THE FUTURE OF INTERNATIONAL TRADE DISPUTE RESOLUTION IN A POST-WTO WORLD

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Although the United States claims that it wants to restore the dispute settlement system of the World Trade Organization (WTO) that it crippled five years ago, trade diplomats remain skeptical of the United States' intentions. Critics wonder if the most recent wave of proposed reforms of the WTO will lead to another impasse now in its fifth year. Without a fully functioning dispute system, the WTO cannot enforce its rules, leaving it in a crisis.

An approach proposed by this Article that has escaped the attention of WTO reformers is the use of the dispute systems in the Preferential Trade Agreements (PTAs) that are proliferating around the world to resolve WTO disputes. PTAs create trade areas providing potential benefits above those of the WTO. Every WTO member is also a member of one or more PTAs. These PTA dispute systems are intact, fully functioning, and modeled on the dispute system of the WTO. Many of these systems can be used to resolve either treaty or WTO disputes. Some treaties have a clause that any violation of the WTO is a violation of the PTA.

The WTO can play a vital role by serving as a central forum for the use of the PTA dispute systems. All PTA members have permanent missions in Geneva, the site of the WTO. The WTO can provide facilities and its staff includes lawyers, economists, statisticians, financial analysts and interpreters who can assist the PTAs. With all PTA dispute systems centralized in the WTO and the continuing creation of new PTAs, clearly the wave of the future, the WTO will have a workable dispute system that it can build upon and improve.

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I. INTRODUCTION

Although the United States has recently committed to resuscitating the crippled dispute settlement system of the World Trade Organization (WTO) by 2024, many nations remain skeptical of the United States' intentions.[1] Some nations believe that the United States, the most frequent litigant in the WTO,[2] has no intention of ever reviving the dispute system, a notion that has been vehemently rejected by Katherine Tai, the United States Trade Representative (USTR).[3] Spurred on by recent optimistic statements by the United States, the WTO embarked in May 2024 on an ambitious formal program to reform the dispute settlement with a sense of urgency and the goal of achieving a fully functioning system by the end of 2024, if not sooner.[4]

The WTO dispute system has been unable to discharge its full responsibilities for nearly five years since December 2019 due to the intransigence of the United States.[5] On that date, the members of the Appellate Body fell below that necessary for a quorum and so became unable to convene.[6] With a disabled Appellate Body, the dispute system became unable to enforce WTO

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[1] Remarks by Ambassador Katherine Tai at the Working Session on Dispute Settlement Reform at the Thirteen Ministerial Conference of the World Trade Organization, https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2024/february/remarks-ambassador-katherine-tai-working-session-dispute-settlement-reform-thirteenth-ministerial (stating that the United States is committed to having a "fully and well-functioning dispute system" by 2024). See Gavin Bade, Biden Officials Try to Revive a Key World Trade Referee After Trump Steamrolled it, Politico (Sept. 22. 2023), https://www.politico.com/news/2023/09/22/tai-targets-china-climate-in-call-to-reform-wto-00117491. For an argument that the United States has no true interest in reviving the WTO dispute system but would prefer a permanently disabled WTO, see Daniel C.K. Chow, Why the United States Wants and Needs a Permanently Crippled World Trade Organization (manuscript on file with the author) (hereinafter "Chow, Permanently Crippled WTO").

[2] Congressional Research Service, Dispute Settlement in the WTO and U.S. Trade Agreements 2 (July 17, 2024), https://crsreports.congress.gov/product/pdf/IF/IF10645 (As of June 2024, about 600 WTO dispute cases have been filed with the United States as complainant or respondent in 283 cases or nearly half of all cases).

[3] Remarks by Ambassador Katherine Tai, supra note 1 (when questioned about whether the United States is truly interested in reviving the WTO dispute system, USTR Tai replied, "I don't have enough time and money to waste resources in Geneva on a process that we don't actually believe in.")

[4] See Part II.C infra.

[5] See Daniel C.K. Chow, A New and Controversial Approach to Dispute Resolution under the U.S.-China Trade Agreement of 2020, 26 Harv. Neg. L. Rev. 31, 49 (2020) (hereinafter, Chow, A New and Controversial Approach to Dispute Resolution). See also Daniel C.K. Chow, Thomas J. Schoenbaum, & Gregory Dorris, International Trade Law: Problems, Cases, and Materials 123 (4th ed. 2022) (hereinafter Chow, Schoenbaum, & Dorris, International Trade Law).

[6] Chow, A New and Controversial Approach to Dispute Resolution, supra note 4, at 50.

rules.[7] Without the ability to enforce its rules and obligations, the WTO plunged into a crisis from which it has yet to emerge.[8] Due to the political and legal constraints of the WTO, no reform of the dispute system is possible without the agreement of the United States, its most powerful and influential member.[9] At this point, the United States appears to remain skeptical about fully reviving the Appellate Body.[10] No one really can be certain of U.S. intentions so the result of the current negotiation efforts could be another impasse.[11]

This Article suggests an alternative approach to the current impasse that has escaped the attention of WTO reformers. Currently, there are a number of alternative and intact dispute systems that are capable of resolving WTO disputes.[12] These systems are contained in the proliferating number of preferential trade agreements (PTAs) that arise outside of the WTO but are recognized and accepted by the WTO.[13] PTAs further liberalize trade and are consistent with the overall goals of the WTO.[14] All modern PTAs consists of WTO members that seek to create trade preferences for treaty members that go beyond those required by the WTO.[15] PTAs are built upon an edifice of WTO obligations but extend benefits beyond basic WTO requirements for treaty members.[16] Two of the most prominent examples of PTAs are the recently concluded United States Mexico Canada Trade Agreement (USMCA) that replaced the North American Free Trade Agreement on July 1, 2020.[17] Another preeminent example is the European Economic Area, part of the European Union (EU), consisting of 27 European nations.[18] Beyond

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[7] Id. at 50-51.

[8] The World Trade Organization: The Appellate Body Crisis: Center for Strategic & International Studies, https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis.

[9] Decisions in the WTO are invariably taken by consensus meaning that no member dissents. See Article IX.1 of the WTO Agreement to Establish the World Trade Organization (1995). The principle of consensus ensures that a majority does not ramrod a decision on a dissenting minority. If a consensus cannot be reached, Article IX.1 provides that a majority vote can be taken. See id. Although this possibility exists, the WTO has invariably used the principle of consensus and has never invoked majority rule in the entirety of its existence. Matthew Yeo, Christophe Bondy, Alexandre Genest, Chloe Baldwin, Tensions Between Consensus and Voting Decision-Making – Part I: Appointing Appellate Body Members (Aug. 31, 2021), https://www.steptoe.com/en/news-publications/global-trade-and-investment-law-blog/tensions-between-consensus-and-voting-in-wto-decision-making-part-i-appointing-appellate-body-members.htm. If the WTO were to use to use a majority vote to override United States' opposition to the Appellate Body, the United States would probably reject the vote as illegitimate.
WTO ("[I]n practice voting at the WTO never takes place. Instead, WTO members have strictly adhered to consensus since the WTO's inception").

[10] See Part II.C infra.

[11] See Part V infra.

[12] See Part IV infra.

[13] See Part III infra.

[14] Id.

[15] Id.

[16] Id.

[17] Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S, Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[18] Agreement on the European Economic Area, Mar. 17, 1993, 1994 O.J. (L 1) 3, as amended.

these two examples are PTAs that have in recent years proliferated in Africa, Asia, and South America.[19] PTAs now cover all geographical areas of the world with active trading nations.[20]

All modern PTAs have dispute settlement systems that are modeled on that of the WTO.[21] Most of the systems use a panel similar to a court of first instance but lack an appeals body, such as the Appellate Body of the WTO.[22] Under the PTAs discussed in later sections of this Article, the panels have authority to resolve WTO issues that involve the PTA and some PTAs have clauses providing that any violation of the WTO is a violation of the PTA.[23] These PTA dispute systems also have enforcement powers through the authorized use of trade sanctions also based on the model of the WTO.[24]

The approach suggested by this Article is to use existing dispute settlement systems in the growing network of PTAs to resolve WTO disputes. This approach is consistent with world trends because PTAs on a plurilateral and bilateral basis are clearly the future of international trade as the world retreats from the era of multilateralism and globalization.[25] The WTO can play a crucial role by serving as a central forum or clearinghouse for these PTA dispute systems.[26] All PTA dispute systems involve the use of trade officials from both parties.[27] Many countries maintain permanent missions in Geneva that participate in the WTO headquarters in Geneva and in other international organizations.[28] Each WTO member has a permanent WTO delegation headed by a senior level trade minister and are staffed with trade officials.[29] These trade delegations are in constant communications and negotiations on various WTO trade issues with each other. These trade delegation offices can facilitate the communications that are part of any dispute resolution either by way of negotiation or litigation. The WTO can also provide access to its dispute settlement facilities, dispute settlement lawyers, trade policy analysts, legal/economic affairs officers, research economists, statisticians, finance experts, translators, and interpreters.[30]

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[19] See Part III.A infra.
[20] Id.
[21] Id.
[22] Id.
[23] Id.
[24] Id.
[25] See Part III infra.
[26] Two of the major functions of the WTO is to serve as a forum for trade talks and negotiations and as a forum for settling trade disputes. These roles were consistent with the WTO's role in facilitating the use of PTAs to resolve WTO disputes. See World Trade Organization, Who We Are, https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm.
[27] See Part IV.D infra.
[28] Permanent Missions in Geneva, https://www.itu.int/hub/membership/our-members/permanent-missions-in-geneva/.
[29] For example, the United States maintains a permanent mission in Geneva to the WTO headed by Deputy USTR Maria Pagan. U.S. Mission to the World Trade Organization, https://geneva.usmission.gov/international-trade/. Like many countries, the U.S. International Mission not only represents the United States at the WTO but also in other international organizations, including the United Nations. See U.S. Mission to International Organizations in Geneva, https://geneva.usmission.gov/usmissiongeneva/.
[30] See Career Opportunities, https://www.wto.org/english/thewto_e/vacan_e/career_e.htm.

With the concentration of these dispute systems in the WTO, no doubt new efficiencies and synergism can give rise to improvements in the dispute resolution process that could address some of the current weaknesses of this approach.[31]

This Article will develop these points as follows. Part II discusses the breakdown of the WTO dispute system and the decisive role played by the United States. Part II also examines the current state and pace of reform of the WTO reform system and the crucial role of the United States in any meaningful reform. Part III examines the growing network of PTAs in the modern world economy. The world is quickly being divided into regional and sub-regional trading blocs. Part IV examines the dispute systems of key modern PTAs with a focus on the United States Mexico Canada Trade Agreement. This part also examines the controversial and unusual dispute clause in the United States – China Economic and Trade Agreement of 2020.[32] This dispute clause is unusual because the United States imposed it on China to ensure that the United States will never lose a trade dispute under the treaty with China. This part shows how China can turn this approach on its head and against the United States in WTO disputes. Part V concludes with observations for the future.

II. THE WTO DISPUTE SETTLEMENT SYSTEM

One of the primary objectives of the WTO was to erect a viable dispute settlement system.[33] Under its predecessor, the General Agreement on Tariffs and Trade 1947 (GATT 1947), which operated for nearly fifty years from 1947 to 1995, contracting parties could resolve disputes by submitting them to a GATT panel.[34] Under the GATT, a panel decision became legally effective after adoption by the GATT parties under the principle of consensus, i.e., when no GATT contracting state objected to its adoption.[35] Parties also had to agree to establish a panel.[36] A party could block the establishment of a panel or a losing party to a dispute could block the adoption of a GATT panel decision by the GATT parties and prevent the decision from

[31] See Part IV infra.
[32] Economic And Trade Agreement Between the Government of the United States Of America and the Government Of The People's Republic Of China, https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text.
[33] Chow, Schoenbaum, & Dorris, International Trade Law, supra note 4, at 96.
[34] The GATT 1947 was intended as a treaty to jump start the reduction of tariffs in post-War period. The GATT was to be administered by the International Trade Organization (ITO) but the ITO never came into existence due to opposition by the U.S. Congress. As a result, the GATT 1947 operated with a skeletal staff as a treaty without an administering organization for nearly fifty years. When the WTO was established in 1995, the WTO took on the role originally intended for the ITO. At that point, GATT 1947 ceased to exist and was reissued as GATT 1994. See Chow, Schoenbaum, & Dorris, International Trade Law, supra note 4, at 10-11. For a discussion of dispute resolution under the GATT through the use of panels, see WTO, Historic Development of the WTO Dispute Settlement System, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm. Dispute settlement under the GATT was based upon GATT Articles XXII and XXIII. See GATT, Arts. XXII & XXIII.
[35] Id.
[36] Id.

having any legal effect.[37] Such a system proved unsatisfactory as in practice it gave the losing party a veto power over any GATT decisions.[38]

When the WTO was established on January 1, 1995, it replaced the GATT 1947 with a far more elaborate organizational structure. One of the most important goals of the WTO was to create a more formal dispute settlement system based upon a litigation model that is set forth in the WTO Dispute Settlement Understanding (DSU).[39] The WTO dispute system consists of three bodies: panels, an Appellate Body, and the DSB.[40] Similar to the GATT, the WTO uses panels, consisting of three panelists, that operate like to a trial court.[41] Decisions by the panel are subject to appeal to the Appellate Body, which sits as a high court of international trade.[42] All decisions must be adopted by the DSB, consisting of all members of the WTO, to be legally effective.[43] Decisions by the panel that are not appealed can be adopted by the DSB.[44] Decisions that are appealed to the Appellate Body can be adopted by the DSB only after the appeal is completed.[45] To eliminate the veto problem under the GATT 1947, the WTO uses a principle of "reverse consensus" for the adoption of decisions by the DSB. Under this principle, a decision must be adopted by the DSB unless there is a consensus *not* to adopt the decision.[46] This means that if there is even one member that votes for adoption, a "reverse" consensus does not exist and the decision must be adopted by the DSB. As a practical matter, all decisions submitted to the DSB are adopted.

