open engagement.

The radical policy shift, which has important ramifications for the MTS requires further consideration. The election of Donald Trump, a controversial businessman and a political outsider, as the forty-fifth U.S. president was an unexpected outcome.[24] His support base included economically-depressed regions in the United States[25] that

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IN10945.pdf [https://perma.cc/CSG5-QJFQ].

21. Yong-Shik Lee, Future of Trans-Pacific Partnership Agreement: Just a Dead Trade Initiative or a Meaningful Model for the North-South Economic and Trade Integration?, 51 J. WORLD TRADE 1, 1–2 (2017).

22. *See* Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974, 47,975 (Sep. 21, 2018).

23. These countries include South Korea, Brazil, and Argentina. For a further discussion, see Yong-Shik Lee, The Steel and Aluminum Quota Agreements: A Question of Compatibility with WTO Disciplines and Their Impact on the World Trading System, 53 J. WORLD TRADE 811 (2019).

24. *See* John Slides, *A Comprehensive Average of Election Forecasts Points to a Decisive Clinton Victory*, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/08/a-comprehensive-average-of-election-forecasts-points-to-a-decisive-clinton-victory/ [https://perma.cc/LEH8-LYHB]; *see also* Yong-Shik Lee, *Law and Economic Development in the United States: Toward a New Paradigm*, 68 CATHOLIC UNIV. L. REV. 229, 230 (2019).

25. For example, President Trump won the majority vote in a number of states that make up the Great Lakes megaregion, commonly referred to as "Rust

did not perceive benefits from the trade liberalization policy that the United States had pursued under the previous administrations. The multinational enterprises based in the East and the West coasts of the United States, new leading industries, such as pharmaceuticals and IT, and international investors and traders may have reaped the benefits from the policy, but the residents in the areas with the declining industries losing out from the competition with imports have supported the trade protectionism advocated by Trump.[26] The elements of neoliberalism in the WTO system, which caused the "development deficits" in WTO disciplines, ironically provoked the trade protectionism from the largest and the most powerful economy, even if the protectionist trade policy of the Trump administration is unlikely to revive the declining U.S. industries and generate more employment and income for his supporters.[27]

This Article, which examines international trade law and practice post neoliberalism, is organized as follows. Part I discusses the development deficits of the WTO system, examines the challenges from developing countries through coalitions and alliances, and analyzes the current impasse of the Doha Round. Part II examines the proliferation of bilateralism and regionalism in international trade, which creates preferential/discriminatory trade arrangements, causes the fragmentation of trade disciplines, and weakens the MTS. Part III discusses the trade protectionism of the

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Belt." This area encompasses the upper Midwest states, stretching from northern Minnesota to western New York and Pennsylvania. The term signifies the economic decline, deindustrialization, population loss, and urban decay caused by the decline of its once-prosperous manufacturing sector. This region has lost more than 1.2 million manufacturing jobs since 1990 and 2.2 million since 1970. Robert D. Yaro, *Toward a National Reinvestment Strategy for Underperforming Regions*, *in* AMERICA 2050: NEW STRATEGIES FOR REGIONAL ECONOMIC DEVELOPMENT 13 (Petra Todorovich & Yoav Hagler eds., 2009).

26. See Trip Gabriel, How Erie Went Red: The Economy Sank, and Trump Rose, N.Y. TIMES, Nov. 12, 2016.

27. It is because the primary cause of the declining U.S. industries is the failure of industrial adjustment through innovation, re-education, and training, rather than trade. *See* Lee, *supra* note 24, at 230–31.

United States under the Trump administration, as demonstrated by its recent trade measures adopted under the pretext of the national security protection. Trade protectionism of the most powerful economy and trader affects the stability of the MTS and undermines its viability. Part IV suggests possible regulatory reforms to address some of the identified problems in the current trade disciplines. Part V draws conclusions.

I. CHALLENGES FROM DEVELOPING COUNTRIES

A. *Development Deficits*

1. An Unbalanced Deal

The Uruguay Round (UR) negotiations aimed at increasing market access. Efforts to increase market access had continued throughout the preceding GATT regime, and tariffs have been systematically reduced since its beginning in 1947. Several multilateral trade negotiations had been convened for the purpose of tariff reductions, and as a result the average tariff rates of industrial countries on industrial products dropped from around 44 percent[28] in the beginning of the GATT era to 3.9 percent at the conclusion of the Uruguay Round.[29] In this process, developing countries made considerable import concessions, particularly during the UR. For instance, India offered an average tariff reduction of 6.16 percent, while it only received an average reduction of 1.22 percent for its exports.[30] Similarly, Thailand offered 5.93 percent and received only 1.46 percent on average.[31] These concessions by developing countries were significant, although developing countries had imposed higher tariff rates than developed countries.

In contrast, developed countries did not offer comparable concessions in market access, particularly in the product

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28. There is an argument that the pre-GATT average tariff rates were lower, at around 22 percent. Chad P. Bown & Douglas A. Irwin, *The GATT's Starting Point: Tariff Levels Circa 1947* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 21782, 2015).

29. There were eight multilateral trade negotiations ("rounds") during the GATT era (1947–1994). The first round (the "Doha Round") in the WTO regime began in November 2001. During the previous GATT rounds, tariffs were reduced by an average of 35 percent at each round. As a result, the tariff rates of non-primary products of industrial countries fell to a mere 3.9 percent after the Uruguay Round in 1994. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 74 (2d ed. 1997).

30. J. Michael Finger & A. Alan Winters, *Reciprocity in the WTO*, *in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK, *supra* note 17, at 57 T. 7.3.

31. *Id.*

areas in which developing countries would have a relative advantage in exports such as agriculture and textile.[32] In agriculture, trade was not fully liberalized. Measures that were not allowed for trade in industrial products, such as export subsidies, were maintained albeit subject to certain reduction commitments.[33] In textiles and clothing trade, extensive import restrictions, such as restrictive quotas and high tariffs, had been prevalent, as represented by the Multifiber Arrangement (MFA).[34] The Agreement on Textiles and Clothing (ATC) was settled during the UR, but it was an interim agreement which maintained the status quo.[35] It took ten additional years before textile and clothing trading was fully integrated with the MTS without trade restrictions such as the MFA.[36]

On the whole, the UR resulted in an unbalanced deal between developed and developing countries. The UR achieved a substantial degree of trade liberalization for trade in industrial projects for which developed countries enjoy a competitive advantage. However, trade liberalization was limited in product areas such as agricultural products, textile, and clothing, in which developing countries would have a competitive advantage, as discussed above. The new rules such as the SCM Agreement created difficulty for developing countries to promote industrial development. The SCM Agreement restricted policy space for developing countries by preventing them from adopting certain trade-related subsidies to promote domestic industries and economic development, such as export subsidies and import-

32. LEE, *supra* note 2, at 141–42.

33. Agreement on Agriculture arts. 8–9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410. The Agreement also stipulates domestic support reduction commitments, as expressed in "Total Aggregated Measurement of Support" (AMS). *Id.* art. 6.

34. LEE, *supra* note 2, at 143.

35. *Id.* at 144.

36. *Id.*

substitution subsidies.[37] Successful developing countries had adopted these subsidies successfully for their own economic development.[38] The UR also concluded preferential rules for developing countries, often referred to as "special and differential treatment" or "S&D treatment," but they were inadequate to balance the outcome as further discussed below.

2. Inadequate "Special and Differential" Treatment

WTO legal disciplines include preferential provisions for developing countries granting S&D treatment. These provisions aim to: (i) increase the trade opportunities of developing countries, (ii) require WTO Members ("Members") to safeguard the interests of developing countries, (iii) allow some flexibility to developing countries with respect to commitments and use of policy instruments, (iv) provide additional transitional time-periods to implement commitments, and (v) offer technical assistance.[39] According to a WTO report, 139 S&D provisions are scattered throughout the WTO disciplines.[40]

However, these S&D provisions are inadequate to meet the development interests of developing countries. The S&D provisions disregard significant differences existing among developing countries in economic and trade capacities and treat them without a distinction, with the sole exception of least-developed countries. The S&D provisions are temporary in nature,[41] insufficient in the extent of

37. SCM Agreement, *supra* note 9, art. 3. Annex I of the SCM Agreement includes the illustrative list of prohibited export subsidies. *Id.* Annex I.

38. LEE, *supra* note 2, at 14–32.

39. WTO Secretariat, Special and Differential Treatment Provisions in WTO Agreements and Decisions, WTO Doc. WT/COMTD/W/196 (June 14, 2013).

40. *Id.*

41. For example, developing countries (those other than least-developed countries) were permitted to apply export subsidies for a period of eight years from the implementation date of the WTO Agreement. SCM Agreement, *supra* note 9, art. 27, para. 2(a).

preference,[42] or impose regulatory impediment on developing countries seeking to benefit from the S&D treatment. The regulatory impediment necessitates further examination. For an example, Article XVIII of the GATT,[43] entitled "Government Assistance to Economic Development," is a primary GATT provision offering development facilitation. Article XVIII enables developing-country Members, whose economies can only support low standards of living and are in the early stages of development,[44] "to maintain sufficient flexibility in their tariff structure [*e.g.*, may increase tariff rates] to be able to grant the tariff protection *required for the establishment of a particular industry* and to apply quantitative restrictions for balance of payment purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development."[45]

Article XVIII is designed to assist developing-country Members in implementing programs and policies of economic development to raise the standard of living for their populations. It does so by authorizing measures affecting imports, such as raising tariffs beyond their multilateral

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42. For example, safeguard measures, emergency import restraint measures adopted under the Agreement on Safeguards, must not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 percent, provided that those developing country Members with less than 3 percent import share collectively account for not more than 9 percent of total imports of the product concerned. Agreement on Safeguards art. 9.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter SA]. The 3 and 9 percent ceilings are criticized for being too restrictive. YONG-SHIK LEE, SAFEGUARD MEASURES IN WORLD TRADE 174 n.31 (3d ed. 2014).

43. General Agreement on Tariffs and Trade art. XVIII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]. The provisions of the 1947 GATT are incorporated by reference in the GATT 1994. They are incorporated as a part of the WTO legal disciplines as a result of the UR. *See* GATT 1994, *supra* note 4 (incorporating the GATT in the WTO legal disciplines).

44. GATT 1947, *supra* note 43, art. XVIII, para. 4(a).

45. *Id.* art. XVIII, para. 2 (explanation and emphasis added).

commitments under the WTO disciplines.[46] However, the Article also requires the Member proposing to adopt the measure to conduct negotiations with the other Members to be affected by the measures and offer adequate compensation, lack of which will entitle the affected Members to withdraw or modify their own trade concessions.[47] Such negotiation may take a considerable amount of time. In addition, developing countries facing resource constraints may not be able to offer adequate compensation. These requirements render Article XVIII measures costly and risky from the perspective of developing countries in need of the measures.[48] The UR did not remedy the insufficient Article XVIII provisions by, for example, creating a more effective agreement, as it did in a number of other areas,[49] that would be more feasible for developing countries to invoke without the burden of time-consuming negotiations, costly compensation, and the risk of retaliation.[50]

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46. *See* LEE, *supra* note 2, at 72–77.

47. GATT 1947, *supra* note 43, art. XVIII, para. 7.

48. *See* LEE, *supra* note 2, at 273. As a result, relatively few Article XVIII measures were adopted. From 1947 to 1994, Section A of Article XVIII (which provides for measures other than for balance-of-payment reasons) was invoked only nine times: by Benelux on behalf of Suriname (1958), Greece (1956, 1965), Indonesia (1983), Korea (1958), and Sri Lanka, twice in 1955 and once each in 1956 and 1957, and has not been invoked since the establishment of the WTO. WORLD TRADE ORG., ANALYTICAL INDEX OF THE GATT 501 (1995) [hereinafter ANALYTICAL INDEX].

