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World Trade, Imperial Fantasies and Protectionism: Can You Really Have Your Cake and Eat It Too?

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ABSTRACT

Populism is telling voters what they want to hear, knowing that it is neither true, nor feasible. Lately, trade and economic integration has seen the spread of untrue and unfeasible tenets, which have proved to be highly popular and have received a warm welcome. Fueled by imperial fantasies and nostalgia for the long-gone era of protectionism, the tectonic movements of world trade have generated a good deal of populist resistance based on the self-delusion that the Gordian knot of world trade needs not to be disentangled but can be simply cut. Unfortunately, however popular and appealing these allegations are, they are not true. Reverting to protectionism simply does not pay out and faces two major, arguably unsurmountable, hurdles: the economic realities, which show that protectionism comes at a very high price even to those it strives to protect, and the disciplines of the WTO, which very much limit unilateral measures inspired by purely protectionist desires. This paper demonstrates three points. First, the modus operandi of international trade makes frontal protectionism self-destructing. Second, the current regime of world trade law developed under the auspices of the WTO significantly limits protectionist policies and leaves no room for a comprehensive protectionist policy. Third, while "taking back control" is an appealing yell, catering to the deepest tribal instincts, in reality, unimpeded sovereignty and unlimited freedom of action are increasingly a wishful thinking.

1. INTRODUCTION

Populism is telling voters what they want to hear, knowing that it is neither true, nor feasible. Lately, trade and economic integration has seen the spread of untrue and unfeasible tenets, which have proved to be highly popular and have received a warm welcome. It is no exaggeration to say that trade liberalization became one of the hottest issues of globalization, generating significant opposition in the advent of

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an age that was claimed to be hallmarked by free trade. Fueled by imperial fantasies and nostalgia for the long-gone era of protectionism, the tectonic movements of world trade have generated a good deal of populist resistance based on the self-delusion that the Gordian knot of world trade needs not to be disentangled but can be simply cut. Voters have been promised that protectionism in the twenty-first century is not only feasible but also capable of enhancing welfare, jobs can be brought home without major damages and loss to the domestic economy, and when it comes to (mega-regional) free trade agreements, a country may stay out without missing out. The U.S. government's suppressing the proposed EU-U.S. Free Trade Agreement (TTIP), pulling out of the Trans-Pacific Partnership (TPP), and questioning the desirability of the North American Free Trade Agreement (NAFTA) all signal the permeation of this thinking. In the same vein, politicians have promised the electorate to "take back control"[1] without impairing the country's wealth and its citizens' well-being. Although the secession of the United Kingdom from the EU (Brexit) may be traced back to various factors, such as migration, the wishful thinking that control can be really taken back without considerable economic losses did play a major role in the British decision to leave the EU.

Unfortunately, however popular and appealing these allegations are, they are not true. Frontal protectionism simply does not pay out, and the economic harm caused to the domestic economy clearly outweighs the benefits accruing to the privileged industry selected for spoon-feeding. The World Trade Organization's (WTO) rules, which cover nearly the entire world GDP (96.7 percent),[2] seriously limit member states' possibility to restrict trade. While disguised protectionism and homeward-leaning playing fields may at times successfully lurk under the radar, frontal attacks, such as protective tariffs and quotas, rarely hit the target. WTO law, in general, bans quantitative restrictions and significantly caps tariff rates. Although it does contain a few exceptions, these have a limited scope, are conditioned, and not infrequently come at a price. Taking back control, while an appealing fantasy, is very costly. Nowadays, the most significant hurdles to trade are disparate regulation, which is ironed by

1. *See* Graham Taylor, UNDERSTANDING BREXIT: WHY BRITAIN VOTED TO LEAVE THE EUROPEAN UNION 2 & 73 (2017).

2. *See*, e.g., Arthur E. Appleton, *Telecommunications Trade: Reach Out and Touch Someone?, Symposium: Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. Pa. J Int'l L. 209 (1998) (discussing the linkages that bind WTO members together in the telecommunications industry*); Symposium: The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002) (addressing the links between the WTO and ostensibly non-trade issues). *See* PETER JOHN WILLIAMS, A HANDBOOK ON ACCESSION TO THE WTO 10 (2008).

regulatory cooperation;[3] having patriotic standards in the shadow of a large trading block is unpatriotically expensive and may lead to regulatory colonization in the form of the unilateral acceptance of foreign standards.[4]

Today, it is clear that the sudden change of the U.S. foreign trade policy–which manifested itself in putting aside the TTIP,[5] canceling the TPP, and renegotiating NAFTA–did not halt the internationalization of free trade. The TPP was renamed (Comprehensive and Progressive Agreement for Trans-Pacific Partnership, CPTPP) and, in March 2018, signed without the U.S. The EU is negotiating or has concluded free trade agreements with various major economies. The Canada-EU Free Trade Agreement (Comprehensive Economic and Trade Agreement, CETA) went into effect on September 21, 2017.[6] The EU-Japan Economic Partnership Agreement was finalized on December 8, 2017, and submitted for approval to the European Parliament and the EU Member States by the European Commission.[7] The negotiations of the EU-Singapore Free Trade Agreement were completed on October 17, 2014.[8]

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3. *See* Csongor István Nagy, *Free Trade, Public Interest, and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*, 9 CZECH Y.B. INT'L L. 197, 207-208 (2018).

4. *See* Charlie Cooper, *Boris Johnson: Chequers Brexit Plan Should Be Torn Up*, POLITICO (July 23, 2018, 1:30 PM), https://www.politico.eu/article/boris-johnson-chequers-brexit-plan-should-be-torn-up/.

5. For an analysis on the TTIP's controversial issues, *see* János Martonyi, *Clash of Ideologies: Is Transatlantic Trade the Right Battlefield?*, *in* NYITÁS ÉS IDENTITÁS: GEOPOLITIKA, VILÁGKERESKEDELEM, EURÓPA 69-79 (János Martonyi, 2018).

6. Council Decision 2017/38, on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part. 2016 O.J. (L 11) 1080. *See Eu-Canada Trade Agreement Enters Into Force*, EUROPEAN COMMISSION (Sept. 20, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723. As CETA is a mixed agreement which comes under both EU and Member State competence, it may go into effect only once it is approved in all the Member States. Since these approval procedures may take numerous years, the EU Council, as allowed for by Article 30.7 (Entry into force and provisional application), made those elements of the CETA that come under EU competence provisionally applicable, until final approval is pending in Member States. Provisions not yet in force concern investment protection, market access for portfolio investment (with the exception of foreign direct investment, as this comes under exclusive EU competence) and the Investment Court System.

7. *See Press Release: EU and Japan Finalise Economic Partnership Agreement*, EUROPEAN COMMISSION (Dec. 8, 2017), http://trade.ec.europa.eu/doclib/press /index.cfm ?id=1767.

8. The remaining 11 signatories went on with the project without the U.S. *See* Sri Jegarajah, Craig Dale, & Leslie Shaffer, *TPP Nations Agree to Pursue Trade Deal Without U.S.*, CNBC (May 21, 2017, 4:11 AM) ("TPP nations agree to pursue trade deal without US"), https://www.cnbc.com/2017/05/20/tpp-nations-agree-to-pursue-trade-

This paper demonstrates three points. First, the modus operandi of international trade makes frontal protectionism self-destructing. Second, the current regime of world trade law developed under the auspices of the WTO significantly limits protectionist policies and leaves no room for a comprehensive protectionist policy. Third, while "taking back control" is an appealing yell, catering to the deepest tribal instincts, in reality, unimpeded sovereignty and unlimited freedom of action are increasingly a wishful thinking.

2. ECONOMIC CONTEXT: THE REALITIES OF INTERNATIONAL TRADE AND THE FALLACY OF TRADE DEFICIT

This section demonstrates the fallacy of trade deficit as a measure to evaluate the advantages and disadvantages of trade and presents various benefits of trade that are not expressed in the balance of trade (increased consumer surplus, enhanced competitiveness due to access to cheap inputs), let alone that protectionism normally comes at a price in the form of retaliatory measures adopted in response. Trade liberalization is not only about what to win but also about what not to lose (trade diversion), and this tenet is reinforced by the emerging large free-trade blocks and mega-regional economic integrations. The reason why this wisdom does not find direct reflection in social discourse is that while trade tends to generate collective benefits, its effects are heterogeneous and discrepant and leave behind short-run individual losers.

2.1. The Fallacy of Trade Deficit as a Measure to Assess the Bounties of Trade

It is a commonplace of international trade economics that international commerce is capable of making the world's nations better off as a whole.[9] This is admitted by even the fiercest opponents of

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deal-without-us.html. In January 2018, they agreed to conclude the TPP-11, renamed as Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and held the formal signing ceremony to be in March 2018. *See* Brenda C. Swick & Dylan E. Augruso, *Canada Reaches Comprehensive and Progressive Trans-Pacific Partnership Agreement*, NAT'L L. REV. (Jan. 29, 2018), https://www.natlawreview.com/article/canada-reaches-comprehensive-and-progressive-trans-pacific-partnership-agreement.

9. In a survey among economists of the Initiative on Global Markets (IGM) Economic Expert Panel, 96% of the members, when weighted by the respondent's confidence, agreed or strongly agreed with the statement that "freer trade improves productive efficiency and offers consumers better choices, and in the long run these gains are much larger than any effects on employment." Four percent was uncertain, while nobody disagreed with the

international trade liberalization, who typically provide critical voices in opposition to particular trade relations or arrangements that allegedly produce trade deficit for one of the parties. Nonetheless, trade deficit–although highly marketable in terms of politics–is an inadequate measure of international trade liberalization's success. This measurement ignores various important aspects of international trade and creates the wrong assumption that commerce is a zero-sum game. According to the mercantilist notion, international trade is like wrestling, where one of the parties inevitably wins at the cost of the other. In this mindset, exports are benefits, and imports are favors (concessions).

This is intensely counter-intuitive as zero-sum games based on voluntary participation rarely make sense. If none of the parties can have a trade surplus (whose flip side is the other party's trade deficit), neither party will be better off as a result of the economic interchange. If one of the parties has a trade surplus, this inevitably comes at the price of a trade deficit on the other side: the benefit gained by the winner equals the loss sustained by the loser.

Nonetheless, the most important virtue of trade is that it is not a zero-sum but a positive-sum game. The gains of one party do not necessarily come at a loss for the other one. International trade is full of win-win situations and proves that trade is not about the re-distribution of wealth but primarily a dynamic structure that enhances output and economic performance. Using economists' metaphor, international trade makes the cake bigger and (if fairly split) all the trading nations better off.[10]

Trade balance, as surplus and deficit, is often calculated in relation to a particular slice of economic intercourse and then extrapolated to trade at large. A deficit as to trade in goods between Mexico and the United States may disregard that a good number of Mexican producers are, in fact, owned by American investors, who may repatriate the profits. This is undoubtedly a benefit to the United States. In addition, the Mexican subsidiary may use the services of U.S.-owned law-firms and "Big Four" audit, which also imply profits ending up outside Mexico.

Measuring international trade only on the basis of the balance of trade ignores some fundamental tenets of economics: trade may increase consumer surplus and may make domestic producers using cheap foreign inputs more competitive in the world market.

The benefits of trade may be better measured though the

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statement. *Free Trade*, IGM FORUM (Mar. 13, 2012, 9:18 AM), http://www.igmchicago.org/surveys/free-trade.

10. *See*, *e.g.*, PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 3-5 (6th ed., Addison Wesley, 2002).

incremental social surplus it generates, although it is certainly much more difficult (if not impossible) to quantify the change in social surplus. In addition, international trade liberalization generates benefits due to its dynamic effect. It is a general experience that companies engaged in exportation and export-driven activities tend to have higher productivity.[11] While it is difficult to ascertain whether it is trade that makes these firms more productive or it is their higher productivity that determines their participation in international trade,[12] it is clear that international trade favors the best and improves the sound selection of the competitive process. While more efficient firms are afforded more opportunities in foreign markets, the appearance of foreign competitors in the domestic market may intensify domestic competition and drive out less efficient enterprises, which improves economic productivity in general.

