

THE REVIVAL OF ECONOMIC NATIONALISM AND THE GLOBAL TRADING SYSTEM

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The election of Donald J. Trump to the U.S. Presidency coincided with the United States adopting an “America First” policy in trade. This policy reflects an underlying theory of economic nationalism that is fundamentally at odds with the current approach of the multilateral trading system established by the General Agreement on Tariffs and Trade and the World Trade Organization (GATT/WTO). The current multilateral system is based on a “positive sum game” theory, i.e., the view that cooperative trade concessions can increase the volume of trade for all nations involved and result in reciprocal and mutual benefits. A large body of theoretical and empirical work, discussed and analyzed in this Article, supports the conclusion that the GATT/WTO system has historically achieved significantly increased trade volumes on both a multilateral and national scale since its creation at the end of the Second World War.

By contrast, President Trump’s economic nationalism holds that trade is a “zero sum game” in which a gain in trade by one nation must be accompanied by a corresponding trade loss by another nation. Under the view of the current Administration, the United States has often been the loser in the global trade deals of the GATT/WTO. The current Administration now seeks to dictate the terms of any future trade agreements so that the United States wins at the expense of its trading partners in a zero-sum game. The economic nationalism espoused by the current

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Administration, if unconstrained, can result in the dismantling of the current multilateral trading system leading to long-term negative, if not catastrophic, consequences for the world economy.

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INTRODUCTION

Since the high-point of economic nationalism and global protectionism following the United States implementation of the Smoot-Hawley Tariff Act of 1930,¹ successive rounds of trade negotiations under the auspices of the General Agreement on Tariffs and Trade² (GATT) have resulted in substantial reductions in tariffs—

¹ Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.). For a sample of the tariffs under and a discussion of the Smoot-Hawley Act, see DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, & MATERIALS 138–40 (3d ed. 2015) (tariff rates of up to 60% under the Column 2 Smoot-Hawley Tariff Act rates).

² The GATT was first drafted and implemented on a provisional basis in 1947 at the conclusion of the Bretton Woods Conference in New Hampshire. See DANIEL C.K. CHOW &

duties imposed on imports at the port of entry—by developed countries.³ Many developed countries also made commitments in the Uruguay Round of GATT to cut tariffs on agricultural and food imports (e.g., rice and dairy products) and to place constraints on government support for domestic agriculture.⁴ Available empirical evidence suggests that the reduction in tariffs attributable to the GATT and its successor, the World Trade Organization⁵ (WTO), has had a significant impact on trade volumes in both the manufacturing and agricultural sectors.⁶ At the same time, there has been significant growth in the number of regional trade agreements (RTAs), such as the North American Free Trade Agreement (NAFTA), especially since the 1990s.⁷ RTAs, such as NAFTA, go beyond the GATT/WTO by eliminating tariffs completely for all or some products;⁸ they also provide for deeper economic

THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 26 (3d ed. 2017) [hereinafter CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*]. After the GATT 1947 was implemented, the contracting parties entered into negotiations to further reduce their tariffs. *See id.* at 49. These negotiations were called “rounds” and named after the place where the negotiations were initiated or the person who initiated them. *See id.* With the establishment of the World Trade Organization (WTO) in 1995, the GATT 1947 was incorporated in a new version, the GATT 1995.

³ *See* Jagdish Bhagwati, *Multilateralism at Risk: The GATT is Dead. Long Live the GATT*, 13 *WORLD ECON.* 149, 150 (1990); *see also* Douglas A. Irwin, *The GATT in Historical Perspective*, 85 *AM. ECON. REV.* 323 (1995); KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 47 (1st ed. 2002); Andrew K. Rose, *Do We Really Know That the WTO Increases Trade?*, 94 *AM. ECON. REV.* 98 (2004).

⁴ *See* Kym Anderson, *Multilateral Trade Negotiations, European Integration, and Farm Policy Reform*, 9 *ECON. POL'Y* 13, 15 (1994).

⁵ CHAD P. BOWN, *SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT* 10–21 (2009).

⁶ *See* Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly*, 72 *J. INT'L ECON.* 151 (2007); *see also* Jason H. Grant & Kathryn A. Boys, *Agricultural Trade and the GATT/WTO: Does Membership Make a Difference?*, 94 *AM. J. AGRIC. ECON.*, 1, 2 (2012).

⁷ *See* WORLD TRADE ORG., *WORLD TRADE REPORT 2011: THE WTO AND PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE* 6 (2011), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf [<https://perma.cc/U43A-HWPG>] [hereinafter WTO, *World Trade Report 2011*].

⁸ The GATT explicitly authorizes its contracting parties to enter into free trade areas. As its name implies, a free trade area is a trading area in which no tariffs are imposed. *See* General Agreement on Tariffs and Trade art. XXIV:5, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, https://www.wto.org/english/tratop_e/region_e/region_art24_e.htm [<https://perma.cc/R3VK-NUJX>] [hereinafter GATT].

integration beyond simple tariff reductions by adopting harmonized standards for labor, the environment, and foreign investment.⁹ These developments indicate that the multilateral trading system put into place by the GATT and the WTO has led to new heights of global economic growth and integration since protectionism reached its peak in the 1930s.

The election of Donald J. Trump as U.S. President on a platform of “America First,”¹⁰ a revival of the policies of economic nationalism, presents a significant challenge to the existing global trading system. President Trump’s platform included pushing back against the multilateral trading system and the GATT/WTO, renegotiating NAFTA,¹¹ withdrawing from the Trans-Pacific Partnership¹² (TPP), and using the threat of adopting tough trade policies against China.¹³ These events should also be seen in the context of an environment that is increasingly unfavorable to deeper global economic integration: public pushback on negotiation of the Trans-Atlantic Trade and Investment Partnership¹⁴ (TTIP) and TPP despite their expected net economic benefits;¹⁵ failure to complete negotiations in the Doha Round of the

⁹ See Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. ECON. PERSP. 95, 107 (2016).

¹⁰ *About*, DONALD J. TRUMP FOR PRESIDENT, <http://www.donaldjtrump.com/about> [https://perma.cc/9KT8-5H23] (last visited Feb. 24, 2018).

¹¹ See OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE PRESIDENT’S 2017 TRADE POLICY AGENDA 2, 6 (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf> [https://perma.cc/7XFD-FPJJ]

¹² *Id.* at 12.

¹³ President Trump has threatened to impose an additional 45% tariff across the board on all imports from China. Such a draconian measure could spark a trade war. See Daniel C.K. Chow, Ian M. Sheldon & William McGuire, *A Legal and Economic Critique of President Trump’s China Trade Policies*, 79 U. PITT. L. REV. 205, 211 (2017).

¹⁴ *Survey Shows Plunging Public Support for TTIP in U.S. and Germany*, REUTERS (Apr. 21, 2016, 12:06 AM), <https://www.reuters.com/article/us-europe-usa-trade/survey-shows-plunging-public-support-for-ttip-in-u-s-and-germany-idUSKCN0XI0AT> [https://perma.cc/YCY7-GNM4].

¹⁵ See Gabriel Felbermayr, Benedikt Heid, Mario Larch & Erdal Yalcin, *Macroeconomic Potentials of Transatlantic Free Trade: A High Resolution Perspective for Europe and the World*, 30 ECON. POL’Y 491 (2015); P.A. Petri & M.G. Plummer, *The Economic Effects of the Trans-Pacific Partnership: New Estimates*, Peterson Institute for International Economics (Peterson Inst. for Int’l Econ., Working Paper No. 16-2, 2016).

WTO;¹⁶ and evidence for a slowdown in global trade growth post-2012 relative to both historical performance and to economic growth.¹⁷ These developments indicate that there may be a widespread revival of the policies of economic protectionism that can undermine or destroy the existing global trading system.

The underlying logic of economic nationalism, as espoused by President Trump, is fundamentally at odds with the underlying theory of the GATT/WTO multilateral trading system. The GATT/WTO system is based upon the economic logic of a “positive sum game,” i.e., that trade concessions can enlarge the pie to mutually benefit all participants in the system.¹⁸ Economic nationalism, by contrast, is based on a “zero sum game” approach, i.e., the pie is of a permanently fixed size so that if one nation obtains a gain in trade, then another nation must suffer a corresponding loss.¹⁹ The current Administration appears to be taking the approach that international trade has been sold to the United States as a “positive sum game” but in practice has been implemented as a “zero sum game” with the United States as the loser in many trade situations.²⁰ By advocating an “American First” approach, President Trump is rejecting the economic logic of the GATT/WTO and is proclaiming that in the future, the United States will win at the expense of other nations if necessary.²¹ The adoption of an approach that is so fundamentally at odds with the underlying logic of the

¹⁶ See Baldwin, *supra* note 9, at 109–11.

¹⁷ See INT’L MONETARY FUND, WORLD ECONOMIC OUTLOOK: OCTOBER 2016 67–68 (2016).

¹⁸ RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 47 (3d ed. 2007).

¹⁹ Roy C. Nelson, *The Rising Tide of Economic Nationalism*, THUNDERBIRD SCH. GLOBAL MGMT. (Mar. 28, 2017), <https://thunderbird.asu.edu/knowledge-network/rising-tide-nationalism> [<https://perma.cc/3VZ3-BR4J>].

²⁰ See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 11, at 6 (“For decades now, the United States has signed one major trade deal after another—and, as shown above, the results have often not lived up to expectations.”); Greg Ip, *The Rise of Zero-Sum Economics*, WALL ST. J. (July 20, 2016, 12:43 PM), <https://www.wsj.com/articles/the-rise-of-zero-sum-economics-1469033016> (quoting Donald Trump saying, “We already have a trade war, and we’re losing badly.”).

²¹ See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 11, at 5–6 (“The Trump Administration . . . will tend to focus on bilateral negotiations, we will hold our trading higher standards of fairness, and we will not hesitate to use all possible legal measures in response to trading partners that continue to engage in unfair activities.”).