49. For example, Agreement on Trade-Related Intellectual Property Rights and Agreement on Safeguards were concluded to enable Members to adopt measures to protect intellectual property rights and safeguard measures, formerly applied under GATT Article XX and XIX, respectively, more effectively under clearer conditions. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; SA, *supra* note 42.

50. *See* LEE, *supra* note 2, at 271.

3. Harmful Trade Remedy Measures

WTO disciplines authorize trade remedy measures or "administered protection," such as anti-dumping measures, countervailing measures, and safeguard measures. Anti-dumping measures are applied in the form of increased tariffs when imports are "dumped," *i.e.*, sold at prices below normal value.[51] Countervailing measures, also in the form of increased tariffs, are applied against imports where the government of the exporting country provided either "prohibited subsidies" or other "actionable subsidies."[52] Safeguard measures are applied in the form of increased tariffs or quantitative restrictions (quotas) against imports where an increase in imports causes serious injury to a domestic industry or threat thereof.[53]

Among administrative protections, anti-dumping measures and countervailing measures are particularly adverse to the development interests of developing countries. Anti-dumping measures are the most prevalent trade remedy measures. As of June 2018, 1,854 anti-dumping measures were in force.[54] Developing countries are particularly vulnerable to anti-dumping measures, because they tend to rely on low-cost labor and price competitiveness for their exports, and anti-dumping measures tend to target low-priced products exported from developing countries.[55]

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51. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 1, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter "Anti-Dumping Practice Agreement" or "ADP Agreement"]. The "normal value" is determined by comparison to the home price or, where a proper comparison cannot be made due to the market situation or a low sales volume in the domestic market, to an export price in a third country. *Id.* arts. 1–2.

52. These categories include export subsidies, import-substitution subsidies, or any other subsidies that adversely affect the trade of other Members. SCM Agreement, *supra* note 9, arts. 7–9.

53. SA, *supra* note 42, art. 2, para. 1.

54. World Trade Organization, *Report (2018) of the Committee on Anti-Dumping Practices*, Annex C, WTO Doc. G/L/1270, G/ADP/25 (Oct. 29, 2018).

55. *See* LEE, *supra* note 2, at 124.

Anti-dumping measures are premised on the presumption that there is somehow a "normal price" that can be determined by the investigating authorities, rather than by the market. Yale economist T. N. Srinivasan characterized anti-dumping as the equivalent of a "nuclear weapon in the armory of trade policy" and suggested removing it in the 1999 WTO high-level symposium on Trade and Development.[56]

Countervailing measures are also adverse to the development interests of developing countries. As mentioned earlier, the successful developing countries in East Asia and in the West adopted subsidies to promote domestic industries.[57] This policy tool is no longer authorized under WTO disciplines where it affects trade. Countervailing measures are applicable against prohibited subsidies such as export subsidies, import-substitution subsidies, and otherwise actionable subsidies.[58] Exports are an import vehicle to promote economic development where domestic markets are small. Government subsidies contingent upon exports (export subsidies) can contribute to export expansion as demonstrated by the successful development cases in East Asia.[59] Likewise, subsidies contingent upon the use of domestic products (import-substitution subsidies) can also contribute to industrial development in the early stages of economic development, even if liberal market economists tend to object to the use of both types of subsidies as economically inefficient.[60] Regardless of the debate, the policy choice—currently limited by the SCM Agreement—should be available to developing countries under qualifying

56. WTO, *Report on the WTO High-Level Symposium on Trade and Development* (Mar. 17–18, 1999), https://www.wto.org/english/tratop_e/devel_e/summhl_e.pdf [https://perma.cc/N2XE-P6RE].

57. *See* CHANG, *supra* note 18, at 50 (for a discussion of the adoption of subsidies for the purpose of economic development).

58. SCM Agreement, *supra* note 9, arts. 7–9.

59. *See* CHANG, *supra* note 18, at 46–51; LEE, *supra* note 2, at 98.

60. LEE, *supra* note 2, at 19–32.

conditions,[61] in consideration of its important role for economic development that is also recognized by the SCM Agreement.[62]

B. *Coalitions of Developing Countries*

1. Developing Countries in Coalitions

The development deficits inherent in the WTO, as discussed in the preceding Section, brewed discontent among developing countries. They felt that the outcome of the UR was unbalanced and did not serve their interests adequately.[63] In contrast to this development, some developed countries encouraged by the outcome of the UR pushed for the inclusion of additional developed-country agendas, such as labor standards and environmental conditions.[64] This push was met with strong objections by developing countries.[65] The WTO's pursuit of global harmonization of an extensive range of national rules caused considerable strain among Members and clashes with local interests seeking policy autonomy.[66] Discontent and tension grew significantly by the late 1990s, contributing to the failure of the Seattle Ministerial Conference in 1999 and the Cancún Ministerial in 2003.[67]

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61. *See* discussion of the Tariff-Facilitating Subsidy *infra* Section IV.A.

62. SCM Agreement, *supra* note 9, art. 27, para. 1 ("Members recognize that subsidies may play an important role in economic development programmes of developing country Members.").

63. LEE, *supra* note 2, at 282; *see also Declaration by the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar* (Oct. 22, 2001), https://www.g77.org/doc/Doha.htm [https://perma.cc/3DZ2-MZS3].

64. John S. Odell, *The Seattle Impasse and Its Implications for the World Trade Organization*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 400, 403 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

65. *Id*. at 400–03.

66. *Id.*

67. See also Sungjoon Cho, A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution, 7 J. INT'L ECON. L. 219, 219 (2004).

Developing countries formed the numerical majority in the WTO, and they found a means to challenge major developed-country Members by forming alliances and coalitions.[68] Efforts to form developing country coalitions (the "South-South coalitions") against the hegemonic developed countries to safeguard their economic and political interests had begun since the historic Bandung Asian-African Conference in 1955.[69] The Group of 77, formed within the United Nations Conference on Trade and Development (UNCTAD) in June 1964, became the most important structure for the South–South coalition and promoted reforms in the GATT.[70] The coalition was not active during the UR but revived through the establishment of the South Center in 1994 and the subsequent Havana Meeting in 2000.[71]

The Group of 77 was a loose organization, and it did not represent the only coalition among developing countries. Developing countries through multiple alliances and coalitions demanded changes necessary to restore a balance in WTO disciplines and reduce the development deficits. For example, twenty developing countries led by Brazil, India, and China (which later became the G21) formulated a common position on negotiations and submitted a joint

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68. See Faizel Ismail, One Year Since the WTO Hong Kong Ministerial Conference: Developing Countries Re-claim the Development Content of the WTO Doha Round, in ECONOMIC DEVELOPMENT THROUGH WORLD TRADE: A DEVELOPING WORLD PERSPECTIVE 121, 139 (Yong-Shik Lee ed., 2008); An Chen, A Reflection on the South–South Coalition in the Last Half-Century from the Perspective of International Economic Law-Making, in ECONOMIC DEVELOPMENT THROUGH WORLD TRADE: A DEVELOPING WORLD PERSPECTIVE, supra, at 33, 35.

69. Chen, *supra* note 68, at 35–36.

70. *Id.* at 36–37. From 1964 to 1968, the Group of 77 strongly advocated and instituted reformative guidelines and jurisprudential principles, *inter alia*, on generalized preferential and non-reciprocal treatment favorable to the developing countries and promoting the partial reform of the GATT legal system. Additionally, the Group of 77 was instrumental to adopting both the U.N. Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States in 1974. *Id.*

71. *Id.* at 38–39.

proposal on global trade reform to the WTO[72] days before the convening of the Cancún Ministerial Conference. The proposal included increasing market access for agricultural products and reducing agricultural subsidies.[73] By the turn of the century, the challenges from developing countries formed a key dynamic in WTO negotiations, which meant that no progress in the MTS would be possible unless their development interests were accommodated.

2. Prospects of the South-South Coalitions

In addition to the Group of 77, various other coalitions and alliances emerged over the course of WTO negotiations, such as the G21; the alliance among CARICOM, the OAU and the least-developed countries (LDCs); and the G33.[74] As discussed in the following Section, the stalemate in the Doha Round continued for well over a decade without an end in sight. Developing countries in alliances and coalitions may have been successful in tabling their development agenda for the MTS but have not yet been so successful in reforming the WTO to meet their development interests. Factors such as the large economic and political gaps existing among developing countries, the divergent and at times conflicting interests among developing countries on specific development issues (*e.g.* the agricultural issues), and the influence of the North and their strategies have imposed a degree of limitations on the South-South coalitions.

Developing countries comprise three-quarters of the WTO membership. They are a large group of extremely divergent countries in economic capacities, trade interests, cultural and political backgrounds. For example, China, which is still considered a developing country in terms of its

72. World Trade Organization, *Agriculture – Framework Proposal*, WTO Doc. WT/MIN(03)/W/6 (Sept. 4, 2003).

73. *Id.*

74. Chen, *supra* note 68, at 43 n.23.

per capita income,[75] is the second largest economy in the world and the largest exporter, with significant political influence. Other "giant" developing countries such as India and Brazil are also very different in economic and trade capacities and political influence from most other developing countries. This extreme divergence is not conducive to maintaining strong and united coalitions over time, despite the claimed solidarity among the members. Conflicts among developing countries also reduce confidence and allegiance in the South-South coalitions. Large developing countries, such as China, may criticize the hegemonic attitude of the Global North, but they have also exerted their own powers and hegemony in their sphere of influence. This is demonstrated by China's trade retaliation against its smaller trade partners, including South Korea, Vietnam, and the Philippines, over geopolitical issues such as the deployment of a missile defense system that it found objectionable.[76]

Additionally, developing countries have not shared common interests on some key trade issues, such as agricultural issues. Some developing countries have strong export interests, but some do not. Consequently, they have shown different attitudes toward the proposed agricultural reform in the WTO.[77] The powerful North exerted their influence on members of the coalitions. Its strategy, including the bilateral approach made by the United States to negotiate and conclude bilateral and regional trade agreements with individual developing countries,[78] has

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75. China's per capita GNI (gross national income) was US $9,460 in 2018, below the world average of US $11,124 in the same year. *GNI per capita, Atlas method (current US$)*, WORLD BANK, https://data.worldbank.org/indicator/NY.GNP.PCAP.CD [https://perma.cc/6H8G-2KU2].

76. For a relevant discussion, see Yong-Shik Lee, *Should China be Granted Market Economy Status?: In View of Recent Development*, 3 CHINA & WTO REV. 319, 327–35 (2017).

77. For example, the majority of the Group of 77 did not join the 2003 Framework Proposal. *See Agriculture – Framework Proposal*, *supra* note 72.

78. *See* Ian F. Ferguson, Cong. Research Serv., RL32060, World Trade Organization Negotiations: The Doha Development Agenda 2, 8 (2006); Joseph

weakened the coalitions. The South-South coalitions are expected to continue, but the emergence of a strong, united coalition that represents the majority of developing countries is unlikely to appear in the near future. Rather, coalitions are more likely to remain as loose groups, and smaller ones such as the G21 will act to advance the common interests of a limited number of developing countries. Regardless of the coalitions, large developing countries such as China, India, and Brazil will continue to play a key role in the MTS on its own economic capacity and political influence, advancing their own agenda that at times could meet the interests of other developing countries as well as their own.

C. *The Doha Round and Its Impasse*

1. The Launch of the Doha Round

The WTO's first trade negotiation round, "the Doha Round," was launched in 2001 in Doha, Qatar at the fourth Ministerial Conference.[79] The focus of the Doha Round was the improvement of the conditions of trade for developing countries, as demonstrated by the establishment of a work program entitled the "Doha Development Agenda (DDA)."[80] The Doha Round (or "the Doha Development Round" for its emphasis on the development issues) arose out of the challenges from developing countries against the development deficits in the WTO. The shift in negotiating powers in favor of developing countries since the failed 1999 Seattle Ministerial meant that it was necessary to address

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Stiglitz, *Arrested Development*, The Guardian (Aug. 10, 2006), http://www.theguardian.com/commentisfree/2006/aug/10/post290 [https://perma.cc/Q3D5-HPJK].