2.1.1. Earning Money through Buying

When consumers buy at a lower price, they are in fact "earning money." When measuring the "benefit" of a market arrangement (or individual transaction), economics uses the concept of surplus, which is made up of the difference between the reservation price and the actual transaction price. On the supply side, the reservation price is the lowest price the seller is inclined to accept, while on the demand side, it is the highest price a buyer is inclined to pay. If producers can sell their products at a price higher than their marginal cost, which functions as the reservation price, they have a surplus (producer surplus). When consumers buy a product or service at a price lower than the reservation price (the highest price the consumers are willing to pay), they also obtains a surplus—known as consumer surplus. The two categories (producer and consumer surplus) make up the social surplus, which is used by economists to measure the efficiency of market structures: arrangements entailing the largest social surplus (producing the "biggest cake") are the most efficient and preferable from an economic point of view. In this regard, producer and consumer surplus should have equal rank and value. It is an economic truism that increasing consumer surplus at the cost of producer surplus may actually be harmful for the society when the increase in the consumer surplus is smaller than the decrease in the producer surplus, because this

11. *See* Hartmut Egger & Udo Kreickemeier, *Fairness, trade, and inequality*, 86 J. INT'L ECON. 184 (2012) ("[I]nternational trade leads to a self-selection of the best firms into export status, with exporting firms having to pay a wage premium").

12. *See* Joachim Wagner, *International Trade and Firm Performance: A Survey of Empirical Studies Since 2006*, 148 REV. WORLD ECON. 235 (2012).

marginal increase in consumer surplus impairs social surplus as a whole. In such cases, economists suggest redistribution measures: let the market produce the biggest possible cake[13] and the state apportion it in line with social justice.

Notwithstanding the above truism, the political discourse on international trade often forgets to docket the enhanced consumer surplus trade generates and ignores the at times enormous social harm tariffs entail.[14] If American consumers have to pay considerably less for textile products produced in China or find an enhanced product variety in the hypermarket, they obviously benefit from this. The increased consumer surplus is an economic benefit generated by trade.[15]

The higher visibility of producer surplus is due to political color-blindness: when producers sell their products at a higher price, the surplus is obvious, as there is cash on the table; on the contrary, when consumers save money because they get a product or service at a lower price, the surplus is less visible. While the producer's increased profits appear in its financial reports, the consumer's surplus is not tangible and sometimes not even perceived by the beneficiary.

History has, however, shown us that consumer surplus may be well-perceived and may serve as the basis of a pro-trade social endeavor. For instance, in the pre-Civil War era, the United States' protectionist

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13. *See* the concept of Kaldor-Hicks efficiency. MATTHEW D ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 21 (2006) ("This standard says that a project is desirable if it makes the winners better off by an amount sufficient to overcompensate the losers, if the losers could be compensated through a costless lump-sum transfer."); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 513 (1980) ("One state of affairs (E') is Kaldor-Hicks efficient to another (E) if and only if those whose welfare increases in the move from E to E' could fully compensate those whose welfare diminishes with a net gain in welfare. Under Kaldor-Hicks, compensation to losers is not in fact paid. Were the payment transaction costless and full compensation given to the losers, Kaldor-Hicks distributions would be transformed into Pareto-superior ones. This characteristic of Kaldor-Hicks has led some to refer to it as a 'potential Pareto-superior' standard").

14. *See* Arne Klau, *When Bad Trade Policy Costs Human Lives: Tariffs on Mosquito Nets* (World Trade Ctr. Econ. Res. & Stat. Division, Staff Working Paper ERSD-2017-14, 2017) (explaining how the policy of many developing countries to levy tariffs on mosquito nets discourages their use and contributes to the spread of diseases such as malaria and dengue), https://www.wto.org/english/res_e/reser_e/ersd201714_e.pdf.

15. *See*, *e.g.*, Joseph Buongiorno, Craig Johnston & Shushuai Zhu, *An Assessment of Gains and Losses from International Trade in the Forest Sector*, 80 FOREST POL'Y & ECON. 209 (2017) (describing through the forest sector that, in form of lower prices and higher consumption, consumers benefit from international trade both in developed and developing countries); Lutz Kersten, *Impacts of the EU Banana Market Regulation on International Competition, Trade and Welfare*, 22 EUR. REV. AGRIC. ECON. 321 (1995) (describing that the EU's restrictive regulation on bananas caused European consumers a loss in value of USD 1.14 billion).

foreign trade policy sparked tensions between the North and South. Namely, the U.S. government, at the behest of the Northern states, imposed protectionist tariffs to shield the American industry from cheap foreign imports. As industrial production was concentrated in the North, protectionist tariffs did not serve the interests of the southerners: while they did not enjoy the protective effects, Southerners were compelled to purchase the more expensive goods produced in the North instead of the cheap import produces. This appeared in the political discourse as a Southern outcry against purchasing the more expensive northern products instead of the cheap import goods.[16]

2.1.2. The Global Factory

The measurement after trade deficit, due to its resting on the mono-production pattern, ignores a dominant strand of international trade. In the mono-location production model,[17] the value chain, up to the point that the final product comes out of the factory, is located in a single country, and the final product is delivered to the country of importation to be consumed there. This model ignores cases where a country supplies raw materials or intermediate products to another country, which are used there to fabricate the final product (global factory pattern). Firms dismantle the different elements of the production chain to source them in countries with the best price-value ratio. Large multinational companies increasingly take advantage of outsourcing various activities.[18] This makes them more efficient and provides trade opportunities for users of intermediate products in various countries. Companies cut off from the global factory pattern opportunities face a competitive disadvantage and therefore diminishing competitiveness. In fact, the global factory production pattern became prevalent in international trade. Final products account merely for one-third of world exports with the rest being made up of intermediate products.[19]

In the case of global supply chains, the buyer's cost-saving is, contrary to the inferential consumer surplus, apparent and impacts on

16. *See* Shane Mountjoy & Tim McNeese, CAUSES OF THE CIVIL WAR: THE DIFFERENCES BETWEEN NORTH AND SOUTH 45-52 (2009).

17. *See* Sungjoon Cho, THE SOCIAL FOUNDATIONS OF WORLD TRADE: NORMS, COMMUNITY, AND CONSTITUTION 90 (2015).

18. *See* Sokol Celo, James Nebus & I. Kim Wang, *The Role of Internal and External Complexity in Global Factory Performance: An NKC Application*, 24 J. INT'L. MGMT. 65 (2018).

19. *See* Richard Baldwin & Javier Lopez-Gonzalez, *Supply-chain Trade: A Portrait of Global Patterns and Several Testable Hypotheses*, 38 THE WORLD ECON. 1682, 1690 (2015) (describing that in 2009 trade in final products account only for 34% of total world exports, while the rest was made up of intermediate products).

the buyer's successfulness as a producer. Access to cheap input products may determine a producer's competitiveness in the world market. So even if, mistakenly, treating producer surplus superior to consumer surplus, higher tariffs may impair the former, too, when the buyer wants to sell the goods it produced with the use of imported products.

Accordingly, producers strive with one another not only for opportunities to sell the output products but also for opportunities for buy cheap input products. In the global factory, access to cheap inputs determines the output products' competitiveness. By way of example, forcing U.S. producers to buy more expensive local products instead of Chinese or Indian components may generate more local employment, but the higher costs will make U.S. products less competitive in relation to other nations' goods, which are not cut off from these cheap resources. It may be certainly painful to see a high-wage country's company outsourcing elements of its production process to a low-wage country and thus "taking jobs away." Nonetheless, if outsourcing and making use of the global factory is thwarted, the company will face higher manufacturing costs in a world market where it competes with companies that do take advantage of low-wage countries' cost-benefits.[20] Protective tariffs may enforce U.S. aluminum and steel on U.S. producers, but that will that make American canned fish and laptops less competitive in the world market? Whoever stays out, misses out.

2.1.3. Protectionism as Action and Reaction

Protectionism saves money in a very costly way. Tariffs protect a particular domestic sector at the cost of domestic consumers who consume the import products and producers who use them as input or are hit by the exporting country's retaliation. To put it otherwise, tariff increases not only hurt domestic stakeholders directly but also incite trading partners to react and avenge the nullification of trade opportunities. They may use authorizations provided by WTO law (such as Article XIX on safeguard measures) or tariff overhangs (the difference between the actual tariff and the bound tariff rate). It must be noted that while tariff overhangs are higher in developing countries, developed countries also have peaks in bound tariffs concerning particular industries (such as clothes and shoes, raw tobacco, peanuts, motor vehicles, train carriages),[21] which provides a tariff overhang that

20. *See* Csongor István Nagy, *Missed and New Opportunities in World Trade*, 58 HUNG. J. LEGAL STUD. 379, 382 (2017).

21. *See*, *e.g.*, EUROPEAN COMMUNITY, FACTSHEET ON TRADE IN GOODS AND CUSTOMS DUTIES IN TTIP (2015) (illustrating some of the effects that EU and US duties

can be used to retaliate. This doubles the costs of protectionist measures. Retaliatory measures may target an industry other than the protected sector.

Of course, international trade is certainly not a fairy tale. Trade deals are based on quid pro quo bargains, and each state has its national champions, cherished products, and infant industries it wants to protect. Although the resulting carve-outs cause discrepancies, the sound operation of international trade tolerates such exceptions as long as they are balanced.

The Uruguay Agreement established special regimes for two economic sectors (the textile industry and agriculture), which were clearly in the interest of developed countries. These industries are labor-intensive, and the competitive advantage of developing countries was considered to be enormous. While the Agreement on Textiles and Clothing expired after ten years (on January 1, 2005),[22] the Agreement on Agriculture is still effective and represents a major source of complaint for developing countries. In the same vein, the WTO expects its members to protect intellectual property rights as defined by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Notwithstanding the alleged moral justifications, this is again clearly in the interest of developed countries as the major exporters of intellectual property.[23] On the other hand, developing countries have an incomparably lower binding coverage and higher bound tariff rates than developed countries: developing countries were granted access to developed countries' markets at a considerably lower "price" than developed countries to the markets of developing countries. This means that while developing countries can discretionarily use tariffs to antagonize imports or for any other purpose, developed countries can do this in an incomparably narrower circle. Furthermore, there are imbalances among developing countries: China has significantly lower tariffs and wider binding coverage than countries of similar wealth. An interesting comparison: China and Brazil have roughly the same level of development in terms of GDP per capita (USD 10.09 thousand and USD 10.22 thousand, respectively),[24] and still, Brazil's average bound tariff rate is more than three times the Chinese rate (31.36 percent and 10

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had), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_152998.1%20Trade%20in%20goods%20and%20customs%20tariffs.pdf

22. *See* Jamie Malaga & Samarendu Mohanty, *The Agreement on Textiles and Clothing: Is It a WTO Failure?* 4 THE ESTEY CTR. J. INT'L & L. TRADE POL'Y 75, 75 (2003).

23. *See* Cho, *supra* note 17 at 97; TU THANH NGUYEN, COMPETITION LAW, TECHNOLOGY TRANSFER AND THE TRIPS AGREEMENT: IMPLICATIONS FOR DEVELOPING COUNTRIES 3-4 (2010).