GATT/WTO by the world's most powerful trading nation poses a threat to the entire foundations of the multilateral trading system.

The threat to the global trading system raises a number of key questions. First, the empirical evidence indicates that the economic logic of the GATT/WTO is valid as it has increased trade volumes overall throughout its history.²² How has the GATT/WTO achieved the dual goals of reducing tariffs and increasing trade flows in the decades since its founding and is that mechanism still effective in further increasing trade flows for the future? If the economic logic behind the trade liberalizing effects of the GATT/WTO is still relevant and applicable, then dismantling the GATT/WTO system can have a negative long-term impact on global trade. The revival of economic nationalism by the Trump Administration can trigger a new era that harkens back to the policies of the period before the Second World War that created an atmosphere of distrust and suspicion that eventually led to hostilities and military conflict.²³ Second, does the GATT/WTO system contain any internal mechanism that can effectively constrain the growth of economic nationalism? If the GATT/WTO contains such a mechanism, then the multilateral trading system may be able to withstand the threat of a rising economic nationalism and continue on its current course in liberalizing trade. On the other hand, if the GATT/WTO system is unable to effectively limit the growth of economic nationalism, then it becomes vulnerable to becoming dismantled or destroyed, leaving the global economy open to all of the attendant negative consequences created by the revival of economic nationalism.

To answer these two questions, this Article proceeds in four parts: first, the seminal economic model rationalizing the economic logic of the GATT/WTO in increasing trade is outlined and explained; second, the approach of economic nationalism to trade policy of the Trump Administration is set in the context of this model; third, the relevance of the GATT/WTO in an era of increasing numbers of RTAs and increasing regionalism is examined; and fourth, the robustness of the

²² Xuepeng Liu, *GATT/TWO Promotes Trade Strongly: Sample Selection and Model Specification*, 17 REV. INT'L ECON. 428, 428–29 (2009).

²³ Marc-William Palen, *Protectionism 100 Years Ago Helped Ignite a World War: Could it Happen Again?*, WASH. POST (June 30, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/?utm_term=.556c6d722fbf [https://perma.cc/GH4W-UWVT].

GATT/WTO legal framework and dispute resolution mechanism as a means for limiting or restraining the effects of economic nationalism is evaluated. The key conclusion of this Article is that the underlying economic logic of the GATT/WTO in reducing tariffs and increasing trade is still relevant and valid, but that enforcement of the GATT/WTO and its effects in increasing trade volumes is likely to be threatened or may completely collapse due to the revival of economic nationalism and the potential for a trade war.

I. BACKGROUND TO AND ECONOMIC LOGIC OF THE GATT/WTO

A. *Success of the GATT/WTO*

By some simple metrics, the GATT, and its successor the WTO, has been a very successful institution of international governance.²⁴ GATT/WTO established a rules-based system for world trade based on a set of principles enshrined in the GATT Articles,²⁵ along with a dispute settlement system,²⁶ that have been universally accepted and respected by its members.²⁷ Membership has grown from the twenty-three countries that signed the GATT in 1947 to 164 countries today.²⁸ Currently, WTO members account for more than 96% of both global trade and gross domestic product.²⁹ Over the seventy years of its existence, the GATT/WTO has witnessed eight rounds of trade negotiations, resulting in average industrial tariffs being reduced to less

²⁴ Kym Anderson, *Contributions of the GATT/WTO to Global Economic Welfare: Empirical Evidence*, 30 J. ECON. SURVS. 56, 82–83 (2016).

²⁵ See *GATT and the Goods Council*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm [<https://perma.cc/4GWU-9LA2>] (last visited Apr. 2, 2019). For a discussion of the basic structure and governance of the WTO, see CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 28–29. The official WTO website contains a detailed discussion of the history and current structure of the WTO at www.wto.org.

²⁶ See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 83.

²⁷ See Baldwin, *supra* note 9, at 95.

²⁸ ANGELO PRESENZA & LORN R. SHEEHAN, *GEOPOLITICS AND STRATEGIC MANAGEMENT IN THE GLOBAL ECONOMY* 3 (2018).

²⁹ *Handbook on Accession to the WTO: Accession in Perspective*, WORLD TRADE ORG. (2007), https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm [<https://perma.cc/T5JV-8Y4G>].

than 4%,³⁰ although it should be noted that there is quite a bit of variation³¹ in the average level of Most Favored Nation (MFN) applied tariffs³² across both countries and sectors.

There are several empirical studies that explore the relationship between membership of the GATT/WTO and countries' trade flows.³³ A widely accepted study argues that the impact of a country's membership of GATT/WTO will depend on three dimensions: first, what a country does with its membership; second, with which other countries a country negotiates; and, third, which products are covered in trade negotiations.³⁴ Their econometric results are consistent with these predictions: industrial countries that participate in reciprocal trade negotiations enjoy a significant increase in trade, bilateral trade is greater when both countries engage in tariff reduction as compared to when only one country does, and sectors such as agriculture that were not covered by trade negotiations exhibit little or no increases in trade.³⁵

³⁰ ANWARUL HODA, WORLD TRADE ORG., TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO: PROCEDURES AND PRACTICES 53 (2001); see Kyle Bagwell, Chad P. Bown & Robert W. Staiger, *Is the WTO Passé?*, 54 J. ECON. LITERATURE 1125 (2016).

³¹ See Baldwin, *supra* note 9, at 99; see also Bagwell, Bown & Staiger, *supra* note 30, at 1131.

³² The MFN principle is one of the foundational principles of the GATT/WTO and is enshrined in the GATT's Article I. In essence, the MFN principle requires each WTO member to extend a trade benefit given to one country to all other members of the WTO. The purpose of MFN is to universalize benefits to all other WTO members, and serves as an inducement to join the WTO. The reference in the text to MFN tariffs simply means the tariffs that all WTO member nations enjoy. As the name implies some preferential treatment while MFN tariffs are the norm in the WTO, the U.S. eschews the term "MFN" in relation to tariff rates and uses the term "Normal Trade Relations" (NTR) instead to describe the U.S. tariff rates that are applied to WTO countries. See CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 1, at 138.

³³ An initial finding by Rose (2004) came as something of a shock to trade economists and policy analysts: membership of the GATT/WTO was not correlated with increased trade flows as compared to non-member countries. Not surprisingly, this generated a body of research seeking to overturn Rose's result, including, *inter alia*, Subramanian and Wei (2007), Tomz, Goldstein and Rivers (2007), and Balding (2010). Subramanian and Wei provide the most robust response to Rose's findings, their econometric analysis being much more consistent with theoretical treatment of the GATT/WTO. See Rose, *supra* note 3, at 98; see also Subramanian & Wei, *supra* note 6, at 151; Michael Tomz, Judith L. Goldstein & Douglas Rivers, *Do We Really Know that the WTO Increases Trade?*, 97 AM. ECON. REV. 2005 (2007); Christopher Balding, *Joining the World Trade Organization: What is the Impact?*, 18 REV. INT'L ECON. 193, 194 (2010).

³⁴ See Subramanian & Wei, *supra* note 6, at 152.

³⁵ See *id.*

Subsequent empirical work found that countries' agricultural trade has been significantly increased by their membership of GATT/WTO.³⁶

These results, subsequently confirmed by additional empirical studies,³⁷ have been interpreted in the context of developing countries receiving special and differential treatment (SDT) under GATT/WTO rules.³⁸ Specifically, developing-country members of GATT/WTO have been exempted from its reciprocity norm, i.e., developing countries get a "free pass" by benefitting from any tariff cuts negotiated between industrialized countries under the MFN rule while not being required to cut their own tariffs. The motivation for SDT is ostensibly that developing countries would be able to gain greater access to developed-country markets under MFN. However, by not lowering their own tariffs, developing-country resources are retained in inefficient import competing sectors.³⁹ In a simple general equilibrium setting, this acts as a tax on their export competing sectors, i.e., in trade negotiations, "what you get is what you give . . ." ⁴⁰ The conclusion to be drawn from the extant empirical research is that membership of GATT/WTO can be characterized as the outcome of a cooperative game that generates mutual benefits for its members in the form of increased trade volumes, and particularly those that engage in reciprocal tariff-cutting.

B. *Economic Logic of the GATT/WTO*

Orthodox trade theory suggests that a small country will unilaterally cut its tariffs, the gains from trade through specialization and exchange subsequently maximizing national income.⁴¹ This is not

³⁶ See Grant & Boys, *supra* note 6, at 2.

³⁷ See Pao Li Chang & Myoung-Jae Lee, *The WTO Trade Effect*, 85 J. INT'L ECON. 53, 54 (2011); see also Theo S. Eicher & Christian Henn, *In Search of WTO Trade Effects: Preferential Trade Agreements Promote Trade Strongly but Unevenly*, 83 J. INT'L ECON. 137, 137–38 (2011).

³⁸ See Kyle Bagwell & Robert W. Staiger, *Can the Doha Round Be a Development Round? Setting a Place at the Table*, in GLOBALIZATION IN AN AGE OF CRISIS: MULTILATERAL COOPERATION IN THE TWENTY-FIRST CENTURY 92–93 (Robert C. Feenstra & Alan M. Taylor eds., 2014).

³⁹ See *id.* at 99.

⁴⁰ See *id.*

⁴¹ See Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LITERATURE 113 (1997).

necessarily the case if a country, such as the United States, is large enough to influence the price of its imports relative to the price of its exports, i.e., its international terms-of-trade, or if public policy is influenced by government preferences other than maximization of national income. In other words, economic analysis of GATT/WTO is about seeking a logical explanation for why a powerful country, such as the United States, would seek to be part of such a trade agreement despite these unilateral incentives to raise tariffs. If the answer to this question is that the United States does benefit from being part of the GATT/WTO, then we might also wonder why the United States or any other member would undermine that agreement or leave it altogether.