A. U.S. Dissatisfaction with the Appellate Body

Soon after the establishment of the WTO, the United States became dissatisfied with the performance of the Appellate Body.[47] The United States believed that the Appellate Body has exceeded its mandate established during the negotiations for the DSU when it decided cases against the United States.[48] The negotiations for the DSU occurred as part of the nine-year Uruguay Round of negotiations leading to the establishment of the WTO, the most extensive and longest round in the history of the GATT. The United States played a leading role in the Uruguay round as it had in the negotiations leading to the GATT 1947.

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[37] Id.
[38] Id.
[39] Understanding on Rules and Procedures Governing the Settlement of Disputes (1995).
[40] DSU, Art. 2.
[41] DSU, Arts. 6 & 11.
[42] DSU, Art. 17.
[43] DSU, Arts. 16 & 17.
[44] DSU, Art. 16.
[45] DSU, Art. 16.4.
[46] DSU, Arts. 16.4 & 17.14.
[47] The U.S. position is set forth in United States Trade Representative, Report on the Appellate Body of the World Trade Organization (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf. (hereinafter USTR Report of the Appellate Body).
[48] Id. at 47-52.

The United States position is that its rights and obligations that existed during the Uruguay negotiation stage and before the establishment of the WTO were part of the existing trade law jurisprudence that was not to be disturbed later by the WTO. According to the United States, this understanding is contained in Article 3.4 of the DSU, which states that "rulings made by the DSB shall be . . . in accordance with the rights and obligations under this Understanding and under the covered agreements."[49] The United States asserts that the WTO has departed from this basic understanding.[50]

In February 2020, the United States Trade Representative promulgated a report setting forth the U.S. criticism and dissatisfaction with the WTO Appellate Body. The Report stated:

> The proper functioning of the WTO Appellate Body has a disproportionate impact on the United States because more than one quarter of all disputes at the WTO have been challenges to U.S. laws or other measures. Specifically, 155 disputes have been filed against the United States, and no other Member has faced even a hundred disputes. According to some analyses, up to approximately 90 percent of the disputes pursued against the U.S. have led to a report finding that the U.S. law or other measure was inconsistent with WTO agreements. This means that, on average, over the past 25 years, the WTO has found a U.S. law or measure WTO-inconsistent between five and six times per year, every year.[51]

The Report sets forth three categories of charges against the Appellate Body.

First, the Appellate Body regularly violates procedural rules of the WTO, including deadlines for making findings of fact, deciding appeals, and by allowing persons whose term on the Appellate Body have expired to continue as panelists in deciding appeals.[52]

Second, the Appellate Body has strayed from the basic understanding that it would not disturb existing rights and obligation of the United States by engaging in judicial activism and making new law.[53] The Appellate Body has felt free to anoint itself as a "Supreme Court of International Trade," a role that was never intended by WTO members.[54] Judicial activism exceeds the mandate of the Appellate Body and is an illegitimate usurpation of power.[55] Only the General Council or Ministerial Conference of the WTO, consisting of all WTO members, has the authority to create new law.[56]

[49] DSU, Art. 3.4.
[50] USTR Report on the Appellate Body, supra note 47, at 3.
[51] Id. at 47-52.
[52] Id. at 25-80.
[53] Id. at 47-52.

[55] Id.
[56] Id.

Third, the Appellate Body has unlawfully invaded the policy space of the United States by invalidating U.S. trade laws relating to dumping, subsidies and countervailing duties, and safeguard laws.[57]

The Report did not offer any solutions. The Report stated that "the purpose of this Report is not to propose solutions to the problems facing the WTO dispute settlement system. Rather, its purpose is to provide a thorough examination of the Appellate Body's failure to comply with the WTO Agreements."[58] The United States emphasized that its concerns are not new: "The United States has raised concerns with the functioning of the Appellate Body for more than 20 years. For too long, these concerns have been ignored, the problems have grown worse, and the WTO dispute settlement system has suffered as a result."[59]

B. U.S. Attack on the Appellate Body

The sentiments that are summarized in the Report explain why the United States took the drastic step of disabling the Appellate Body. Beginning in 2016, the Obama administration refused to reappoint a member of the Appellate Body.[60] The Trump administration continued this policy of intransigence with the result that on December 10, 2019, the number of panelists fell below that necessary for a quorum and the Appellate Body became unable to convene.[61] In another indication of the bipartisan dissatisfaction with the WTO, the Biden administration has continued the obstruction of the Appellate Body. In February 2024, the Biden administration blocked a 73rd attempt at initiating the Appellate Body selection process to name new panelists, a proposal that was supported by 130 members.[62]

The effect of the paralysis of the Appellate Body is that all WTO obligations have become unenforceable. Any member found by a panel to be in violation of the WTO agreements can nullify the panel decision by appealing it to the defunct Appellate Body. Article 16.4 of the DSU states:

> Within 60 days after the circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal . . . If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.[63]

No panel decision can have legal effect until it is adopted by the Dispute Settlement Body.[64] Panel decisions that are not appealed are not affected and can be adopted, but once a panel

[57] Id. at 95-119.
[58] Id. at 121.
[59] Id.
[60] Chow, A New and Controversial Dispute Resolution Mechanism, supra note 5, at 49-50.
[61] Id. at 50.
[62] Ian Allen, It's Time for the United States to End its Bipartisan Attack on the WTO, Just Security (Mar. 2, 2024), https://www.justsecurity.org/93024/its-time-for-the-united-states-to-end-its-bipartisan-attack-on-the-wto/.
[63] DSU, Art. 16.4.
[64] DSU, Art. 2.1.

decision is appealed it becomes suspended in a legal limbo. The Dispute Settlement Body cannot adopt a panel decision that has been appealed until the appeal is completed and as the Appellate Body is disabled, the appeal cannot be completed.[65] The effect of an appeal of any panel decision is to nullify its effect. When China won a panel decision rejecting the Trump administration's punitive new tariffs on Chinese imports, the United States immediately appealed the decision, nullifying its effect, and continued with its tariffs.[66]

The United States attack on the Appellate Body has caused the WTO to plunge into a crisis.[67] The question that arises is whether an organization that touts a legal regime of international trade rights and obligations that suddenly becomes unenforceable remains a viable organization. Moreover, one has to seriously wonder whether an organization that has now gone for five years saddled with a crippled dispute system has through inaction and inertia become obsolete and incapable of ever reviving itself.

C. Attempts at Reform

In an attempt to stave off this crisis, on March 27, 2020, the EU and 15 other members established the Multi-Party Interim Arbitration Arrangement (MPIA) pursuant to Article 25 of the DSU.[68] This arrangement establishes a private body that is in effect a substitute Appellate Body that will function to hear appeals until the formal Appellate Body is restored. The arbitration process will follow the same substantive and procedural rules of the appellate procedures set forth in the DSU.[69] The persons available to hear appeals through the substitute Appellate Body is drawn from a pool of ten panelists.[70] A total of 19 WTO members have signed the arrangement but it is open to all members that wish to join.[71] The United States has refused to join so the arrangement has a gaping hole in coverage: the most important and powerful country in the WTO and one of its most frequent litigants is not a party to the MPIA. The United States has been involved either as a complainant or a respondent in nearly half or in 283 of the approximately 600 total disputes at the WTO.[72] For this reason, the MPIA cannot be considered to be a viable solution to the paralysis of the Appellate Body.

Some recent statements by the United States have sparked optimism that the long blockade of the Appellate Body may be finally coming to an end. On February 28, 2024, Katherine Tai, the USTR for the Biden administration, stated that the United States was

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[65] DSU, Art. 16.4.
[66] United States – Tariff Measures on Certain Goods from China – Notification of an Appeal by the United States under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS543/10 (Oct. 27, 2020).
[67] Simon Lester, Ending the WTO Dispute Settlement Crisis: Where to from Here? (Mar. 2, 2022), https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis#:~:text=World%20Trade%20Organization%20(WTO)%20dispute,and%20leaving%20the%20dispute%20unresolved.
[68] Multi-Party Interim Appeal Arbitration Arrangement, https://wtoplurilaterals.info/plural_initiative/the-mpia/.
[69] Id.
[70] Id.
[71] Id.
[72] See Note 2 supra.

committed to "having a fully and well-functioning dispute settlement system . . . by 2024."[73] A prominent trade organization proclaimed that these remarks by USTR Tai are "a significant vote of confidence from the country that brought the WTO's dispute settlement process to its knees in 2019 when it refused to appoint new Appellate Body members."[74] Other experts opined that after these remarks, "The odds of a restored dispute settlement mechanism in 2024 may have increased significantly."[75] The WTO itself appears to have gained new confidence as well. Similar remarks made in 2023 by Deputy USTR Maria Pagan, head of the U.S. delegation in the WTO headquarters in Geneva, might have led the WTO at the Twelfth Ministerial Conference held in Geneva from June 12-16, 2023 to issue a declaration that WTO members "commit to . . . having a fully and well-functioning dispute settlement system accessible to all Members by 2024."[76] At the Thirteenth Ministerial Conference held in Abu Dhabi from February 26 to March 2, 2024, the WTO issued the following declaration: "We instruct officials to accelerate discussion in an inclusive and transparent manner, build on progress already made, and work on unresolved issues, including issues regarding appeal/review and accessibility to achieve the objective by 2024 as we set forth in [the Twelfth Ministerial Conference]."[77] On May 4, 2024, the WTO appointed a new facilitator to deal with reform of the dispute system.[78] Under the leadership of the facilitator, the WTO convened its first formal meeting on restoring the dispute system with a sense of urgency to complete work by the end of 2024, if not sooner.[79]

Despite these positive developments, a sense of skepticism about U.S. intentions remains among some WTO members and observers. A number of nations doubt that the United States really wants to restore the dispute system as opposing to keeping the status quo of a crippled system.[80] For the United States the status quo has some distinct advantages. The United States can enjoy the benefits of the WTO without having to follow any of its rules.[81] In the past, the

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[73] Remarks by Ambassador Katherine Tai at the Working Session on Dispute Settlement Reform at the Thirteen Ministerial Conference of the World Trade Organization, https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2024/february/remarks-ambassador-katherine-tai-working-session-dispute-settlement-reform-thirteenth-ministerial.

[74] WTO May be Close to Fixing Dispute Settlement System, The Westerner Producer (Mar. 21, 1014), https://www.producer.com/news/wto-may-be-close-to-fixing-dispute-settlement-system/. See also Eric Martin & Shruti Srivastava, Biden Trade Chief Arrives at WTO Optimistic on Overhauling Trade Forum, Bloomberg (Feb. 27, 2024), https://www.bloomberg.com/news/articles/2024-02-27/biden-trade-chief-optimistic-on-wto-talks-to-reform-organization?embedded-checkout=true.

[75] Alan Yanovich, Hannes Sigurgeirsson, Jan Walter, WTO Dispute Settlement – What to Expect in 2024 (Jan. 23, 2024), https://www.akingump.com/en/insights/alerts/wto-dispute-settlementwhat-to-expect-in-2024.

[76] MC12 Outcome Document, Ministerial Conference 12th Session, Geneva, 12-15 June 2022, ¶ 4, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf&Open=True.

[77] Ministerial Declaration, Dispute Settlement Reform, WT/MIN(24)/37 WT/L/1192 adopted on Mar. 2, 2024.

[78] New Facilitator Details Next Steps for Dispute Settlement Reform Talks after Consultations (May 14, 2024), https://www.wto.org/english/news_e/news24_e/disp_14may24_e.htm.

[79] See WTO Members Hold First Formal Meeting on WTO Dispute Reform, https://www.wto.org/english/news_e/news24_e/disp_30may24_e.htm.

[80] Sarah Anne Aarup, Reform or Die? If the US Gets its Way, the WTO Might do Both, Politico (May 9, 2023), https://www.politico.eu/article/reform-die-usa-washington-world-trade-organization-wto-ngozi-okonjo-iweala-joe-biden/(hereinafter Aarup, Reform or Die?).

[81] Chow, Permanently Crippled WTO, supra note 1, at 6.

USTR has complained vociferously about U.S. losses in the Appellate Body.[82] With the current crippled dispute system, the United States can never lose another case in the WTO.[83] The United States has complained that the WTO has invaded its policy space by invalidating U.S. trade remedies.[84] With the status quo, the United States is free to use any of this trade remedies without regard to whether they are lawful under the WTO.[85]

Under the Biden administration, the United States has embarked on a new industrial policy that takes a page right out of China's state capitalism playbook.[86] To compete with China, the United States is providing hundreds of billions of dollars in subsidies to the semi-conductor, electric vehicle, and green energy industries.[87] In the past, the United States consistently claimed that China's extensive use of government subsidies violates its WTO obligations.[88] Now it is the United States that would be vulnerable to attack in the WTO for its use of subsidies if the WTO dispute settlement system is restored to full capacity.[89]

The United States is also able to impose harsh trade sanctions against China, its chief protagonist and global rival, without worrying about WTO rules. For example, due to concerns about rising imports from China of high technology and industrial goods, on May 24, 2024, the Biden administration imposed new 25 to 50% tariffs on semi-conductors, solar cells, batteries, steel, aluminum, graphite, and syringes.[90] To deal with the possibility that China will export large quantities of cheap electric cars to the United States due to excess industrial capacity in

[82] USTR Report on the Appellate Body, supra note 47, at 3.
[83] Chow, Permanently Crippled WTO, supra note 1, at 33.
[84] USTR Report on the Appellate Body, supra note 47, at 95-119.
[85] Id.
[86] Chow, Permanently Crippled WTO, supra note 1, at 3.
[87] See Remarks on Executing a Modern American Industrial Strategy by NEC Director Brian Deese (Oct. 13, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/13/remarks-on-executing-a-modern-american-industrial-strategy-by-nec-director-brian-deese/; FACT SHEET: Chips and Science Act will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China (Aug. 9, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sh/.eet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china; Ryan Tracey, Senate Approves $280 Billion Bill to Boost U.S. Chipmaking, Technology, Wall St. J. (July 27, 2022), https://www.wsj.com/articles/senate-approves-280-billion-bill-to-boost-u-s-science-chip-production-11658942295; Fact Sheet: Biden-Harris Administration Announces New Actions to Cut Electric Vehicle Costs for Americans and Continue Building Out a Convenient, Reliable, Made-in-America EV Charging Network (Jan. 19, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/19/fact-sheet-biden-harris-administration-announces-new-actions-to-cut-electric-vehicle-costs-for-americans-and-continue-building-out-a-convenient-reliable-made-in-america-ev-charging-network/; Biden-Harris Administration Announces $20 Billion in Awards to Expand Access to Clean Energy and Climate Solutions and Lower Energy Costs for Communities Across the Nation (Apr. 4, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/04/biden-harris-administration-announces-historic-20-billion-in-awards-to-expand-access-to-clean-energy-and-climate-solutions-and-lower-energy-costs-for-communities-across-the-nation/.
[88] See Chow, Permanently Crippled WTO, supra note 1, at 4.
[89] Id.
[90] Agathe Demarais, Biden's New Tariffs Raise Alarm Bells in Beijing, Foreign Policy (May 30, 2024), https://foreignpolicy.com/2024/05/30/china-us-tariffs-trade-war-ev-clean-technology-biden/.