24. *See* INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK: CYCLICAL UPSWING, STRUCTURAL CHANGE (2018).

percent, respectively).[25]

2.1.4. Free Trade Agreements: Trade Creation and Trade Diversion

Global competition for trade opportunities, both on the input and the output side, features the spread of free trade agreements too.[26] The world has seen the emergence of mega-regional free trade agreements (such at the CPTPP and the proposed TTIP) that create strong regional economic blocks. These function as free trade clubs, which yield significant benefits to their members and disadvantage those who are left out. Notably, a state's decision on whether or not to join a free trade block needs to consider not only the benefits it provides but also the serious detriments it implies for states that stay out. Nowadays, trade liberalization is not only about what to gain but also about what to lose. And the extent of the detriments depends on the attitude of rival economies; the success of states is also dependent on the reaction of other states, which may join the free trade block or become part of another regional economic integration. Not being a member may be a huge competitive disadvantage when competing with club members for trade opportunities in insider countries. In this sense, the rationality of joining a trade block comprises both extra-trade opportunities and the avoidance of competitive backsliding. States are interdependent: they join free trade blocks not only to gain benefits but also to avoid the losses resulting from being left out.[27] Not surprisingly, there is a global rush for membership in trading blocks.[28]

Again, whoever stays out, misses out. Free trade agreements create a lot of trade; but for as much trade as is created for insiders, an equal amount of trade is diverted from countries that are outside the framework.[29] Assume that gadgets are imported to Japan both from

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25. *See International Trade and Market Access Data*, WORLD TRADE ORG. (2017).

26. On the spread of regional trade agreements see János Martonyi, *Multilateralism and Regionalism in International Trade Law* 58 HUNG. J. LEGAL STUD. 384, 387-90 (2017).

27. As Xi Jinping, president of the People's Republic of China, put it eloquently: "[p]ursuing protectionism is just like locking oneself in a dark room." Ishaan Tharoor, *China casts a long shadow over Trump and Davos*, WASH. POST (Jan. 26, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/01/26/china-casts-a-long-shadow-over-trump-and-davos/?noredirect=on&utm_term=.e5d914abfa5c.

28. *See* Csongor István Nagy, *Missed and New Opportunities in World Trade*, 58 HUNG. J. LEGAL STUD. 379, 382 (2017).

29. *See* Richard G. Lipsey, *The Theory of Customs Unions*, 24 ECONOMICA N.S. 40 (1957); Denis O'Brien, *Customs Unions: Trade Creation and Trade Diversion in Historical Perspective*, 8 HIST. POL. ECON. 540 (1976); Paul Oslington, *Contextual History, Practioner History, and Classic Status: Reading Jacob Viner's The Customs Union Issue*, 35 J. HIST. ECON. THOUGHT 491 (1950).

Australia and the United States, the tariff is 15 percent, and the American products cost USD 100 per unit while the Australian products cost USD 110. In this scenario, assuming that the quality is the same, Japanese companies and consumer would certainly favor American products because Australian products are 10 percent more expensive. Nonetheless, if Australia and Japan join the same free trade block while the United States stays out (as it happened with the CPTPP), American products would be suddenly put at a considerable competitive disadvantage. The price of the American gadgets will remain USD 100 topped with a USD 15 percent customs duty (producing a gross price of USD 115 for Japanese buyers). However, the Australian gadgets will become tariff-free and generate a roughly 5 percent saving for the buyers: their gross price will be USD 110. This is a USD 5 price difference in favor of Australian products, which projects fewer opportunities for American businesses and more for Australian firms. Additionally, the abolition of tariffs are not the only measure tilting the playing field towards block members. Regional economic integrations may work out uniform or harmonized standards, more relaxed border controls, and less red tape, which all make trading with other members of the free trade block more appealing than trading with outsiders.

At times, trade diversion emerges in an intricate way. Free trade blocks attract investments. Member countries function as entry-gates to the whole free trade zone. Currently, the products manufactured in a Japanese company's car factory located in the United Kingdom enjoy duty-free access to the whole internal market. If this access is lost after Brexit, supplying the internal market from the United Kingdom may become considerably more costly and may justify the plant's relocation to an EU Member State.

The "gateway effect" is illustrated well with Harley-Davidson's relocation of some of its production plants. The relocation was implemented as a reaction to the EU's increased duty retaliating against the United States' recently introduced protective tariffs on aluminum and steel. The European 25 percent tariff for motorcycles, introduced as a retaliation in response to American steel and aluminum levies,[30] represented a USD 2,200 extra cost per motorcycle shipped to the EU (Harley-Davidson's second-biggest market). To avoid the extra charge, the iconic American manufacturer decided to shift the manufacturing of motorcycles produced for the European market to

30. *See* Jonathan Stearns, *EU Retaliation Against U.S. Over Metal Tariffs to Start June 22*, BLOOMBERG (June 20, 2018, 7:10 AM), https://www.bloomberg.com/news/articles/2018-06-20/eu-retaliation-against-u-s-over-metal-tariffs-to-start-june-22.

overseas plants.[31] In relation to motorcycles, the United States lost its status as a "tariff gateway" to the EU, and this made the manufacturer move within the "castle walls." Although this did not emerge in the context of a free trade zone, it demonstrates how companies may try to overcome tariff barriers through shifting production to the other side of the frontier.

In the same vein, free trade arrangements, as a form of trade diversion effect, stimulate the use of intra-block inputs.

> Am I missing something with the announcement that Ford will build a new plant in China to build the next generation small car (Focus)? I believe that this was the plant that Ford originally planned for Mexico, but changed its mind after criticism from Mr. Trump. It seems to me that the major result of the decision to build the plant in China rather than in Mexico is that while the vehicles produced in the Mexican plant would likely have used 35-40% US parts and components (to meet the 62.5% NAFTA value added requirements), the Chinese made Focuses will likely have little or no US parts content. Ford will probably save enough money in using cheaper Asian parts to more than offset to 2.5% duty assessed when the finished vehicles enter the United States. Somehow, this doesn't seem the best way to preserve manufacturing jobs in the US. Or am I missing something?[32]

2.1.5. Collective Winners and Individual Losers of International Specialization

It is important to stress that economists and proponents of free trade have never promised that trade liberalization will make every single individual better off. The tenet is that trade makes us better off as a whole but not necessarily as an individual. In fact, some may be

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31. *See* Gabrielle Coppola, *Once a Trump Favorite, Harley Now Feels the Pinch From Trade War*, BLOOMBERG (June 25, 2018, 7:26 AM), https://www.bloomberg.com/news/articles/2018-06-25/harley-davidson-to-shift-motorbike-production-to-counter-tariffs ("The EU's retaliation to Trump's steel and aluminum levies will cost about $2,200 per motorcycle shipped to Harley's second-biggest market in the world, the company estimated in a filing Monday. So it's shifting production of bikes for European riders to unspecified overseas plants").

32. *David Gantz on Ford in China Comment*, INT'L ECON. L. AND POL. BLOG (June 22, 2017, 02:54 PM), http://worldtradelaw.typepad.com/ielpblog/2017/06/david-gantz-on-ford-in-china.html.

even worse off as a result of trade, even if their losses are counter-balanced by the gains of others, and they may be worse off only in the short- or mid-run. International trade facilitates specialization, where some domestic activities are set back but others gain more opportunities, and the total wealth produced becomes considerably bigger.[33]

Where countries have absolute advantages over each other, the direction of specialization is clear.[34] However, specialization is also reasonable if a country has no absolute advantage over another country. According to the classical theory of comparative advantages, as resources are scarce and no country can produce all goods, the more developed country will concentrate on products where it has a comparative advantage (where its advantage is the highest) and drop products where its advantage is comparatively lower. On the other hand, the less developed country will focus on products where it has the comparatively lowest disadvantage.[35] An alternative theory of specialization is based on the tenet that countries tend to export products that use factors of production where they have abundant and cheap resources and to import products the manufacturing of which uses factors of production that are scarce in the given country.[36]

International specialization actually means that a country will focus its resources on certain activities, while removing resources from others. How this disparate impact finds reflection in the democratic process and the political opinion depends much more on social perceptions than on economic fundamentals. Disadvantaged stakeholders are expected to oppose free trade while advantaged groups are expected to support it. Nonetheless, the general experience is that, for various reasons, the benefits are less salient than the detriments.

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33. For an analysis on the relationship between export specialization and national income see Olivier Cadot, Céline Carrère, & Vanessa Strauss-Kahn, *Export Diversification: What's Behind the Hump?*, 93 REV. ECON. STAT. 590 (2011) (describing that low-income and high-income countries have a higher level of specialization than middle-income countries).

34. For a classical formulation, *see* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 275 (1776) ("If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage. The general industry of the country, being always in proportion to the capital which employs it, will not thereby be diminished . . . but only left to find out the way in which it can be employed with the greatest advantage").

35. *See generally* DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (3d ed. 1821).

36. *See generally* BERTIL OHLIN, INTERREGIONAL AND INTERNATIONAL TRADE (1933) ("A capital-abundant country will export the capital-intensive good, while the labor-abundant country will export the labor-intensive good").

It must be noted that international trade is obviously not the only game changer that resets the economic fundamentals. Technological and social developments often have similar effects. The invention of the spinning machine made a whole profession useless and entailed huge unemployment and social frustration that brought about the movement of frame-breakers. But were the Luddites right when they tried to halt the spread of spinning-machines? This invention increased the social surplus considerably but impoverished masses of families through eliminating the demand for spinners. Interestingly, the Luddite movement met no comparable social movement supporting spinning machines. The reason was likely that the losses were concentrated in a relatively small social group while the advantages were dispersed in the society at large.

2.1.6. Why is Trade Liberalization Exposed to Populist Resistance?

In the same way, balance of trade benefits and detriments may not find reflection in the political discourse. The losers of trade may be more successful in having their voices heard and may be more effective lobbyists. This is probably caused by the fact that the losses of trade are concentrated while the gains are dispersed, which gives the detriments a much noisier echo.[37] Whether pro- or anti-free-trade lobbying is prevalent, depends on a country's peculiarities. Large countries may have a high number of huge firms concentrating on the domestic market, both in terms of inputs and outputs, and they may be adversely affected by international trade and favor a protectionist commercial policy. On the other hand, small countries' economies may be more trade-dependent and made up of firms interested in exportation and importation, who may eagerly lobby for free trade.[38]

Furthermore, the social discourse and political process on international trade is often dominated by Baptist-Bootlegger coalitions,[39] where selfish interest groups longing for protectionist spoon-feeding (Bootleggers) combine with stakeholders endeavoring to protect social values (Baptists). These coalitions may emerge unnoticed

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37. *See*, *e.g.*, Nicholas Rosen & Helen Campbell, *International Trade*, in COVERING GLOBALIZATION: A HANDBOOK FOR REPORTERS 241, 248 (Anya Schiffrin & Amer Bisat eds., 2004) ("Resistance can also be attributed to the fact that losers from free trade (the already employed and the existing owners of failing companies) tend to be better organized and more vocal than those who gain (the unemployed and consumers)").

38. *See* Klas Rönnbäck, *Interest-group lobbying for free trade: An empirical case study of international trade policy formation*, 24 J. INT'L TRADE & ECON. DEV. 281 (2015).