In order to answer the first question, we briefly examine the seminal approach to modeling the GATT/WTO.⁴² The workhorse model for this approach is a simple two-good, two-country model, where one country (home) has a comparative advantage in producing one good, and a second country (foreign) has a comparative advantage in producing a second good. There are two important price relationships in this setting: local relative prices of goods in the home and foreign country respectively, and world relative prices of goods. In the absence of home and foreign tariffs, local and world relative prices are exactly the same, i.e., markets are fully integrated. If each country sets a tariff on the good it imports from the other country, it drives a wedge between its local and world relative prices, giving protection to their import-competing sector by raising the price of imports compared to local products; at the same time, each country is large enough to be able to improve their terms-of-trade through a tariff, i.e., they are large enough to be able to drive down the world relative price of their imported good. Given that local prices determine the level and distribution of incomes earned by factors of production (labor and capital) in each country, various government preferences discussed in the political economy literature can be implemented, including national

⁴² For a more extensive treatment of this topic, see the considerable body of work by Kyle Bagwell and Robert W. Staiger. See Kyle Bagwell & Robert W. Staiger, *An Economic Theory of GATT*, 89 AM. ECON. REV. 215 (1999); BAGWELL & STAIGER, *supra* note 3; Kyle Bagwell & Robert W. Staiger, *The World Trade Organization: Theory and Practice*, 2 ANNUAL REV. ECONOMICS 223 (2010); Bagwell & Staiger, *supra* note 38; Bagwell, Bown & Staiger, *supra* note 30.

income maximization⁴³ and political lobbying models.⁴⁴ It is also assumed that holding its local relative price fixed, both home and foreign governments value an improvement in their terms-of-trade, i.e., the fall in the world relative price of their imported good generates additional tariff revenue.

If there is no trade agreement, the home and foreign countries play out a non-cooperative game in tariffs where each government strikes a balance with respect to the local and world relative price effects of their tariff choices.⁴⁵ In terms of local relative price changes, there is a trade-off between the political benefits of redistribution to factors of production employed in the import-competing sector and any deadweight losses to domestic consumers.⁴⁶ With respect to world relative price changes, the improvement in one country's terms-of-trade necessarily results in a worsening of the other country's terms-of-trade, i.e., each country shifts some of the costs of their protection onto the other country.⁴⁷ For example, the home country, in using a tariff to drive down the relative price of its imported good, necessarily worsens the terms-of-trade of the foreign country who exports that same good.

Essentially, it is the cost-shifting externality that results in the non-cooperative equilibrium tariffs being inefficient. Each government would like to lower their respective tariffs to reduce the domestic distortion and generate more trade, but, if done unilaterally, each nation suffers a worsening of their terms-of-trade. The key insight offered by Professors Bagwell and Staiger is that if the terms-of-trade externality can be neutralized, it will be beneficial for both countries to lower their tariffs.⁴⁸ In other words, suppose that neither country's government cares about terms-of-trade effects, and thus tariffs will be set to satisfy domestic political objectives alone. These tariffs are termed "politically-

⁴³ See Harry G. Johnson, *Optimum Tariffs and Retaliation*, 21 REV. ECON. STUD. 142 (1953); see also Wolfgang Mayer, *Theoretical Considerations on Negotiated Tariff Adjustments*, 33 OXFORD ECON. PAPERS 135, 136 (1981).

⁴⁴ See Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994); see also Gene M. Grossman & Elhanan Helpman, *Trade Wars and Trade Talks*, 103 J. POL. ECON. 675, 676 (1995).

⁴⁵ See Bagwell & Staiger, *An Economic Theory of GATT*, *supra* note 42, at 229.

⁴⁶ See *id.* at 229.

⁴⁷ See *id.*

⁴⁸ See *id.* at 226–27.

optimal tariffs,”⁴⁹ which would either be zero if each government seeks to maximize national income through free trade, or they would be positive in order to satisfy domestic political-lobbying constraints (such as the protection of domestic industries); but, importantly, they are lower than those in a non-cooperative game. Therefore, if countries enter into a trade agreement, they will seek mutual reductions in tariffs generating an increase in national economic welfare.

Given this model structure, the application of the principle of reciprocity in GATT/WTO does result in tariff reductions that raise economic welfare.⁵⁰ Specifically, reciprocity means that for either country to offer a tariff concession, it requires a tariff concession from the other country such that the world relative prices remain unchanged, i.e., terms-of-trade effects are ruled out. Tariff-cutting continues until one of two conditions is satisfied: either one country’s government achieves its preferred local relative price before the other country, or “politically-optimal tariffs” are achieved. Of course, the idea that trade negotiators are concerned with the technicality of terms-of-trade effects is likely unrealistic, but this concept can be expressed in terms of market access.⁵¹ A tariff, while creating a terms-of-trade benefit for the importing country, also results in a loss of market share for the exporting country. In other words, from a practical standpoint, trade negotiations are about mutual concessions on market access.⁵²

Reciprocity also helps explain the idea behind “withdrawal of equivalent concessions,” a principle of proportionality that is a key part of the dispute settlement mechanism of the GATT/WTO.⁵³ Standard

⁴⁹ See *id.* at 222–23.

⁵⁰ See *id.* at 226–27.

⁵¹ See *id.* at 231–32.

⁵² There is a growing body of empirical evidence supporting the terms-of-trade theory of trade agreements. See Christian Broda, Nuno Limão & David E. Weinstein, *Optimal Tariffs and Market Power*, 98 AM. ECON. REV. 2032, 2034 (2008); see also Kyle Bagwell & Robert W. Staiger, *What Do Trade Negotiators Negotiate About? Empirical Evidence from the World Trade Organization*, 101 AM. ECON. REV. 1238, 1240 (2011); Chad P. Bown & Meredith A. Crowley, *Self-Enforcing Trade Agreements: Evidence from Time-Varying Trade Policy*, 103 AM. ECON. REV. 1071, 1072 (2013); Swati Dhingra, *Reconciling Observed Tariffs and the Median Voter Model*, 26 ECON. & POL. 483, 484 (2014).

⁵³ An example of the principle of proportionality can be seen in Article 4.10 of the WTO Agreement on Subsidies and Countervailing Measures (SCM). Agreement on Subsidies and Countervailing Measures art. 4.10, Apr. 15, 1994, Marrakesh Agreement Establishing the World

game theory would suggest that both home and foreign countries have an incentive to deviate from the low-tariff equilibrium that results from a trade agreement.⁵⁴ Consequently, in a repeated game,⁵⁵ a credible punishment threat is reversion to the non-cooperative high tariff equilibrium. In practice, the rules of GATT/WTO seek to maintain the balance of concessions and avoid the use of punitive actions.⁵⁶ Essentially, if the home country were to deviate from the agreement by raising its bound tariff, this would imply a loss of previously negotiated market access for the foreign country.⁵⁷ Assuming that this action is not “abusive” under GATT/WTO rules, the exporting country is allowed to withdraw an amount of market access equivalent to what the home country has withdrawn⁵⁸—by implication, there will be no change in

Trade Organization, Annex 1A, 1869 U.N.T.S. 14, http://www.wto.org/english/docs_e/legal_e/24-scm.pdf [<https://perma.cc/TRJ2-ZZW4>]. Article 4.10 states that if the DSB’s recommendation is not followed, “the DSB shall grant authorization to the complaining Member to take appropriate countermeasures.” *Id.* The term “appropriate” is defined in a footnote as follows: “This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.” *Id.* at n.9. This is merely one example of the principle of proportionality in the WTO agreements.

⁵⁴ See BAGWELL & STAIGER, *supra* note 3, at 95–96.

⁵⁵ If the choice of tariffs were made only once, each country knows that the other has a unilateral incentive to set a high tariff in order to improve their terms-of-trade, i.e., the game has the structure of a Prisoners’ dilemma—each prisoner knows it is rational for the other prisoner to confess to a crime, so both confess even though they are collectively better off not confessing to the crime. If this game is repeated over many time periods, each country has an incentive to set a lower tariff—the discounted economic benefits of long-run cooperation being greater than the one-period gains from cheating with a high tariff, each country knowing it is credible for the other to punish them by reverting to the non-cooperative tariff equilibrium.

⁵⁶ See Robert W. Staiger, *International Rules and Institutions for Trade Policy*, in 3 HANDBOOK OF INTERNATIONAL ECONOMICS 1495, 1500 (Gene M. Grossman & Kenneth Rogoff eds., 1995); see also Ben Zissimos, *The GATT and Gradualism*, 71 J. INT’L ECON. 410, 411 (2007).

⁵⁷ The lower GATT tariff provides access to the domestic market because it results in a lower price to the consumer and in higher consumer demand. If the tariff is raised, the importer will normally pass on the tariff to the consumer, raising the price. The higher price results in lower consumer demand, thereby denying market access. As the GATT tariff rate was negotiated by the contracting parties, the increase of the tariff beyond the GATT rate reneges on a bargain made by the nation that raises the tariff.

⁵⁸ This is the basic premise of the principle of proportionality. Under the WTO Dispute Settlement Understanding Article 22.4, the Dispute Settlement Body of the WTO can authorize the complaining party to suspend trade concessions, i.e., withdraw a tariff concession made to the offending party. See Understanding on Rules and Procedures Governing the Settlement of

either country's international terms-of-trade. However, if the home deviates in an "abusive" manner, reversion to the non-cooperative equilibrium is possible. In other words, the objective of the GATT/WTO rules is to ensure that retaliation by one country against the unilateral action of another is proportionate, thereby minimizing the chance of a trade war.⁵⁹

In addition to reciprocity, the principle of non-discrimination in the GATT/WTO also requires that tariffs be applied on an MFN basis—i.e., in the simple model, if the home and foreign country agree to lower their tariffs, those tariff cuts should be extended by each of those countries to any other country that is a member of the GATT/WTO.⁶⁰ Importantly, MFN, in combination with reciprocity, can minimize the risk of third-country spillovers.⁶¹ Suppose the home country exports their good to two foreign countries and imports the other good from both countries, and it chooses to enter into reciprocal tariff reduction with foreign country A, but each offers their respective tariff cuts to foreign country B under MFN. The end result is that given foreign country B keeps its tariff fixed, negotiations between the home and foreign country A under MFN ensure that there is a single world relative price that remains unchanged, i.e., foreign country B experiences no change in its export volume. It should be noted, though, that without reciprocal tariff cuts by the home and foreign country A, the world relative price will change, thereby affecting foreign country B's export trade volume—in other words, MFN on its own is not sufficient to prevent concession erosion.⁶² Both MFN and reciprocity are required to maintain stable world relative prices.