China, the Biden administration also imposed a 100% tariff on electric vehicles, effectively closing off the U.S. market.[91]

All of these new tariffs are of dubious legality under the WTO. U.S. tariffs on Chinese goods are set forth in the U.S. tariff schedule negotiated with all WTO members and on file with the WTO.[92] Under the GATT/WTO, U.S. tariffs are "bound," i.e. subject to a ceiling as set forth in the U.S. GATT schedule. The United States cannot just raise tariffs above its GATT rates due to concerns about competition from China. The United States can exceed its bound rates only under narrowly circumscribed conditions, none of which appear to exist to justify the new tariff increases.[93] Yet, China is not likely to challenge the Biden administration's new tariffs as any challenge would be futile under the current crippled dispute system.

Doubts about the true intentions of the United States are further exacerbated by the United States' vagueness about what it means by restoring a "fully functioning" dispute settlement system. The United States avoids details in its statements and never specifically mentions reconstituting the Appellate Body. What has come to light about the United States' position on the Appellate Body is not encouraging. According to reports, the United States is now floating a proposal behind the scenes that a reformed WTO dispute settlement be divided into two stages: a non-binding stage consisting of panel decisions and a binding stage consisting of Appellate Body decisions.[94] A dispute moves from the non-binding to the binding stage of the Appellate Body only with the consent of the parties.[95]

The crux of the U.S. proposal is that the use of the dispute system should be optional.[96] Any party that loses in the panel can refuse to move to the second stage, leaving only a non-binding panel decision that can be ignored.[97] Prior to its paralysis by the United States, the Appellate Body had mandatory jurisdiction over panel decisions.[98] The United States is currently floating the idea of an Appellate Body with voluntary jurisdiction based upon the consent of both parties. This proposal would in essence return the WTO to the GATT 1947 era when any losing party can block a GATT panel decision from being adopted by the GATT parties and becoming legally effective.[99] Such a proposal is controversial and may not receive support from other WTO members as its effect will be to further diminish the WTO. Trade diplomats have expressed their suspicion that the U.S. proposal, while styled as one to save the WTO, is really intended as a final fatal blow to a moribund organization.[100] According to one source,

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[91] Id.
[92] See Consolidated Tariff Schedules Database, https://www.wto.org/english/tratop_e/tariffs_e/cts_e.htm.
[93] For example, the United States can assert that one of the exceptions to its GATT obligations is available under the general exceptions clause, GATT Article XX. The United States can also argue that it is allowed to impose higher tariffs as a safeguard under GATT Article XIX, the safeguards clause, or under the WTO Safeguards Agreement (1994). None of these provisions appear to be applicable in this case.
[94] Aarup, Reform or Die?, supra note 80.
[95] Id.
[96] Id.
[97] Id.
[98] DSU, Art. 17.
[99] WTO, Historic Development of the WTO Dispute Settlement System, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm.
[100] Aarup, Reform or Die?, supra note 80.

"Washington is — ever so quietly — floating the idea of a new-look appeals process that could help get the WTO off life support. And that is leading some trade diplomats in Geneva to question whether the patient would survive the operation that Joe Biden's administration has in mind."[101]

III. USE OF REGIONAL AND BILATERAL TRADE AGREEMENTS

The continuing U.S. blockade of the Appellate Body and U.S. skepticism of the value of a mandatory dispute system raise doubts about the future of reforms in the WTO, despite the recent burst of optimism. The current negotiations for the reform of the dispute settlement system seem far from certain to result in a successful revival of the dispute settlement system in the foreseeable future.

This Article proposes an avenue that has no far escaped attention of reformers in the WTO, the United States, and other leading countries. This approach is based on the use of dispute resolution mechanisms that exist in the growing number of PTAs that are regional and bilateral trade agreements. One of the advantages of the suggested approach is that these dispute resolution systems are currently in existence and are intact, fully functioning, and have mandatory enforcement powers.[102] There is no need to create new systems. Most of these systems are modelled on the WTO and so share many of the features set forth in the DSU and are familiar to all members of the WTO.

Not all trading relationships are covered by these agreements so the coverage of WTO disputes under PTAs is far from complete. This gap in coverage means that some countries will not be able to use the PTA dispute systems discussed below to resolve WTO disputes with a particular country because the two countries do not have a PTA. Nevertheless, the suggested approach is preferable to the stagnant *status quo* and the uncertainty swirling around present negotiations. Both the United States and China are subject to PTAs and the EU is a signatory to the MPIA so the most powerful trading countries are covered to some extent for WTO disputes. Undoubtedly, new PTAs will emerge in the future so new nations will be able to participate in the suggested approach. For the present, a patchwork system of dispute resolution systems can be pieced together from the current network of PTAs. As set forth below, the WTO will also have a central role to play in the suggested approach.

A. Preferential Trade Agreements and the WTO

PTAs are trade agreements entered into on a bilateral or plurilateral basis by nations or a selected group of nations; this contrasts PTAs from the multilateral approach of the WTO that seeks worldwide membership. In the modern world, all PTAs are between states that are also WTO member nations.[103] States enter into PTAs for political and economic reasons.[104] PTAs allow for greater economic integration as PTAs potentially can offer trade benefits that exceed

[101] Id.
[102] See Part III.A infra.
[103] All of the PTAs discussed in this section are populated by WTO members.
[104] World Trade Report: 2011 The WTO and Preferential Trade Agreements: From Co-existence to Coherence 94-97, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.

those under the WTO and can cover areas that are not covered by the WTO, such as labor and the environment.[105] For example, a basic feature of modern PTAs are zero or very low tariffs on for the trade in goods; many PTAs also include preferential treatment for services, intellectual property, and foreign direct investment.[106] For trade in goods, only goods from members of the PTA enjoy preferential treatment in the form of zero tariffs. Goods from non-PTA members are subject to normal GATT rates.

On their face, PTAs are inconsistent with the WTO because they derogate from the Most Favored Nation (MFN) principle contained in Article I of the GATT.[107] MFN requires that any trade preferences or advantages given by a WTO member to any country must be immediately extended to all other WTO members.[108] MFN requires members of a PTA to extend zero tariffs to goods from all WTO members.[109] Of course, such a requirement would make PTAs impossible. PTAs are made possible and consistent with the WTO by Article XXIV of the GATT, which provides for an exception to MFN for PTAs under certain conditions.[110]

Under GATT Article XXIV, to qualify as a PTA entitled to an exception from MFN, a bilateral or plurilateral preferential trade agreement must meet three conditions: (1) it must involve "substantially all the trade between constituent territories";[111] (2) the "duties [tariffs] and other regulations" imposed on third party states "shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations" applicable "prior to the formation" of such PTA;[112] and (3) the PTA shall be notified to the WTO.[113] The overall approach is that the GATT/WTO recognizes and supports PTAs because the benefits of increased trade and cooperation among treaty members contributes to global trade liberalization.

PTAs have become very popular and have proliferated around the world:

- In North America, there is the United States Mexico Canada Trade Agreement, which placed the North American Free Trade Agreement on July 1, 2020.[114]
- In Europe, there is the European Economic Area (1994), which is part of the European Union, consisting of 27 states.[115]
- In the Asia and pacific region, there is the Regional Comprehensive Economic Agreement (2020), led by China and consisting of 10 ASEAN members (Brunei

[105] Id. The USMCA has chapters on environment (Chapter 24) and labor (Chapter 23).
[106] The USMCA has chapters on services (Chapter 15), intellectual property (chapter 20), and foreign direct investment (Chapter 14).
[107] Article I of GATT states in relevant that "any advantage, favour, privilege or immunity granted by any contracting party to any product originated in . . . 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." GATT, Art. I.
[108] Id.
[109] Id.
[110] GATT, Art. XXIV.
[111] GATT, Art. XXIV:2.
[112] GATT, Art. XXIV:5(a)-(b).
[113] GATT, Art. XXIV:7.
[114] See note 17 supra.
[115] See note 18 supra.

Darussalam, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam) and China, Australia, New Zealand, Japan, and South America.[116] There is also the Comprehensive and Progressive Trans-Pacific Partnership Agreement (2018) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam.[117] The United States was leading party to the original Trans-Pacific Partnership, but withdrew as one of the first official acts of the Trump administration.[118]

- In South America, there are two major PTAs: Mercosur (1991) consisting of Argentina, Brazil, Paraguay, and Uruguay and the Pacific Alliance (2011) consisting of Chile, Colombia, Peru, and Mexico.[119]
- In Africa, there is the African Continental Free Trade Agreement (2021) consisting of 54 African states.[120]

Aside from these plurilateral agreements, countries such as the United States have entered into numerous bilateral preferential trade agreement. Currently, the United States maintains bilateral trade agreements with 20 countries.[121] The EU has bilateral agreements in place with 78 states or territories and is in the process of ratifying or negotiating agreements with 13 other states or entities, including Mercosur, South Korea, and India.[122] In total, there are now some 700 regional and bilateral agreements and every WTO member is a party to one or more of them.[123] The number of PTAs is expected to increase in the future.[124]

GATT Article XXIV recognizes two different types of PTAs: customs unions and free trade areas.[125] The EU is the preeminent example of a customs union and the USMCA is an example of one of the most complex and sophisticated free trade areas.[126] In a free trade area such as the USMCA, parties eliminate tariffs and other trade barriers for among the treaty parties

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[116] Regional Comprehensive Economic Partnership Agreement, Nov. 15, 2020, 60 I.L.M. 354, https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text

[117]Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents

[118] Office of the United States Trade Representative, The United States Officially Withdraws from the Trans-Pacific Partnership, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.

[119] Mercosur, Mar. 26, 1991, https://www.mercosur.int/en/Framework Agreement of the Pacific Alliance, June 6, 2012, http://www.sice.oas.org/tpd/pacific_alliance/Pacific_Alliance_e.asp.

[120] Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area

[121] Office of the United States Trade Representative, Free Trade Agreements, https://ustr.gov/trade-agreements/free-trade-agreements.

[122] European Commission, Negotiations and Agreements, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.

[123] Chow, Schoenbaum, & Dorris, International Trade Law, supra note 5, at 45.

[124] Uri Dadush, Enzo Dominguez Prost, The Problem with Preferential Trade Agreements (May 9, 2023) https://www.bruegel.org/system/files/2023-06/the-problem-with-preferential-trade-agreements--%289033%29_0.pdf. (PTAs continue to proliferate).

[125] GATT, Art. XXIV (entitled "Territorial Application – Frontier Traffic – Customs Unions and Free-Trade Areas").

[126] Chow, Schoenbaum, & Dorris, International Trade Law, supra note 5, at 47.

but each party maintains its own tariffs and other trade barriers for trade with non-parties.[127] For example, under the USMCA, goods travel from Mexico to the United States and Canada duty free but goods from Japan entering Mexico, the United States, or Canada would be subject to three different tariffs, each under the tariff schedule of the particular country.

In the case of a customs union, tariff and trade barriers are also eliminated among members of the union but the union maintains a single external tariff for goods from non-members.[128] In the EU, the same tariff is paid under EU law for goods entering the EU for the first time no matter where the goods enter among the 27 EU member states.[129] Once the goods enter the EU after paying the tariff, the goods can then travel throughout the EU duty free.[130]

This difference between a customs union and a free trade area means that in the case of the latter some exporters will wish to seek out the country with the lowest tariff rate to serve as the point of entry and then ship the goods to their final destination.[131] For example, an exporter from Japan might find that Mexico has a lower tariff than the United States for a particular product. The exporter then would have an incentive to ship the goods to Mexico, pay the Mexican tariff, and then ship the goods duty free to the United States.[132] To prevent this type of behavior, all free trade areas have rules of origin to determine the country of origin of the goods.[133] Under the prior example, the rules of origin would require the Japanese goods transshipped through Mexico to the United States to have Japan designated as their country of origin so when the goods enter the United States from Mexico the goods would be subject under the U.S. tariff schedule to a duty on goods from Japan. All free trade areas have rules of origin.[134] The USMCA has particularly complex rules of origin for all goods, but especially as applied to automobiles and auto parts in order to protect the U.S. auto industry.[135]

As this discussion suggests, customs unions require countries to relinquish their sovereignty to determine tariffs for non-union members in favor of a single external tariff. Customs unions not only require a greater sacrifice of national sovereignty but also greater political integration and coordination.[136] The EU is not only an economic union but also a political and monetary union.[137] Due to the greater demands of customs union, most PTAs in the world today are free trade areas. The Africa Continental Free Trade Agreement provides that it creates a free trade area to "lay the foundation for the establishment of a Continental Customs Union at a later stage."[138]

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[127] Id.
[128] Id.
[129] Id.
[130] Id.
[131] Id.
[132] Id.
[133] Id.
[134] Id.
[135] Id. at 53.
[136] Id. at 47.
[137] Id.
[138] AFCTA, Art. 3(d).

The growing popularity of PTAs raise the question of whether they are beneficial or harmful to global trade. PTAs are double two-edge swords. PTAs increase trade between members of the PTA but they also divert trade from treaty members from the rest of the world.[139] The issue is whether the beneficial effects of trade increases is greater than the harmful effects of trade diversion. The next section of this Article takes up this topic in detail.