39. *See* Bruce Yandle, *Bootleggers and Baptists-The Education of a Regulatory Economist*, AEI J. GOV. REG. & SOC'Y, May/June 1983, at 12, 13.

and the two interest groups may not be aware drive the social discourse and the political process in the same direction unconsciously. Bootleggers may contribute to this with intensive lobbying while Baptists may provide useful moral labels.[40] In the context of international trade, this may imply that domestic fishing companies may combine with animal protection non-governmental organizations (NGOs) to cut out foreign goods produced via methods causing unnecessary pain to animals (killing dolphins or turtles), or local farmers may combine with public health advocates to cut out foreign products disinfected in an alternative way (such as chlorine-washed chickens).[41]

3. INSTITUTIONAL AND REGULATORY CONTEXT: LIMITS AND RESTRICTIONS

The contemporary history of world trade was opened by the conclusion of the 1947 General Agreement on Tariffs and Trade (GATT '47) and was consummated by the creation of the WTO in 1994. The last seventy years have seen a revolutionary development in world trade governance and have featured the enormous success of WTO and its predecessor, the GATT '47. While initially this platform of cooperation was, for the most part, used by market-based economies and rejected by socialist countries,[42] the collapse of communism extended the club's

40. Of course, Baptist-Bootlegger coalitions emerge concerning any regulatory choice, outside the sphere of international trade. *See* Jonathan H. Adler et al., *Baptists, Bootleggers & Electronic Cigarettes,* 33 YALE J. REG. 313, 316 (2016) (describing the operation of Baptist-Bootlegger coalitions through the regulatory treatment of electronic cigarettes. These products "pose fewer health risks than traditional tobacco products" and, hence, "provide significant health benefits". On the other hand, they pose a substantial threat to the interests of both incumbent tobacco firms and producers of tobacco-cessation products and may potentially affect tax revenues. With the support of some public health advocates, this resulted in a perverse coalition for treating e-cigarettes, from a regulatory perspective, in the same way as traditional tobacco products).

41. For a further example *see* Metodi Sotirov, Maike Stelter & Georg Winkel, *The emergence of the European Union Timber Regulation: How Baptists, Bootleggers, devil shifting and moral legitimacy drive change in the environmental governance of global timber trade*, 81 FOREST POL. ECON. 69 (2017) (arguing that the new EU timber trade regulation's prohibition to place illegally harvested timber on the EU market and due diligence requirement against economic operators putting timber products in circulation in the EU for the first time are, partially, the products of a Baptist-Bootlegger coalition between environmental organizations and the European timber industry, where the former strived to reduce illegally harvested timber, while the latter were seeking protection against cheap foreign products).

42. With the notable exception of Czechoslovakia and Cuba, which were founding members and remained a member after the communists seized power. China was also a founding member but subsequently withdrew from GATT after the communists took power. Interestingly, it was not the People's Republic of China but the Republic of China

membership considerably. In the last two decades, the WTO's disciplines became ubiquitous. With the accession of China and Russia, the WTO became the sole global framework of trade and covered almost the entire globe.

In contrast to GATT '47, which was founded by twenty-three countries, the WTO currently has more than 150 members. With the accession of China in 2001 and Russia in 2012, the WTO became a truly universal trade organization: its member countries account for 96.4 percent of world trade,[43] and thus, its rules and principles are vested with an almost *erga omnes* authority.

This section demonstrates, first, that WTO law considerably limits the use of protectionism's heavy cavalry in shielding the local industry from foreign competition: WTO law's core disciplines on protectionism virtually abolished quantitative restrictions and made the force of tariffs, all in all, very limited. Second, although WTO law contains a few exceptions to the foregoing disciplines, which may be used (or abused) for protectionist purposes and may give rise to token skirmishes, they cannot serve as a solid basis for an expansive protectionist policy. Third, it addresses the national security exception (WTO law's soft spot) separately in the context of the current remonstrative debate on the recent U.S. tariffs on steel and aluminum (Trump tariffs) and the affected countries' rebalancing measures.

3.1. WTO Law's Core disciplines on Protectionism: no Quantitative Restrictions and Capped Tariffs (Tariff-Bindings)

While states still have a wide array of possibilities to regulate or even restrict trade, nowadays, the use of the most robust tools to protect the local economy are kept within limits: quantitative restrictions are almost fully prohibited while tariffs are considerably capped. GATT '47 prohibited quantitative restrictions and measures having equivalent effects at large[44] and obliged states to use solely tariffs (tarification). In addition, it made tariff caps binding and served as a platform for a long process to universally reduce duty rates.

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governed by the Kuomintang, having fled to Taiwan, which notified the withdrawal as the entity occupying China's seat at the relevant time. Monica Hsiao, *China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT*, 12 PAC. BASIN L.J. 431, 433-34 (1994); *see also* Pasha L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39 J. WORLD TRADE 1195 (2005).

43. *See* Williams, *supra* note 3, at 10.

44. *See* General Agreement on Tariffs and Trade art. 11, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194 [hereinafter GATT].

The era opened by GATT '47 saw a remarkable tariff abatement. The 20-30 percent average tariff rate prevailing in 1947 (pre-GATT)[45] fell considerably. The WTO's 2007 World Trade report concluded that in developed countries the average duty rate of industrial products fell to less than 4 percent.[46] UNCTAD's 2013 Key Statistics and Trends in Trade Policy reported that in 2012 the average applied tariff was 1 percent in developed countries and between 4-10 percent in developing countries;[47] the average tariff on world trade was about 2 percent.[48] As for the distribution of tariff burden, it reported that approximately 40 percent of international trade was fully duty-free under most-favored nation (MFN) terms while about 10 percent faced tariff peaks of over 10 percent.[49] In the EU-U.S. relations, more than half of trade is not subject to customs duties while the remaining half faces differing rates ranging from 1-30 percent for goods like clothes and shoes. The EU tariff on motor vehicles is 10%, and the U.S. tariff for train carriages is 14%. In extremely rare cases, though, tariffs are prohibitively high. For instance, the U.S. tariff on raw tobacco is 350 percent and on peanuts is over 130 percent.[50] This implies that in developed countries tariffs represent a significant trade barrier merely in a few product categories.

The diminution of applied tariffs was paralleled by a similar process concerning bound tariffs–legally binding duty rate caps established for specific product lines. These were agreed in a series of "rounds" that provided a platform for GATT members to negotiate tariff reductions with each other and to gradually reduce duty rates. While states may unilaterally change their applied tariffs, Article II GATT makes tariff promises binding.

The representatives of states arrived to the rounds with a request list and an offer list and tried to convince countries representing their export markets to reduce tariffs in exchange for the tariff reductions they were inclined to offer. Because bilateral arrangements and concessions have been ruled out (as a result of the MFN Clause

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45. *See* WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2007: SIX DECADES OF MULTILATERAL COOPERATION: WHAT HAVE WE LEARNT? 207 (2007) [hereinafter WTO Report]; Chad P. Brown & Douglas A. Irwin, *The GATT's Starting Point: Tariff Levels circa 1947* (World Bank Group, Pol. Res. Working Paper No. 7649, 2016) (finding that the average tariff level in 1947 was about 22%).

46. *See* WTO Report, *supra* note 45, at XXXI. After the Uruguay Round, the weighted bound tariff average of the United States, Japan and EU (at that time having 12 Member States) was 3.1%, with the US having 3.5%, Japan 1.7% and the EU 3.6%. *See id.* at 209.

47. *See* U.N. Conference on Trade and Development, *Key Statistics and Trends in Trade Policy*, 5, UNCTAD/DITC/TAB/2013/2 (2013).

48. *See id.* at 3.

49. *See id.* at 7.

50. *See* EUROPEAN COMMUNITY FACTSHEET, *supra* note 21.

embedded in Article I GATT), member countries have not been able to discriminate among members. If one state reduces the tariff of certain products, that reduction applies to all products coming from any member country. Although the promises to reduce customs duties were technically not based on bilateral or plurilateral agreements, the tariff reductions negotiated and agreed upon during the trade rounds were based on mutually promised concessions that resulted in mutual trade benefits. A state brought down the tariff rate of a particular product line because one or more other states made similar reductions as to products the first state was, in terms of exports, interested in. The principle that tariff reductions were made for consideration and hence are unilaterally not retractable finds reflection in Article II GATT, which provides that commitments not to increase the tariff rate of a particular product over a certain level (tariff-bindings) are legally binding and may not be revoked without compensating the affected parties.

WTO members' tariff bindings were included into the Schedule of Concessions and Commitments annexed to GATT '94. The Uruguay Round, which took place between 1986-1994, was extremely successful in extending binding coverage: in developed countries, bound rates were virtually extended to all products (99 percent of product lines), same as in transition economies, which increased their binding coverage from 73 percent to 98 percent. This was paralleled by a similar process in developing countries, where binding coverage increased51 (extended to the vast majority of products: 73 percent of products lines that increased from 21 percent pre-Uruguay)[52] and bound tariffs also came down sharply (although still remained high).[53]

The world's ten largest economies[54] by GDP (representing 80

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51. *See* WTO Report, *supra* note 45.

52. *See Tariffs: more bindings and closer to zero*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm.

53. *See* WORLD TRADE ORGANIZATION, 20 YEARS OF THE WTO: A RETROSPECTIVE (2015).

54. Based on the 2017 GDP data (current prices, U.S. dollars) of the IMF data, *see World Economic Outlook Database,* INT'L MONETARY FUND (Apr. 2018), http://www.imf.org/external/pubs/ft/weo/2018/01/weodata/index.aspx.

Country	GDP
Australia	1,379.548
Brazil	2,054.969
Canada	1,652.412
China	12,014.61

percent of world GDP) are characterized by almost full-binding coverage (with the exception of India) and relatively low bound tariffs. The first three economies—EU, Japan and the United States (representing 52 percent of world GDP)—have a less than 5 percent simple average bound tariff.

	Binding coverage	Simple average bound tariff, in percentage	Simple average applied MFN tariff, in percentage	Simple average bound tariff of non-agricultural products (NAMA), in percentage	Simple average applied MFN tariff of non-agricultural products (NAMA), in percentage
Australia	97.05	9.95	2.52	10.96	2.75
Brazil	100	31.36	13.53	30.75	14.12
Canada	99.7	6.52	4.08	5.17	2.16
China	100	10	9.92	9.13	8.98
EU	100	4.97	5.16	3.94	4.19
India	74.42	48.47	13.39	34.52	10.17
Japan	99.66	4.49	4.03	2.51	2.51

EU	17,308.862
India	2,611.012
Japan	4,872.135
Russia	1,527.469
South-Korea	1,538.03
US	19,390.6
Total	64,349.647
World	79,865.481

Russia	100	7.58	7.15	7.06	6.51
South-Korea	94.89	16.47	13.90	9.83	6.76
US	99.94	3.43	3.48	3.22	3.20

Source: WTO data of 2016[55]

It has to be added that the actual tariff rates are usually considerably lower than the bound tariffs (the latter functioning only as a ceiling). At times, this produces a huge overhang in case of countries having a high bound tariff rate. For instance, India has exceptionally high bound tariff rates (48.47 percent) but a lower simple average applied MFN tariff rate (13.39 percent) than Brazil (13.53 percent) and South Korea (13.9 percent), which have otherwise considerably lower bound tariffs (31.36 percent and 16.47 percent respectively). Interestingly, China and Russia, though developing countries, have a modest average bound tariff (10 percent and 7.58 percent respectively), and their actual tariff rates are close to the ceiling (9.92 percent and 7.15 percent respectively).

The above demonstrates that in global trade, the traditional and most robust tools of trade restriction are not determinant factors anymore. As noted, quantitative restrictions have been virtually banned from the beginning while tariff rates have been gradually degraded and their ceilings ossified. Developed countries are covered by intensely low bound tariffs, in particular as to non-agricultural products (with the exception of Australia where the simple average bound tariff of agricultural products is 3.44 percent while that of non-agricultural products is 10.96 percent). This implies, on one hand, that in developed countries the overall significance of tariffs has diminished considerably (albeit that they are still relevant is agriculture and specific sectors, in particular labor-intensive industries), and on the other, that the prerogative of developed countries to discretionarily use tariffs as an effective tool to antagonize imports has been confined to a limited number of products and has, in essence, lost its force. On the contrary, states, mostly developing countries, having a huge tariff overhang may take advantage of their higher ceilings. For them, customs duties under the bound rate remained both a legitimate and viable means of trade policy. Nevertheless, these countries' economic weight and share in the world economy is rather limited.