79. For relevant documents on the Doha Round, see World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1 (2001) [hereinafter Doha Declaration]. *See also* WORLD TRADE ORG., THE DOHA ROUND TEXTS AND RELATED DOCUMENTS (2009) [hereinafter DOHA TEXTS].

80. Doha Declaration, *supra* note 79, para. 2; DOHA TEXTS, *supra* note 79, at 5.

development issues for the MTS to progress in the new WTO system.[81]

The Doha Round included a long list of ambitious objectives: implementation, agriculture, services, market access (non-agriculture), intellectual property, investment, competition, transparency in government procurement, trade facilitation, anti-dumping, subsidies, regional agreements, dispute settlement, environment, e-commerce, small economies, debt and finance, trade and technology transfer, technical cooperation, least-developed countries, and special and differential treatment.[82] Members were expected to maintain the single undertaking and accept the entire package on the outcome of the negotiations, [83] which later proved to cause substantial delays in the conclusion of the Doha Round.

Of the number of subjects to be negotiated, agriculture was the most important. The agriculture section in the DDA included "substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support," while maintaining special and differential treatment for developing countries.[84] Under the terms of the Agreement on Agriculture, work for the negotiation had already been underway.[85] The DDA, however, did not include deeper regulatory reform that would re-balance the WTO disciplines to meet the development interests of developing countries, such as reformation of the subsidies regime to allow export and import-substitution subsidies for qualified developing countries,[86] adjustment of the binding tariff concessions (*i.e.*,

81. LEE, *supra* note 2, at 282–83.

82. Doha Declaration, *supra* note 79.

83. *Id.* para. 47.

84. *Id.* para 13.

85. *Id.*

86. *See* discussion on the DFS *infra* Section IV.A.

clarification and reinforcement of Article XVIII measures),[87] and substantial adjustment of anti-dumping measures toward its removal.[88]

2. The Long and Winding Road: A Long Impasse

The Doha Round was originally scheduled to conclude by January 2005.[89] However, the failure of the first post-Doha Ministerial (the 2003 Cancún Ministerial) due to disagreements over agricultural issues and a standstill over a group of other issues ("Singapore Issues")[90] signaled its treacherous path. The Singapore issues included four subjects: trade and investment, competition policy, transparency in government procurement, and trade facilitation.[91] Members agreed at the 1996 Singapore Ministerial Conference to establish working groups for further investigation.[92] The DDA initially included these developed-country issues, but lack of consensus on the part of developing countries caused the removal of three of them from further negotiation.[93] Accordingly, Members agreed to proceed only on the subject of trade facilitation, [94] which led to the conclusion of the Agreement on Trade Facilitation later in the process.

Members failed to meet the negotiation deadlines repeatedly which had to be extended each time. Further,

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87. *See* discussion on the DFT *infra* Section IV.A.

88. *Id.* For a reform proposal, see discussion *infra* Section IV.A. *See also* LEE, *supra* note 2, at 290–98.

89. Doha Declaration, *supra* note 79, para. 45.

90. *See* Robert Baldwin, *Failure of the WTO Ministerial Conference at Cancún: Reasons and Remedies*, 29 WORLD ECON. 677, 689 (2006) (discussing the causes of the failure).

91. *Id.*

92. World Trade Organization, Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC, paras. 20-22 (1996).

93. World Trade Organization, *Decision Adopted by the General Council*, para. 1(g), WTO Doc. WT/L/579 (Aug. 2, 2004).

94. *Id.*

Members could not agree on the three key issues ("the triangle of issues"): agricultural domestic support, agricultural market access, and non-agricultural market access (NAMA).[95] Director-General of the WTO at the time, Pascal Lamy, described the impasse: "the gap in level of ambition between market access and domestic support remained too wide to bridge. This blockage was such that the discussion did not even move on to the third leg of the triangle—market access in NAMA."[96] The strong political interests associated with agricultural domestic support in the United States and the EU limited their options and created a substantial difficulty in making any breakthrough on these issues.[97] A number of Members also diverted their attention and resources to bilateral and regional trade deals, which further weakened focus on the Doha negotiations.[98]

Despite the impasse, visible outcomes were produced in the 2013 Bali Ministerial and the subsequent 2015 Nairobi Ministerial in the form of Ministerial Decisions. These include the Agreement on Trade Facilitation,[99] facilitating food security in developing countries,[100] special safeguard mechanism for developing countries,[101] cotton trade (prohibiting export subsidies and calling for a further

95. Chairman's Introductory Remarks, Informal TNC meeting at the level of Head of Delegation, WORLD TRADE ORG. (July 27, 2006), https://www.wto.org/english/news_e/news06_e/tnc_dg_stat_28march06_e.htm [https://perma.cc/BLP5-422D].

96. *Id*.

97. *See* Daniella Markheim & Brian Riedl, *Farm Subsidies, Free Trade, and the Doha Round*, THE HERITAGE FOUNDATION (Feb. 5, 2007), https://www.heritage.org/budget-and-spending/report/farm-subsidies-free-trade-and-the-doha-round [https://perma.cc/DR94-V56M].

98. LEE, *supra* note 2, at 286.

99. World Trade Organization, Agreement on Trade Facilitation – Ministerial Decision of 7 December 2013, WT/MIN(13)/36, WT/L/911 (2013).

100. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/44, WT/L/979 (2015).

101. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/43, WT/L/978 (2015).

reduction in domestic support and improvements to market access for LDCs),[102] preferential rules of origin for LDCs,[103] and extension of trade preference for LDC trade in services.[104] Most importantly, a decision was issued to eliminate all export subsidies in agriculture.[105] Under this Decision, developed-country Members were required to eliminate their remaining scheduled export subsidy entitlements as of the date of adoption of the Decision, while developing-country Members were required to eliminate such entitlements by the end of 2018.[106]

The 2015 Nairobi Ministerial did not formally declare the end of the Doha Round, but Members disagreed on the continuation of negotiation on the Doha mandate.[107] For the latter reason, some called the Doha Round effectively ended.[108] Members, however, remained committed to continuing negotiations on the remaining Doha issues.[109] Regardless of the formal announcement, the momentum to revive the Doha Round seems to have been lost, and as shown by the outcome of the subsequent Buenos Aires Ministerial

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102. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/46, WT/L/981 (2015).

103. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/47, WT/L/917/Add.1 (2015).

104. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/48, WT/L/982 (2015).

105. World Trade Organization, Export Competition – Ministerial Decision of 19 December 2015, WT/MIN(15)/45, WT/L/980 (2015) [hereinafter Export Competition Declaration].

106. *Id.* paras. 6–7.

107. World Trade Organization, Ministerial Declaration of 19 December, 2015, WT/MIN(15)/DEC (2015).

108. The Editorial Board, *Global Trade After the Failure of the Doha Round*, N.Y. TIMES (Jan. 1, 2016), https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html [https://perma.cc/WF4Q-Y2EP]; The FT View, *The Doha round finally dies a merciful death*, FINANCIAL TIMES (Dec. 21, 2015), https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879 [https://perma.cc/Y7KT-TJTA].

109. Export Competition Declaration, *supra* note 105, para. 1.

without a reference to the DDA.[110] The WTO's inability to conclude its first negotiation round might be viewed as its failure, but the outcome reflects the changing dynamics in the international trading system post neoliberalism. Developing countries, through various coalitions, were able to put forward a difficult development agenda, such as politically sensitive agricultural subsidy issues. They did not prevail over the disagreements of the United States and the EU, resulting in the impasse. However, this stalemate suggested that the challenges developing countries mounted were effective, resulting in partial successes such as the elimination of agricultural export subsidies.[111] The process confirmed that the United States and the EU no longer controlled rule-making in the MTS and could no longer impose the one-size-fits-all, neoliberal approach that had prevailed during the UR.[112]

110. See Eleventh WTO Ministerial Conference, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm [https://perma.cc/D8ER-TYVG].

111. Export Competition Declaration, *supra* note 105, para. 6.

112. The FT View, *supra* note 108 (suggesting that "[a] better approach would be plurilateral pacts among a group of governments, expanding to more countries after their creation and eventually being multilateralised under WTO rules").

II. PROLIFERATION OF BILATERALISM AND REGIONALISM

A. *"Exception" Becomes the Rule*

The proliferation of regional trade agreements (RTAs), including bilateral trade agreements, which aim to remove tariff and non-tariff barriers to trade among the signatories to the RTAs, is a salient feature of the international trading system post neoliberalism. As of January 2020, 303 RTAs were in force, which correspond to 483 notifications from Members, counting goods, services and accessions separately.[113] This is a radical increase from 39 RTAs in force when the UR was completed in 1994.[114] The European Economic Area (EEA), the North America Free Trade Agreement (NAFTA), the ASEAN Free Trade Agreement, and the Southern Common Market (MECOSUR) are some of the largest RTAs in force. Since RTAs provide preferential market access exclusively to their members, they are considered an exception to the general rule in the MTS based on the most-favored-nation (MFN) principle.

The MFN requirement is stipulated in GATT Article I. The Article provides in relevant part:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product

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113. Regional trade agreements, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts [https://perma.cc/2SWC-GSGS]; *see also* Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHICAGO J. INT'L L. 597 (2011) (commenting on the proliferation of RTAs); Gonzalo Villalta Puig and Omiunu Ohiocheoya, *Regional Trade Agreements and the Neo-Colonialism of the United States of America and the European Union: A Review of the Principle of Competitive Imperialism*, 32 LIVERPOOL L. REV. 225 (2011).

114. Regional Trade Agreeements Database, WORLD TRADE ORG., https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx [https://perma.cc/QA67-RTZS].

> originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[115]

The MFN requirement prohibits discriminatory treatment according to the origin of a product, and it is a key legal requirement essential to sustain the MTS. Thus, preferential treatment under RTAs is an important departure from this principle.

The GATT nevertheless authorized the formation of RTAs under qualifying circumstances to accommodate the then-existing preferential trade arrangements among the founding members.[116] The number of RTAs remained relatively small throughout the GATT regime (1948–1994), as illustrated in the following figure.[117] RTAs started to increase substantially since the establishment of the WTO: the number was 39 in 1994, increased to 83 in 2000, and to 214 in 2010.[118]

115. GATT 1947, *supra* note 43, art. I, para. 1.

116. GATT 1947, *supra* note 43, art. XXIV.

117. *See Regional Trade Agreements Database, supra* note 114. The number was under five in the 60s and increased to 9 in 1973 and to 23 in 1986.

118. *Id*.