Disputes art. 22.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. However, under Article 22.4, "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." *Id.*

⁵⁹ See *supra* note 58.

⁶⁰ See GATT, *supra* note 8, art. I(1) (MFN principle requires the universalization of trade benefits or privileges to all WTO members).

⁶¹ See Bagwell & Staiger, *An Economic Theory of GATT*, *supra* note 42, at 245–46.

⁶² Empirical evidence supporting the reciprocity and non-discrimination principles in GATT/WTO negotiations can be found in Chad P. Bown, *Trade Policy under the GATT-WTO: Empirical Evidence of the Equal Treatment Rule*, 37 CANADIAN J. ECONOMICS. 678, 682 (2004); see also Nuno Limão, *Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the United States*, 96 AM. ECON. REV. 896, 897 (2006); Nuno Limão,

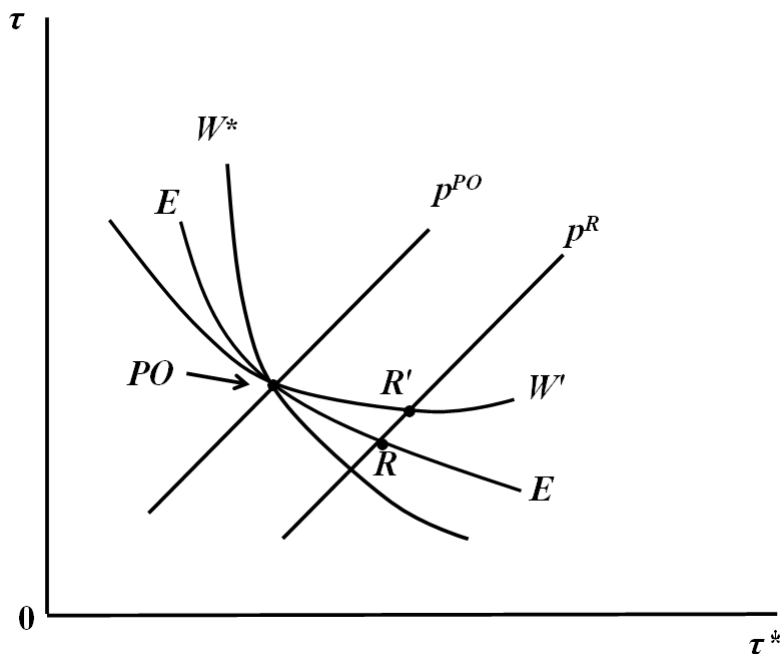
C. *Economic Nationalism in the Context of the GATT/WTO*

This large body of theoretical and empirical work in trade indicates that the GATT/WTO model creates increased trade volumes for all countries that participate in the system. Given that the Trump Administration has explicitly announced that it feels free to depart from this system in pursuit of a policy of economic nationalism, we need to examine whether such a position makes economic and political sense in the context of this large body of economic and empirical work. In other words, is it possible to rationalize the trade policy approach of the current U.S. administration in the context of this large body of work? If the existing equilibrium is efficient in the sense that each country is picking a tariff to maximize its own economic welfare given the other country's tariff, and each country's tariff choice is politically optimal, there are no obvious gains to economic welfare to unilaterally raising tariffs, i.e., it should be renegotiation-proof.⁶³ However, it is possible that the existing tariff equilibrium is efficient but not politically optimal and is, therefore, not renegotiation-proof. If the current administration seeks to achieve certain political objectives, such as giving government aid to impoverished geographical areas or protecting certain depressed industries harmed by trade, then the administration may have a rationale to increase tariffs even though the existing tariff equilibrium is economically efficient. That is, the Trump Administration might believe that it has reasons to renegotiate current trade deals for political, not economic reasons. Given sufficient domestic political incentives and pressures within the United States, it might be politically optimal for the Administration to withdraw some tariff concessions under GATT Article XXVII,⁶⁴ after which the affected country would be permitted to withdraw equivalent concessions.

Are Preferential Trade Agreements with Non-Trade Objectives a Stumbling Block for Multilateral Trade Liberalization?, 74 REV. ECON. STUD. 821, 824 (2007).

⁶³ See Bagwell & Staiger, *An Economic Theory of GATT*, *supra* note 42, at 227–30.

⁶⁴ See GATT, *supra* note 8, art. XXVII (withholding or withdrawal of concessions).

Figure 1: Tariff equilibrium

These two arguments are described in figure one above. Given home U.S. and foreign country tariffs, τ and τ^* , EE represents efficient pairs of these tariffs, and PO and R describe two particular combinations. The lines p^{PO} and p^R trace out pairs of tariffs for which each country's terms-of-trade remain constant, while W' and W^* trace out pairs of tariffs that are individually politically-optimal for the United States and foreign country respectively. The latter schedules also intersect at PO which is the jointly politically-optimal combination of tariffs. If the U.S. economy has actually reached this point after successive rounds of trade negotiations, it cannot be beneficial for it to raise its tariffs unilaterally, i.e., it is renegotiation proof.

Suppose instead, the U.S. economy starts at a point such as R , where W (not shown) is sufficiently close to R such that there is still no incentive to withdraw any tariff concessions. Now allow for the current U.S. administration to have different political objectives than those held by the previous administration, where the new objectives are represented by W' . This puts pressure on the United States to withdraw

some tariff concessions, the foreign country responding by withdrawing equivalent concessions in such a way as to preserve the world price ratio at R' where the United States now maximizes its economic welfare. Under these circumstances, there may be a political rationale for the United States to withdraw tariff concessions, but its willingness to do so is constrained by the retaliation allowed to the foreign country by GATT/WTO rules.⁶⁵

The key to this argument is that the preferences of the current administration have shifted enough in favor of renegotiating previous tariff concessions in the GATT/WTO. Why would they choose to do this? First, one could appeal to a political lobbying model⁶⁶ to argue that the United States seeks to increase the tariff applied to the import-competing sector due to less weight being attached to average social welfare, i.e., the deadweight costs imposed on individual voters are not weighed as heavily in the policymaker's decision calculus. Also, in a political lobbying model where loss aversion on the part of owners of specific factors in the import competing sector matters more,⁶⁷ it may be that the world price has fallen below the reference price, and so an increase in the U.S. tariff seeks to bring the United States price up to the reference price. However, this argument is difficult to reconcile with empirical research finding that that the burden of increased protection is likely to fall disproportionately on individuals at the lower end of the income distribution, many of whom likely voted for Donald Trump.⁶⁸ In addition, if the U.S. import-competing industry has been long in decline, the level of protection should be declining, not increasing, as popular sensitivity to losses diminishes over long periods of time—an argument supported empirically with reference to the U.S. steel industry.⁶⁹ Interestingly, President Trump did authorize an investigation under Section 232 of the Trade Expansion Act of 1962 into whether steel imports are a threat to U.S. national security, and, in particular, whether excess capacity in the Chinese steel sector resulted in

⁶⁵ See DSU, *supra* note 58, art. 22 (compensation and suspension of concessions).

⁶⁶ See Grossman & Helpman, *Trade Wars and Trade Talks*, *supra* note 44, at 678–79.

⁶⁷ See Caroline Freund & Çağlar Özden, *Trade Policy and Loss Aversion*, 98 AM. ECON. REV. 1675, 1675–76 (2008).

⁶⁸ Pablo D. Fajgelbaum & Amit K. Khandelwal, *Measuring the Unequal Gains from Trade*, 131 Q. J. ECONOMICS 1113, 1116–17 (2016).

⁶⁹ See Freund & Özden, *supra* note 67, at 1686–87.

their dumping steel on the world market. An economic argument can be made that the premise for such an investigation misses the point for several reasons: first, the decline in employment in the U.S. steel industry happened long before China became a significant player in the world market; second, the bulk of U.S. steel imports come from Canada; and, third, China is proactively seeking to reduce its production capacity.⁷⁰ This argument leads to the conclusion that China is not willing to continue reducing capacity if President Trump unilaterally implements tariffs in order to look tough.⁷¹

A second possibility is that the United States seeks to rebalance trade with countries with whom it has a bilateral trade deficit, the objective being to negotiate “more reciprocal” tariffs with such countries. For example, the current Administration seems to believe that reciprocity should result in uniform reciprocal tariff rates, i.e., if the United States has a tariff rate of 2.5% on automobiles, then China should also have a 2.5% tariff on automobiles.⁷² However, this view does not appear to recognize the exact nature of reciprocity in the GATT/WTO, which incorporates the notion of “first-difference” reciprocity, i.e., “tariff cuts are to proceed via bargaining that reflects a balance of perceived advantage at the margin rather than by . . . perceived full equality of market access and reverse market access (or what in modern American parlance, is pithily described as ‘level playing field’).”⁷³ Third, it is possible that the current Administration

⁷⁰ See *Trade Talks Episode 3: Nerves of Steel: Waiting for Trump's Trade War*, TRADE TALKS (Sept. 15, 2017), <https://piie.com/experts/peterson-perspectives/trade-talks-episode-3-nerves-steel-waiting-trumps-trade-war> [<https://perma.cc/5FJF-2T7U>].