It is worth of note that the use of the tariff overhang, due to the

55. *See International Trade and Market Access Data*, *supra* note 25.

MFN principle, cannot be targeted at particular member countries. This reduces its effectiveness. Cheap products coming from developing countries cannot be specifically targeted, but the duty rates need to be jacked up as to products coming from all member states. This means that protective tariffs will come at a highly inflated price. Assume the U.S. government plans to shield American producers from cheap Chinese imports of gadgets, and in this product line the applied tariff is considerably lower than the bound tariff, so the United States has a large margin. In this plight, the United States could make use of the tariff overhang to protect its producers against Chinese imports; however, that would hurt all member states producing gadgets, and thus the United States would face adverse reactions from countries whose exports did not bother it. Likewise, even if concerned about the huge exports of motor vehicles from Germany, the United States cannot impose a higher customs duty specifically against EU imports (even less specifically against German imports) as higher tariffs will also hit, for instance, the Japanese car industry.

Of course, Member States may try to circumvent the prohibition against discriminating among WTO members through redefining product categories, subjecting them to differential duty rates, then arguing that this veils no de facto discrimination.[56] However, even if such an abusive and reprehensible practice could temporarily work as to certain product lines, it does not offer a general strategy susceptible of being used for protectionist purposes.

A similar framework prevails as to trade in services, where the Schedule of Commitments annexed to the General Agreement on Goods and Services (GATS) fulfils a role similar to that of the Schedule of Concessions and Commitments annexed to GATT 1994. The GATS Agreement was, for the most part, modelled after the GATT, but it contains two important limitations: as to services, market access and national treatment have to be provided only if the member state concerned specifically promised them as to a given sector. This means that WTO members' enterprises are guaranteed no access to foreign markets and need not be afforded national treatment unless the country of destination promised one or both of these services in its Schedule of

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[56] *See, e.g.*, Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, BISD 28S/102 (adopted June 11, 1981); Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R/USA (May 22, 1997); Appellate Body Report, *European Communities –Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R, (Sept. 25, 1997); *see also* Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?*, 36 J. WORLD TRADE 921 (2002).

Commitments. States may make commitments as to any of the four modes of supply specified by GATS (cross-border supply, consumption abroad, commercial presence, physical presence) and may make these commitments with restrictions. Similarly to tariff bindings, GATS commitments cannot be revoked unilaterally unless the affected members are duly compensated.57 This happened recently in U.S. Gambling,[58] where the United States chose not to revoke the rebuked measure but to compensate the affected parties.[59]

3.2. The Exceptions to WTO Law's Founding Principles: the "Small Gates"

WTO law contains several "small gates,"[60] which deserve consideration in the context of a trade policy favoring protectionism: measures against unfair trade (anti-dumping and countervailing duties), general exceptions (Article XX GATT and Article XIV GATS), safeguard measures, balance of payment safeguards, and national security. Even though these exceptions were not designed to accommodate protectionist desires and endeavors, they may be used for that purpose with some abuse. With the exception of the rule on national security, these exceptions are highly conditioned (they may be applied only if certain substantive conditions are met). Furthermore, safeguard measures come at a price (they allow the affected parties to lawfully rebalance revoking benefits).

Although WTO law allows member states to react to "unfair trade" (dumping and subsidies), this is defined rather narrowly and is highly conditional.

First, dumping is considered to be a form of unfair trade and targets cases where "products of one country are introduced into the commerce of another country at less than the normal value of the products."[61] Anti-dumping duties may be imposed if the practice causes or threatens to cause a material injury to the domestic industry producing like products. However, the "normal value" is, in principle, defined with

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57. *See id.* at Article XXI.

58. *See* Communication from Antigua and Barbuda, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/26 (Apr. 25, 2013).

59. *See* Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, 2 J. INT'L COM. & ECON. 127, 133-134 (2009).

60. "Next to every big gate there is a small gate" is a Hungarian proverb ("Minden nagykapu mellett van egy kiskapu"). It means that besides lawful means there are always semi-lawful or lawful but somewhat abusive means to circumvent or evade a legal prohibition.

61. *See* General Agreement on Tariffs and Trade, Article VI (1994) [hereinafter GATT].

reference to the market price in the exporting country: there is a dumping margin if the product's price in the importing country (in the ordinary course of trade) is less than that of like products sold in the market of the exporting country. The room of maneuver is wider and allows a more vigorous intervention if, in the exporting country, there are no comparable domestic prices that could be used as a benchmark. This is the case if the exporting country is a non-market economy, as its domestic prices, very likely, cannot be regarded as representative; however, the lack of comparable domestic prices may emerge also in the case of market economies. Absent comparable domestic prices, the importing country may either use the prices of exports targeting "any third country" (the highest comparable price for the like product for export to any third country in the ordinary course of trade) or, if it wishes, may build up the normal value bottom-up based on the production-marketing costs and reasonable profit (the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit).

The regime on dumping clearly does not target low prices but discriminatory prices. It was not designed to help against cheap foreign products, even if the import products' prices are only a fraction of those of domestic products, but only if the products are not sold at a price lower than the price in the country of origin. Still, anti-dumping duties may be an effective means to shield the domestic economy from imports: states have a rather wide margin in case the exporting country's domestic market prices cannot be used as a benchmark, as they can choose to rely either on third-country export prices or cost-margin calculation.[62]

A dumping analysis is highly fact-intensive, and the wide playing field gives states plentiful opportunities to intervene. The most notable example is the debate on China's market-economy status. Several countries, including the EU and the United States, consider China to be a non-market-economy and, as a consequence, use third-country comparisons and cost-price analysis to impose anti-dumping duties. China recently initiated a complaint against the EU and questioned the legality of this practice.[63] Not surprisingly, given the issue's immense

62. *See Swedish Anti-Dumping Duties*, ¶ 28, WTO Doc. L/328 - 3S/81 (adopted Feb. 26, 1955), at 6 (1955) ("The Panel was of the opinion that if the Swedish authorities considered that it was not possible to find 'a comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country', no provision in the General Agreement would prevent them from using one of the other two criteria laid down in Article VI").

63. *See* First Written Submission by the European Union, *European Union – Measures Related to Price Comparison Methodologies*, WT/DS516 (Nov. 14, 2017).

economic significance, numerous countries, most notably the United States,[64] intervened to oppose granting China a market-economy status and to uphold their anti-dumping practice against goods from China, vigorously taking advantage of the accruing wider margin to impose anti-dumping duties.

While the difference between using domestic market prices and relying on exports to third countries compared to carrying out a cost-price analysis may seem to be technical, it is pivotal in anti-dumping cases: a dumping analysis is centered on the ascertainment of the fair price (reference price) and the outcome is determined by the data that may be used. The vast playing field provided by third-country price comparisons and cost-price analyses enables the EU and the United States to lawfully maintain high anti-dumping duties against Chinese products.

Second, an importing state may impose a countervailing duty if the foreign product was subsidized (including not only explicit subsidies but also measures having an equivalent effect). This is "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise," which must not exceed "an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product."[65] Accordingly, the importing state may impose a countervailing duty if it proves that a benefit in the form of a financial contribution was provided by the government or any public body and the subsidy was specific (that is, it benefited certain enterprises, a certain industry or was region-specific, or it was an export subsidy or contingent on the use of domestic over imported products).

Another option for protecting domestic industry is safeguard measures allowed by Article XIX GATT. These are less conditioned but are temporary, specific, and, last but foremost, come at a price. This exception can be used only in case of unforeseen developments generating increased imports that cause a serious injury to the domestic production of like or directly competitive products.[66] Safeguard measures can address only unexpected difficulties caused specifically by increased imports, justify measures only as to specific products, and provide no exemption for measures addressing economic difficulties in a

64. *See* Third Party Submission of the United States of America, *European Union – Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516 (Nov. 21, 2017), https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Su.pdf.

65. GATT, *supra* note 62, at Article VI ¶ 3.

66. *See id.* at Article XIX(1)(a).

general economic crisis. The developments triggering the safeguard measure need to be unforeseen and cause a serious injury to like or directly competitive products.[67] Most importantly, however, safeguard measures come at a price: the affected member country is authorized to suspend substantially equivalent concessions or other obligations.

Finally, states may use GATT Articles XII and XVIII(8)-(12) to "restrict the quantity or value of merchandise permitted to be imported" to safeguard the country's balance of payment. These provisions may be used only temporarily and in a proportionate manner.[68] Import restrictions adopted as safeguards "shall not exceed those necessary to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves" or "to achieve a reasonable rate of increase in its reserves" in case the Member State has "very low monetary reserves." The WTO's application of Articles XII and XVIII(8)-(12) is reliant on the International Monetary Fund's (IMF) macroeconomic determinations. It must be noted that not only are the provisions of Articles XII and XVIII(8)-(12) highly conditioned[69] but they also lost much of their significance with the abolition of exchange controls and other hurdles to capital movement.[70]

3.3. Can National Security Provide a Pretext for Protectionism: WTO Law's Soft Spot?

WTO law's only lightly conditioned exemption is the national security exception embedded in Article XXI GATT, Article XIV is GATS, and Article 73 TRIPS (for the sake of simplicity, hereafter references will be made solely to Article XXI GATT). These provisions, if used in an abusive manner, may appear to open the backdoor to protectionism. Not surprisingly, the Trump administration chose this point of entry to increase tariffs. At first glance, the U.S.–Steel and Aluminum Products (centering around the US government's introduction, as of March 23, 2018, of protective tariffs for steel and aluminum in value of 25 percent

67. *See id.* at Art. 2.1 (1994) ("A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products").

68. *Id.* at XII(2)(b), at ¶ 1-4.

69. *See* Report of the Appellate Body, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial*, WTO Doc. WT/DS90/AB/R (Aug. 23, 1999).

70. *See* Karen McCusker, *Are Trade Restrictions to Protect the Balance of Payments Becoming Obsolete?* 35 INTERECONOMICS, No. 2, Mar.- Apr. 2000, at 89.

and 10 percent with reference to national security)[71] may give the impression that the architecture of world trade governance can be put upside down. Nonetheless, the reality is that the Trump tariffs, even though they have substantial economic effects, are still token measures in comparison to the tariff increases promised by the Trump Administration and are very far from a general protectionist trade policy. The administration's choice of the battlefield proves that WTO disciplines stand firm and are susceptible of sobering down the longing desire for frontal protectionism, let alone the fact that, with the Trump tariffs, the US exposed itself to painful rebalancing measures it may hardly block.

The United States' reliance on Article XXI GATT and the reaction of the affected countries sparked a fierce debate of interpretation, and contrary to previous disputes concerning Article XXI, which usually remained bilateral,[72] it evolved into an "everybody against one" dispute. At the WTO Council for Trade in Goods in March 2018, more than forty members raised concerns about the U.S. measures and "the impact they may have on the global trading system."[73] This was followed by the initiation of several complaints by China, the EU, Canada, India, Mexico, Norway, Russia, Switzerland, and Turkey,[74] quite of few of

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71. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018) and Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 8, 2018) are based on the Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862 (1962) (allowing the adjustment of the imports of an article and its derivatives, if it "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security").

72. *See* John H. Jackson, William J. Davey & Alan O. Sykes, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1199-1203 (2013).

73. *WTO members raise concerns over US tariffs on steel and aluminium at Goods Council*, WORLD TRADE ORG. (Mar. 23, 2018), https://www.wto.org/english/news_e/news18_e/good_23mar18_e.htm.