B. Preferential Trade Agreements and Trade Liberalization

1. Preferential Trade Agreements: Shallow vs. Deep Integration

Not much has happened in terms of multilateral trade liberalization since conclusion of the Uruguay Round of the GATT in 1994. In the words of trade economist Richard Baldwin, ""[T]the WTO is widely regarded as suffering from a deep malaise", the Doha Development Round having "staggered between failures, flops, and false dawns since it was launched in 2001."[140] At the same time, there has been a significant proliferation in the number of PTAs since the mid-1990s, rising to a current cumulative total of 369 in force from 37 in 1994, with significant tariff reductions continuing to occur despite the deadlock in the Doha Round of the WTO.[141,142]

It has been argued that the growth in PTAs has partly been driven by an increased demand for "deep" as opposed to "shallow" policy reforms, the latter being what the GATT/WTO was set up to negotiate.[143] Deep integration, originally defined by economist Robert Lawrence as "behind-the-border" integration,[144] goes well beyond reducing tariffs, PTA provisions being denoted as "WTO-extra", with examples including labor and environmental standards, foreign direct investment provisions, protection of intellectual property, and competition policy.[145] Evidence on new PTAs indicate that the number of deep provisions they contain exhibit a sharp increase from the early-2000s through to the financial crisis, especially those connected to offshoring.[146]

Offshoring has been driven by what has been termed the "unbundling" of production, i.e., the breakup of vertically integrated manufacturing processes across time and space driven by North-South wage differences, lower transport costs, and innovation in communication. Unbundling began in the 1980s in both the United States and Japan. For example, Japanese firms headquartered in Japan began to export human-capital intensive intermediates to factories in East Asia for labor-intensive assembly, the final products being shipped back to either Japan

[139] Chow, Schoenbaum, & Dorris, International Trade Law, supra note 5, at 46.
[140] See Richard Baldwin, The World Trade Organization and the Future of Multilateralism, 30, J. Econ. Perspectives 95, 95 (2016).
[141] See Id. At 95-96.
[142] See WTO, Regional Trade Agreements Database (2024). Note: the WTO data refers to regional trade agreements (RTAs), defined as reciprocal preferential trade agreements, i.e., two-way preferences on either part of or a substantial portion of trade.
https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx
[143] See Baldwin, supra note 140, at 107-08.
[144] See Robert Z. Lawrence, Regionalism, Multilateralism, and Deeper Integration 7-9 (1996).
[145] See Kyle Bagwell, Chad P. Bown & Robert W. Staiger, Is the WTO Passé? 54, J. Econ. Lit. 1137 (2016).
[146] See Baldwin, supra note 140, at 107-08.

or Europe.[147] Importantly, offshoring has meant that in terms of trade policy, tariff reduction has become less important, the focus turning to provisions that protect investment and intellectual property rights (IPRs).[148] Firms based in the developed North have been willing to participate in offshoring, provided that host nations in the less developed South commit to protecting the transfer of IPRs as well as non-tangible assets, and that associated flows of goods, services, and investment are not impeded.[149] The necessary assurances required for offshoring have typically come through deep provisions in PTAs, i.e., "my markets for your reform".[150]

Given the nature of their membership, the policies they cover, and their depth, PTAs, can be defined as:

> [A]n international treaty with restrictive membership and including any articles that (i) apply to only its members and (ii) aim to secure or increase their respective market access.[151]

A number of observations can be made about this definition. First, compared to the principle of MFN embedded in the GATT/WTO system, PTAs are by definition discriminatory, i.e., the articles of a specific treaty apply only to the members of that treaty.[152] As previously noted, GATT Article XXIV does provide an exception to MFN, allowing WTO members to form PTAs, the key stipulations being that the PTA must eliminate tariffs on "substantially all" trade among its member countries, and MFN tariffs applied to non-members of the PTA should not be increased.[153] Second, the definition allows for any policy, not just tariff reduction, that improves the market access of member countries. Third, it captures different membership requirements, ranging from those that are explicitly regional, e.g., the EU the USMCA, free trade agreements, and those that are transcontinental, e.g., the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

The definition also covers the classification of different types of PTA ordered by their increasing degree of economic integration, i.e., (i) non-reciprocal PTAs such as the Generalized System of Preferences which allow for one-way preferential tariffs; PTAs such as USMCA that have two-way preferences with tariffs being eliminated on most trade; (iii) a customs unions such as Mercosur; (iv) common markets such as the EU which allow for free movement of capital and labor; and (v) economic unions such as the EU which are a customs union with added dimensions including monetary union.[154]

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[147] See Richard Baldwin, Globalization: The Great Unbundling(s), in Globalization Challenges for Europe and Finland 22-24 (Econ. Council of Finland, 2006).
[148] See Baldwin, supra note 140, at 107.
[149] Id at 111.
[150] Id at 111. For an early outline of the latter argument, see Wilfred J. Ethier, The New Regionalism, 108 Econ. Journal 1149, 1154-60.
[151] See Nuno Limão, Preferential Trade Agreements, in Handbook of Commercial Policy, Vol. B 279, 284 (Kyle Bagwell & Robert W. Staiger, eds., 2016).
[152] See GATT, Art. I:1.
[153] Id at Article XXIV: 8(a)(i), 5(a) and 5(b).
[154] See Limão, supra note 151, at 285-286, who draws on the classification of PTAs originally suggested by Jeffrey A. Frankel, Ernesto Stein & Shang-Jin Wei, Regional Trading Blocs in the World Economic System 12-17 (1997).

This classification clearly implies increasing depth of economic integration, moving from "shallow" to "deep" agreements, and by the mid-1980s, there had been a clear increase in the extent of "deeper" PTAs. By defining groups of policies affecting the extent of cooperation within PTAs, a sense of the depth of integration can also be developed ranging from: (i) tariffs; (ii) non-tariff barriers, e.g., product standards and customs procedures; (iii) "behind-the-border" polices, e.g., state aid and competition policy; to (iv) other policies, i.e., regional and industrial.[155] Based on a sample of 100 PTAs covering WTO members through 2011, 100 percent covered tariffs, 98 percent covered tariffs and NTBs, 89 percent covered tariffs and "behind-the-border" policies, 60 percent covered tariffs and other policies, and 56 percent covered all policies.[156]

2. PTAs: "Stumbling Blocks" or "Building Blocks" to Trade Liberalization?

The economic literature analyzing PTAs is very extensive, with several reviews of multiple dimensions, including, *inter alia*, contributions by Richard Baldwin and Anthony Venables,[157] Arvind Panagariya,[158] Pravin Krishna,[159] Caroline Freund and Emanuel Ornelas,[160] and Nuno Limão.[161] Despite its breadth, a key and continuing issue in the literature has been whether PTAs are "building blocks" or "stumbling blocks" to global free trade, a terminology originally attributed to international economist Jagdish Bhagwati.[162] The core of the argument is as follows: PTAs are considered a "building block" if they either accelerate or at least do not slow down moves to global free trade, and they are a "stumbling block" if they prevent or slow down multilateral trade liberalization.[163] This debate crystalized in the early-1990s in what has been termed "Big-Think Regionalism", focusing on whether regionalism helps or hinders multilateralism.[164] In an important article, Nobel Prize winner Paul Krugman, examined how world economic world welfare might change as the number of trading blocs is reduced through integration, arguing on the one hand that less trade will be encumbered by tariffs, and on the other that larger trading blocs will tend to exert market power by setting high external tariffs, the

[155] Id at 288.
[156] Id at 290. See also, Henrik Horn, Petros C. Mavroidis & André Sapir, Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements 33 World Econ.1565, 1577-79 (2010).
[157] See Richard E. Baldwin & Anthony J. Venables, Regional Economic Integration, in Handbook of International Economics, Vol. 3, 1597-1644 (Gene M. Grossman and Kenneth Rogoff, eds., 1995).
[158] See Arvind Panagariya, Preferential Trade Liberalization: The Traditional Theory and New Developments 38, J. Econ. Lit. 287-331 (2000).
[159] See Pravin Krishna, The Economics of Preferential Trade Agreements, in Handbook of International Trade: Economic and Legal Analyses of Trade Policy and Institutions, Vol. II, 294-312 (E. Kwan Choi and James C. Hartigan, eds., 2008).
[160] See Caroline Freund & Emanuel Ornelas, Regional Trade Agreements, 2, Ann. Rev. Econ. 139-66. (2010).
[161] See Limão, supra note 151, at 279-367.
[162] See Lawrence, supra note 5, at 2-4, referring to Jadish Bhagwati, The World Trading System at Risk 77 (1991), also confirmed in Jagdish Bhagwati & Arvind Panagariya, Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes?, in The Economics of Preferential Trade Agreements 1-78 (Jagdish Bhagwati & Arvind Panagariya, eds., 1996).
[163] See Richard E. Baldwin & Elena Seghezza, Are Trade Blocs Building or Stumbling Blocks?, 25, J. Econ. Integration 276, 276-277 (2010).
[164] See Richard Baldwin, Big-Think Regionalism: A Critical Survey, NBER Working Paper 14056 1, 2 (2008).

relationship between the number of blocs and world welfare being U-shaped, i.e., the best outcome being one single bloc, welfare declining and then rising with the number of blocs.[165] In a less technical setting, Bhagwati also speculated as to the time-path of world welfare and regionalism, arguing that it could: (i) increase or fall moderately in the short-run and then stagnate due to fragmentation of the world economy; (ii) result in multilateral free trade; and (iii) fall short of free trade due to free-riding behavior.[166] In a robust response to both Krugman and Bhagwati, Lawrence Summers rejected the idea that regionalism was the enemy of multilateralism, making the now oft-cited claim that:

> I therefore assert and will defend the following principle: economists should maintain a strong but, rebuttable, presumption in favor of all lateral reductions in trade barriers, whether they be multi, uni, bi, plurilateral. Global liberalization may be best, but regional liberalization is very likely to be good.[167]

Summers based his proposition on four points: (i) the benefits of regionalism would outweigh any costs; (ii) even if there were costs to regionalism, it would still increase world welfare; (iii) beyond trade, there would be other benefits to regionalism; and (iv) regionalism would just as likely stimulate general trade liberalization as to hold it back. More to come on the costs and benefits of PTAs in a later section.[168]

3. Dynamics of Regional Trade Liberalization

Not surprisingly, this original discussion has continued to be much debated and analyzed by, to name but a few, Wilfred Ethier,[169] Richard Baldwin,[170] and Philippe Aghion *et al*.,[171] a common feature of this literature being the emphasis on the dynamics of trade liberalization. An early argument put forward by Ethier, which pre-dates the literature on "unbundling" of production and offshoring,[172] focuses on the incentives for policy reform in developing countries as a means to attracting foreign direct investment, thereby allowing them to participate more fully in the multilateral trading system.[173] The motivation for the argument rests on the observed characteristics of "new regionalism" in the late-1980s/early-1990s: (i) small countries linking up with larger countries through regional agreements (Mexico and the United States); (ii) small countries implementing unilateral policy reforms (Mexico); (iii) regional trade liberalization

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[165] See Paul Krugman, The Move Toward Free Trade Zones, 3 Econ. Rev., Federal Reserve Bank of Kansas 5, 11-12 (1991). See also Paul Krugman, Is Bilateralism Bad?, in International Trade and Policy 20-21 (Elhanan Helpman & Assaf Razin, eds., 1991).

[166] See Jagdish Bhagwati, Regionalism and Multilateralism: An Overview, in New Dimensions in Regional Integration 31-33 (Jaime De Melo & Arvind Panagariya, eds., 1993).

[167] See Lawrence H. Summers, Regionalism and the World Trading System, 3 Econ. Rev., Federal Reserve Bank of Kansas 295, 296 (1991).

[168] Id at 297.

[169] See Ethier, supra note 150; see also Wilfred J. Ethier, Regionalism in a Multilateral World, 106 J. Pol. Econ. 1214-1245 (1998).

[170] See Richard E. Baldwin, Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade, 29 World Econ. 1451-1518 (2006).

[171] Philippe Aghion, Pol Antràs & Elhanan Helpman, 2007. Negotiating Free Trade 73 J. Int'l Econ. 1-30 (2007).

[172] See Richard Baldwin, Globalization: The Great Unbundling(s), in Globalization Challenges for Europe and Finland (Economic Council of Finland, 2006).

[173] See Ethier, supra note 169, at 1214-16.

being more than just tariff reduction, with small countries typically making large concessions to their larger trading partners.[174] Which leads to the key question: why did reform-minded small countries seek regional trade agreements with large countries that conferred only minimal trade advantages?[175]

In the analysis, developed countries produce final traded goods whose production depends on the combination of two stages, stage one requiring human capital at home, and stage two requiring skilled labor, production at stage two being subject to Marshallian scale economies, i.e., increased production results in beneficial spillovers to other producers. If stage two of production occurs abroad (offshoring), the unfinished goods are then exported by the foreign subsidiary back home to be combined with stage one production.[176] Less developed countries, who maintain distortionary domestic policies due to pressure from special interests, produce rudimentary final goods for local consumption with skilled labor, given that they do not have access to human capital and stage one production.[177]

Starting from an equilibrium where developed countries have unilaterally imposed tariffs, and less developed countries are autarkic, developed countries have an incentive to liberalize trade multilaterally, raising final goods output, thereby enhancing scale effects, the welfare of each developed country increasing, i.e., the benefits of technological spillovers are conferred on all developed countries.[178] At the same time, less developed countries do not participate in multilateral trade liberalization because the economic benefits of reform are considered less than the minimum necessary for their governments to give up autarky and reform their distorting policies.[179]

Suppose less developed countries observe the decline in final goods tariffs due to multilateral trade liberalization by developed countries and the extent of international technological spillovers, and then decide whether or not to reform. The choice to reform is dependent on the probability of success, which is contingent on developed country firms undertaking direct investment in stage two production in the less developed country, as well as their reducing tariffs on stage two imports. Importantly, the decision to reform by less developed countries occurs through their entering a regional trade agreement.[180]

Key here is that less developed countries seeking to reform their distortionary policies understand the importance of attracting foreign direct investment, and that reform makes them more attractive relative to other less developed countries. Liberalizing trade through a regional agreement gives a less developed country a marginal advantage over others in terms of getting access to a developed country market. In addition, internalization of the externality (i.e., technological spillovers) spreads the benefits of a multilateral trading system to all countries, reinforcing rather than undermining multilateralism.[181] Overall, the "new regionalism" is seen as