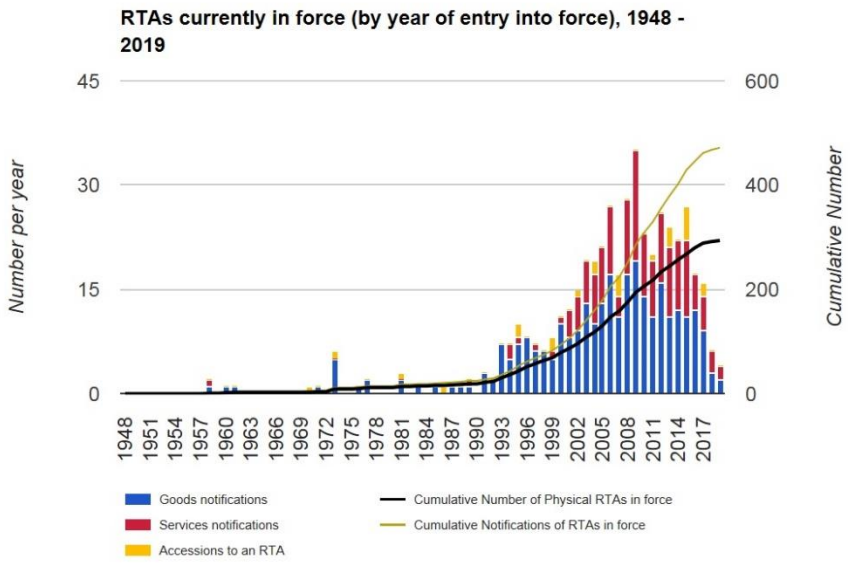

Figure 1: RTAs in Force (1948–2019)[119]

119. *Id.*

As discussed in the preceding Section, the long impasse in the Doha Round has driven Members to focus on RTAs outside the WTO, bilaterally or with a group of other Members sharing stronger trade interests and closer economic, regional, and political ties.[120] As a result, nearly every Member is a part of one or more RTAs,[121] operating both in the MTS under the auspices of the WTO and in one or more preferential RTA regimes. RTAs cover more than half of international trade and comprise the international trading system alongside the MTS,[122] thereby becoming a rule, rather than an exception. The next two Sections discuss the legal requirements for the formation of RTAs and the issues arising from their proliferation.

B. *Formation of Regional Trade Agreements*

1. Regulatory Control

GATT Article XXIV and Article V of the General Agreement on Services (GATS)[123] regulate RTAs for trade in goods and services, respectively. The 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("the Enabling Clause")[124] also regulates preferential trade agreements made among developing countries. The WTO

120. For a list of RTAs in force, see *RTAs in force*, WORLD TRADE ORG., http://rtais.wto.org/UI/PublicAllRTAList.aspx [https://perma.cc/L9B5-4V9U].

121. *Id.* According to the WTO RTA map, all Members but Mauritania joined one or more RTAs as of March 2020. *Participation in Regional Trade Agreements*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm [https://perma.cc/48VX-DG5M].

122. *Regional trade agreements are evolving – why does it matter?*, OECD, http://www.oecd.org/trade/topics/regional-trade-agreements [https://perma.cc/BP46-RKVN].

123. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

124. Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, L/4903 (Nov. 28, 1979), GATT B.I.S.D., at 203 (1980) [hereinafter GATT 1979].

receives notifications, considers individual RTAs, and monitors their operation through the Committee on Regional Trade Agreements (CRTA), established within the WTO General Council for Trade.[125] The CRTA has a mandate to hold discussions on the systemic implications of the agreements for the MTS.[126]

GATT Article XXIV authorizes formation of RTAs in the form of a free trade area and a customs union.[127] The Article provides:

> [T]he provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.[128]

A free trade area created by RTAs liberalizes trade among participating countries, but each participant maintains its own trade policy. For example, each participant sets a separate tariff schedule.[129] A customs union (*e.g.*, the European Union) liberalizes trade internally and also maintains common external trade policies such as a common tariff schedule.[130] GATS Article V also authorizes "an agreement liberalizing trade in services between or among the parties to such an agreement" without a distinction between a free trade area and a customs union.[131]

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125. Regional Trade Agreements: Committee, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/regcom_e.htm [https://perma.cc/X85L-CRRG].; World Trade Organization, Committee on Regional Trade Agreements: Decision of 6 Feb. 1996, WTO Doc. WT/L/127 (1996) [hereinafter CRTA Decision].

126. CRTA Decision, *supra* note 125.

127. GATT 1947, *supra* note 43, art. XXIV, para. 5.

128. *Id.*

129. LEE, *supra* note 2, at 179.

130. *Id.*

131. The distinction between a free trade area and a customs union is absent because trade in service does not involve tariffs. GATS, *supra* note 123, art. V para. 1. The Article provides, "This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade

The Enabling Clause also authorizes Members to accord differential and more favorable treatment to developing countries with respect to preferential trade agreements concluded among developing countries.[132]

2. "Substantially All Trade"

The approval of RTAs is predicated on trade liberalization. Thus, Article XXIV sets a regulatory threshold for the approval of RTAs: for trade in goods, "substantially all trade" must be liberalized (*i.e.*, elimination of duties and other restrictive regulations of commerce).[133] For trade in services, there must be "substantial sectoral coverage," and "substantially all discrimination" must be absent or eliminated in the covered sectors.[134] Neither GATT Article XXIV nor GATS Article V requires "complete" trade liberalization for the approval of an RTA. In *Turkey – Restrictions on Imports of Textile and Clothing Products,*[135] the Appellate Body noted the absence of an agreement on the interpretation of the term "substantially" in GATT Article XXIV.[136] According to the Appellate Body, the term, "substantially all the trade" is not the same as "all the trade," but considerably more than merely some of the trade.[137] This requires a degree of qualitative assessment, and it will not be impossible to assign numerical guidelines such as a percentage of trade in terms of quantity or value. This provides Members negotiating RTAs with some discretion as to the extent of trade liberalization.

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in services between or among the parties to such an agreement . . . ." *Id.*

132. GATT 1979, *supra* note 124, para. 2(c).

133. GATT 1947, *supra* note 43, art. XXIV, para. 8.

134. GATS, *supra* note 123, art. V, para. 1.

135. Appellate Body Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WTO Doc. WT/DS34/AB/R (Oct. 22, 1999) [hereinafter Turkey - Textiles].

136. *Id.* para. 48.

137. *Id.*

The Appellate Body also found that the term "substantially all the trade" has both qualitative and quantitative components.[138] For example, the qualitative component suggests that RTAs that completely exclude a sector, such as agriculture, may not meet this requirement even if the quantity of trade in the excluded section may only be small compared to the all trade covered by the RTA.[139] According to the Understanding on the Interpretation of Article XXIV, this requirement is not applied to RTAs between developing countries approved under the Enabling Clause.[140] Thus, developing countries may pursue partial trade liberalization under this scheme.

3. "Shall Not Be On the Whole Higher or More Restrictive Than Before"

Article XXIV authorizes preferential trade arrangements under RTAs, but does not authorize exclusive trade blocks as seen in the 1930s.[141] To prevent the formation of exclusive and discriminatory trade blocks, Article XXIV imposes a condition for the authorization of RTAs that "the duties and other regulations of commerce imposed . . . shall not on the whole be higher or more restrictive than the

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138. *Id.* para. 49.

139. Some RTAs excluded agricultural sector altogether. The WTO Secretariat issued a report in 1998 in which it "examined 69 FTAs and RTAs and stated that 54 FTA agreements excluded some agricultural products and, in 2 FTA agreements, all of agricultural products were excluded." Mitsuo Matsushita & Yong-Shik Lee, *Proliferation of Free Trade Agreements and Some Systemic Issues - In Relation to the WTO Disciplines and Development Perspectives*, 1 L. & DEV. REV. 23, 32 (2008) (citing Committee on Regional Trade Agreements, *Background Note by the Secretariat: Inventory of Non-Tariff Provisions in Regional Trade Agreements*, WTO Doc. WT/REG/W/26 (May 5, 1998)). However, no examination report by the Committee on Regional Trade Agreements had been adopted due to a lack of consensus. ANALYTICAL INDEX, *supra* note 48, at 814.

140. GATT 1979, *supra* note 124, para. 2(c).

141. Such trade blocks provided trade preferences to the participants and raised trade barriers such as higher tariffs to the countries outside the blocks, worsening the global economic recession. LEE, *supra* note 2, at 180.

general incidence of the duties and regulations of commerce . . . prior to the formation."[142]

Article XXIV does not define what constitutes "higher or more restrictive" duties and other regulations of commerce. The Understanding on Interpretations of Article XXIV of the GATT provides a guide in the case of tariffs: the weighted average rate should be used to determine the restrictiveness for the formation of a customs union.[143] With respect to "other regulations of commerce," it would be difficult to quantify and aggregate the regulations of commerce other than tariffs for the purpose of comparison. Thus, individual measures and regulations must be assessed on a case-by-case basis.[144] It is debatable whether rules of origin are "other regulations of commerce" under Article XXIV.[145] According to an argument, rules of origin are merely a means to decide the place of origin for a product to determine whether the product benefits from the preferential treatment of RTA, but not a trade restriction.[146] An opposing viewpoint states that rules of origin operate as a *de facto* trade restriction even if they are not a trade restriction *per se*.[147] In the UR, negotiators addressed this issue but did not reach an agreement.[148]

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142. GATT 1947, *supra* note 43, art. XXIV, para 5.

143. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 219, para. 2.

144. *Turkey - Textiles*, *supra* note 135, para. 54. According to *Turkey – Textiles*, an economic test should be performed to assess "trade restrictiveness." *Id.* para. 55.

145. Matsushita & Lee, *supra* note 139, at 33–34.

146. Committee on Regional Trade Agreements, Examination of the North American Free Trade Agreement: Note on the Meeting of 30 July 1996, WTO Doc. WT/REG4/M/2 (Feb. 21, 1997).

147. Matsushita & Lee, *supra* note 139, at 34.

148. Committee on Regional Trade Agreements, Background Note by the Secretariat: Systemic Issues Relating to "Other Regulations of Commerce", WTO Doc. WT/REG/W/17, para. 9 (Oct. 31, 1997).

C. *Implications for the Multilateral Trading System*

1. Fragmentation of Trade Disciplines

RTAs created in accordance with the requirements of Article XXIV appear to be compatible with the objective of the MTS, because they do not raise trade barriers *vis-à-vis* non-RTA members. However, this does not remove the inherent exclusivity of trade preferences afforded by RTAs and still affects the trade of non-member countries adversely. For example, suppose that country A and country B are both subject to a tariff rate of 10 percent *ad valorem* on the export of their smartphones to country C under the MFN requirement. Suppose also that country A and country C form an RTA and liberalize trade between them, and country B is not a member of this RTA. After the conclusion of the RTA, which eliminates the 10 percent tariff on smartphones traded between country A and country C, the smartphone exporters of country B will be disadvantaged *vis-à-vis* the smartphone exporters from country A because their smartphone exports remain subject to the 10 percent tariff rate while no tariff is applied to the smartphones exported from country A as a result of the RTA.

The disadvantage to the non-RTA members would be greater where RTAs also reduce non-tariff barriers ("NTBs"). NTBs, such as technical barriers to trade including product safety and sanitary requirements, have become more important, as multilateral trade negotiations have reduced tariffs have across the board.[149] RTAs may reduce NTBs and enhance trade between the members by including terms to facilitate mutual cooperation of the technical standards and product safety requirements.[150] RTAs may also remove or

149. Doha Declaration, *supra* note 79.

150. For example, Article 9 of the Free Trade Agreement between the United States of America and the Republic of Korea (US – Korea FTA) mandates such cooperation. *See* The United States – Korea Free Trade Agreement, S. Kor.-U.S., art. 9, Dec. 3, 2010, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [https://perma.cc/H59G-FW7B].

reduce trade remedy measures. Some RTAs, including the Canada-Chile Free Trade Agreement, abolish trade remedy measures such as anti-dumping measures. These preferences will benefit the exporters of the member countries in the exclusion of the non-members. The reduction or removal of trade barriers also applies to trade in services where the service sectors are covered by the RTA. RTAs set a preferred regulatory regime for the benefit of the member countries to the exclusion of the non-members, leading to fragmentation of trade disciplines.

RTAs also set forth trade disciplines beyond NTBs. These disciplines include separate rules of origin,[151] rules for international investment and intellectual property rights, and separate dispute settlement procedures. These RTAs rules may vary from the WTO provisions covering the relevant areas. As a result, their proliferations add complexity and confusion to the international trading system, which runs counter to the objective of the MTS.[152] Large RTAs create substantial overlaps in membership among Members. [153] As a result, multiple RTAs are applied to trade between identical members, causing a considerable regulatory burden on the customs at borders that have to

151. It is subject to argument that the rules of origin must be included among NTBs, in which case the discussion of NTBs should be placed in the preceding paragraph. *See* discussion *supra* Section II.B.