⁷¹ See *id.*

⁷² See Chad P. Bown, Robert W. Staiger & Alan O. Sykes, *Multilateral or Bilateral Trade Deals? Lessons from History*, in *ECONOMICS AND POLICY IN THE AGE OF TRUMP* 153, 159–60 (Chad P. Bown ed., 2017).

⁷³ See JAGDISH BHAGWATI, *PROTECTIONISM* 36 (1st ed. 1988). Trade negotiations in the GATT/WTO have followed the principle of seeking equal cuts in tariffs at the margin, “*marginal reciprocity*,” as opposed to seeking equal levels of tariffs, “*mirror image reciprocity*.” The former implies that each country would cut its tariffs by the same agreed percentage, while the latter implies that countries with initially higher tariffs would have to cut them by a higher percentage than those with initially lower tariffs. The latter would be politically infeasible as it would favor the low-tariff group of countries over the high-tariff group of countries. See C. Fred Bergsten, *The U.S. Agenda: Trade Balances and the NAFTA Renegotiation*, in *A PATH FORWARD FOR NAFTA* 13, 15–16 (C. Fred Bergsten & Monica de Bolle eds., Peterson Inst. For Int'l Econ., 2017).

does not fully appreciate the GATT/WTO “latecomers” problem.⁷⁴ While developing countries such as Brazil, India, and China might like to offer tariff cuts in the GATT/WTO, developed countries such as the United States, which have undergone successive rounds of tariff cuts, do not have much to offer in new rounds of reciprocal tariff-cutting, i.e., there is essentially “globalization fatigue.”⁷⁵ The way to approach this problem is not through “leveling the playing field,” i.e., unilaterally threatening to raise tariffs if developing countries such as China do not lower their tariffs, but instead to seek a new reciprocal trade bargain within the GATT/WTO.⁷⁶ In order to “make room” for the developing countries at the GATT/WTO table, the traditional reciprocal exchange of market access through tariff concessions will have to be replaced with an approach that involves developed countries either lowering or eliminating their agricultural export sector subsidies, thereby improving the terms-of-trade of developing country agricultural exporters, in exchange for which developing countries reduce their tariffs on imports of manufactures.⁷⁷

The overall conclusion to be drawn is that the current administration’s approach to trade differs in fundamental respects from those of previous administrations. While previous administrations participated in decades of successful rounds of multilateral tariff cuts,⁷⁸ the Trump Administration is following a path of economic nationalism and pushing back with threats of not playing by the accepted rules of international governance. The approach of the current administration is to address what they see as “unfair trade practices” by following unilateral policies, renegotiating or withdrawing from trade agreements, and threatening to apply import protection.⁷⁹ Essentially, President Trump believes that his approach to bargaining will be much more

⁷⁴ See Bown, Staiger & Sykes, *supra* note 72 at 160.

⁷⁵ See Bagwell & Staiger, *supra* note 38, at 92.

⁷⁶ See Bown, Staiger & Sykes, *supra* note 72 at 160.

⁷⁷ See Bagwell & Staiger, *supra* note 38, at 114–15.

⁷⁸ The United States participated in all of the early rounds of negotiations under the GATT. All of the rounds prior to the Tokyo Round in the 1970s focused on the reduction of tariffs. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 49.

⁷⁹ Kyle Handley & Nuno Limão, *Trade Under T.R.U.M.P. Policies*, in *ECONOMICS AND POLICY IN THE AGE OF TRUMP*, *supra* note 72, at 141, 141–43.

likely to get a “better deal” for the United States.⁸⁰ In other words, rather than being the win-win of reciprocal and multilateral exchange of market access as a resolution to an inefficient tariff equilibrium, it would seem that trade agreements are instead perceived as a zero-sum game, where until now, the United States has typically lost and its trading partners have won. The approach of the Trump Administration is to use trade measures to reach the opposite result, where the United States always wins at the expense of its trading partners.

This view of trade agreements certainly appears to characterize the current Administration’s attitudes towards the GATT/WTO. The United States seems to believe that the GATT/WTO creates a system in which the rules are applied to create trade benefits for United States trading partners at the expense of the United States. As a result, the United States has recently shown a marked hostility towards the GATT/WTO. For example, the United States has been blocking the appointment of two judges to the WTO’s Appellate Body, and planned to block the appointment of a third when the current incumbent stood down in December 2017.⁸¹ The Administration is expressing its dissatisfaction with the WTO due to its perception that the WTO routinely denies the United States the benefits of the dispute settlement process. Specifically, U.S. Trade Representative Robert Lighthizer believes that these benefits include the right to impose anti-dumping duties, and the fact that the United States has lost a significant number of cases involving United States anti-dumping actions means that the judges are denying the United States its rightful benefits under the GATT/WTO.⁸² The reaction of the United States in blocking the appointment of additional judges to the Appellate Body could result in the paralysis of the GATT/WTO dispute settlement system.⁸³

⁸⁰ See Bown, Staiger & Sykes, *supra* note 72, at 159.

⁸¹ See *Trade Talks Episode 4: Holding the WTO Hostage, Trump Style*, TRADE TALKS (Sept. 22, 2017), <https://piie.com/experts/peterson-perspectives/trade-talks-episode-4-holding-wto-hostage-trump-style> [<https://perma.cc/4W68-2RL4>].

⁸² See Lesley Wroughton, *U.S. Trade Envoy Says WTO Dispute Settlement is ‘Deficient’*, REUTERS (Sept. 18, 2017, 12:13 PM), <https://www.reuters.com/article/us-trade-nafta-lighthizer/us-trade-envoy-says-wto-dispute-settlement-is-deficient-idUSKCN1BT205> [<https://perma.cc/ZMY7-PKPD>].

⁸³ See Tom Miles, *World Trade’s Top Court Close to Breakdown as U.S. Blocks Another Judge*, REUTERS (Sept. 26, 2018, 10:53 AM), <https://www.reuters.com/article/us-usa-trade-wto>

The Administration's attitude to dispute settlement in the GATT/WTO is also mirrored in its renegotiation stance over dispute settlement in NAFTA. Specifically, NAFTA's Chapter 19 is designed to resolve disputes over anti-dumping and the use of countervailing duties, based on an arbitration panel picked by the United States, Canada, and Mexico.⁸⁴ Chapter 19 has its origins in the Canadian-U.S. Free Trade Agreement (CUSFTA) signed in 1988 when Canada sought to restrain the United States from using trade remedies such as anti-dumping duties against Canadian exports.⁸⁵ Essentially, the current Administration wants to scrap Chapter 19 so that there are no restrictions on its use of trade remedies.⁸⁶

II. THE RISE OF REGIONAL TRADE AGREEMENTS

At the same time that the current Administration expressed skepticism about multilateral trade agreements, it demonstrated an interest in negotiating smaller, especially bilateral, trade deals.⁸⁷ One notable example is the ongoing effort to renegotiate NAFTA, which involves only the United States, Canada, and Mexico.⁸⁸ Although the administration expressed a willingness to walk away from NAFTA if it is

judge/world-trades-top-court-close-to-breakdown-as-us-blocks-another-judge-idUSKCN1M621Y [https://perma.cc/MQW9-YC85].

⁸⁴ See *The North American Free-Trade Agreement Renegotiation Begins*, ECONOMIST: SECONDS OUT (Aug. 17, 2017), <https://www.economist.com/finance-and-economics/2017/08/17/the-north-american-free-trade-agreement-renegotiation-begins> [https://perma.cc/RCE5-XRX2].

⁸⁵ See generally Peter Morici, *The Canada-U.S. Free Trade Agreement*, 3 INT'L TRADE J. 347 (1989).

⁸⁶ See *Trade Talks Episode 1: NAFTAomics: The Economics of Three Big Fights*, TRADE TALKS (Sept. 1, 2017), <https://piie.com/experts/peterson-perspectives/trade-talks-episode-1-naftanomics-economics-three-big-fights> [https://perma.cc/8AKM-4ETY].

⁸⁷ Eduardo Porter, *Trump's Trade Endgame Could be the Undoing of Global Rules*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/business/economy/trump-trade.html> [https://perma.cc/4GTP-64BQ].

⁸⁸ See Ana Swanson, *Trump Administration Unveils Goals in Renegotiating NAFTA*, WASH. POST (July 17, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/17/trump-administration-outlines-goals-for-nafta-rewrite/?utm_term=.1441a2e825a6 [https://perma.cc/8V24-4PWJ].

not satisfied with the process, the negotiations continue.⁸⁹ This stands in stark contrast to the administration's hostility towards the WTO. Given the current administration's hostility to multilateral trade agreements, several questions arise. Why is President Trump interested in smaller trade agreements? Is the administration's position on smaller trade deals consistent with its hostility towards multilateral agreements? As we shall see in the analysis below, the Trump Administration's approach to bilateral and regional trade agreements is consistent with an overall approach of economic nationalism because smaller trade agreements can block the development of multilateral trade agreements.

A. *A Brief History of Regional Free Trade Agreements*

Although countries have been entering into RTAs since the post-war period, countries have recently shown an increasing interest in entering into RTAs.⁹⁰ The first major RTA in the post-war period was the formation of the European Economic Community (EEC) in 1958, followed quickly by the establishment of the European Free Trade Area (EFTA) in 1960.⁹¹ Attempts were made through the 1960s and 1970s to launch additional RTAs, especially in the developing world, but they were not successful.⁹² The next wave of regionalism came in the 1980s and 1990s. The EEC became the European Community (EC) as part of its transformation into a single, unified market.⁹³ The EC (now the EU) and the United States both began negotiating regional and bilateral trade agreements with partners around the world.⁹⁴ Developing countries in Asia, Latin America, and Africa also launched ambitious efforts to build common regional markets.⁹⁵ The third wave of

⁸⁹ Patrick Gillespie, *Trump: Tearing Up NAFTA 'Will be Fine'*, CNN: BUS. (Oct. 11, 2017, 5:17 PM), <https://money.cnn.com/2017/10/11/news/economy/trump-nafta/index.html> [https://perma.cc/4ALN-ENQZ].