[174] Id. at 1216-18.
[175] Id. at 1218.
[176] Id. at 1218-19.
[177] Id. at 1222.
[178] Id. at 1227-28.
[179] Id. at 1227.
[180] Id. at 1229-30.
[181] Id. at 1242.

being the result of multilateral liberalization, and also the means by which small less developed countries can exploit multilateral benefits.[182]

Baldwin, in what he terms the "domino" theory of regionalism, argues deepening integration between a subset of countries increases incentives for other countries to seek membership of that PTA, thereby generating further trade liberalization through a process of "dominos" starting the "juggernaut" of multilateralism "rolling".[183] The argument is developed as follows: there is an idiosyncratic shock to an initial PTA equilibrium, which results in political pressure in non-member countries to accede, based on non-member exporting firms recognizing the benefits of joining and the costs of remaining outside the PTA, pro-membership forces outweighing anti-membership forces. Once one non-member country joins, this results in continued and greater discrimination against non-members, reinforcing the pro-membership forces in outside countries, such that a country previously against accession now applies to join, i.e., once one "domino" falls, others follow.[184] Whether or not lowering tariffs among members of a PTA leads to downward pressure on their MFN tariffs, and start the "juggernaut" rolling will depend on whether the PTA leads to more or less total PTA imports.[185]

To back up his hypothesis, Baldwin provides an historical narrative of trade liberalization in the post-war period, arguing that multilateral and regional trade liberalization have gone hand-in-hand. The obvious example of a "domino" effect was the launching of the European Economic Community (EEC) in 1957 which eventually led to the original six member countries (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands) forming a customs union. In turn, this resulted in the United Kingdom (UK) leading formation of the European Free Trade Area in 1960, a trade bloc of non-EEC European countries (Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the UK), with the UK subsequently applying for EEC membership in 1961. In other words, formation of the EEC resulted in pro-membership forces in the UK seeing to avoid the discrimination it implied, which was followed by Ireland, Norway and Denmark all applying to become members of the EEC.[186] Given that the United States also faced discrimination in terms of its export market access to the EEC, it can be argued that the "juggernaut" of multilateral trade liberalization was set rolling by the "domino" effect of regionalism in Europe, starting with the Kennedy Round of GATT negotiations in 1967, subsequently reinforced by greater economic integration in Europe.[187] It might even be argued that Summers was "closer to the mark" in his commentary, given that completion of the Uruguay Round of GATT occurred at the same time of spreading regionalism in both Europe, North America, and elsewhere.[188]

Following the Uruguay Round, trade liberalization was also characterized by what has been termed the multilateralization of regionalism, notably through creation of the Pan-European Cumulation System, which "tamed the spaghetti bowl" of PTAs in Europe in the late-1990s.[189]

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[182] Id. at 1244.
[183] See Baldwin, supra note 170, at 1467-71.
[184] Id. at 1467-68.
[185] Id. at 1470.
[186] Id. at 1476.
[187] Id. at 1477-1482.
[188] See Baldwin, supra note 164, at 2.
[189] See Baldwin, supra note 170, at 1499-1504.

This "spaghetti bowl", a term originally due to Bhagwati,[190] emerged in the period after disappearance of the Eastern bloc and collapse of the Soviet Union in the late-1980s/early-1990s, the EU and European Free Trade Area signing PTAs with 12 Central and East European countries, some of whom also signed PTAs among themselves. This was followed by Mediterranean countries seeking bilateral PTAs with the EU, culminating in Turkey joining the EU customs union in 1995, and the EU signing bilateral FTAs with Tunisia and Israel, followed by, *inter alia*, Morocco (1996), Jordan (1997), Egypt (2001), Algeria (2002), and Syria (2004). The Mediterranean countries themselves also signed regional deals, e.g., the Agadir Agreement, consisting of Morocco, Tunisa, Egypt, and Jordan.[191]

At this point, non-harmonized rules of origin[192] applied to goods being traded in the Euro-Mediterranean area became very complex, forcing the EU to implement the European Social Cohesion Platform in 1997, which covered all members of the EU and European Free Trade Area, as well as central eastern European countries and the Baltic States.[193] With increased offshoring of production by EU-based firms to lower cost producers in Central Europe, introduction of Pan-European Cumulation System harmonized rules of origin, which reduced documentation costs along value chains, and also allowed firms to source inputs from any Pan-European Cumulation System member, without losing origin status when exporting final products to the EU.[194]

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[190] See Jagdish Bhagwati, US Trade Policy: The Infatuation with FTAs, in The Dangerous Drift to Preferential Trade Agreement 2-3 (Jagdish Bhagwati & Anne O. Krueger, eds., 1995).

[191] See Baldwin, supra note 170, at 1483-84.

[192] Rules of origin attribute a country of origin to a product in order to determine its economic nationality, i.e., where a product is made, which matters when implementing tariffs. See WTO, Rules of Origin, https://www.wto.org/english/tratop_e/roi_e/roi_e.htm

[193] See Baldwin, supra note 170, at 1483-84.

[194] Id at 1501. Pan-European Cumulation System was an EU amendment to the various FTAs in the EU, European Free Trade Area and the set of Central Eastern European Countries applying for EU membership. It substituted in a common set of rules of origin, such that value could be accumulated without affecting the tariff-free status of end products traded within the EU. The technical language refers to a "diagonal cumulation" zone, i.e., a set of countries adopt a common set of rules of origin, the zone being termed a rules of origin union. Once a product enters the zone, its origin is determined by the common rules of origin, and it cannot lose its origin status by crossing an internal border. As an illustration, the EU signs bilateral FTAs with Hungary and Poland, and suppose the EU cloth industry competes directly with that in Poland, and the EU cloth industry initially lobbies for protectionist rules of origin on cloth, such that shirts imported tariff-free into the EU have to be made of EU cloth. If cumulation is bilateral, the rules of origin force Hungarian shirt producers to switch from Polish to EU-sourced cloth to get preferential access to the EU. In this case bilateral cumulation plus rules of origin acts like a Hungarian tariff on Polish cloth. So, if an EU firm locates production in Hungary, its shirts are subject to two sets of rules of origin – the EU-Hungary rules, and the Hungary-Poland rules – this is costly as it requires two sets of documentation. PECs eliminate this problem and applied one set of rules of origin.

Subsequently, the Pan-European Cumulation System on rules of origin was widened in 1999 to include Turkey, and was then replaced in 2011 by the Pan-Euro-Mediterranean Cumulation Zone covering 25 contracting parties, the EU, European Free Trade Area (Switzerland, Norway, Iceland, and Liechtenstein), participants in the Barcelona Process (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Syria, and Tunisia), participants in the Stabilization and Association Process (Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia, and Kosovo), the Republic of Moldova, Georgia and Ukraine.[195] Essentially the Euro- Mediterranean Trade bloc is one regional free trade zone, i.e., "spaghetti bowls" can be "building blocks" to free trade.[196]

Drawing on the earlier dynamic path arguments of Krugman and Bhagwati,[197] Aghion *et al*. analyze the conditions under which sequential bargaining (multiple rounds of PTA negotiations involving different subsets of countries) may or may not lead to global free trade. While technically challenging, several important predictions are generated from the analysis, drawing on a model where a leading country such as the United States, decides whether to negotiate sequentially with a sub-set of countries (regionalism), or simultaneously with all countries (multilateralism). Initially, a benchmark result is derived: with no spillover effects from a sub-set of countries forming a coalition via a PTA, and if the payoff from all countries being in a grand coalition (GATT/WTO) exceeds that of all other coalitions (superadditivity), the leading country will be indifferent between multilateral and sequential bargaining, and if a grand coalition forms, there is free trade.[198]

Typically, the reduction in trade barriers associated with a PTA will affect world prices, such that the welfare of countries outside a trade bloc will depend on whether those prices rise or fall, and whether outside countries are exporters or importers. Here, sequential bargaining through a PTA with a sub-set of countries is preferred if negative externalities are imposed on non-member countries, creating an incentive for the latter to join at a later stage, while multilateral bargaining is preferred if there are positive externalities from a PTA reducing the incentive for non-members to join at a later stage. Importantly, whichever strategy is adopted by the leading country, a grand coalition is ultimately formed with free trade. In other words, contrary to Bhagwati and others' concerns about regionalism, it will result in global free trade under specific conditions.[199]

The latter result is sensitive to the assumption that superadditivity holds, i.e., global free trade generates the highest payoff. However, if political economy considerations matter, where a country's welfare is the weighted sum of aggregate welfare and the profits of special interest groups, non-free trade outcomes can be equilibria.[200] In such a setting, even if multilateral negotiations could result in free trade, if the payoff from a PTA is greater than any other possible coalition, sequential bargaining will not generate free trade, i.e., regionalism can be a stumbling

[195] See European Commission, The Pan-Euro-Mediterranean Cumulation and the PEM Convention (2024). https://taxation-customs.ec.europa.eu/customs-4/international-affairs/pan-euro-mediterranean-cumulation-and-pem-convention_en

[196]See Baldwin, supra note 170 at 1502.

[197] See Krugman, supra note 165, and Bhagwati supra note 166.

[198] See Aghion et al., supra note 171, at 8-10.

[199] Id at 12-14.

[200] See Gene Grossman & Elhanan Helpman, Protection For Sale 84 Am. Econ. Rev. 833-50 (1994).

block. Alternatively, if multilateral negotiations simply do not work, sequential negotiations can allow a leading country to form a PTA with a sub-set of countries, and then induce other countries to join, i.e., regionalism is a "building block".[201]

4. Trade Creation vs. Trade Diversion

Given these different conceptual arguments for PTAs not necessarily being "stumbling blocks" to trade liberalization, what lay behind the idea that they might be welfare reducing? Central to Bhagwati's original terminology concerning regionalism is application of Jacob Viner's seminal argument that PTAs are not necessarily welfare-improving.[202] The key trade-off is one where distortion due to tariff(s) is reduced between members (trade creation), but there is also a substitution away from a non-member (trade diversion).[203] Viner showed that if the non-member is the lower cost supplier it is possible for trade diversion to outweigh trade creation.[204] Importantly, as pointed out by Bhagwati,[205] preferential trade liberalization is an example of the theory of second-best due to Lipsey and Lancaster.[206] Specifically, the textbook case of global free trade is the first-best outcome, maximizing economic welfare, but if a PTA is introduced nothing can be said *a priori* about the welfare and efficiency effects because while some tariffs have been reduced under the PTA, others still remain.[207]

The standard textbook analysis of the argument considers two countries A and B, along with the rest of the world W, where the home country A can import a specific product from either B or W subject to a non-discriminatory tariff T. If A chooses to remove its tariff T against B via a PTA, the net effect on welfare will depend on whether B is more or less efficient than W. Suppose that B is more efficient than W, such that import prices inclusive of T are $P^B+T < P^W+T$, i.e., A's imports come entirely from B, increasing furtherafter the PTA is formed, i.e. there is trade creation which is welfare-improving because the added benefits to consumers in A of the lower price of B (consumer surplus) outweighs the loss of A's tariff revenue.[208]

Alternatively, suppose that the rest of the world W is more efficient than B, such that import prices inclusive of T are $P^B+T > P^W+T$, i.e., A's imports come entirely from W. After a PTA between A and B is formed, removal of the tariff T against B ensures that $P^B< P^W+T$, A now shifting all of its imports away from W to B, i.e., there is trade diversion which is welfare reducing as A's net gain in consumer surplus from $P^B< P^W+T$ is outweighed by the loss of A's tariff revenue due to $P^W<P^B$.[209]

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[201] See Aghion et al., supra note 171, at 19-20.
[202] See Jacob Viner, The Customs Union Issue (1950). For detailed discussion of the Vinerian tradition, see Panagariya, supra note 158, and Krishna, supra note 159.
[203] See Freund and Ornelas, supra note 160, at 141-2.
[204] See Viner, supra note 202, at 42-4.
[205] See Bhagwati, supra note 166, at 23.
[206] See Richard G. Lipsey & Kelvin Lancaster, The General Theory of Second Best, 24 Rev. Econ. Studies 11-31; see also Richard G. Lipsey, The Theory of Customs Unions: Trade Diversion and Welfare, 24 Economica 40, 40-41 (1957); and Richard G. Lipsey, The Theory of Customs Unions: A General Survey, 70, Econ. J. 496, 496-98 (1960).
[207] Id at 13-14.
[208] See Krishna, supra note 159, at 295-97.
[209] Id at 297.

This argument has informed an extensive theoretical literature emphasizing the expected impact of PTAs, key results including those due to Kemp and Wan,[210] and Panagariya and Krishna[211] showing under what conditions welfare-improving PTAs can be achieved through either a customs union or a free trade area respectively – specifically what form the external tariff vector should take in order to eliminate trade diversion. For example, if the external tariff set by a customs union does not affect trade with non-member countries, the PTA is necessarily welfare-improving, i.e., with constant external trade, trade between customs union members must be trade creating.[212] Interestingly, in motivating his argument in favor regionalism, Ethier dismisses the Vinerian paradigm of trade creation versus trade diversion on the grounds that it only applied to what he terms the "old regionalism", i.e., formation of the European Economic Community, and is not relevant to the "new regionalism" that began in the late-1980s, i.e., the US-Canada free trade agreement and onwards.[213]

35 Empirical Evidence on PTAs

Beyond the orthodox economic theory of PTAs, what does the empirical evidence have to say? One summary of the literature of trade diversion in PTAs concludes that, in general, it tends to be small, although it can be significant in some sectors and countries.[214] In evaluating the increase in number of PTAs since completion of the Uruguay Round of GATT, Richard Baldwin concludes that "the specter that regional trading agreements would inefficiently divert trade never really appeared",[215] and given MFN tariffs are very low, PTAs provide little incentive to divert trade, the empirical evidence suggesting "trade diversion due to bilateral and regional agreements is not a first-order concern in the world economy".[216]

To support his conclusion, Baldwin cites the findings of two studies: first, Estevadeordal *et al*. show that for Latin American countries over the period 1990 to 2001, preferential tariff reduction in a given sector led to reduction in MFN tariffs in that same sector, i.e., trade diversion was minimized;[217] second, Acharya *et al*. in analysis of PTAs accounting for approximately 40 percent of world trade over the period 1970-2008, conclude that when looking at extra-PTA exports and imports, most PTAs have been trade creating rather than trade diverting.[218]

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[210] See Murray C. Kemp & Henry Wan. 1976. An Elementary Proposition Concerning the Formation of Customs Unions, 6 J. Int'l Econ. 95-8 (1976).
[211] Arvind Panagariya & Pravin Krishna, On the Existence of Necessarily Welfare-Improving Free Trade Areas, 57 J. Int'l Econ. 353-367 (2002)
[212] See Freund and Ornelas, supra note 160, at 142.
[213] See Ethier, supra note 169, at 1215-16.
[214] See Maurice Schiff & L. Alan Winters, Regional Integration and Development 209-259 (2003).
[215] See Baldwin, supra note 140, at 112.
[216] Id at 112.
[217] See Antoni Estevadeordal, Caroline Freund & Emanuel Ornelas, Does Regionalism Affect Trade Liberalization Toward Nonmembers?, 123, Quart. J. Econ. 1531, 1566-68 (2008).
[218] See Rohini Acharya, Jo-Ann Crawford, Maryla Maliszewska & Christelle Renard, Landscape, in Preferential Trade Agreement Policies for Development: A Handbook, 57-64 (Jean-Pierre Chauffour & Jen-Christophe Maur, eds., 2011).