152. The preamble of the WTO Agreement sets out the objectives. It states in relevant part, WTO Members are "desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." *See* WTO Agreement, *supra* note 1, pmbl.; *see also* Adrian Johnston & Michael Trebilcock, *Fragmentation in International Trade Law: Insights from the Global Investment Regime*, 12 WORLD TRADE REV. 621, 621 (2013).

153. Yong Shik Lee & Kwangkug Kim, *Tripartite Free Trade Agreement among China, Korea, and Japan: A Step Towards Economic Integration in Northeast Asia?*, *in* REGIONAL COOPERATION AND FREE TRADE AGREEMENTS IN ASIA 129 (Jiaxiang Hu & M. Vanhullebusch eds., 2014).

process imports under the terms of multiple RTAs and those engaged in trade who have to understand those terms.[154]

The complexity and confusion caused by the proliferation of RTAs add to the transaction cost, which is not conducive to the expansion of trade. The following figure illustrates how complex the fragmentations could be with multiple and overlapping RTAs applying to trade.

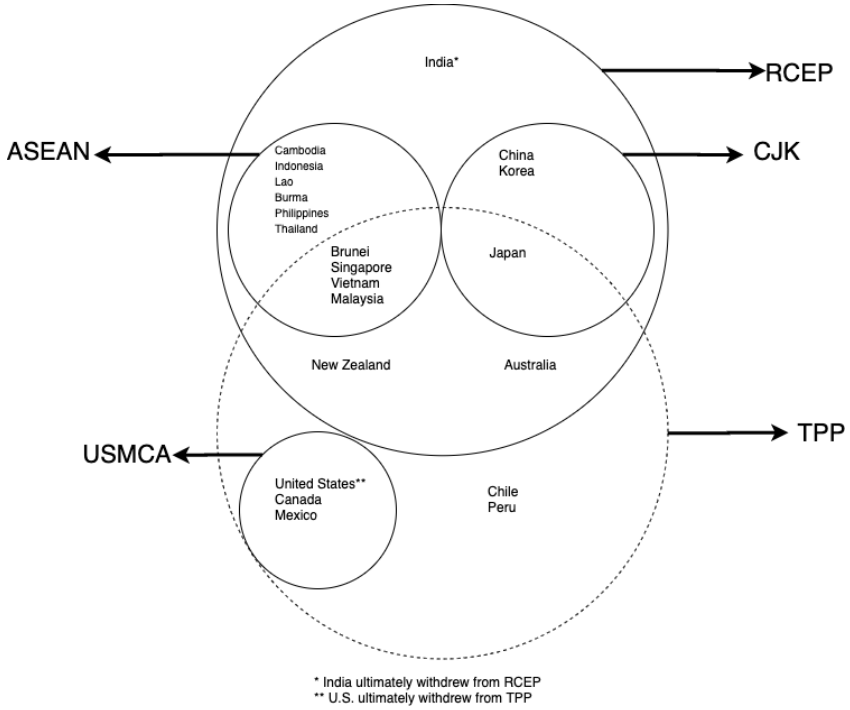

Figure 2: RTAs in force and negotiation (2020)[155]

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154. For this, Professor Matsushita argues the necessity of an "FTA network" in which FTA officials are frequently convened and discuss trade rules and other matters with the view to convergence. *See* Mitsuo Matsushita, *View on Future Roles of The WTO: Should There be More Soft Law in The WTO*, 17 J. INT'L ECON. L. 701, 701 (2014).

155. *ASEAN Member States*, ASS'N OF SOUTHEAST ASIAN NATIONS, https://asean.org/asean/asean-member-states/ (last visited Apr. 7, 2020) (listing the members of ASEAN); Yen Nee Lee, *The world's largest trade deal could be signed in 2020 – and the U.S. isn't in it*, CNBC (Nov. 12, 2019), https://www.cnbc.com/2019/11/12/what-is-rcep-asia-pacific-trade-deal-slated-to-be-worlds-largest-

2. Weakening of the MTS

The long impasse of the Doha Round and the inability of the WTO to conclude the Round have raised questions about the future of the WTO in at least two of its key areas: multilateral trade negotiations and setting trade rules. [156] The significant difference in the Members' positions on the key issues, such as agricultural subsidies, caused deadlock in the Doha negotiation process.[157] In addition, the proliferation of RTAs affected negotiations in the Doha Round, because Members—by focusing on RTAs—diverted manpower and resources available for trade negotiations from the Doha Round to a number of RTAs.[158] The RTA drive by major Members like the United States weakened the momentum for continuing the Doha Round. The proliferation of RTAs and increased Member participation in RTAs had adverse ramifications for the Doha Round and the MTS.

The WTO may have become a victim of its own success. With its current membership of 164 countries, each with an equal vote, the institution may have reached a point where another successful "round" of negotiations has become very difficult due to the vast divergence in interests and priorities among many Members, each with vastly different economic

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fta.html (listing the members of RCEP and noting that India ultimately withdrew); James McBride & Andrew Chatzky, *What Is the Trans-Pacific Partnership?*, COUNCIL ON FOREIGN REL. (Jan. 4, 2019), https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp (listing the members of TPP and noting the U.S. ultimately withdrew); Chris Buckley & Terril Yue Jones, *East Asian powes set to push trade pact talks*, Reuters (May 12, 2012), https://www.reuters.com/article/us-china-summit/east-asian-powers-set-to-push-trade-pact-talks-idUSBRE84C00V20120513 (discussing the negotiations for the China-Japan-South Korea Free Trade Agreement); *USMCA*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/usmca (last visited Apr. 7, 2020) (listing the members of USMCA).

156. *See* discussion *supra* Section I.C.

157. *See supra* Section I.C.

158. By November 2015, the United States had been engaged in the negotiations of 12 RTAs, European Union in 31 RTAs, and Canada, Japan, and South Korea in 14, 17, and 14 RTAs, respectively, since 2001. *See Regional Trade Agreements*, *supra* note 113.

and trade capacities and political influence. Therefore, RTAs among a smaller group of countries sharing a set of common interests and priorities might be a more feasible means to develop trade relations.[159] This explains the proliferation of RTAs during the Doha Round, which may well be a natural course of development. Nonetheless, RTAs do not replace the MTS,[160] because RTAs, including mega RTAs such as EU, NAFTA, MERCOSUR, and ASEAN, are not designed to accommodate the divergent interests and priorities of trading nations on a global scale. The Members addressed this point at the Nairobi Ministerial and reaffirmed "the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral trading system."[161] The proliferation of RTAs may have weakened the MTS, but most of the Members are not willing to discard the latter for RTAs.[162]

159. A study examined the impact of the Doha Round impasses on the proliferation of RTAs. *See* Stephen W. Hartman, *The WTO, the Doha Round Impasse, PTAs, and FTAs/RTAs*, 27 INT'L TRADE J. 411 (2013).

160. Director-General Roberto Azevêdo noted that bilateral and regional trade agreements have been "growing rapidly" but stressed that "there are many big issues which can only be tackled in an efficient manner in the multilateral context through the WTO." *See Regional initiatives cannot substitute for the multilateral trading system—Azevêdo*, WORLD TRADE ORG. (Mar. 24, 2015), https ://www.wto.org/english/news_e/spra_e/spra50_e.htm (last visited Mar. 14, 2020).

161. World Trade Organization, Ministerial Declaration of 19 December, 2015, WT/MIN(15)/DEC (2015).

162. *Id.*

III. PROTECTIONISM FROM THE UNITED STATES

A. *Trade Protectionism under the Trump Administration*

This Part examines the third development in international trade law and practice post neoliberalism: the new trade protectionism from the United States under the Trump administration. The election of Donald Trump as the forty-fifth President of the United States marked a new era for U.S. trade policy. Shortly after taking office in 2017, he discarded his predecessor's outward and engaging trade policy, including the Trans Pacific Partnership (TPP) Agreement, and made a swift policy change toward protectionism.[163] He argued that his protectionist trade policy would bring back jobs and more income for working people in the United States. Trade protection through tariff hikes and other means would raise the prices of imported products and reduce their quantities, thereby improving the competitiveness of domestic products in the domestic market. This, in turn, would create more jobs and income for workers in the United States.[164]

President Trump's argument may appear plausible, but a deeper examination points to a very different outcome. Even if foreign and domestic businesses were to set up more manufacturing facilities in the United States to avoid high tariffs, such policy is unlikely to create more jobs and income for domestic workers. If manufacturers were compelled to produce in the United States, hiring American workers and paying higher wages than they would elsewhere, they would try to reduce employment by adopting labor-saving, automated production processes. This policy will not increase employment over time. Trade protection also instigates retaliation from abroad, as witnessed in the aftermath of the

163. John King & Jeremy Diamond, *Trump team floats a 10% tariff on imports*, CNN (Dec. 22, 2016), http://www.cnn.com/2016/12/21/politics/donald-trump-tariffs/ [https://perma.cc/937E-A6GB].

164. *Id.*

steel and aluminum tariffs.[165] Such retaliation would reduce U.S. exports and cause job losses in the export industries. Therefore, the more likely policy outcome from trade protection is the rise of consumer prices on account of the higher tariffs on imported products, without corresponding increases in jobs and income. [166]

Notwithstanding the expected adverse policy outcome,[167] the new administration proceeded to implement the protectionist trade policy. The administration withdrew from the TPP Agreement that previous administrations strived to conclude for a decade, demanded re-negotiation of major trade agreements such as U.S. – Korea Free Trade Agreement and North American Free Trade Agreement, escalated a trade war with China, and adopted sweeping steel and aluminum tariffs on an unprecedented scale. The adoption of tariffs itself does not necessarily mean a change of trade policy toward protectionism; the previous administrations also adopted them through trade measures authorized by the WTO such as anti-dumping measures, countervailing measures, and safeguard measures. However, as discussed in the following two Sections, the trade measures adopted by the Trump administration are unprecedented to the point that the use of the term "protectionism" is warranted.

The United States remains the world's largest economy and trader, and its trade policy has a significant impact on the world economy and international trade. Thus, the policy shift toward protectionism has raised substantial concerns around the world[168] and requires examination. The following Sections discuss two incidents that reflect the U.S. trade

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165. *See infra* note 242.

166. Lee, *supra* note 24, at 230–31.

167. *Id.*

168. *See, e.g.*, James Politi, *A WTO warning for Donald Trump*, FINANCIAL TIMES (Apr. 8, 2019), https://www.ft.com/content/5ff5538c-5a0d-11e9-9dde-7aedca0a081a [https://perma.cc/WQF9-KS2U].

policy. The first incident discussed is the recent trade war with China and its ramifications for the MTS, which began with the imposition of tariffs by the Trump administration. The second is the adoption of steel and aluminum tariffs by the United States for the alleged protection of its national security.

B. *Trade War with China*

On July 6, 2018 and August 23, 2018, the United States imposed 25 percent tariffs *ad valorem* on US $34 billion worth of imports from China (818 tariff subheadings) and again on US $16 billion (279 tariff subheadings), respectively.[169] Prior to this imposition, the Office of the United States Trade Representative (USTR) initiated an investigation into certain acts, policies, and practices of China related to technology transfer, intellectual property, and innovation under Section 301 of the Trade Act of 1974 (Section 301).[170] Section 301 authorizes the U.S. government to adopt trade measures if the acts, policies, and practices (of the foreign government) covered in the investigation are unreasonable or discriminatory and if they burden or restrict U.S. commerce.[171] However, the WTO-consistency of Section 301 action is questionable when it is taken without approval under the terms of WTO disciplines.[172]

169. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28,710 (June 20, 2018); Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40,823 (Aug. 16, 2018).