⁹⁰ Scott L. Baier, Jeffrey H. Bergstrand & Ronald Mariutto, *Economic Determinants of Free Trade Agreements Revisited: Distinguishing Sources of Interdependence*, 22 REV. INT'L ECON. 31 (2014).

⁹¹ Jagdish Bhagwati, *Regionalism Versus Multilateralism*, 15 WORLD ECON. 535, 539 (1992).

⁹² See *id.*

⁹³ See *id.* at 541.

⁹⁴ See WTO, World Trade Report 2011, *supra* note 7, at 52.

⁹⁵ See *id.* at 52–53.

regionalism began after the conclusion of the Uruguay Round of GATT negotiations in 1994 and continues today. As of 2017, the WTO has been notified of 445 RTAs in force among its members.⁹⁶ These RTAs coalesced around regional trading “blocs” in the Americas, the European Area, and Asia.⁹⁷ Most recently, the major economies of the world have focused on the negotiation of so-called mega-regional trade agreements, such as TPP and TTIP. These types of agreements typically involve large groups of countries, many of which have already negotiated RTAs with each other. Compared to previous waves of regionalism, today’s mega-regionals focus more on “deep integration,” i.e., issues such as labor and environmental standards rather than tariff reductions. This partly reflects the success of previous multilateral negotiations. Today, 84% of trade flows fall under the MFN tariff schedule negotiated through successive trade rounds of the GATT/WTO.⁹⁸ With the success in tariff reductions, nations have turned to reduce other trade barriers that are created by inconsistent national regulatory standards on matters such as labor and the environment, which can lead to increased production costs. RTAs can effectively promote “deep integration” whereas multilateral agreements under the WTO cannot.⁹⁹

Why the explosion of RTAs? Economists offer several possible explanations. One possibility is that RTAs are more effective than multilateral agreements for promoting “deep integration.”¹⁰⁰ The third wave of regionalism has occurred parallel to the stalled Doha Round.¹⁰¹

⁹⁶ See *Regional Trade Agreements: Facts and Figures*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts [https://perma.cc/JZH9-AF3S] (last visited Jan. 30, 2019).

⁹⁷ See Jo-Ann Crawford & Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements* (World Trade Org., Econ. Research & Statistics Div., Discussion Paper No. 8, 2005).

⁹⁸ Pascal Lamy, *Is Trade Multilateralism Being Threatened by Regionalism?*, in *POWER SHIFTS AND NEW BLOCS IN THE GLOBAL TRADING SYSTEM* 61, 65 (Sanjaya Baru & Suvi Dogra eds., 1st ed. 2015).

⁹⁹ Multilateral agreements under the WTO cannot promote integration in areas such as labor and workers’ rights because these areas are not covered by the WTO agreements. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 395–98.

¹⁰⁰ See Baldwin, *supra* note 9, at 113–14.

¹⁰¹ The formal name of the Doha Round is the Doha Development Agenda of 2001. It is the most current round of trade negotiations under the WTO and the most ambitious and

Negotiators may have found that it is easier to conduct complex negotiations around harmonizing domestic regulatory standards if they work in smaller groups.¹⁰² It might also be easier to build consensus among a small group of “like-minded” negotiators.¹⁰³

B. *The Trump Administration’s Preference for RTAs*

The Trump Administration’s preference for RTAs over the multilateral agreements of the WTO can be understood if we compare NAFTA with the WTO agreements. Unlike the WTO, NAFTA contains many so-called “deep integration” measures, also known as “WTO-extra” provisions.¹⁰⁴ These commitments are “WTO-extra” because they cover areas that are explicitly outside the scope of the GATT/WTO, which is concerned only with laws and measures that apply to international trade. These commitments typically target the harmonization of domestic regulatory standards, including labor and environmental standards as well as protections for foreign investors and intellectual property protections that go beyond the minimum required by the WTO.¹⁰⁵ All of these areas are not covered by the WTO agreements.¹⁰⁶ So in the absence of a bilateral or regional free trade

complex. Due to conflicts between developed and developing countries over issues such as agriculture, the Doha Round has stalled and been effectively suspended. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 49–50.

¹⁰² See Lamy, *supra* note 98, at 63.

¹⁰³ See Bhagwati, *supra* note 91, at 551.

¹⁰⁴ For example, NAFTA contains two side agreements, the North American Agreement on Labor Cooperation and the North American Agreement on Environmental Cooperation, that respectively deal with labor and environmental issues. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 60.

¹⁰⁵ See *id.*

¹⁰⁶ Article II of the Marrakesh Agreement Establishing the World Trade Organization sets forth the scope of the WTO. Under Article II, the “WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.” *Marrakesh Agreement Establishing the World Trade Organization*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm [https://perma.cc/ES4Q-C2R6] (last visited Apr. 11, 2019). An examination of the agreements and instruments in the Annexes indicates that no internal domestic regulatory standards such as those that apply to the environment or labor within the domestic legal order of a country are covered by any of the WTO agreements. The exclusion of these matters is consistent with the scope of the WTO to

agreements, these areas are left up to each nation to regulate for itself.¹⁰⁷ The creation of RTAs with obligations in these areas allows countries, such as the United States, to adopt uniform standards in these areas to govern their trade relationships, a result not possible under the WTO.¹⁰⁸ As firms have increasingly relied on “offshoring” some parts of their production processes to other countries in order to reduce costs, their governments have sought to negotiate harmonized standards in these areas in order to reduce costs.¹⁰⁹ Harmonized standards or “deep integration” would help firms reduce costs by eliminating inconsistent regulatory standards across multiple countries. This type of “deep integration” can be viewed as a form of trade liberalization that is a step beyond tariff reduction.

One way to interpret President Trump’s skepticism toward the WTO and (begrudging) embrace of NAFTA is simply as an extension of the global trend away from multilateralism and toward RTAs. President Trump may believe that while multilateral trade agreements are harmful to United States interests, RTAs, especially bilateral trade agreements, are beneficial to the United States so long as the United States is able to dictate terms and win in a zero-sum game. If the Trump Administration is in favor of smaller trade agreements, the question that arises is whether regionalism is in conflict with multilateralism. Will the Trump Administration’s preference for regionalism benefit or harm the multilateral trading system?

cover only external “trade relations among its Members” as expressly stated in Article II. *Id.* Thus, these domestic regulatory matters are considered to be “WTO-extra” matters that are outside the scope of the WTO agreements.

¹⁰⁷ *See id.* It follows that unless a matter outside of the WTO is governed by a bilateral or multilateral treaty, the matter is under the sovereignty of the nation state.

¹⁰⁸ *See supra* note 106. Matters that are “WTO-extra” or outside of the WTO can be the subject of agreement between nations through the use of bilateral treaties.

¹⁰⁹ *See, e.g.*, Creating American Jobs and Ending Offshoring Act, S. 3816, 111th Cong. (2010); Offshoring Prevention Act, H.R. 2005, 115th Cong. (2017); 156 CONG. REC. S8330 (daily ed. Dec. 1, 2010) (statement of Sen. Richard Durbin) (“If a company thinks it is in its . . . profit motive and best interest to locate overseas, so be it. Let them make that decision. But we should not encourage it. We should not subsidize it. We should not reward it. The reward should actually go to the many businesses that stay[,] . . . hiring American workers . . .”).

C. *Are RTAs Good for Globalization?*

As RTAs have proliferated and the Doha Round of the WTO has stalled, economists have turned their attention to the question of whether RTAs increase *global* economic welfare.¹¹⁰ This is related to the question of whether RTAs are “building blocs” or “stumbling blocs” toward multilateral trade deals.¹¹¹ Economists have long been skeptical of the efficiency implications of RTAs.¹¹² Although RTAs reduce trade barriers, they are, by definition, discriminatory; they grant concessions to only a select few trade partners who are members of the RTA, while non-members do not enjoy the trade concessions of the RTA.¹¹³ Thus, RTAs may reduce global welfare if the increase in trade created by the RTA for its members is less than the trade from non-members of the FTA that is diverted. In other words, RTAs are inefficient if their trade diversion effects are greater than their trade creating effects. An additional inefficiency occurs when RTA members import from less efficient producers inside the agreement rather than the more efficient producers outside the agreement.¹¹⁴ Discriminatory tariff cuts can also create opportunities for “bilateral opportunism.”¹¹⁵ Bilateral opportunism exists when two parties to an RTA agree to reduce tariffs on each other’s goods, improving their terms-of-trade at the expense of excluded partners.¹¹⁶ Concerns like these are why the MFN principle of universalizing tariff reductions has been central to the GATT/WTO since its inception. RTAs operate as an exception to the MFN principle,¹¹⁷ so we must examine whether RTAs create an overall benefit to the global trading system.

However, we must be careful to separate the static and dynamic effects of RTAs when trying to evaluate their impact on global economic

¹¹⁰ Philippe Aghion, Pol Antràs & Elhanan Helpman, *Negotiating Free Trade 1–2* (Nat’l Bureau of Econ. Research, Working Paper No. 1071, 2006).

¹¹¹ See JAGDHISH N. BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 77 (1991).

¹¹² JACOB VINER, *THE CUSTOMS UNION* 51–68 (1950).

¹¹³ See Baier, Bergstrand & Mariutto, *supra* note 90, at 31.

¹¹⁴ See VINER, *supra* note 112, at 51–68.

¹¹⁵ See Bagwell, Bown & Staiger, *supra* note 30, at 1158–62.