74. *See* Request for Consultations by China, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/1 (Apr. 9, 2018); Request for Consultations by the European Union, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/1 (Apr. 9, 2018); Request for Consultations by Canada, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS550/1 (Apr. 9, 2018); Request for Consultations by India, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS547/1 (May 23, 2018); Request for Consultations by Mexico, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS551/1 (June 7, 2018); Request for Consultations by Norway, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS552/1 (June 19, 2018); Request for Consultations by the Russian Federation, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS554/1 (July 2, 2018); Request for Consultations by Switzerland, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/1 (July 12, 2018); Request for Consultations by Turkey, *United States –*

which are also imposing retaliatory tariffs against the United States.[75]

It is doubtless that U.S.–Steel and Aluminum Products will give an opportunity to clarify WTO law's various questions of interpretation and will be a milestone in the history of world trade. The controversy centers, in essence, around two legal questions. On the one hand, could the United States rely on Article XXI GATT to justify the increased tariffs and the ignorance of its tariff bindings? On the other hand, are the rebalancing tariffs imposed by the affected countries lawful?

The debate features the internal tension embedded in Article XXI: on the one hand, it affords an extremely wide, almost limitless, discretion to states. On the other hand, its excessive or abusive use may undermine the whole trading system. Furthermore, the US measures have an interesting twist: they are unnecessarily discriminatory. While the US argued that it needs to maintain a strong steel and aluminum industry for military purposes (that is, the reason of the tariffs was not imports from specific countries but the suppression of the US steel and aluminum industry by imports at large), it did grant exemptions to certain countries (such as Argentina, Australia, Brazil and South Korea),[76] making the measure, at best, inconsistent. Nonetheless, it should also be noted that whatever the answer to these theoretical questions is, as demonstrated below, the lack of retrospective remedy enables affected countries to effectively retaliate against the United States. All schoolchildren know: "[t]hose to whom evil is done, [d]o evil in return."[77]

Article XXI GATT authorizes a member state, among others, to take:

> Any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military

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Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS564/1 (Aug. 20, 2018).

75. *See* Saleha Mohsin, *China Tariff Retaliation Threatens Key States in Trump Country*, BLOOMBERG (May 10, 2018), https://www.bloomberg.com/news/articles/2018-05-10/china-tariff-retaliation-threatens-key-states-in-trump-country;
Jonathan Stearns, EU Retaliation Against U.S. Over Metal Tariffs to Start June 22 (June 20, 2018), available at https://www.bloomberg.com/news/articles/2018-06-20/eu-retaliation-against-u-s-over-metal-tariffs-to-start-june-22.

76. Proclamation 9740, 83 Fed. Reg. 20683, 20683-20684 (Apr. 30, 2018).

77. W.H. Auden, *September 1, 1939, in* ANOTHER TIME (1940).

establishment; (iii) taken in time of war or other emergency in international relations.

Article XXI GATT grants an immensely wide discretion to states.[78] Some claim it to be self-judging,[79] although the operation of national security is limited to specified cases, so it is at least in this sense not self-judging. The language of Article XXI leaves the definition of "national security" to the discretion of states (any action which it considers necessary for the protection of its essential security interests). On the other hand, national security's purview is clearly confined by non-self-judging limits made up by the three cases listed above: fissionable materials, products relevant for military purposes (broadly conceived), and times of war or other emergency in international relations. While states have an extremely wide margin of discretion as

78. *See* JACKSON, DAVEY & SKYES, *supra* note 79, at 1199-1203 ("The problem with a national security exception in international agreements, however, is that it is virtually impossible to define its limits. Almost every sector of economic endeavor can and does argue that it is necessary for national security, from shoes to watches, radios to beef production").

79. *See*, e.g., PCA CASE NO. 2013-09, Devas v. India, Award on Jurisdiction and Merits, (July 25, 2016) ("219. Indeed, it is well established by judgments of the International Court of Justice (the "ICJ") and investment arbitration awards that, unless a treaty contains specific wording granting full discretion to the State to determine what it considers necessary for the protection of its security interests, 286 national security clauses are not self-judging. (…) FN286 Self-judging "essential security interests" provisions are far from being unknown in international law. See, for instance, Article XXI of the General Agreement on Tariffs and Trade 1947 ("GATT"): "Nothing in this Agreement shall be construed: (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."). Cf. "We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of measures relating to a Member's security interests,' because that would permit anything under the sun. Therefore, we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance. … there must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose". The Chairman of Commission A suggested in response that the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuses of this kind. Statement of one of the drafters of the original Draft Charter made in the Geneva session of the Preparatory Committee. U.N. ESCOR Mtg. 33, at 20-21 and Corr.3, U.N. Doc. EPCT/A/PV/33 (July 24, 1947); *see also* U.N. Doc. EPCT/A/SR/33, at 3.

to national security, which is close to being non-justiciable, the limits of national security's operation are subject to legal interpretation.

Nonetheless, whether national security is self-judging or not, it would be very difficult to question that the endeavor to maintain a steel and aluminum industry of a certain capacity is reasonably related to national security. The maintenance of sufficient production capacity of materials necessary for the fabrication of military equipment is an example of the national security exception's use.

Thus, if a nation's defense and security depend, or are believed to depend, on the existence of industries such as shipbuilding or steelmaking, those industries are likely to be maintained regardless of cost or any other economic considerations.[80]

However painful it is, it has to be accepted that in cases where the protection of national security consists in such a conservation, the exception of Article XXI GATT and pure protectionism, at least in terms of effects, do overlap. A supporting reference to the case law of the EU internal market: in Campus Oil Limited,[81] Ireland obliged importers to purchase a certain percentage of their requirements from a state-owned refinery operating in Ireland and thus discriminating against foreign products. The Court of Justice of the European Union held, under the European equivalent of Article XX GATT, that the maintenance of sufficient domestic capacity could be justified with reference to public security.

However blatantly abusive and inconsistent the measure is (which is most revealed by the fact that, as noted, a few countries were granted exemption from the Trump tariffs), its connection to national security can be reasonably established. Let the national security exception be self-judging or just affording an extremely wide margin of discretion, given the link between steel and aluminum and the military industry, the maintenance of sufficient domestic production capacity seems to be justified. In the same vein, the states' right to regard certain other states' production capacities as quasi-domestic cannot be controverted, even if it appears to be hypocritical to argue that Argentina's or Brazil's steel and aluminum supplies would be available to the U.S. military industry under all circumstances while European supplies would not.

Nonetheless even if Article XXI GATT is not properly equipped to screen out abusive use, the GATT, in the form of non-violation claims under Article XXIII(1)(b) GATT, contains a constraint which comes into action in cases where the WTO's underlying balance of concessions is distorted in an abusive and unfair way.

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80. *See* JACKSON, DAVEY & SKYES, *supra* note 79, at 1199-1203.

81. *See* Case 72/83, Campus Oil Limited and others v. Minister for Industry and Energy and others, 1984 E.C.R. 02727.

The major problem and unfairness of the Trump tariffs is that they nullify trade benefits other states have paid for. A state offered bound tariffs during world trade rounds in exchange for comparable concessions from other countries. Because the MFN principle rules out bilateral agreements, the consideration payed for the lower U.S. tariffs on steel and aluminum is not documented and is, at the end of the day, irrelevant. What matters, however, is that the system of bound tariffs is based on mutually agreed concessions; hence, any unilateral withdrawal goes counter to WTO's most basic notion of fairness. While all beneficiaries ought to be aware that the competitive relationship between domestic and import products is dependent on various contingencies beyond the tariff itself and that WTO law does contain various exceptions, there is no reason to tolerate state measures frustrating legitimate expectations and turning the price of delivered benefits to ashes.

The above considerations are exactly the ones accommodated in Article XXIII(1)(b) GATT, which is meant to preserve the reciprocal balance of concessions. As established by the panel in EEC – Oilseeds,[82] non-violation claims prevent member states from taking back with one hand what they gave with the other.

> 144. (…) these provisions, as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions. The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.
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> 148. (…) The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff

82. *See* Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, WTO Doc. L/6627 - 37S/86 (Jan. 25, 1990).

> concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations.

As noted by the panel in Korea – Procurement,[83] non-violation claims are the emanation of the international law principle of *pacta sunt servanda*.

> 7.93 In our view, the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law. As noted above, the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which might undermine the value of negotiated tariff concessions. In our view, this is a further development of the principle of pacta sunt servanda in the context of Article XXIII:1(b) of the GATT 1947 and disputes that arose thereunder, and subsequently in the WTO Agreements, particularly in Article 26 of the DSU.

The concept of non-violation claims obviates situations where a member state wants to eat its cake and have it too. World trade is not about free cakes but about quid pro quo, so tariff-bindings cannot be dried out without consequences.

> It is not surprising that concerns remained in the minds of the GATT 1947 drafters that Member states might take actions to circumvent binding tariff reductions, whose integrity could not be fully protected by the agreement's general obligations. The fear was that this

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83. *See* Panel Report, *Korea – Measures Affecting Government Procurement (Korea Procurement)*, WTO Doc. WT/DS163/R (May 1, 2000).

> would dilute 'reciprocity' between GATT Members. Under the above approach in which legal obligations were regarded as just one option among various diplomatic instruments, drafters of the GATT 1947 devised an expansive and ambiguous, yet convenient provision. This 'non-violation' provision entitled a contracting party – even in the absence of a breach of obligations by another contracting party – to argue that their benefits had been nullified or impaired under the GATT 1947. The aggrieved country would thus be authorized to receive compensation. The GATT 1947 architects' most important concern seemed to be whether a specific measure in question affected (nullified or impaired) any benefits accruing from tariff concessions, regardless of the distinctions between 'breach of obligation' (violation cases) and 'other' cases (non-violation cases).[84]

The concept of legitimate expectations is a key element of the highly exceptional non-violation claims. The benefits of WTO disciplines, in particular bound tariffs, may be impaired by various lawful means. However, nullifications and impairments that "could not reasonably have been anticipated"[85] may be targeted by non-violation claims. While non-violation claims have been typically submitted in response to the introduction of lawful subsidies that were introduced to nullify or impair the benefits of promised tariff cuts, in principle, any lawful state measure may give rise to a non-violation claim.

In EC – Asbestos,[86] the Appellate Body (AB) suggested that no exception of WTO law is immune from non-violation claims: it established that even measures exempted by Article XX GATT might be targeted by non-violation claims.[87] This may result in situations where WTO law approves a violation under one of its exceptions as justified but makes it actionable via a non-violation claim in case the use of the exception (or the discretion provided by the exception) could not be reasonably anticipated and frustrates legitimate expectations. This suggests that the strikingly excessive use of national security arguments may scrape through Article XXI but may be easily caught in

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84. Sungjoon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 315-316 (1998).

85. *The Australian Subsidy on Ammonium Sulphate*, II/188, GATT BISD (1952).

86. *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001).

87. *See id.* at ¶ 187-89.

the net of non-violation claims.

The other question related to Trump tariffs is whether affected states have the right to react unilaterally. Notably, China and the EU introduced retaliatory duties in response to the Trump tariffs. Although Article 23 of the Dispute Settlement Understanding rules out self-help, expecting states to follow the pertinent WTO procedures to seek remedy, and Article XXI GATT contains no exception to this, they have consistently argued that the Trump tariffs qualify as a safeguard measure and, in turn, Article XIX GATT does allow states to withdraw concessions to offset the loss of benefits. This raises an interesting and, so far, untested question of interpretation: is Article XIX retaliation lawful against a measure adopted with reference to Article XXI or any other measure of WTO law?

Before addressing this question, it must be noted that the lawfulness of retaliatory measures appears to be of relatively limited practical relevance. In WTO law, there are no retrospective remedies, which is a deficiency that may enable hit-and-run violations.[88] This means that the rebalancing duties, if assailed by the United States, are likely not to be judged before the Trump tariffs, and any WTO determination will apply to them only for the future. If the Trump tariffs fail, that will provide a legal basis for retaliatory tariffs (except if the U.S. complies and withdraws them). If the tariffs stand and the rebalancing tariffs are found non-compliant, the affected states may fight fire with fire and put in place measures referring to Article XXI with similarly exaggerated arguments (as the Trump tariffs did). This would be the most unfortunate outcome and fulfill the prophecy of the founders of GATT who warned states not to abuse Article XXI as this may undermine the whole system.[89] Although the WTO is a firm edifice, its mortar is the member states' good faith.