However, other empirical evidence does not generate a very consistent picture, e.g., in studying the Canada United States Free Trade Area of the 1980s, Clausing[219] finds no evidence of trade diversion, Romalis finding the exact opposite for both Canada United States Free Trade Area and its successor, the North American Free Trade Agreement (NAFTA).[220] There is also a strand of literature examining the impact of preferential trade agreements on multilateral trade liberalization, with evidence suggesting that the United States,[221] EU,[222] and Japan[223] would have cut their negotiated multilateral tariffs more in the absence of PTAs, which compares with other evidence suggesting the opposite in Latin America.[224] Finally, if trade diversion is interpreted as a negative terms-of-trade effect on non-member countries,[225] there is evidence that non-members of Mercosur[226] and non-member exporters to Spain after its EU accession, were faced with a decline in their export prices.[227]

Limão in his survey of the PTA literature is considerably less optimistic in his conclusion about PTAs and the potential for trade diversion once evaluation includes dimensions beyond simple tariff reduction.[228] Early studies of PTAs using *ad hoc* gravity equations[229] generated mixed findings. For example, a meta-analysis of 362 estimates of the effect of PTAs on trade found that one-third of the parameter estimates were statistically insignificant, 12 percent showed a negative effect, while only 54 percent were positive and statistically insignificant.[230]

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[219] See Kimberly A. Clausing, Trade Creation and Trade Diversion in the Canada-United States Free Trade Agreement, 34 Can. J. Econ. 677, 677-78 (2001).
[220] See J. Romalis, NAFTA's and CUSFTA's Impact on International Trade, 89 Rev. Econ. & Stats. 416, 416-19 (2007).
[221] See Nuno Limão, Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the United States, 96 Am. Econ. Rev. (2006).
[222] See Baybars Karacaovali & Nuno Limão, The Clash of Liberalizations: Preferential vs. Multilateral Trade Liberalization in the European Union, 74 J. Int'l Econ. 299, 299-302 (2008).
[223] See Tobias Ketterer, Daniel M. Bernhofen & Christopher Milner, The Impact of Trade Preferences on Multilateral Tariff Cuts: Evidence for Japan, 38 J. Japanese and Int'l Econ. 31, 32-33 (2015).
[224] See Alok K. Bohara, Kishore Gawande & Pablo Sanguinetti, Trade Diversion and Declining Tariffs: Evidence from Mercosur, 64 J. Int'l Econ.65, 85-6 (2004); see also Estevadeordal et al., supra note 217, at 1566-68.
[225] See L. Alan Winters, Regionalism and the Rest of the World: The Irrelevance of the Kemp-Wan Theorem, 49 Oxford Econ. Papers 228, 230-32 (1997).
[226] See Won Chang & L. Alan Winters, How Regional Trade Blocs Affect Excluded Countries: The Price Effects of MERCOSUR, 92 Am. Econ. Rev. 889, 889-90 (2002).
[227] See L. Alan Winters & Won Chang, Regional Integration and Import Prices: An Empirical Investigation, 51 J. Int'l Econ. 363, 363-64 (2000).
[228] See Limão, supra note 12, at 356-57.
[229] The original gravity equation, based on an analogy with Newton's law of gravity, predicts that the volume of trade between two countries will be proportional to their gross domestic products (GDPs), and inversely related to the distance between them – see James E. Anderson, The Gravity Model, 3 Ann. Rev. Econ. 133, 133-32 (2011). Subsequently, other variables such as IPRs have been included as explanatory variables, e.g., see Minyu Zhou, Ian Sheldon & Jihyun Eum, The Role of Intellectual Property Rights in Seed Technology Transfer Through Trade: Evidence From U.S. Field Seed Crop Seed Exports, 49 Agri. Econ. 423, 426 (2018).
[230] See World Bank, Global Economic Prospects 2005: Trade, Regionalism, and Development 63 (2005).

More recent estimates, based on robust econometric evaluation of structural gravity equations[231] over time indicate large positive trade effects for PTA members relative to non-members.[232]

However, the latter results cannot be fully explained by tariff reduction - what is termed the "trade elasticity puzzle", where trade elasticity is defined as the rate at which trade flows change in response to changes in trade costs.[233] Essentially, a typical static trade model would require either an implausibly high trade elasticity or a very large reduction in tariffs to generate the observed trade effect of PTAs, neither condition being present in the data, the PTA effect remaining even after tariff reductions are accounted for.[234]

The implication to be drawn here is that while pre-PTA tariffs tend to be low, providing little reason for trade diversion, there is still potential for it to occur over time due to dynamic and deep integration effects,[235] including, *inter alia*, the following. First, reduction in non-tariff trade barriers may have a positive effect on member trade. For example Chen and Mattoo find that PTAs including harmonization and mutual recognition of product standards increase bilateral trade between members.[236] Second, regulatory convergence and product standards may increase trade between members, e.g. Gene Grossman *et al*., argue that governments should harmonize product standards in a deep PTA where there are consumption externalities, arguing mutual recognition of such standards will not be efficient.[237] Third, with offshoring, a large amount of trade occurs in intermediate goods, which may magnify the impact of tariff reduction as intermediates crisscross borders. For example, Caliendo and Parro in analyzing the impact of NAFTA find that when intermediate goods are included, the aggregate trade effects of tariff reduction are increased.[238] Fourth, a PTA may increase foreign direct investment across members, as firms take advantage of specialization through vertical integration. For example, Chen estimates the impact of PTAs on countries' ability to attract multinational firms, finding that they do increase foreign direct investment, but the extent varies with the size of the integrated market.[239] Finally, PTAs may reduce expected protection and also uncertainty about

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[231] For a long time, the gravity equation was considered lacking in terms of its theoretical foundation, but subsequently, it has been shown to have a clear analytical justification, drawing on a range of trade theories, e.g., see Arnaud Costinot & Andrés Rodríguez-Clare, Trade Theory With Numbers: Quantifying The Consequences of Globalization, in Handbook of International Economics, Vol. 4, 197–261 (Gita Gopinath, Elhanan Helpman & Kenneth Rogoff, eds., 2014).

[232] See Scott L. Baier & Jeffrey H. Bergstrand, Do Free Trade Agreements Actually Increase Members' International Trade, 71 J. Int'l Econ. 72, 89 (2007); see also J. E. Anderson and Yoto V. Yotov, Terms of Trade and Global Efficiency Effects of Free Trade Agreements, 1990-2002, 99 J. Int'l Econ. 279, 285-88 (2016).

[233] Id at 307-08.

[234] Id at 308-312.

[235] Id at 317.

[236] See Maggie X. Chen & Aaditya Mattoo, Regionalism in Standards: Good or Bad for Trade?, 41 Can. J. Econ. 838, 860 (2008).

[237] See Gene M. Grossman, Phillip McCalman & Robert W. Staiger, The "New" Economics of Trade Agreements: From Trade Liberalization to Regulatory Convergence?, 89 Econometrica 215, 215-20 (2021).

[238] See Lorenzo Caliendo & Fernando Parro, Estimates of the Trade and Welfare Effects of NAFTA, 82 Rev. Econ. Studies 1, 1-5 (2015).

[239] See Maggie X. Chen, Regional Economic Integration and Geographic Concentration of Multinational Firms, 53 Eur. Econ. Rev. 355, 355-58 (2009).

future trade policy. For example, if risk aversion is sufficiently strong, there is an uncertainty-reducing motive for a PTA, the reduction in uncertainty increasing trade-related foreign direct investment in the export sector and generating a higher expected trade volume.[240] In addition, other analysis suggests that PTAs can play a key role in insuring against potential trade wars.[241] Of course, reduction in trade policy uncertainty can also be achieved via multilateral agreement, but there may be bargaining advantages in PTAs, such as not being subject to MFN free riding, and also ease of enforcement.[242]

In summary, care should be taken in concluding that PTAs have an unambiguous impact on trade and economic welfare, especially if they incorporate deep provisions. The evidence suggests that PTAs generate more trade than is consistent with reduction in relatively low applied tariffs. In other words, even if those tariffs are reduced, there may be other effects such as removal of non-tariff trade barriers, growth in foreign direct investment, and reduction in trade policy uncertainty that could divert trade away from non-member to member countries, including the negative impact that preferential trade liberalization can have on multilateral tariff reduction and non-members' terms-of-trade.

Therefore, while trade economists are still debating the impact of PTAs on economic welfare, they do seem to agree that changes in the global economy, including the rise in offshoring, have affected the type of rules necessary for international economic cooperation, but there is some divergence in terms of how the status of the WTO is viewed. On the one hand, Bagwell *et al*., based on their extensive review of the literature, argue that the WTO is "not passé",[243] and notwithstanding the changes in the global economy, "the rules for international economic cooperation are still fundamentally the same".[244] In contrast, Baldwin suggests trade governance has become a "two-pillar" system, the WTO taking care of traditional trade issues, PTAs focusing on "WTO-extra" provisions.[245]

IV. PTAs AND DISPUTE RESOLUTION

A review of the dispute resolution of PTAs contained in the discussion below indicates that these are fully function dispute systems with mandatory enforcement mechanisms that can be used to decide either WTO disputes or PTA disputes. These PTA mechanisms offer existing systems that can be an alternative to resolve the settlement of disputes involving WTO obligations.

A. Dispute Resolution under The United States Mexico Canada Trade Agreement

[240] See Nuno Limão & Giovanni Maggi, Uncertainty and Trade Agreements, 7 Am. Econ. J. Microeconomics 1, 1-8 (2015).
[241] See Limão, supra note 151, at 329-31.
[242] Id at 338-39.
[243] See Bagwell et al., supra note 145, at 1219.
[244] Id at 1219.
[245] See Baldwin, at supra note 140, at 114.

During his presidential campaign in 2016, Donald Trump promised to renegotiate NAFTA.[246] Upon ascending to the presidency, Trump followed through on this promise and, following about a year of negotiations, the USMCA came into effect on July 1, 2020 replacing NAFTA.[247] During the period leading up to the establishment of the USMCA, the United States had already instituted its blockade of the Appellate Body and the Appellate Body became defunct shortly before the USMCA went into effect.[248]

During the USMCA negotiations, the United States knew that many disputes under the USMCA would also involve overlapping WTO issues. The USMCA imposes a set of rights and obligations on top of existing WTO obligations that the parties must observe by virtue of their WTO membership. The WTO forms an existing substratum of rights and obligations upon which the USMCA adds additional layers. Many of the WTO agreements find parallels in chapters covering the same subject matter in the USMCA.[249] The United States knew that it would be important for the USMCA to be able to also resolve WTO issues so that USMCA disputes could be decided by the parties without having to split off WTO issues for decision in the WTO dispute settlement system.

The United States also knew during this period that the Appellate Body would soon become disabled and the WTO dispute system would be crippled. The time period of these developments and the text of the USMCA suggest that the United States established the USMCA as an alternative and parallel dispute settlement system that could be used to resolve WTO disputes between the USMCA parties once the Appellate Body became defunct. Without the ability to resolve WTO disputes on its own in light of the crippled Appellate Body, such issues would be left without a forum. A USMCA dispute system able to resolve WTO issues was necessary to ensure the continuing effective operation of the USMCA.