¹¹⁶ See *id.*

¹¹⁷ 113 EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION* 8.41-1 (2008)

welfare.¹¹⁸ It is possible for the dynamic gains from RTAs to compensate for their static losses, i.e., trade diversion. Of course, the size of the dynamic gains depends on whether RTAs act as “building blocs” or “stumbling blocs” toward multilateral agreements.¹¹⁹ Aghion, Antràs, and Helpman provide a framework to understand trade negotiations where a leading country such as the United States either bargains multilaterally with all other countries simultaneously or sequentially negotiates RTAs with subsets of countries which may or may not lead to a multilateral agreement, known as a “grand coalition.”¹²⁰ Assuming all countries maximize aggregate economic welfare (national income plus consumer surplus), and the leading country is willing to make side payments to other coalition members, it is shown that RTAs will generally be building blocs toward a multilateral agreement.¹²¹ As long as the benefits of the grand coalition are greater than either the sum of the benefits under no agreement or the sum of the benefits under an RTA excluding at least one country, RTAs will eventually lead to a multilateral agreement.¹²² Importantly, this result holds regardless of whether or not an initial RTA generates a price “externality.”¹²³ If an initial coalition lowers (raises) the world price of the good exported by an excluded country, the leading country will prefer sequential (multilateral) bargaining in order to minimize the size of its side payments, the equilibrium trade agreement being multilateral.

The result that RTAs are not stumbling blocs to multilateral agreements is conditioned on markets being competitive, as well as policymakers maximizing a country’s aggregate economic welfare. To understand this, we can draw on a model of trade policy formation as the outcome of competition among domestic interest groups.¹²⁴

¹¹⁸ See Bhagwati, *supra* note 91, at 548–54.

¹¹⁹ See Aghion, Antràs & Helpman, *supra* note 110, at 1

¹²⁰ *Id.* at 3.

¹²¹ Side payments among the members of existing RTAs can be rationalized in terms of an exchange of concessions on non-trade related issues such as agreements on product and labor standards. *Id.* Side payments help ensure the expansion of customs unions by transferring a portion of the gains from expanding the RTA to the losers among the existing RTA members. Without these mechanisms, RTAs are more likely to stall. See Bhagwati, *supra* note 91, at 539.

¹²² See Aghion, Antràs & Helpman, *supra* note 110, at 8.

¹²³ See *id.* at 13.

¹²⁴ See Grossman & Helpman, *Protection for Sale*, *supra* note 44, at 833.

Policymakers maximize a weighted average of aggregate economic welfare and the welfare of industry-specific interest groups whose members can earn additional profits from trade policies offered by politicians seeking campaign contributions.¹²⁵

Political competition among special interest groups, both inside and outside the RTA, can lead to a “domino effect” that draws more and more countries into the agreement.¹²⁶ If we assume the country starts in political equilibrium, an exogenous shock that expands the RTA will expand exporting sectors in member states relative to import-competing sectors.¹²⁷ This translates into a shift in the relative sizes of their campaign contributions, and political movement towards expanding the RTA.¹²⁸ If we assume the expansion of the RTA imposes negative externalities on the remaining non-members, i.e., through terms-of-trade effects, this will also strengthen the special interest groups pushing to join the RTA within non-member countries.

However, this kind of political competition does not guarantee that RTAs will always expand to form multilateral agreements.¹²⁹ An RTA might actually prevent the formation of a multilateral agreement if the RTA imposes positive externalities on the excluded country. Suppose that the leading country along with a second country both import a good from a third country, the second country imposing a higher tariff. If the leading country and the second country form an RTA, the price of the good falls in the second country relative to the leading country, resulting in increased import demand from the newly-expanded RTA and an increase in the world price. As a consequence, profits earned by political interest groups rise in both the leading country and excluded country, but fall in the second country due to the fact that the increase in the world price does not compensate its political interest groups for the reduction in its level of protection. Politicians in the leading country prefer this outcome to that of a multilateral agreement because the payoff to its special interest groups is higher than under a multilateral

¹²⁵ See *id.* at 842.

¹²⁶ See Richard E. Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade*, 29 *WORLD ECON.* 1451, 1466–69 (2006).

¹²⁷ See *id.* at 1467.

¹²⁸ See *id.*

¹²⁹ See Aghion, Antràs & Helpman, *supra* note 110, at 19–22.

agreement where profits would fall, and therefore, no further expansion of the RTA is likely to occur.

This analysis indicates that the creation of RTAs is driven by economic considerations—the RTAs will be building blocs towards a multilateral trade agreement, which will result in increased trade volumes for all members of the multilateral agreement. However, if political considerations and special interests become paramount in creating RTAs, then the RTAs become a stumbling bloc, i.e., they will block the development of new multilateral agreements. The current U.S. Administration appears to be driven by political considerations, such as nationalism, and by special interest groups, many of whom voted for President Trump. Under these circumstances, the creation of new RTAs and the renegotiation of existing RTAs could become stumbling blocs to the further expansion of the multilateral trading system. The Trump Administration's approach to RTAs is consistent with its overall approach of economic nationalism, and serves as an additional constraint or threat to the existing multilateral trading system.

IV. WTO DISPUTE SETTLEMENT AND ECONOMIC NATIONALISM

Although the United States political approach to trade seems to have fundamentally changed, the institutional features of the WTO have not. The WTO dispute settlement system is considered to be one of the WTO's major achievements.¹³⁰ The dispute settlement system ensures reciprocal and proportionate responses when countries fail to uphold their obligations under the WTO.¹³¹ The question now raised is whether the GATT/WTO dispute settlement system is able to prevent or limit the expansion of U.S. economic nationalism. If the GATT/WTO can effectively contain the rising economic nationalism of the United States, then the new policies of the Trump Administration do not pose a realistic threat to the multilateral system.

¹³⁰ See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 83.

¹³¹ The principle of proportionality is expressed in the Dispute Settlement Understanding. Article 22.4 states: "The level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." DSU, *supra* note 58, art. 22.4. The "suspension of concessions" refers to trade retaliation authorized by the DSB; trade retaliation must be proportionate to the injury, i.e., the nullification or impairment.

As this Part demonstrates, the dispute settlement system cannot be used effectively to deter the rising tide of nationalism as exhibited by some of the policies of the current Administration. To understand why this is the case, we must start with a basic understanding of how the dispute settlement system works to resolve trade disputes. The ultimate goal of the dispute settlement system is to bring a non-conforming measure, law or regulation issued by a WTO member into compliance with the obligations of the WTO as set forth in its agreements.¹³² All other types of remedies, such as compensation or retaliation (both further explained below), are seen as temporary measures with the goal of inducing compliance.¹³³

A. *WTO Dispute Settlement and Trade Remedies*

To bring an action within the dispute settlement system, the complaining party must show a “nullification or impairment” of a trade benefit in order to assert a viable claim against an offending party.¹³⁴ One can view this as a requirement that the complaining party must show an injury cognizable under the WTO.¹³⁵ This is the standard that is adopted in the WTO Dispute Settlement Understanding (DSU), in the GATT Article XXIII:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

¹³² See DSU, *supra* note 58, art. 22.1.

¹³³ See *id.*

¹³⁴ GATT, *supra* note 8, art. XXIII.

¹³⁵ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 91.

(c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.¹³⁶

To begin with, note that under Article XXIII, an action cannot be brought before the WTO Dispute Settlement Body (DSB) until a “nullification or impairment” of a benefit has already occurred. In other words, the WTO dispute settlement system does not contemplate any type of relief to prevent an injury; in general, the injury must have already occurred before any relief is possible. Contrast this position with a domestic legal system such as that of the United States in which it is possible, under the right circumstances, to obtain injunctive relief to prevent an injury from occurring when such a possibility is imminent. The WTO lacks the power to issue injunctive relief to prevent a harm from occurring; this type of relief is not possible within the WTO and this can be considered one of its shortcomings.¹³⁷ The result of this deficiency in the WTO is that the global trading system must have first suffered a trade distortion in the form of a protectionist trade measure before any type of relief can be sought. The relief that is sought must then undergo a set of procedures and a decision-making process that can last several years before a decision is reached.¹³⁸

Now assume that the current Administration makes a sudden unilateral decision to raise tariffs on imports above the agreed upon WTO rate for the imports. The United States has no legal justification for the sudden spike but is implementing a new set of protectionist measures meant to protect local industry from import competition. In this situation, the nation that is subject to the sudden increase in tariffs on its imports can assert the “nullification or impairment” of a trade benefit, i.e., the U.S. decision to impose a higher tariff than the lawful

¹³⁶ GATT, *supra* note 8, art. XXIII.

¹³⁷ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 83–88 (discussing remedies under the WTO but having no mention of injunctive relief as an available option under the WTO).

¹³⁸ See *id.* at 89–90 (setting forth a schedule in an actual dispute from start to finish that required sixteen months to final reports being adopted by the WTO).

WTO rate.¹³⁹ The nullification or impairment is the result of United States and its failure to carry out its obligations under the WTO to apply the WTO tariff rate as required by GATT Article XXIII:1(a).¹⁴⁰ The aggrieved nation can then bring an action within the WTO dispute settlement system subject to the rules of the WTO Dispute Settlement Understanding. Let the United States further assume that the aggrieved nation wins the WTO case and the WTO issues a decision finding that the United States is in violation of its WTO obligations. In this event, the WTO dispute settlement body will “recommend” that the United States bring the offending measure, i.e., the higher tariff, into compliance with its WTO obligation, i.e., that the United States lower the tariff rate to the lawful WTO rate.¹⁴¹ At this point, under the WTO procedures, the United States has a reasonable period of time to comply with the recommendations of the DSB.¹⁴²

If the United States fails to follow the recommendation of the DSB within a reasonable time by removing the offending higher tariff, the aggrieved party can seek compensation from the offending party.¹⁴³ Providing compensation is a voluntary decision on the part of the offending party, the United States in this hypothetical. Compensation in this context does not refer to a monetary payment but the granting of additional concessions on the part of the offending party to benefit the aggrieved party.¹⁴⁴ For example, the United States could agree to impose zero tariffs instead of the agreed WTO rate on certain imports from the aggrieved party. The zero tariffs would result in tariffs not collected that would otherwise be due and would thus provide a financial benefit or compensation to the aggrieved party. As compensation is a voluntary measure on the part of the offending party, the current administration might refuse to provide compensation. At this point, the aggrieved party can seek authorization from the DSB to impose countermeasures in the form of suspending trade concessions (such as low tariffs on United

¹³⁹ Imposing tariffs higher than authorized in the relevant GATT tariff schedule is a breach of the GATT Article II:1(a) and constitutes a violation case under the GATT Article XXIII:1(a).