The crucial questions concerning the legal fate of the rebalancing tariffs is whether the affected states may rely on Article XIX in case the United States did not refer to this provision when justifying the Trump tariffs and whether the latter, in fact, meet the definition of safeguard measures embedded in Article XIX.

This interpretation is framed by two tenets that may be deduced

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88. *See* Alexander Keck & Simon Schropp*, Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements* 11-14 (World Trade Org. Econ. Res. & Stat. Division Staff Working Paper ERSD No. 2007-02, 2007), https://www.wto.org/english /res_e/reser_e/ersd200702_e.pdf.

89. "[E]very country must [be the judge in] the last resort on questions relating to its own security. On the other hand, every CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement." *Discussion of the complaint of Czechoslovakia at the Third Session in 1949*, CP.3/SR.22, GATT (1949).

from the AB's recent decision in Indonesia – Iron or Steel Products.[90]

First, the characterization of the state adopting the safeguard measure is not decisive, although relevant. The concept of a safeguard measure is subject to independent characterization and has an autonomous meaning.

> 5.60. In light of the above, we consider that, in order to constitute one of the 'measures provided for in Article XIX', a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination, a panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.
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> 5.64. We recall that, in order to determine whether a measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement of Safeguards, a

90. *See* Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WTO Doc. WT/DS490/AB/R/Add.1 & WT/DS496/AB/R/Add.1 (Aug. 15, 2018).

> panel must objectively assess the design, structure, and expected operation of the measure as a whole, identify all the aspects of the measure that may have a bearing on its legal characterization, and recognize which aspects are the most central to the measure. In the present case, the Panel was required to ascertain whether the suspension, withdrawal, or modification of a GATT obligation or concession entailed by the measure at issue is designed to prevent or remedy serious injury.

Accordingly, a safeguard has two conceptual elements under Article XIX. On the one hand, it needs to violate a provision of GATT. On the other hand, it needs to have a protectionist gravity. Article XIX refers to national measures that aim to protect a domestic industry against imports; whether this is proportionate or not belongs to the question of legality. Characterization is based both on the object and the effects (as the AB put it: "design, structure, and expected operation"). It does not suffice if the measure, in effect, protects the local industry. To qualify as a safeguard measure, it also needs to have a corresponding design and structure.

Second, the AB clearly rejected the panel's approach that conflated the characterization as a safeguard measure and its legality (permissibility) under Article XIX. This leads to the conclusion that a measure need not be lawful to have the character of a safeguard; therefore, the legality of the measure under Article XIX and its status as a safeguard measure are independent from each other. This implies that states may rebalance other states' safeguard measures irrespective of whether these are lawful or not.

It may be reasonably asserted that WTO law's different exceptions operate in parallel. The fact that a measure meets the requirements of Article XXI does not exclude the possibility of also meeting the requirements of other exceptions, such as Article XX or Article XIX. This is confirmed by the fact that the purview of the exceptions overlap, and WTO law does not indicate any hierarchy in this regard. For instance, under Article XXI a member state may shelter the national steel industry having unexpected difficulties due to increased imports to make sure that it would have steel production capacities in case of emergency or war. In this sense, the maintenance (protection) of the national industry fosters national security. However, the very same endeavor and logic may justify a measure under Article XIX. None of these provisions is superior to the other.

In most cases, it would not make a difference which exception justifies the measure; the only thing that matters is that it is justified.

However, Article XIX has a very special facet: it is the only provision that authorizes member states to use self-help. This is an exception to the general doctrine that member states, if damaged by other member countries, have to use WTO's dispute settlement mechanism and await the final decision before retaliating. Due to the lack of a retrospective (restitutive) remedy, this is detrimental to the victims of WTO law violations: the transgressor enjoys the benefits of its transgression ex tunc, while the victim may retaliate only ex nunc (provided the impugned law is not revoked).

Although the possibility of rebalancing provided by Article XIX seemingly rectifies this imperfection, in reality, it poses an immense threat to the whole trading system. In the same way as the excessive or abusive use of the national security exception, the widespread use of Article-XIX-based rebalancing, possibly followed by echoes of retaliations, may undermine the whole system. Theoretically, all anti-dumping and counter-veiling duties, import bans justified by Article XX GATT, and measures adopted for the sake of national security under Article XXI could give rise to retaliation since, as a side-effect, they do protect the local industry.

As virtually all measures restricting trade shelter the national economy, it is essential to draw a clear line between the exceptional state measures that may attract unilateral retaliation (safeguards) and measures where self-help is strictly prohibited. The starting point of such a delimitation should be the quint-essence of safeguards: these are conditioned but genuine protectionist measures that strive to shelter a local industry. It is not the public interest that compels regulatory considerations or national security that warrants the restriction of trade, it is simply the fact that imports cause difficulties to the domestic industry: a circumstance that naturally pertains to international trade and, in principle, does not justify state intervention in WTO law. Article XIX, in fact, sanctions protectionist measures in case of devastating difficulties that were not contemplated by states when promising the concessions. If the local industry is not experiencing difficulties or these were not unforeseen or not caused by imports, the safeguard measure will be unlawful but will still remain a safeguard measure.

It is submitted that, in this regard, WTO law could use the "naked ancillary" restraints doctrine elaborated in antitrust law.[91] According to

91. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); Polk Bros., Inc., v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985); Allen G. Haroutounian, Developments in the Law: *Shedding Light on the Federal Courts' Treatment of Horizontal Restraints Under Section 1 of the Sherman Antitrust Act*, 45 LOY. L.A. L. REV. 1173, 1180-1181 (2012); CSONGOR ISTAVÁN NAGY, EU AND US COMPETITION LAW: DIVIDED IN UNITY? 69-70 (2013).

this doctrine, a naked restraint is an agreement whose direct purpose is the restriction of competition. In the case of ancillary restraints, the agreement has a legitimate purpose: the parties engage in legitimate cooperation (joint venture, introduction of a new product, research & development), and the emerging restrictions are the by-products of this legitimate aim. Here, the agreement's direct purpose is a legitimate cooperation, and the accompanying restriction of competition is merely collateral to this legitimate aim. The distinction between a naked and an ancillary restraint is not based on the intensity of the restriction: theoretically, a naked restraint may be less restrictive to competition than an ancillary restraint. The notion of ancillary restraints is based on the argument that the restriction of competition is undesired but concomitant. In the case of a naked restraint, the very purpose is the restriction of competition.

Accordingly, if the protection to the local industry accrues as an ancillary effect (side effect) of a genuine endeavor to protect the local public interest (Article XX) or to stand up to unfair trade practices (dumping, countervailing duties), that is not taken as a safeguard measure; although, in terms of effect, it does the same as safeguard measures do. If a country embargos British products because, allegedly, an epidemic of mad cow disease rages in the United Kingdom, this should not be considered a safeguard measure although it certainly protects the local beef industry. On the other hand, if the measure's primary objective is protecting the local industry for whatever reason, that would be a "naked restriction" of trade and retaliation under Article XIX should be available. Although the policy to maintain a local mining capacity of iron because that is needed for military equipment and, thus, for national security may be perfectly legitimate under Article XXI, its primary purpose is to protect the local industry against imports.

It is crucial not to treat all measures having a protective effect as safeguards since this would sweep off the entrenched prohibition of self-help and make the WTO dispute settlement system collapse. The American ban on shrimp harvested with methods that kill turtles, the European ban on harmonized beef, and the prohibition of the use of asbestos all have the same effects as safeguards. However, these effects are ancillary to arguably legitimate ends.

If having a local industry of a certain size is considered to be a legitimate purpose and, accordingly, sheltering the local industry is susceptible of meeting the requirements of one of the exceptions of WTO law, the measure qualifies to a safeguard since the alleged legitimate end identifies with sheltering the local industry and not the other way around. Making sure that there is a local industry of a certain capacity

is a safeguard measure because it is in the public interest and can be retaliated against before the DSB adopts a decision. On the contrary, maintaining a prohibition because it is in the public interest, while this prohibition in turn protects local producers from foreign competition, is not a safeguard measure and cannot be retaliated without a DSB decision

4. National Regulatory Autonomy and Social Surplus: The Luxury of Taking Back Control

Due to the remarkable drop in tariffs in the last several decades, especially after the Marrakesh Agreement of 1994 establishing the WTO, technical barriers to trade (including sanitary and phytosanitary measures) came to the fore. Tariffs are no longer the major issue (though in certain industries they may still be high), and states strive to enhance the fruit-bearing capacity of trade through diminution of technical barriers. Nowadays, they are considered to be the most significant hurdles to trade, particularly in relation to commerce between developed countries, which have reduced their customs duties the most. For producers, beyond the costs of having double or multiple production lines, discrepant national standards necessitate extra administration, red-tape, and paperwork in the form of conformity assessments (e.g. registration, testing, certification, licensing), which generates delay and unpredictability.

In the following section, it will be demonstrated that although trading systems prohibit protectionist regulation, the most effective way to iron technical barriers to trade is treating them in a positive manner. Regulatory cooperation enhances frictionless trade and handles regulatory competition, which may manifest itself both as a "race to the bottom" and a "race to the top." Interestingly, regulatory cooperation in certain cases may be even more protective of regulatory sovereignty: it may guarantee the status of a co-regulator instead of a rule-taker.

All trading systems strive to prevent states from using their regulatory powers for protectionist purposes and allow them to restrict trade only if the restriction is justified by local, legitimate ends and is not disproportionate. Article XX GATT and Article XIV GATS contain a list of legitimate ends that may justify the restriction of trade if they are free from "arbitrary or unjustifiable discrimination" or "disguised restriction on international trade." Articles 36, 52, and 65 TFEU authorize EU Member States to restrict the free movement of goods, services, and capital (and the freedom of establishment) if justified on grounds like public policy, public health, and public security. The U.S. Constitution Dormant Commerce Clause's case law allows states to

maintain a restrictive measure if justified by local legitimate ends; however, discriminatory measures have an extraordinarily low chance of survival.[92] The Australian Constitution's Free Trade Clause prohibits measures discriminating against out-of-staters but countenances such restrictions if justified by the local public interest.[93]

All these regimes treat local standards in a negative way: they do not establish standards but rather judge local standards on the basis of the trade restriction caused and the social benefit achieved, which screens out illegitimate and unreasonable (disproportionate) measures. The negative filter of national standard-setting, however, is unavoidably imperfect.

First, innocent regulatory differences, entailed by sincere and genuine (that is, non-protectionist) public interest motivations, may considerably restrict trade. Standards developing in isolation from each other may diverge considerably for various historical reasons. The color of the turn light, the structure of the plug-ins, and the voltage used by the electricity system, although distorting trade considerably, may be traced back to trade-neutral causes. In its own way, every standard may be reasonable and contribute to the attainment of a legitimate end without being discriminatory or unreasonable.[94] The heterogeneity of the regulatory landscape, however, may give rise to sheltered strongholds for local producers.

Second, a central issue of the negative filter's application is proportionality and the connected issue of value judgment. Free trade and public interest are not unigenous values; hence, they cannot be weighed with each other without a proper value-judgment. A neutral observer may conclude that a million barrels of crude oil is more than half million barrels, but he would have a hard time answering the question whether a million barrels of crude oil is more than ten thousand pines. Though common sense and personal taste may produce an answer, there is no "exchange rate" for contrasting two disgeneric values. This raises issues and difficulties in terms of justiciability.