USMCA Chapter 31 deals with state-to-state dispute settlement.[250] Unlike NAFTA, which allowed a party to block the establishment of a panel, the USMCA requires a panel to be established so long as a party decides to go forward after a period of alternative dispute resolution, including consultation, conciliation, or mediation, has failed to resolve the dispute.[251] Under NAFTA, only three cases were decided from 1994 to 2019 and a fourth was never

[246] FACT SHEET: President Donald J. Trump is Keeping His Promise to Renegotiate NAFTA (Aug. 27, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-keeping-promise-renegotiate-nafta/.
[247] See note 17 supra.
[248] The Appellate Body become incapacity on December 10, 2019 and the USMCA went into effect on July 1, 2020.
[249] See Chow, Schoenbaum, & Dorris, International Trade Law, supra note 5, at 50-62.
[250] USMCA, Ch. 31. In addition to state-to-state disputes, USMCA also resolves disputes concerning anti-dumping and countervailing duties; investment disputes, environmental-trade disputes; and labor-trade disputes.
[251] USMCA, Arts. 31.4, 31.5, 31.6.

considered after the United States blocked a panel chair.[252] Under the USMCA, four cases have already been resolved under Chapter 31 since the inception of the USMCA in 2020.[253]

Article 31.6 calls for the establishment of a five-person panel to be chosen from a roster of 30 persons.[254] After oral and written submissions from the parties, the panel issues an initial written report to the parties.[255] The role of the panel is to find the facts and to determine whether any USMCA obligations have been violated.[256] The panel makes decisions by consensus or by a majority vote if a consensus is not possible.[257] The parties are allowed to comment on the initial report.[258] The panel then issues a final report.[259]

So far the procedures of the USMCA closely track those of the WTO. However, the USMCA does not have an appellate body and no appeals are possible. Within 45 days, the parties are to agree on the implementation of the panel report.[260] If the parties cannot agree, the winning party can use the enforcement mechanism of the USMCA, also modeled on the WTO.[261]

Faced with a recalcitrant losing party, the winning party is allowed to suspend benefits under Article 31.19.[262] The suspension of benefits is in practice a form trade retaliation. A party to the USMCA extends the benefit of zero tariffs on most goods to other parties. After a winning party "suspends" the benefit of zero tariffs, the party can then impose tariffs on goods from the losing party.[263] The amount of the tariffs is limited to an amount that has an equivalent effect of the harm suffered by the winning party.[264] The winning party should first suspend benefits in the same sector of goods, but if that is not possible then the party can suspend goods in a different sector.[265] For example, if the United States is illegally restricting trade from Canada in pharmaceuticals then Canada should first impose tariffs on imported pharmaceuticals from the United States. If Canada does not import large quantities of pharmaceuticals from the United States, Canada can choose to impose tariffs on another sector, such as electronic goods. The use of trade sanctions is to pressure the losing party to bring its disputed measure into conformity

[252] Congressional Research Service, The United States-Mexico-Canada-Trade Agreement 25 (Updated May 29, 2024) https://crsreports.congress.gov/product/pdf/R/R4498.
[253] Secretariat, Canada-Mexico-United States Chapter 31 Dispute Settlement Disputes, https://can-mex-usa-sec.org/secretariat/dispute-differends-controversias/chapter-chapitre-capitulo_31.aspx?lang=eng. The four cases are Dairy TRQ Allocation Measures (CDA-USA-2021-31-01); Crystalline Silicon Photovoltaic Cells Safeguard Measure (USA-CDA-2021-31-01); Automotive Parts and Vehicles – Rules of Origin (USA-MEX-CDA-2022-31-01); and Dairy TRQ Allocation Measures 2023 (CDA-USA-2023-31-01).
[254] USMCA, Arts. 31.6 & 31.8.
[255] USMCA, Art. 31.17.1.
[256] USMCA, Art. 31.13.1(a)-(b).
[257] USMCA, Art. 31.13.5.
[258] USMCA, Art. 31.17.3.
[259] USMCA, Art. 31.17.5.
[260] USMCA, Art. 31.8.1.
[261] USMCA. Art. 31.19.
[262] Id.
[263] Id.
[264] USMCA, Art. 31.19.1.
[265] USMCA, Art. 31.19.2(a)-(b).

with its obligations under the USMCA. Trade sanctions must be lifted once the losing party cures the violation.[266]

The suspension of benefits provision follows the practice of the WTO as set forth in the DSU but omits the preliminary step under the WTO of compensation that is available before retaliation.[267] Compensation does not refer to a financial payment but to additional market access and increased trade revenue.[268] To return to our previous example of U.S. restrictions on imported pharmaceuticals from Canada, the United States could agree to give increased access to other Canadian goods to allow Canada to earn increased trade revenue in an amount necessary to offset the harm suffered. The increased revenue compensates Canada for the harm caused by the U.S. trade restriction. Under the WTO, compensation is possible only when the parties agree.[269]

As set forth in Article 31.2(a), the scope of review of USMCA panels concerns "the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement."[270] Article 31.3. ("Choice of Forum") provides that "[i]f a dispute regarding a matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute."[271] Article 1.2 ("Relation to Other Agreements") provides, "Each Party affirms its existing rights and obligations with respect to each other under the WTO Agreement . . . ."[272]

The rationale of Article 1.2 is that the purpose of a free trade agreement such as the USMCA is to create a level of benefits beyond that of the WTO, which serve as the base or foundation of the PTA. A violation of WTO obligations can cause harm to the PTA as the WTO creates the basic obligations or the edifice on which are built the new and extended rights and benefits of the PTA. Read together, Articles 1.2 and 31.3 indicate that a dispute between the parties that involves a WTO issue can also be brought in the USMCA. If a party violates a WTO obligation, the WTO violation is a violation of Article 1.2 as the breaching party has violated "existing rights and obligations with respect to reach other under the WTO Agreement." The violation of Article 1.2 means that the WTO violation is also a violation of the USMCA. As a result, the complainant is allowed to choose the USMCA to resolve the WTO dispute – even one that does not also directly involve a violation of the substantive provisions of the USMCA – under the choice of forum provision, Article 31.3.

A sense of how WTO and USMCA issues overlap and how the USMCA decides WTO issues can be gleaned from *Crystalline Silicon Photovoltaic Cells Safeguard Measure*, a USMCA panel decision of February 1, 2022 (hereinafter Solar Cells Safeguard case).[273] In this case, the United States imposed a safeguard on imported solar cells from Canada, among other

[266] USMCA, Art. 31.19.3.
[267] DSU, Art. 22.
[268] Chow, Schoenbaum, & Dorris, International Trade Law, supra note 5, at 119-20.
[269] DSU, Art. 22.1.
[270] USMCA, Art. 31.2(a).
[271] USMCA, Art. 31.3.1
[272] USMCA, Art. 1.2.
[273] Solar Cells Safeguard Case, USA-CDA-2021-31-01.

trade measures. Under the GATT/WTO, an importing nation is allowed to impose a safeguard or a temporary trade restriction against a sudden and unexpected surge in imports.[274] The exporting nation has not committed any unfair or illegal acts but the safeguard is nevertheless justified to give the importing nation some breathing room in light of a trade emergency.[275]

Article 10.2.1 of the USMCA states that each party retains rights and obligations under Article XIX of GATT, the original safeguard provision, and the WTO Safeguards Agreement that implements Article XIX.[276] Article 10.2.1 then adds two new provisions providing that imports from a USMCA party shall be excluded from the safeguard measure unless the imports "account for a substantial share of total imports" and the imports "contribute important to the serious injury, or threat thereof, caused by imports."[277] Canada argued that its solar cells should be excluded from increased U.S. tariffs of the safeguard because they met these two conditions.[278] The panel found that Canada made a prima facie case that it met the two conditions and that the United States did not rebut Canada's prima facie case.[279] The panel concluded that the United States failed to satisfy its burden of showing that Canada met the two conditions so the safeguard measure imposed on solar cells from Canada was found to be in violation of Article 10.2.1 and had to be withdrawn or face trade sanctions.[280]

Canada did not challenge the legality of the safeguard measure itself but assumed its legality and argued that its products should have been excluded from the safeguard. Let us suppose, however, that Canada had challenged the legality of the safeguard. This challenge would be analyzed under GATT Article XIX, the original safeguards provision, and the WTO Safeguards Agreement that supplements and expands upon Article XIX.[281] These authorities establish the conditions under which safeguards can be lawfully imposed. If Canada had asserted this challenge, Canada would have likely brought this claim in the USMCA even though it is entirely a GATT/WTO issue. To establish jurisdiction over a purely WTO issue, Canada can point to Article 10.2.1, which states "[e]ach Party retain its rights and obligation under Article XIX of the GATT 1994 and the Safeguards Agreement."[282] A violation of the GATT/WTO is a violation of Article 10.2.1.

Canada requested the establishment of a USMCA panel on June 21, 2021.[283] By this date, the Appellate Body was already defunct. If Canada brough a case in the WTO and won, the United States could nullify the WTO panel decision by appealing it. Such a result is not possible under the USMCA. In this situation, Canada would most likely have brought this case in the USMCA even though the substantive issues are purely based on the GATT/WTO. This is an

[274] GATT, Art. XIX; WTO Safeguards Agreement, Art. 2.1.
[275] Chow, Schoenbaum, & Dorris, International Trade Law, supra note 5, at 411-12.
[276] USMCA, Art. 10.2.1.
[277] USMCA, Art 10.2.1(a)-(b).
[278] Solar Cells Safeguard Case, supra note 273, at ¶ 136.
[279] Id. at ¶ 138.
[280] Id.
[281] GATT, Art. XIX (GATT safeguards clause); WTO Safeguards Agreement (1994).
[282] USMCA, Art. 10.2.1.
[283] Solar Cells Safeguard Case, supra note 273, at ¶ 4.

example of how the USMCA can be used to decide purely WTO issues. This was part of the design of the United States knowing that the WTO dispute system would become defunct.

The current dispute pending between the United States and Mexico over genetically engineered corn provides another good illustration of how WTO issues can be resolved in the USMCA.[284] The dispute concerns restrictions in decrees issued by the President of Mexico that banned genetically engineered corn from the United States for use in dough and tortillas and the gradual substitution of the corn for use in animal feed and human consumption.[285] The 2023 presidential decree states that its main purpose is "to protect the rights to health and a healthy environment, native corn, the milpa, biocultural wealth, peasant communities, and gastronomic heritage; as well as to ensure the nutritious, sufficient and quality diet."[286]

The United States challenged the Mexican decrees under the USMCA chapter on food safety regulations on the grounds that the decree was not based on scientific evidence.[287] Chapter 9 of the USMCA is based on the WTO Sanitary and Phytosanitary Agreement, which regulates the use of food safety standards by states to restrict trade in food products so that such restrictions do not unfairly burden trade and are not used as a disguise for protectionism.[288] The basic approach of the SPS Agreement is to require all food safety measures to be based on scientific evidence and a risk assessment.[289]

Article 10.1 of the USMCA affirms the rights and obligations under the SPS Agreement[290] and Chapter 9 adds new obligations, including audits, import checks, and a certification process.[291] If United States challenges the Mexican decrees on substantive grounds, in the USMCA, the dispute can proceed on the basis of the SPS Agreement alone. The dispute is ongoing but is a good example of how WTO issues cannot be avoided in USMCA disputes.

Aside from the USMCA, the United States is a party to 20 bilateral trade agreements, most of which also have WTO rights and obligations clauses and choice of forum clauses similar to that of the USMCA.[292] The same analysis set forth above also applies to those bilateral trade

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[284] Congressional Research Service, the U.S.-Mexico Genetically Engineered Corn Dispute (June 5, 2024), https://crsreports.congress.gov/product/pdf/R/R48083#:~:text=On%20June%202%2C%202023%2C%20the,under%20the%20prior%20technical%20consultations.

[285] Id. at 1.

[286] Id.

[287] Id.

[288] WTO Sanitary and Phyto-Sanitary Agreement, Art. 2.3.

[289] Id., Art. 2.2 & Art. 5.

[290] USMCA, Art. 10.1.

[291] USMCA, Arts. 9.10, 9.11, & 9.12.

[292] These treaties are: United States-Australia Free Trade Agreement (FTA) (Article 21.4); United States-Bahrain FTA (Art. 19.4); United States-Chile FTA (Article 22.3); United States -Morrocco FTA (Article 20.4); United States-Columbia Trade Promotion Agreement (Article 21.3); United States-Dominican Republic FTA (with members Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua) (Article 20.3); United States-Korea FTA (Art. 22.6); United States-Oman FTA (Art. 20.4); United States-Panama Trade Promotion Agreement (Art. 20.3).

agreements: their dispute resolution mechanisms can be used to decide either WTO or treaty disputes.

B. Other PTAs

Due to its origins, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) has a dispute resolution mechanism that uses language that is substantially similar to USMCA.[293] The United States led the negotiations and was the principal drafter of the original Trans-Pacific Partnership.[294] Although Trump withdrew the United States from the treaty, the original agreement with no meaningful changes is now in force with the remaining 11 treaty members.[295] The CPTPP has both a choice of forum and a WTO rights and obligations clause that is identical in substance and nearly identical in wording to the provisions in the USMCA.[296] As with the USMCA, the United States reasoned that with the impending disability of the Appellate Body, the treaty would need an alternative dispute system for the WTO issues that would inevitably arise under the CPTPP.

Three other PTAs have provisions that allow for either resolution of WTO or treaty disputes. Mercosur has the following choice of forum provision:

> Article 21 Choice of Forum
>
> 1. The disputes related to the same matter arising under the scope of [this treaty] and under the WTO agreement or under any other agreement to which the relevant Parties are party, may be settled under this Title or under the WTO Dispute Settlement Understanding or the dispute settlement of that other agreement at the discretion of the complaining Party.[297]

The Pacific Alliance, the other PTA in South America, has a choice of forum clause using similar language.[298]

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[293] CTPP, Art. 1.2 ("[E]ach Party affirms . . . in relation to existing international agreements to which all Parties are party, including the WTO Agreement, its existing rights and obligations with respect to the other Parties."); Art. 28.4 ("If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, 28-3 including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.").

[294] Office of the United States Representative, Trans-Pacific Partnership: Summary of U.S. Objectives, https://ustr.gov/tpp/Summary-of-US-objectives.

[295] The CTPP incorporates bulk of the full text of the TPP by reference. See Government of Canada, About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgrounder-document_information.aspx?lang=eng.

[296] See note 293 supra.

[297] Mercosur, supra note 119, Art. 21.

[298] Pacific Alliance, supra note 109, Art. 17.4 ("Disputes on the same subject matter arising under this Additional Protocol, the WTO Agreement or any other trade agreement to which the Parties are party may be settled in any such forum, at the option of the complaining party.").

RECEP explicitly incorporates specific WTO provisions and agreements. For example, Article 2.3 states: "Each party shall national treatment to the goods of the other Parties in accordance with Article III of GATT 1994. To this end, Article III of GATT is incorporated into and made part of this Agreement, mutatis mutandis."[299] Other articles that are incorporated include GATT Article VII on valuation of goods,[300] GATT Article V.3 on freedom of transit of goods,[301] and GATT Article XI on the elimination of quantitative restrictions.[302] WTO agreements that are incorporated include the Import Licensing Agreement,[303] the Customs Valuation Agreement,[304] the Sanitary and Phyto-Sanitary Agreement,[305] the Technical Barriers to Trade Agreement,[306] the Anti-Dumping Agreement,[307] the Subsidies and Countervailing Measures Agreement,[308] and the Agreement on Trade-Related Intellectual Property Rights.[309]

RECEP also includes a forum selection clause:

> Article 19.5 Choice of Forum
>
> 1. Where a dispute concerns substantially equivalent rights and obligations under this Agreement and another international trade or investment agreement to which the Parties to the dispute are party, the Complaining Party may select the forum in which to settle the dispute and that forum shall be used to the exclusion of other fora.[310]

The incorporation of a large number of articles and agreements of the WTO is an indication that the WTO is a trade agreement with "substantially equivalent rights and obligations" that can be resolved in the RECEP dispute system. Article 19.4 further provides that with respect to "any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of WTO panels and the WTO Appellate Body."[311]

The African Continental Free Trade Agreement and the Regional Comprehensive Economic Partnership covering Asia explicitly incorporate WTO provisions and agreements. For example, ACFTA specifically incorporates parts of GATT Article III (National Treatment),[312] Articles VI and XVI of GATT covering dumping and subsidies and the WTO Agreement on Subsidies and Countervailing Measures,[313] Article XIX of the GATT on safeguards and the

[299] RECEP, Art. 2.3.
[300] Id., Art. 2.8.
[301] Id., Art. 2.9.
[302] Id., Art. 2.17.
[303] Id., Art. 2.19.
[304] Id., Art. 4.19.
[305] Id., Arts. 5.1 & 5.4
[306] Id., Arts. 6.1 & 6.4.1.
[307] Id., Art. 7.1.
[308] Id.
[309] Id., Art. 11.2 & 11.3.
[310] Id., Art. 19.5.
[311] Id., Art. 19.4
[312] AFTCA, Protocol on Goods, Art. 5.
[313] Id., Art. 7(b).