¹⁴⁰ See GATT, *supra* note 8, art. XXIII:1(a).

¹⁴¹ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 84.

¹⁴² See DSU, *supra* note 58, art. 21.3.

¹⁴³ See *id.* art. 22.2.

¹⁴⁴ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 87.

States imports) given to the offending member.¹⁴⁵ Although the WTO uses the term “countermeasures,” this is really a form of trade retaliation.¹⁴⁶ The aggrieved member can ask for and may receive authorization from the DSB to impose higher tariffs on imports from the US.¹⁴⁷ Retaliation, like compensation, is viewed by the WTO as a form of political pressure to induce the offending member to bring its non-conforming measure into compliance with its WTO obligations.¹⁴⁸ In other words, retaliation, like compensation, is meant to induce the United States to lower its tariffs.¹⁴⁹

Trade retaliation is viewed as an extreme measure and is rarely invoked,¹⁵⁰ but trade retaliation is problematic and may be the weakest part of the GATT/WTO dispute settlement system, at least in relation to powerful states. Trade retaliation may create effective pressure on weaker trading states to comply with the WTO, but trade retaliation creates the possibility that powerful states, such as the United States, will refuse to comply for many years and simply live with retaliation.¹⁵¹ This policy could mean that in the event of a trade dispute arising from the current administration’s imposition of higher tariffs as a protectionist measure, the current administration will ignore any adverse decision of the WTO and simply live with the consequences of any WTO authorized trade sanctions. Living with trade retaliation, while arguably against the spirit of the WTO, is in line with its letter. In fact, the current administration might further escalate trade tensions by imposing additional protectionist trade measures as a form of counter retaliation against the aggrieved country. In other words, if the current administration decides to implement a protectionist measure in the form of increased tariffs in direct violation of United States obligations under the GATT/WTO, there is ultimately nothing that the GATT/WTO dispute settlement system can do to compel the United States to withdraw the tariff increase.

¹⁴⁵ See DSU, *supra* note 58, art. 22.3.

¹⁴⁶ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 88.

¹⁴⁷ See DSU, *supra* note 58, art. 22.2.

¹⁴⁸ See *id.* art. 22.1.

¹⁴⁹ See *id.*

¹⁵⁰ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 88.

¹⁵¹ See *id.* at 90.

B. *Foreign Direct Investment and Protectionist Measures*

So far this discussion has focused on protectionist and nationalistic policies involving trade in goods. The WTO has major agreements regulating three of the four channels of trade: the GATT governing the trade in goods, the General Agreement on Trade in Services (GATS) governing the trade in services, and the Agreement on Trade Related Intellectual Property Rights (TRIPS) governing the trade in technology or intellectual property. Any dispute involving any of these channels of trade (goods, services, and technology) can be brought within the WTO dispute settlement system. However, the WTO does not have a major agreement governing trade in foreign direct investment (FDI).¹⁵² A simple example of investment trade or FDI is when a multinational company, with its headquarters in one nation, establishes a subsidiary in a foreign nation.¹⁵³ The foreign subsidiary is established through the investment of capital. As of today, no WTO agreement creates any direct legal obligations governing the domestic law treatment of the foreign subsidiary.¹⁵⁴ The lack of a WTO agreement on investment means that trade disputes involving FDI are not subject to review in the WTO dispute settlement system.¹⁵⁵ Nations can impose protectionist measures on FDI and the WTO is without jurisdiction to rule on the legality of the action or to offer a remedy.¹⁵⁶

Outside of the WTO, issues involving FDI can be expressly made subject to dispute resolution by an international arbitration body in the case of a bilateral investment treaty (BIT) or a regional trade treaty, such as NAFTA.¹⁵⁷ However, in the absence of a BIT or an RTA governing

¹⁵² See CHOW & SCHOENBAUM, *supra* note 1, at 397–99.

¹⁵³ See *id.* at 350.

¹⁵⁴ See *id.* at 397–99.

¹⁵⁵ The WTO dispute settlement system only has jurisdiction over cases that arise under the WTO agreements. This is made clear by Article 1 of the WTO DSU. Article 1 of the DSU refers to the WTO agreements set forth in Appendix 1 as the “covered agreements.” Only disputes arising under the covered agreements can be decided under the WTO dispute settlement understanding. See DSU, *supra* note 58, art. 1. As none of the covered agreements deals with FDI, such disputes fall outside of the DSU and the WTO dispute settlement system, and must be resolved in some other forum.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 39–40 (discussing dispute settlement under NAFTA).

investment, the issue of discrimination or protectionism in investment trade is subject to domestic law only. For example, in the case of the United States and China, the two countries currently do not have a BIT, and the United States has withdrawn from the TPP. This means that issues of protectionism in investment trade are to be decided under U.S. law only. To take a concrete example of FDI, suppose that a Chinese state-owned enterprise seeks to acquire a U.S. company. Under current U.S. law, the transaction would be subject to review by the U.S. Committee on Foreign Investment (CFIUS) under the Foreign Investment and National Security Act (FISIA)¹⁵⁸ to determine whether any national security interests of the United States might be compromised by the Chinese acquisition of a U.S. company.¹⁵⁹ Suppose further that the United States decides on a pretext to reject the Chinese acquisition and that protectionist and nationalistic reasons underlie the decision. There is no recourse from such a decision within the WTO. Any remedy would have to be found within the U.S. legal system. The United States can exercise protectionist policies in the area of FDI, and foreign nations such as China that do not have a bilateral or regional trade agreement with the United States have no legal recourse outside of the U.S. legal system.

C. *The WTO as an Ineffective Deterrent Against Economic Nationalism*

The structure of the WTO dispute settlement system is based on the good faith of the WTO members, peer pressure, and an overall desire of all WTO members to maintain the viability and credibility of the WTO system.¹⁶⁰ In the event that a powerful country such as the United States is determined to impose protectionist measures that promote its own view of economic nationalism, as opposed to multilateralism as the basis of the modern trading system, there is little

¹⁵⁸ 50 U.S.C. § 4565 (2018). For a more detailed discussion of FISIA and CFIUS, see Daniel C.K. Chow, *Why China Wants a Bilateral Investment Treaty with the United States*, 33 B.U. INT'L L.J. 421 (2015).

¹⁵⁹ See CHOW & SCHOENBAUM, *supra* note 1, at 423.

¹⁶⁰ Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, 351–68 (2006).

that the WTO can do. A powerful country like the United States can simply decide to live with any sanctions authorized by the WTO, an option that is permitted under the DSU. The WTO dispute settlement system, as presently organized, will not be able to operate as an effective deterrent to the type of nationalistic policies that the Trump Administration has announced that it intends to follow. A second major deficiency of the system is that disputes involving FDI are outside the purview of the WTO, so any protectionist measures undertaken by the United States will be immune from WTO review. Unless the nation has a bilateral or regional treaty with the United States that covers FDI, the nation will be without any legal recourse to challenge protectionist actions of the United States in the area of trade in investment.

CONCLUSION

The election of Donald J. Trump as the U.S. President resulted in economic nationalism becoming the mantle of the United States, a leader in world trade and one of the original architects of the GATT/WTO multilateral trading system. The approach of the current Administration is a fundamental departure from that of previous U.S. administrations and is in fundamental tension with the GATT/WTO. The basic approach of the GATT/WTO has been remarkably successful in reducing trade barriers and in increasing trade volumes through the eight successive rounds of trade negotiations over several decades and through the widespread implementation of WTO obligations, such as MFN and reciprocity. The key conclusion of this Article is that the economic logic of the GATT/WTO is still relevant and effective, and, if undisturbed, should continue to result in future trade liberalization and increases in trade volumes. However, the revival of economic nationalism by the Trump Administration poses a significant threat to the continuing function of the GATT/WTO system.

Underlying President Trump's economic nationalism is a basic departure from the view espoused by the GATT/WTO that global trade is a positive sum game that can result in absolute increases in trade volumes and mutual benefits for all or most nations that play by the rules set forth in the GATT/WTO. Replacing this view is a stark and harsh view that global trade is consists of a no-holds barred battle to decide who will be the winner and who will be the loser in a zero-sum

game. According to President Trump's approach, a nation that wins in international trade must impose a corresponding loss on another nation. Under his America First approach, President Trump has promised that the United States will use its clout to dictate the terms of trade deals that will allow America to obtain gains in trade at the expense of its trading partners, if necessary. Harboring a deep mistrust of the GATT/WTO, the current administration seeks to harken back to the pre-GATT/WTO era of economic nationalism and protectionism. The current administration would replace a model of trade based on multilateral agreements with a model focused on bilateral and regional agreements that will allow the United States to impose its terms on its trading partners and to block the development of future multilateral agreements.

This Article has argued that a large body of empirical and theoretical work demonstrates that the GATT/WTO model of international trade has been historically effective and that its economic logic continues to be relevant and valid. The threat of economic nationalism, however, threatens to constrain and destroy this model. While the GATT/WTO dispute settlement mechanism is a crowning achievement in resolving trade disputes, a closer examination of the system indicates that it will likely be unable to constrain the growth of U.S. economic nationalism. Unless other factors come into play, such as a policy reversal by the current administration or political change in the United States, the revival of economic nationalism could derail decades of growth in global trade and result in the ultimate dismantling of the multilateral trading system leading to many harmful effects on the global economy.