170. Trade Act of 1974, 19 U.S.C. § 2411 (2012).

171. 19 U.S.C. § 2411(b).

172. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

Under sections 301(b) and 304(a) of the Trade Act,[173] the USTR made the following determinations: (i) China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from U.S. companies; (ii) China's regime of technology regulations forces U.S. companies seeking to license technologies to Chinese entities to do so on non-market based terms that favor Chinese recipients; (iii) China directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies; (iv) China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies to access their sensitive commercial information and trade secrets.[174] The President subsequently authorized the increased tariffs on this determination.[175]

China's practice in intellectual property rights (IPRs) and its industrial policy to support strategic industries, such as "Made in China 2025," were direct causes of the U.S. action. The United States argued that it raised concerns on IPR issues repeatedly with China, but China was unwilling to offer meaningful modifications to its unfair practices.[176] A

173. 19 U.S.C. §§ 2411(b), 2414(a).

174. Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14,906, 14,907 (Apr. 16, 2018).

175. On the grounds of (i), (iii), and (iv) in the determination, the United States chose to file a complaint with the WTO on the technology licensing regulations. *See* Request for Consultations by the United States, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1, IP/D/38 (Mar. 26, 2018).

176. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974, 47,975 (Sep. 21, 2018).

USTR report also states that trade analysts from several U.S. government agencies identified products that benefit from Chinese industrial policies, including Made in China 2025, indicating that the U.S. measures were, at least in part, motivated to check against China's industrial drive.[177] China defended its policies and objected to the U.S. tariffs, imposing approximately US $50 billion of retaliatory tariffs on imports from the United States.[178] The United States responded and escalated the situation by imposing additional tariffs on the unprecedented US $200 billion worth of imports from China (5,745 full and partial tariff subheadings) at 10 percent *ad valorem* on September 24, 2018, to be increased to 25 percent *ad valorem* on January 1, 2019.[179] Talks ensued between the two countries, leading to an agreed outcome that suspended tariff hikes.[180]

The U.S. concerns about China's IPR practice and its industrial policy have some legitimate grounds.[181] Indeed, other WTO Members such as the EU have also raised concerns about China's IPR practice.[182] Nonetheless, the unilateral action by the United States under Section 301 is not consistent with WTO legal disciplines. Article 23.2 of the Dispute Settlement Understanding (DSU) provides in relevant part:

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177. Notice of Determination, 83 Fed. Reg. at 14,907.

178. Notice of Modification, 83 Fed. Reg. at 47,974.

179. *Id.*

180. Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, U.S.-China, Jan. 15, 2020, https://assets.documentcloud.org/documents/6656794/USTR-Economic-and-Trade-Agreement-Between-the.pdf [https://perma.cc/QDS9-ED7M].

181. *Id.*

182. *See* Request for Consultations by the European Union, *China - Certain Measures on the Transfer of Technology*, WTO Doc. WT/DS549/1, G/L/1244, IP/D/39 (June 6, 2018).

> 2. Members shall:
>
> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
>
> . . .
>
> (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.[183]

Article 23.2 prohibits unilateral trade measures in response to the perceived breach of WTO obligations. On a dispute concerning Section 301, the previous WTO dispute settlement panel also held that taking unilateral actions against other WTO member countries without first securing approval under the terms of the DSU would be inconsistent with the WTO disciplines. [184] The prior U.S. administrations have refrained from adopting unilateral trade measures under Section 301, and their revival on such an unprecedented scale signals the new U.S. trade protectionism.

C. *U.S. Steel and Aluminum Tariffs*

On March 23, 2018, the United States imposed 25 percent and 10 percent increases in tariffs on all imported steel and iron products and all entries of aluminum products respectively, affecting $29 billion of steel trade and $17

183. DSU, *supra* note 172, art. 23, para. 2.

184. Panel Report, United States – Sections 301-310 of The Trade Act of 1974, WT/DS152/R (adopted Jan. 27, 2000).

billion of aluminum trade.[185] The U.S. steel and aluminum tariffs are unprecedented in scale (in the amount of affected trade in the covered product categories) and unusual in the rationale—the protection of national security—which has rarely been invoked for trade measures. Prior to the implementation, the Department of Commerce investigated the national security effect of imports of steel and aluminum products under Section 232 of the Trade Expansion Act of 1962,[186] and submitted final reports by January of 2018.[187] The reports underscored that steel and aluminum are essential to U.S. national security and that increased imports had weakened domestic industries producing these products.[188] They concluded that the measures to reduce imports of these steel and aluminum products were necessary to strengthen domestic steel and aluminum industries that are essential to national security.[189]

The unprecedented U.S. measures led to strong criticism from major steel and aluminum exporters around the world. Several Members, including the EU, China, Japan, Mexico, Canada, India, Norway, Russia, Switzerland, and Turkey, filed complaints with the WTO.[190] These Members disagreed that the U.S. measures were necessary to protect national

185. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018); Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 15, 2018).

186. As amended, 19 U.S.C. § 1862.

187. U.S. Dep't of Commerce, The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, As Amended (2018) [hereinafter Steel Report]; U.S. Dep't of Commerce, The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, As Amended (2018) [hereinafter Aluminum Report].

188. Steel Report, *supra* note 187, at 2; Aluminum Report, *supra* note 187, at 2.

189. Steel Report, *supra* note 187, at 2; Aluminum Report, *supra* note 187, at 2.

190. *See Panels established to review US steel and aluminum tariffs, countermeasures on US imports*, WORLD TRADE ORG. (Nov. 21, 2018), https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm [https://perma.cc/2LCF-EQEW].

security concerns and concluded that the tariffs are a disguised trade protection inconsistent with WTO disciplines.[191] There is history that supports this view. The United States has attempted to protect its declining domestic steel and aluminum industries for decades by adopting multiple trade measures, including a number of anti-dumping measures.[192] Thus, Members did not give credence to the national security argument that the United States raised to justify the steel and aluminum tariffs and considered it another pretext for the protection of domestic industries for a commercial purpose.[193]

Regardless of the U.S. motive, GATT Article XXI authorizes the application of a measure that a Member "considers necessary for the protection of its essential security interests." [194] However, the scope of the national security interests defined by the U.S. government does not seem to be compatible with the requirement of the Article. While Article XXI does not define "essential security interests," the Article limits the scope of these interests to those (i) relating to fissionable materials or the materials; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; and (iii) taken in time of war or other emergency in international relations. [195]

Notwithstanding the limitations in Article XXI, the U.S. authorities defined the scope of the national security interests too broadly. The Department of Commerce

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191. *Id.*

192. For the imposition of anti-dumping measures, see Anti-dumping Sectoral Distribution of Measures: By Reporting Member 01/01/1995 – 30/06/2019, WORLD TRADE ORG. https://www.wto.org/english/tratop_e/adp_e/AD_Sectoral_Measures ByRepMem.pdf [https://perma.cc/T86B-RX5J].

193. *See supra* note 190 and accompanying text (discussing the grounds for their complaints).

194. GATT 1947, *supra* note 43, art. XXI.

195. GATT 1947, *supra* note 43, art. XXI(b).

investigation reports identify the essential security interests as "national defense" and "critical infrastructure."[196] The measures required for national defense are likely justified under Article XXI. However, there is a question about the necessity to cover infrastructure needs under the essential national security, particularly when the needs are as broad and diverse as listed in the reports. The reports include all sorts of items, such as "chemical production, communications, dams, energy, food production, nuclear reactors, transportation systems, water, and waste water systems" (in the steel report),[197] as well as "[e]lectric power transmission and distribution . . . [a]ircraft, automobiles, railroad freight cars, boats, ships, trains, trucks, trailers, wheels . . . [c]abinets, cans, foils, storage bins, storage tanks . . . [b]ridges, structural supports, conduit, piping, siding, doors, windows, wiring . . . [m]achinery, stampings, castings, forgings, product components, consumer goods, heating and cooling devices, and utility lighting fixtures" (in the aluminum report).[198]

The reports do not justify the inclusion of such a broad range of items, including a variety of transportation devices and all components of construction, as relevant to the essential national security interests. If Members were allowed to include items of everyday use without particular security connotations (*e.g.*, windows, cabinets, consumer goods) for the purpose of national security protection under Article XXI, they could use Article XXI to justify trade measures on every conceivable product, such as automobiles (another key product that has been investigated under Section 232), semiconductors, ships, and many others, citing their protection as somehow necessary to protect national security interests. If Members could invoke Article XXI for

196. Steel Report, *supra* note 187, at 23; Aluminum Report, *supra* note 187, at 24, 36.

197. Steel Report, *supra* note 187, at 23–24.

198. Aluminum Report, *supra* note 187, at 24.

the protection of any product for its feeble connection to "essential security interests"—as defined by the Member—the MTS will not be sustainable. The United States argued that the issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement,[199] but a recent WTO panel held that the WTO has jurisdiction to review issues arising under Article XXI.[200] The unprecedented steel and aluminum tariffs that are unlikely WTO-compliant represent new trade protectionism from the United States.

199. *See* Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/13 (June 11, 2018).

200. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R, paras. 7.53–7.58 (adopted Apr. 5, 2019) (asserting that the panel has jurisdiction to review Article XXI matters).

IV. CALL FOR REGULATORY REFORM

The preceding Parts discussed the issues of international trade law post neoliberalism, including the development deficits, the proliferation of bilateralism and regionalism, and trade protectionism from the United States. Building on this discussion, this final Part proposes possible regulatory reforms to address the identified problems in the current trade disciplines.

A. *Remedying Development Deficits*

The UR, which adopted the neoliberal "one-size-fits-all" approach, produced the rules of international law that exhibit the development deficits.[201] The current S&D treatment has proved to be inadequate to meet the development interests of developing countries,[202] and some of the key provisions, such as the SCM Agreement, deprive developing countries of the ability to adopt effective development policies proven in successful development cases.[203] The following discussion introduces proposals to remedy development deficits in the current disciplines.

1. Development-Facilitating Tariff (DFT)

The current WTO disciplines create difficulties for developing countries in need of a flexible tariff schedule to facilitate domestic industries. GATT Article II provides:

> (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or

201. *See* discussion *supra* Section I.A.

202. *See* discussion *supra* Section I.A.

203. *See* discussion *supra* Section I.A.

> qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.[204]

The principle of binding concessions under Article II provides essential stability for the international trading system. However, it also restricts the ability of developing countries to adopt tariff measures above the maximum binding rates to promote domestic industries for development purposes. Notwithstanding the controversy regarding the effectiveness of the tariff protection as means of facilitating domestic industries and fostering economic development, provisions of the GATT such as Article XVIII approve measures for this purpose.

Article XVIII, as discussed above,[205] has certain limits: it requires developing countries to conduct negotiations with other interested Members and offer compensation in the form of trade concessions (*e.g.*, lowering tariff rates).[206] Such negotiations may take a considerable amount of time and cause delays in implementing necessary measures for development purposes.[207] The required compensation may also burden the developing countries facing economic constraints, which would contradict their development interests. This multilateral scrutiny (*i.e.*, negotiation and compensation requirement) embedded in Article XVIII diminishes its effectiveness as a tool for development; Members have never invoked Article XVIII since the beginning of the WTO, except to address balance of payment issues.[208] This calls for regulatory adjustment to improve its

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204. GATT 1947, *supra* note 43, art. II, paras. 1(a)–(b).

205. *See* discussion *supra* Section I.A.

206. GATT 1947, *supra* note 43, art. XVIII, para. 7.

207. *See* discussion *supra* Section I.A.

208. ANALYTICAL INDEX, *supra* note 48, at 501 (citing a few cases of Article

use.