WTO Safeguard Agreements,[314] Article VIII of GATT on fees and formalities in importing an exporting,[315] Article XI of GATT on the elimination of quantitative restrictions,[316] Article V of the General Agreement on Trade in Services authorizing free trade agreements in services,[317] the WTO Agreement on Technical Barriers to Trade,[318] and the WTO Sanitary and Phyto-Sanitary Agreement.[319] Disputes that involve these WTO obligation can be brought directly in the ACFTA.[320]

This review of the major PTAs currently in existence indicates that their dispute systems can be used to resolve WTO disputes. This result follows from the basic relationship of PTAs to the WTO. In many cases, WTO issues are unavoidable in PTA disputes. Of the major PTAs, only the EU lacks such choice of forum clause, but the EU is a leading member of the Multi-Party Interim Appeal Arbitration Arrangement, discussed earlier, that provides for a private arbitration alternative to the dispute system of the WTO.[321]

C. The United States China Economic and Trade Agreement of 2020

No discussion of the use of trade agreements to resolve WTO disputes would be complete without discussing whether an alternative forum exists to resolve U.S-China WTO disputes as the two nations have the most important and contentious trade relationship in the WTO. Such a dispute resolution mechanism does exist, although, as further explained below, it has certain unique and controversial features inserted at the insistence of the Trump administration.

On January 20, 2020, about one month after the Appellate Body became defunct, the United States and China signed the United States China Economic and Trade Agreement (USCTA).[322] The timing of these two events was not a coincidence. Having crippled the WTO, the Trump administration wanted to then set up a parallel or alternative dispute resolution mechanism for USCTA and WTO disputes with China.

The first step by the United States in the USTCA was to extract a major trade commitment from China. The ostensible purpose of the USCTA was to establish a pause in the on-going trade war between the United States and China. In exchange for China's commitment to purchase $200 billion in goods and services, the United States would offer some relief from

[314] Id., Art. 7(c).
[315] Id., Art. 7(d).
[316] Id., Art., Art. 9.
[317] AFTCA, Protocol on Trade in Services, Art. 4.2.
[318] WTO Agreement on Technical Barriers to Trade (1994).
[319] WTO Sanitary and Phyto-Sanitary Agreement (1994).
[320] ACFTA, Art. 20.
[321] See Part II.C supra.
[322] Office of the United States Trade Representative, Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text.

escalating U.S. tariffs.[323] This commitment that was extracted by the United States from China was in violation of a fundamental principle of the WTO.

Under the MFN principle contained in Article I of the GATT, a nation must immediately extend any trade benefit or privilege given to any country to all other members of the WTO.[324] MFN requires China to commit to purchase $200 billion in goods and services from all other WTO members, which is impossible. Other WTO members are harmed by China's commitment to purchase exclusively from the United States as these members, such as the EU, lose the opportunity to compete for $200 billion in sales to China. The USCTA is not a free trade agreement so the United States cannot claim the exception to MFN under GATT Article XXIV for preferential trade agreements.[325]

The United States is not concerned that the EU or any other WTO member will challenge China's WTO-inconsistent measure. The United States was well aware that by the time the USCTA was executed by the parties in January 2020, the WTO dispute system would be crippled and no challenge would be possible. Requiring a WTO inconsistent commitment from China indicates that the United States was well aware of the timing of the USCTA and that it knew that the WTO dispute system would be crippled by the time the USCTA became effective.

The dispute system of the USCTA eschews the use of panels, opting for a "Bilateral Evaluation and Dispute Resolution Arrangement" consist of trade officials from both sides.[326] If the dispute cannot be resolved through negotiation by lower-level trade officials then it is elevated to higher levels ending with the USTR for the United States and the Vice Premier of China.[327]

Article 7.4.4(b) set forth the procedure to be followed at this point:

> If the concerns of the Complaining Party are not resolved at a meeting between the United States Trade Representative and the designated Vice Premier of the People's Republic of China, the Parties shall engage in expedited consultations on the response to the damages or losses incurred by the Complaining Party. If the Parties reach consensus on a response, the response shall be implemented.[328]

If the parties cannot agree on compensation, then at this point, the Complaining Party is given a unilateral right of retaliation:

> If the Parties do not reach consensus on a response, the Complaining Party may resort to taking action . . . , including by suspending an obligation under this Agreement or by adopting a remedial measure in a proportionate way that it considers appropriate . . . . If

[323] USCTA, Art. 6.2.
[324] GATT, Art. I.
[325] To constitute a free trade agreement, the agreement must cover substantially all trade between the parties. GATT, Art. XXIV:2. That is not the purpose of the USCTA. A free trade agreement between the United States and China is not viable in the current political environment.
[326] USCTA, Art. 7.1.1.
[327] USCTA, Art. 7.4.4(a).
[328] USCTA, Art. 7.4.4(b).

> the Party Complained Against considers that the action by the Complaining Party pursuant to this subparagraph was taken in good faith, the Party Complained Against may not adopt a counter-response, or otherwise challenge such action. If the Party Complained Against considers that the action of the Complaining Party was taken in bad faith, the remedy is to withdraw from this Agreement by providing written notice of withdrawal to the Complaining Party.[329]

What is controversial and unusual about this clause is that it was drafted so that the United States can never lose a treaty dispute with China. As the United States drafted the USMCA to impose new commitments on China, the United States envisioned that it would be the complaining party in USCTA disputes. Frustrated by what it claims to be China's refusal to live up to its WTO commitments, the United States did not want China to back out of the USCTA and wanted an iron clad method of enforcement. Under the USCTA, the United States will either win the dispute through negotiations or will be entitled to impose trade sanctions on China. At this point, China's only alternative would be to withdraw from the USCTA – no retaliation is possible.[330] With the looming threat of new punitive threats, the United States knew that China would be under strong pressure to agree to this clause. The United States also had a very low level of trust in China. Robert Lighthizer, the USTR under the Trump administration, summed up this sentiment when he said, "The only arbitrator I trust is myself."[331]

While the United States calculated that China was unlikely to use the dispute clause because it bore the bulk of the USCTA obligations, the clause is drafted in neutral language so nothing prevents China from being the complaining party with a unilateral right of retaliation against the United States. In drafting the USCTA, the United States may have also overlooked the WTO obligations clause set forth in Article 7.6.1 of the USCTA, which states that "[t]he Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which the Parties are party."[332] Under this clause, China is able to bring claims asserting WTO violations against the United States in the USCTA as a violation of Article 7.6.1 and, as the complaining party, China cannot lose the dispute: either the United States must agree to compensate China or be subject to trade sanctions.

The highly unusual nature of this one-sided dispute resolution clause may have backfired on the United States. Such is the risk of coercing a powerful nation to accept lop-sided treaty obligations through bullying and intimidation. China's advantage in WTO disputes may not the result intended by the United States but it is supported by the text of the treaty. If China were to use this clause to assert WTO claims, the United States might need to revise this mechanism in Phase II of the USCTA that the Trump administration intended to complete before he lost the 2020 presidential election.[333]

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[329] USCTA, Art. 7.4.4(b).
[330] Id.
[331] Bob Davis, U.S.-China Deal Could Upend the Way Nations Settle Disputes, Wall St. J. (Jan. 16, 2020), https://www.wsj.com/articles/u-s-china-deal-could-upendthe-way-nations-settle-disputes-11579211598 [https://perma.cc/J4KB-LDUN].
[332] USCTA, Art. 7.6.1.
[333] Joshua Cartwright & Robert Delaney, United States Trade Says Efforts on a Phase Two Deal with China Have Faltered, South China Morning Post (Mar. 31, 2022),

D. Vital Role of the WTO

This review of PTAs and other trade agreements indicates that it is possible to bring some WTO claims using the dispute systems of these treaties. The WTO can play a role in facilitating the resolution of these disputes by offering a central forum for the treaty parties to resolve trade disputes. PTAs are recognized under Article XXIV of the GATT and are notified to the WTO. PTAs are art of the multilateral trading system and further liberalize trade beyond the minimum requirements of the WTO and should be entitled to WTO resources and assistance.[334]

All of the parties to the PTAs discussed above have official delegations in Geneva, the site of the WTO headquarters. Each delegation is headed by a high-level trade minister or official.[335] As all of the parties are in one location, ease of consultations and negotiations of issues arising under PTAs should be possible.[336] In fact, one of the functions of the WTO is to promote discussions on trade issues among its members and its location is designed to facilitate those discussion.[337] The WTO also has the facilities and resources to support such negotiations. Such discussions could avoid the need for litigation.[338]

If litigation is necessary, all of the disputes under these PTAs can be resolved using tribunals and trade officials who are already in Geneva or can be stationed there as part of permanent missions. In addition, the WTO can offer physical facilities and assistance in the resolution of disputes. The WTO has hearing rooms and records of past disputes that may provide useful in any PTA disputes.[339] WTO personnel and staff may also be able to offer technical assistance to the parties on the application and interpretation of WTO obligations.[340] The WTO dispute system also has legal personnel, economists, statisticians, financial specialists, and interpreters who assist WTO members in research and drafting documents.[341] These personnel can perform a similar function for the WTO members when they litigate WTO issues through their PTAs and other trade agreements. Serving as a central forum in which all PTAs and treaty disputes involving WTO issues can be resolved can create efficiencies and synergism created through the use of WTO resources.

Almost all of the most frequent and powerful WTO litigants will be able to resolve their WTO disputes through this patchwork system. Through the USMCA and its bilateral trade treaties, the United States will be able to resolve WTO disputes with its most important trading partners, including Canada and China. As both the EU and China are members of the MPIA, their WTO disputes can be resolved through the MPIA. The most significant gap is that U.S. –

https://www.scmp.com/news/china/diplomacy/article/3172477/us-trade-representative-says-efforts-phase-two-deal-china-have.

[334] GATT, Art. XXIV:7.
[335] See Part I.C supra.
[336] Id.
[337] Id.
[338] Id.
[339] Id.
[340] Id.
[341] Id.

EU disputes currently have no forum. The United States was negotiating a free trade agreement with the EU, the Transatlantic Trade and Investment Partnership, which would have been the world's largest bilateral free trade arrangement, before President Trump stalled the negotiations by initiating a trade conflict with the EU.[342] If the United States were to resume negotiations and achieve a treaty then it is likely, based on the structure of existing U.S. free trade agreements, that a dispute mechanism for the U.S.-EU disputes concerning WTO issues will be set in place.

Of course, the suggested patchwork approach has weaknesses and shortcomings. Decisions by PTAs on WTO issues do not form part of WTO jurisprudence as these are decisions that have not been adopted by the Dispute Settlement Body. These decisions will have no legal status within the WTO and have no precedent value. Decisions will also be issued by different tribunals that could proceed under different procedures and legal assumptions lacking unity and harmonization. With the institutional support of the WTO, however, the use of PTAs to resolve WTO disputes will no doubt evolve and changes, improvements, and efficiencies could be forthcoming.

V. CONCLUSION

Now in its fifth year, the current impasse at the WTO has plunged the organization into a crisis from which it cannot seem to emerge. With a crippled dispute system, the WTO cannot enforce its rules and teeters on the brink of extinction. Although the WTO is engaged with renewed enthusiasm in tackling the challenge of resuscitating its dispute system, no one really knows with certainty whether the United States will agree to resurrect the Appellate Body and the dispute system. To the contrary, some nations suspect the opposite: that the United States' goal is to eventually destroy the WTO. What can be gleaned about the U.S. position does not bode well for the future of the WTO. What can be stated with some certainty is that if the stalemate continues indefinitely, then a sense of impotence and futility could become permanent, and the WTO, already moribund, could fade away into a final obscurity.

The suggested approach in this Article is based upon the existence of alternative intact dispute systems that are authorized to decide WTO disputes. There is no need to create new systems. The ability to resolve WTO issues is a necessary and inevitable part of the work of PTAs as they are built upon an edifice of WTO obligations. Centralizing all of these dispute systems in the WTO, which can serve as a central forum and clearinghouse, offers the advantages of efficiency, synergism, and the prospect of new improvements. It is possible that the United States and the WTO will eventually agree to reviving the Appellate Body. At that point, there would be no need to continue the suggested approach. On the other hand, some observers have a dim view of this possibility. The stalemate in the WTO could continue on indefinitely and with it the real risk that an impotent WTO will then fade away into obscurity. The suggested approach has the advantage of a present workable solution that may or may not evolve into a permanent solution.

[342] Peter Chase, Enhancing the Transatlantic Trade and Investment Partnership (Feb. 3, 2021), https://www.scmp.com/news/china/diplomacy/article/3172477/us-trade-representative-says-efforts-phase-two-deal-china-have.

Such an approach also recognizes the reality that the most important and active actors in current global commerce are regional and bilateral trade areas, not the WTO. The recent proliferation of vast PTAs in Asia and Africa point to a not-too-distant future in which PTAs will dominate world trade and in which the WTO plays a supporting role. This Article recognizes this inevitable development. One critical form of support that the WTO can offer is serving as a central forum for the many PTA dispute systems that can also be used to resolve WTO disputes.