To remedy this problem, the "Development-Facilitation Tariff" or "DFT" has been proposed.[209] The DFT scheme sets the maximum additional tariff rate above the tariff binding under Article II for the purpose of assisting with the facilitation of domestic industries.[210] Different maximum DFT rates are to be assigned to individual developing countries on a sliding scale in accordance with its level of economic development, measured by relevant economic indicators such as per-capita gross national income (GNI) figures.[211] For example, suppose that the maximum DFT rate is set at 100 percent over the tariff binding, and the threshold for an eligible developing country to benefit from a DFT is US $8,000 per capita GNI. In that case, countries with a higher per-capita income than US $8,000 will not be eligible for a DFT. Country A with the per capita GNI of US $2,000, which is 25 percent of the threshold income, will be allowed to apply a DFT of 75 percent (100 percent x (100 percent – 25 percent) = 75 percent). County B with the per capita GNI of US $6,000, which is 75 percent of the threshold income, will be allowed to apply a DFT of 25 percent (100 percent x (100 percent – 75 percent) = 25 percent). The DFT scheme does not impose negotiation and compensation requirements on developing countries to improve its use. In lieu of these requirements, the DFT scheme introduces a series of procedural safeguards, including a public hearing, notice, a report setting forth rationales for the proposed increase in tariffs, and gradual liberalization and

XVIII invocations).

209. Yong-Shik Lee, Facilitating Development in the World Trading System—A Proposal for Development Facilitation Tariff and Development Facilitation Subsidy, 38 J. WORLD TRADE 935, 942–48 (2004); see also Yong-Shik Lee, WTO Disciplines and Economic Development: A Reform Proposal, 1 J. INT'L & COMP. L. 293, 300–01 (2014); Yong-Shik Lee, The Long and Winding Road – Path Towards Facilitation of Development in the WTO: Reflections on the Doha Round and Beyond, 9 L. DEV. REV. 437, 450–51 (2016).

210. Lee, The Long and Winding Road, supra note 209, at 450.

211. *Id*.

elimination of the DFT after a set period of time, to reduce the possibility of abuse.[212]

2. Development-Facilitating Subsidy (DFS)

Government subsidies are an important tool for economic development, as recognized in the SCM Agreement.[213] However, the SCM Agreement prohibits key trade-related subsidies, such as export subsidies and import-substitution subsidies.[214] Other subsidies that affect the trade of other Members adversely are also made "actionable," *i.e.*, subject to trade sanctions including countervailing measures under the SCM Agreement.[215] As Dani Rodrik has explained, the current trade rules have made "a significant dent in the ability of developing countries to employ intelligently-designed industrial policies."[216]

The historical accounts demonstrate that subsidies have played an important role in the economic development of today's developed countries.[217] Thus, it stands to reason that developing countries should be accorded an option to adopt necessary subsidies without the risk of retaliation or rule breach. The concept of the sliding income scale, adopted in the DFT, can also be applied to authorize subsidies that are otherwise prohibited or actionable under the current SCM Agreement. The "Development-Facilitation Subsidy" ("DFS")

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212. *See, e.g.*, SA, *supra* note 42, arts. 3, 7, 12.

213. *See supra* note 62 and accompanying text (discussing the SCM provision that recognizes the role).

214. SCM Agreement, *supra* note 9, art. 3.

215. *Id.* arts. 5–7.

216. Rodrik, *supra* note 19, at 34–35.

217. *See* CHANG, *supra* note 18, at 19–21. For instance, the United Kingdom provided extensive export subsidies to textile products in the eighteenth century. *Id.* at 21–22. The United States offered subsidies to railway companies in the nineteenth century and invested heavily in research and development of new technologies. *Id.* at 30–31. Germany also subsidized a number of industries, including textiles and metals. *Id.* at 33–34. Other developed countries today, including France, the Netherlands, Sweden, Japan, and the East Asian countries (NICs) all provided subsidies to promote their industries. *Id.* at 35–51.

can be introduced for the benefit of developing countries under certain per-capita income thresholds as in the DFT.[218] The DFS scheme allows developing countries to adopt the currently prohibited or actionable subsidies in accordance with their per-capita income status.[219] For example, if the income threshold is US $8,000 and a developing country's GNI per capita is US $6,000, which is 75 percent of the income threshold, the country is authorized to adopt a subsidy equivalent to 25 percent (100 percent – 75 percent) of the product value.

The DFS cannot be used to support exports from developing countries that are already competitive in export industries whose share in the export market is above pre-set thresholds, since the objective of the DFS is to promote economic development through export facilitation. Further, developing countries that are already competitive in the export market of the concerned product would not need this subsidy for export facilitation. For example, if the threshold export market share is 10 percent, a developing country Member that takes up 15 percent of the export market will not be eligible to adopt the DFS in the corresponding product category. If a developing country's export market share is 5 percent, the country may adopt the DFS, according to the income scale, until it reaches the threshold market share but not after. The procedural requirements to prevent abuse, such as those listed for the DFT (*e.g.*, a public hearing, notice, a report setting forth rationales for the proposed increase in tariffs, and gradual liberalization and elimination of the DFT after a set period of time), are also applicable to the DFS scheme.

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218. Lee, *Facilitating Development*, *supra* note 209, at 948–53; Lee, *WTO Disciplines*, *supra* note 209, at 301–02; Lee, *The Long and Winding Road*, *supra* note 209, at 451–52.

219. Lee, *The Long and Winding Road*, *supra* note 209, at 459.

3. Reforming Administered Protection

The preceding discussion has identified anti-dumping measures and countervailing measures as adverse to the development interests of developing countries.[220] The problems with countervailing measures will be reduced with the introduction of the DFS, as these measures will not be applicable against the DFS. However, the issues with anti-dumping measures remain and need to be addressed. As discussed earlier, anti-dumping measures are applicable when imports are "dumped," *i.e.*, sold at prices below normal value.[221] The normal value is determined by comparison to the home price or, where a proper comparison cannot be made due to the market situation or a low sales volume in the domestic market, to an export price in a third country.[222] The normal value can also be "constructed" with costs and reasonable profits.[223] This flexibility accords the importing country a degree of latitude in anti-dumping determination.

For example, there may be multiple home market prices to compare, and the determination of a reference home price will require a complex calculation of an adjusted average.[224] Where an investigator has to make a comparison to an export price in a third country, there may exist substantially different, multiple prices. Where an investigator has to "construct" a normal value, the outcome may vary depending on the specific methodology that the investigator chooses to adopt to calculate costs and "reasonable profit," the measure of which can also vary.[225] Considering the flexibility enjoyed by investigators, national investigating authorities virtually have a free hand to determine the existence of dumping and the dumping margin. The DDA included limited reform proposals, including clarifying and improving disciplines

220. *See* discussion *supra* Section I.A.

221. ADP Agreement, *supra* note 51, art. 1; *see* discussion *supra* Section I.A.

222. ADP Agreement, *supra* note 51, arts. 1–2.

223. *Id.* art. 2.

224. LEE, *supra* note 2, at 122.

225. *Id.*

under the ADP Agreement, [226] but these limited proposals are unlikely to remove the inherent arbitrariness from the anti-dumping regime.

A deeper reform which restrains the imposition of anti-dumping measures against imports from developing countries altogether is necessary. Major developing countries, such as China and India, are among the frequent users of anti-dumping measures. For the period from July 1, 2017 to June 30, 2018, India, Argentina, China, and Brazil were reported to have adopted 43, 13, 12, and 10 definitive anti-dumping measures, respectively, while the United States, the EU, and Canada adopted 34, 6, and 2 measures, respectively.[227] Increasing anti-dumping measures also target imports from developed countries as well as from developing countries. Anti-dumping measures might be a politically expedient tool for import control due to the regulatory flexibility, but most economists question the economic justification of anti-dumping measures.[228] The GATS also does not have a provision for anti-dumping measures applied in the service trade. Given the weak economic justifications, consideration may also be given to completely removing anti-dumping measures from the MTS. Some RTAs, including Canada-Chile Free Trade Agreement, have abolished anti-dumping measures.

B. *Bridging the Gap between the MTS and the RTAs*

Another area that requires regulatory reform is RTAs. The widespread derogation from the MFN principle with the proliferation of RTAs is one of the most important issues affecting the future of the MTS. The MFN tariff rates and the other conditions of trade agreed at the WTO negotiations no longer present the conditions of trade applicable to all

226. Doha Declaration, *supra* note 79.

227. World Trade Organization, *Report (2018) of the Committee on Anti-Dumping Practices*, Annex C, WTO Doc. G/L/1270, G/ADP/25 (Oct. 29, 2018).

228. LEE, *supra* note 2, at 119–20.

WTO membership, but merely a baseline, and exclusive trade preferences are prevalent. The gaps between the MTS and the RTAs are widening with the proliferation of the latter and need to be bridged. A possible solution may include a gradual elimination of trade barriers within RTAs at more or less the same rate and on the same timetable as the lowering of barriers towards non-members.[229] Under this solution (despite a significant free rider problem), the discriminatory effect of RTAs against non-members would be minimized. However, there is a coordination problem with this scenario: RTAs have their own timetables for trade liberalization and may not necessarily follow the suggested approach and set pace according to the reduction of trade barriers to non-member countries.

Alternatively, a "sunset policy," which prescribes a limitation on the duration of RTA preferences to a pre-set period, may present a solution.[230] The present rules (Article XXIV) do not limit the life of an RTA or the trade preferences that it offers. Thus, RTAs run in perpetuity unless the participants terminate the agreement under its terms. One way to limit the deviation from the MFN principle would be to limit RTA preferences to a pre-determined time period and then require RTA members to extend trade preferences to the entire WTO membership on an MFN basis. RTA members will not have an incentive to comply with this without reciprocal compensation. Thus, the following collective action would be required: most likely there will be more RTAs that a member of an RTA has not joined than those it has. This means that the member will receive more trade preferences than it extends at any given time if trade

229. Renato Ruggiero, former general-director of the WTO, observed this possibility in certain regional trade areas such as APEC and MERCOSUR. Press Release, World Trade Organization, Regional Initiatives Should Aim for a Free Global Market, Says Ruggiero (Apr. 24, 1996), https://www.wto.org/english/news_e/pres96_e/pr057_e.htm [https://perma.cc/A8RT-M82P].

230. Yong Shik Lee, Reconciling RTAs with the WTO Multilateral Trading System: Case for a New Sunset Requirement on RTAs and Development Facilitation, 45 J. WORLD TRADE 625, 637 (2011).

preferences in *all* RTAs are to be extended to the entire WTO membership.[231]

231. *See id.* A question has been raised as to how to reconcile wide and deep RTAs with much shallower ones. There is a possibility that Members with a few but major RTAs with their key export markets may not show much interest in the other RTAs, which may not offer attractive export markets to them. An alternative approach to the compulsory sunset policy would be to agree on the sunset policy on a voluntary, plurilateral basis. However, this alternative arrangement may raise an issue of "prisoner's dilemma" discussed in the game theory: when an optimal outcome for everyone is expected only with everyone's cooperation, one may still not cooperate because it does not know whether the other party will also cooperate. Where it is offered as voluntary, not as a compulsory measure, joining the voluntary arrangement will be an uncertain proposition for a WTO Member. Without knowing whether the other members will join the voluntary arrangement, a Member may not be willing to embark on the potentially costly process to persuade the domestic constituency to accept the MFN extension of their RTA preferences. The proposed compulsory policy may have a better political traction than in the past: a systematic concern about the multiplicity of rules as a result of the proliferation of RTAs and the resulting confusion and instability, which will raise cost in trade, may also encourage Members to look more favorably on the MFN extension of RTA preferences. *Id.* at 640 n.64.

The following table illustrates the point, applying the game theory. An RTA member or a "group" will lose if it extends trade preference unilaterally, but it will gain, along with every other RTA member, if all of them extend trade preferences to the entire membership by cooperation.[232]

	The other RTA groups extend trade preferences.	The other RTA groups do not extend trade preferences.
RTA Group A extends trade preferences	Outcome A: Both RTA Group A and the other RTA groups win	Outcome B: RTA Group A loses and the other RTA groups win
RTA Group A does not extend trade preferences	Outcome C: RTA Group A wins and the other RTA groups lose	Outcome D: Neither RTA Group or the other RTA groups win or lose.

Table 1: Extension of Trade Preferences by RTA Group[233]

Outcome D represents the *status quo*: no RTA group extends trade preferences to non-members, so no group wins or loses. Outcome A represents a result of collective action or cooperation: all RTA groups win. The optimal cooperation can be facilitated by the revised WTO rule that limits the life of exclusive RTA preferences and requires the extension of trade preferences to all WTO Members after a predetermined period of time.[234] This extension of trade preferences would also increase the level of trade liberalization across the board.[235]

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232. *Id.*

233. *Id.* at 639.

234. *Id.* at 641. A period of fifteen years has been suggested. Fifteen years will be sufficiently long: few RTAs ever visage at the inception trade benefits to be gained from exclusive trade preferences beyond this time period.

235. However, consideration should be given to waiving the extension requirement for developing countries to meet their development interests. *See id.* at 644–47.

Finally, a determination needs to be made about the kinds of trade preference to be extended on the MFN basis. Tariffs will be straightforward, and the removal of tariffs among RTA members can be extended to non-members on the MFN basis after the pre-set time period. NTBs, however, are more complex and require further consideration. For example, mutual approval of professional qualifications and product standards among RTA members are likely to have been agreed after examination of the professional qualification requirements and the level of product standards of the members.[236] As such, the MFN extension of these types of regulatory preferences may not be appropriate where the requirements and standards of the non-members may vary and may not be suitable for recognition for the members extending them. In contrast, removal of some other types of NTBs, which is not influenced by a standard or qualification, such as an abolishment of a cap on foreign ownership of a designated industry, may be appropriate for the MFN extension.[237] A case-by-case examination would be necessary with respect to the NTBs to be liberalized on the MFN basis.

C. *Dealing with Trade Protectionism: A Few Suggestions*

Protectionist trade policies and measures undermine the trade interests of Members on the receiving end. An example is the recent steel and aluminum tariffs imposed by the United States.[238] The Article XXI justification for these tariffs is questionable,[239] and several Members have filed complaints with the WTO.[240] However, the dispute settlement process may take years, and in the meantime the

236. Lee, *supra* note 230, at 642.

237. *Id.*

238. *See* discussion *supra* Section III.C.

239. *See* discussion *supra* Section III.C.

240. *See supra* note 190 and accompanying text (discussing the record of complaints).

exporting Members subject to the tariffs sustain injury. Even if the complaining Members ultimately win in the process, the WTO dispute settlement body (DSB) provides only a prospective remedy that requires the offending Member to bring their measures in conformity with their obligations under WTO disciplines, without compensating the exporters for the injury sustained from the measures.[241] Thus, arguably, the dispute settlement process does not deter determined Members from adopting offending measures due to its inherent limitations.

In response to protectionist tariffs from the U.S., several exporting Members have adopted retaliatory tariffs against imports from the United States.[242] However, the consistency

241. *See supra* note 190 and accompanying text

242. *See, e.g.*, European Union, 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, WTO Doc. G/SG/N/12/EU/1 (May 18, 2018); Russian Federation, 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, WTO Doc. G/SG/N/12/RUS/2 (May 22, 2018); 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, WTO Doc. G/SG/N/12/CHN/1 (May 22, 2018); Turkey, 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, WTO Doc. G/SG/N/12/TUR/6 (May 22, 2018); India, 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, WTO Doc. G/SG/N/12/IND/1/Rev.1 (June 14, 2018); Customs Notice 18-08: Surtaxes Imposed on Certain Products Originating in the United States, CAN. BORDER SERVS. AGENCY (June 29, 2018, Revised July 11, 2018), https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn18-08-eng.html [https://perma.cc/Q7CJ-G4Y8]. (Can.); Decreto por el que se modifica la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, el Decreto por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte y el Decreto por el que se establecen diversos Programas de Promoción Sectorial, Diario Oficial de la Federación [DOF] 05-06-2018 (Mex.).

of these retaliatory tariffs with WTO disciplines is also questionable.[243] Besides the WTO-compliance issue, this type of retaliatory response may also escalate into a trade war, such as the recent one between the United States and China.[244] In addition to the risk of causing a trade war, immediate retaliation may not offer a full remedy to the injured export industries. The revenue collected from the retaliatory measures (*i.e.*, increased tariffs) could be transferred to injured industries and compensate them for the loss of the export revenue. However, the compensation cannot generate alternative export markets for the affected industries or fully cover some of the loss caused by the reduction in export, such as reduction in production and loss of employment, which has long-term ramifications. The retaliatory measures may benefit domestic producers competing with the covered imports but will raise prices of the imports for domestic consumers. In addition, the outcome of the initial import restraints and retaliation would be higher prices and reduced trade volumes, causing a net economic loss.[245]

The delays and limitations in remedy (*i.e.*, only prospective remedy), as well as the adverse economic impact of retaliation, demand a different approach. The delays in the dispute settlement process require an improvement by expediting the process and reducing the current case backlog. To make this improvement, resources available to the WTO, including the number of full-time lawyers to assist the DSB, need to be expanded. Additional measures, such as the appointment of full-time panelists, introduction of intensive sessions for the panel and the Appellate Body

243. Yong-Shik Lee, Are Retaliatory Trade Measures Justified under the WTO Agreement on Safeguards?, 22 J. INT'L ECON. L. 439 (2019).

244. *See* discussion *supra* Section III.C.

245. According to the study of welfare economics, the welfare loss to consumers caused by trade restraints is greater than the welfare gain by domestic producers, resulting in a net loss to the society. DOMINICK SALVATORE, INTERNATIONAL ECONOMICS 221–28, 257–60 (11th ed. 2013).

proceedings, and the expansion of the Appellate Body membership, would be helpful to expedite the process. However, it not clear whether the Members would be willing to agree on the expansion of the resources. The failure to conclude the Doha Round has weakened institutional confidence in the WTO, and some Members are known to have limited trust in the WTO dispute settlement process.[246]

Consideration should also be given to fix the prospective remedy currently offered by the DSB. Remedies may include the requirement of payment, including the return of payment equivalent to the revenue generated by the increased tariffs found inconsistent with WTO rules. The calculation of payment will be more complex when a quota is involved. As in the case of retaliation, compensation in the form of payment may not be a full remedy for the affected exporting industry, because it may not cover the loss of export markets and employment. Despite these limits, the payment requirement will discourage Members from adopting measures inconsistent with WTO disciplines. Additional measures, such as injunctive relief, which requires the Member applying the disputed measure to suspend its application in whole or in part pending the final outcome of the dispute settlement process, could also be helpful to prevent the escalation of the situation. The conditions defining a threshold for such suspension, such as the number of complainants and the size of trade to be affected by the measure, will have to be determined.

246. *See* Tom Miles, *Diplomats search for way to save trade system after U.S. vetoes judges*, REUTERS WORLD NEWS (Nov. 27, 2017), https://www.reuters.com/article/us-usa-trade-wto/diplomats-search-for-way-to-save-trade-system-after-u-s-vetoes-judges-idUSKBN1DR2PR [https://perma.cc/E24K-XA3C].

V. CONCLUSIONS

This Article has examined developments in international trade law and practice post neoliberalism. The failure to conclude the Doha Round undermined institutional confidence and credibility of the WTO, but most Members agree that there is no replacement for the MTS under the auspices of the WTO.[247] The development deficits in WTO disciplines, as a result of the neoliberal approaches ("one-size-fits-all") adopted in the rule making process of the UR, caused subsequent challenges from developing countries.[248] Developing countries, through various coalitions and alliances, prevented the expansion of the neoliberal agenda ("the Singapore issues") after the UR and renewed focus on development through the DDA. The Doha Round did not accomplish fundamental regulatory reform, such as the reform of the subsidies regime as introduced in this Article. However, even the limited reform agenda faced objections from developed countries, demonstrating the substantial gaps in positions on development issues between developed and developing countries.

While the Doha Round stagnated, developed country Members that could not advance their agenda through multilateral negotiations turned to RTAs. The proliferation of RTAs might be viewed as a natural development in consideration of the size of the WTO membership (164 countries) and the vast differences among Members in their capacities, interests, and priorities related to trade. However, the proliferation of RTAs can lead to a fragmentation of the trade disciplines and the destabilization of the MTS.[249] RTAs may increase the space of free trade, but their exclusive nature erodes the MFN principle, which is the core base of the MTS. Further, RTAs

247. World Trade Organization, Ministerial Declaration of 19 December, 2015, WT/MIN(15)/DEC (2015).

248. *See* discussion *supra* Part I.

249. *See* discussion *supra* Part II.

burden trading nations with dissimilar rules under multiple RTAs, whose terms may be different from one another and also from WTO rules. This complexity is not conducive to the expansion of international trade. Developing countries may, once again, be on the receiving end in RTA negotiations with more powerful developed countries where they cannot form effective coalitions and alliances.

Trade protectionism is another concerning development. The recent U.S. trade policy—a shift toward protectionism and unprecedented protective trade measures argued to be necessary to safeguard U.S. trade interests and preserve policy autonomy[250]—is an ironic response, considering that the United States was the main architect of the post war international trading system, including the GATT and the WTO. It is a testament to the change that has taken place since the 1990s, suggesting that the time for neoliberalism has passed. Indeed, the neoliberalism embedded in WTO disciplines does not even work for the most powerful economy and the largest trader, regardless of the legitimacy of the trade policy and trade measures adopted by the Trump administration. The tariff hikes under the Trump administration, both against China and the rest of the world (the steel and aluminum tariffs) are unprecedented in scale. The rationale for the tariffs—the protection of national security—is similarly unprecedented. National security has never been invoked to justify such massive trade measures on a global scale, and its proliferation would endanger the stability of the MTS. At the time of writing, the U.S. Department of Commerce has completed another investigation report concluding that trade measures are also necessary to protect domestic automobile industries for national security.[251]

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250. *See* discussion *supra* Part III.

251. David Lawder & David Shepardson, *U.S. agency submits auto tariff probe report to White House*, REUTERS (Feb. 17, 2019), https://www.reuters.com/article/us-usa-trade-autos/us-agency-submits-auto-tariff-probe-report-to-white-house-idUSKCN1Q706C [https://perma.cc/BL7B-7DQL].

This Article has also examined possible regulatory reforms to address the issues raised in the proceeding discussion: the development deficits, the gaps in the trade disciplines caused by the proliferation of RTAs, and the problems caused by trade protectionism and retaliations.[252] As to the development deficits, this Article has introduced regulatory reforms that will instill flexibility in the tariff schedules, such as the Development-Facilitating Tariff or "DFT." This Article has also suggested reforms that will restore developing countries' ability to adopt trade-related subsidies for economic development, such as the Development-Facilitating Subsidy or "DFS." Further, it has discussed the revision of anti-dumping measures, beyond the limited reform that has been proposed in the Doha Round.[253] On RTAs, the derogation from the MFN principle is inherently incompatible with the MTS, weakening the latter. This Article has examined regulatory reforms, such as the proposed sunset policy, to close the gaps between the MTS and RTAs.[254] Lastly, the recent trade protectionism and the unprecedented trade measures raise substantial concern for the future of the MTS. Retaliatory responses are not a sustainable solution, and consideration should be given to more feasible ones, which include measures to expedite the WTO dispute settlement process, augment the current prospective remedies with payment requirements, and provide injunctive relief. The suggested reforms will reinforce the MTS in the changing international socioeconomic environment post neoliberalism.

252. *See* discussion *supra* Part IV.

253. *See* Doha Declaration, *supra* note 79.

254. *See* discussion *supra* Part IV.