Third, the negative filter is necessarily imperfect in the sense that it is either ineffective and countenances some veiled protectionism or too interventionist and stifles local regulatory sovereignty. A more tolerant approach may open the way to disguised protectionism and may permit states to surround national markets with regulatory walls to preserve

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92. *See* United Haulers Ass'n, v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007); Maine v. Taylor, 477 U.S. 131 (1986); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *See also* Nagy, *supra* note 3, at 208.

93. *See Cole v. Whitfield* (1988) 165 CLR 360 (Austl.).

national markets. At the same time, a more interventionist approach may subordinate local regulatory considerations to free trade, which entails legitimacy issues and fuels political resistance.

Given that local legitimate ends and regulatory considerations may be used to foster pure economic interests, the trading system's effectiveness and the local regulator's margin of discretion are inversely proportionate. The states' margin of appreciation is meant to preserve regulatory sovereignty and the free trade system's legitimacy. The excessive protection of the inter-state flow of goods and services may interfere or even stifle local regulatory policy. At the same time, states may use their regulatory discretion to foster local economic interests in the form of disguised protectionism. Even though a wider margin of discretion may make the enforcement of local values easier, it also makes it easier for nationalistic and protectionist trade interests to capture regulatory decision-making.

The dilemma in balancing trade and local legitimate ends is truly Hamletian. The states' margin of appreciation serves the purpose of preserving regulatory sovereignty and concurrently the system's legitimacy, which could diminish if the local electorate perceives that the interest of trade triumphs over local legitimate regulatory policy considerations. A more lenient scrutiny, however, not only gives deference to the local sovereign but also implies a higher chance of disguised protectionism. Under the surface of regulatory balancing, decision-making is often enchanted by nationalistic emotions and protectionist lobbying activity bankrolled by industry lobbyists.[95]

While some authors convincingly argue that only those measures should be prohibited where protectionist intent is proved,[96] it is still uncertain how to ascertain disguised protectionism and how to distinguish it from the honest use of regulatory powers. May the regulator's mens rea be investigated? Namely, a restrictive measure may be based equally on protectionist and public interest considerations, which makes it deucedly difficult to pronounce it truly protectionist or a truly legitimate exercise of regulatory powers. In fact, the protagonists of protectionism are usually smart enough to veil their selfish economic interests with fancy "public good" labels, which may include protection of the environment, workers' rights, or the health issues associated with foreign foodstuff.[97]

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95. *See* Nagy, *supra* note 3 at 208.

96. *See*, *e.g.*, Donald H. Regan, *Article: The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

97. *See*, *e.g.*, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DB58/AB/RW (Oct. 21, 2001); Dispute

Identifying a measure's protectionist edge may, at times, be an extremely complex exercise, as illustrated by the Hungarian "egg case." In Hungary, retail chains offer large discounts during peak seasons such as Easter, but in the discounted packages they sell small (S-size eggs), so purchases concentrate on this category. The purchase of medium (M), large (L), and extra-large (XL) eggs does not increase but might decrease. Domestic egg producers would be able to cover the entire demand in Hungary even in peak seasons; however, they cannot supply a sufficient quantity of S-size eggs. The reason is that these are laid by young hens, which make up only a small portion of the Hungarian hen population. As a consequence, during peak seasons retail stores import a considerable amount of eggs compared to minimal importation at other times. This plight may be detrimental both to producers and consumers. The interests of domestic producers are clear. Imports take away the market from them. At the same time, the foregoing scenario also raises serious public interest issues. Consumers are deceived since they purchase seemingly discounted products that may be cheaper per egg but more expensive per gram. In this sense, the discounted product may be more expensive. These two factors, the legitimate consumer protection considerations and the material interests of domestic producers, may intermingle in a legislative proposal.[98]

Price regulation is another seemingly innocuous measure, which may have serious restrictive effects. States may introduce price floors and price caps to protect producers or consumers. These may, however, be used to cut out foreign trade. Price floors may strip cheaper foreign products of their competitive advantage[99] and may be an effective means of shielding local producers in cases where foreign products are considerably cheaper and local products are not inferior in quality (at least, as perceived by local consumers). In such a case, local consumers to some extent may be loyal to local brands, but that may be overcome by the lower prices of import products. If price floors do not allow products to be sold at a discounted price, import products' competitive advantage is lost. Absent a substantial price difference, local consumers

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Settlement Panel Report, *United States - Restrictions On Imports of Tuna*, DS29/R (June 16, 1991).

98. *See* Nagy, *supra* note 3, at 208.

99. *See* Case 82/77, *van Tiggele v. Netherlands*, 1978 ECR 25; *Cloverland-Green Springs Dairies, Inc.* v. *Pa. Milk Mktg. Bd.*, 298 F.3d 201 (3rd Cir. 2002); Csongor István Nagy, *The Hungarian Competition Office Stops a Cartel Investigation Due to Blocking Legislation: Can National Law Suppress a Cartel Investigation That Affects Inter-state Trade? (Watermelon Cartel)*, CONCURRENCES (Apr. 10, 2013), http://www.concurrences.com /en/bulletin/news-issues/april-2013/The-Hungarian-Competition-Office-53124.

may be more inclined to stick to well-known local brands.

The above difficulties suggest that the best way to address standards is to positively coordinate them and make the negative screening of trade-restricting national measures a second best. Notably, while certain disparities may be deeply rooted and caused by entrenched public policy considerations, a substantial part of the diversity is due to diverging traditions, historical contingencies, and random development. These standards may chill trade without being considered protectionist and without being prohibited. In this sense, the question is not whether common or approximated standards are needed but to what extent they are needed. Not surprisingly, new-generation free trade agreements commonly contain chapters on regulatory cooperation and provide for various mechanism for coordination, information exchange, and elaboration of common standards.

Regulatory cooperation certainly does not allow a state to have its own cake and eat it too: a state cannot take back control and still maintain frictionless trade.[100] The smooth flow of goods and services calls for a rule-based framework, and rules, even if accepted voluntarily, are the results of compromise and by definition limit states' discretion and unimpeded freedom of action. Unfortunately, wealth benefits of trade and national regulatory sovereignty are like oil and water: they feature an inverse proportionality and, hence, trade benefits cannot be boosted without limiting national regulatory autonomy. Preserving unlimited local regulatory autonomy comes at a price and appears to be a luxury in the age of free trade and regional economic integrations.

Furthermore, approximation of standards via regulatory cooperation is often warranted not only by the desire for frictionless trade but also by regulatory competition.

Undoubtedly, the most well-known case of regulatory competition is the "race to the bottom" (labeled as the "Delaware effect" after Delaware's success in becoming the most favored state for the incorporation of business associations). This is based on the intuition and experience that states may lower their standards or tax rates to make their producers more competitive or to attract more investors. Regulatory competition may indeed exert a downward push on national

100. "Boris Johnson: I think what - look, the single market people will think what do you mean by the single market? The single market is a huge territory now that comprises the member states of the European Union. Would we be able to trade freely with that territory? I think yes we would. Andrew Marr: But would we actually leave it as an institution? In other words, if I'm making marmalade and I'm trying to sell my marmalade to Italy and the Italians say do you know what, Andrew Marr, your marmalade has too many pips in it per jar, we're not going to accept it and that is a pure attempt to stop my marmalade coming in, then there are rules so – you'd lose all of that?" *Andrew Marr Show*, (BBC television broadcast Mar. 6, 2016).

or state regulation in case of standards governing the production process (such as environmental and labor standards, corporate governance, taxation) where other states cannot block the importation of the products with reference to the lower out-of-state standards and tax rates. If products from low-standard countries could be cut out, the race to the bottom would be less intensive or absent. If blocking is not possible, however, products of high-standard countries may sustain a competitive disadvantage and prompt their government to follow suit.

Nonetheless, perhaps counterintuitively, regulatory competition may also work the other way around, a phenomenon labeled as the "California effect."[101] In cases where the standards determine the products' features, regulatory discrepancies may impede low-standard products' access to high-standard markets. What is more, at times, standards are neither higher nor lower but still different. The color of the turn light, the size of the plug-ins or the voltage used by the electricity system may vary from country to county, but these differences are not based on any considerable differences in terms of level of protection. If the differences determine the characteristics of the product, producers and service providers may be willing to comply with the highest standards, provided they are used by a country representing a major market. If access to this major market is crucial, economic interests may compel producers to voluntarily comply with the higher standards, provided double production lines are not feasible or economically reasonable.

Both the Delaware and the California effect warrant that states engage in regulatory cooperation. While the race to the bottom generated by the Delaware effect makes the unilateral maintenance of higher standards difficult, regulatory cooperation in the shadow of a major economic block is justified by the fact that, absent cooperation, a comparatively small country may become a rule-taker instead of a co-regulator. Taking back control in such a situation is illusionary and, in fact, means less control: a country engaged in regulatory cooperation may co-regulate, while an outsider country, whose producers are

101. Nonetheless, perhaps counter-intuitively, regulatory competition may also work the other way around, a phenomenon labelled as California effect. *See* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 248-270 (1995) ("This pattern has three components: two relate to market forces, and the third has to do with politics. First, to the extent that stricter regulations represent a source of competitive advantage for domestic firms, the latter may be more likely to support them. Second, rich nations which have enacted greener product standards force foreign producers to adjust to them in order to continue to enjoy market access, thus helping in turn to raise foreign product standards. Third, agreements to reduce trade barriers can provide richer and more powerful greener national with the opportunity to pressure other nations into adopting stricter product and production standards").

complying with foreign standards due to economic and marketing considerations, is a rule-taker. It is difficult to imagine a situation more derogatory to national regulatory sovereignty.

5. CONCLUSION

Reverting to protectionism faces two major, arguably unsurmountable, hurdles: the economic realities, which show that protectionism comes at a very high price even to those it strives to protect, and the disciplines of the WTO, which very much limit unilateral measures inspired by purely protectionist desires.

The modus operandi of international trade makes frontal protectionism self-destructing. The idea that international trade is a zero-sum wrestling match to be measured by trade deficit and trade surplus is outdated. International trade produces various benefits that are not expressed by the balance of trade, such as larger consumer surplus, enhanced competitiveness due to global supply chains, and access to cheap inputs. In addition, protectionist measures provoke retaliation. In the age of mega-regional trade agreements and free trade zones, trade liberalization is not only about what to win but also about what (not) to lose. These arrangements not only create trade for insiders but also divert trade from outsiders. Trade, like any game-changer, leaves both winners and losers behind. This, however, does not change the painful fact that, notwithstanding individual losers, overall it makes us better off, and the rational choice is, just as in case of technological innovation, to enjoy its benefits, while giving losers time to adapt to the new environment and, if necessary, compensate them via redistribution.

The current regime of world trade law developed under the auspices of the WTO significantly limits protectionist policies. Quantitative restrictions were essentially abolished long ago, and tariffs have been largely capped (tariff-bindings), especially in developed countries. The exceptions provided by WTO law are normally conditioned and may come at a price, which leaves no room for a comprehensive protectionist policy.

The discourse on international trade is increasingly focusing on non-frontal restrictions, in particular regulatory hurdles and regulatory cooperation, which makes national regulatory sovereignty attract special attention. Although trading systems prohibit protectionist regulation, the most effective way to iron technical barriers to trade is treating them in a positive manner. Regulatory cooperation enhances frictionless trade and handles regulatory competition, which may manifest itself both as a “race to the bottom” and a “race to the top.” Interestingly, regulatory cooperation, in certain cases, may be even

more protective of regulatory sovereignty: it may guarantee the status of a co-regulator instead of a rule-taker. While "taking back control" is an appealing yell, catering to the deepest tribal instincts, in reality, unimpeded sovereignty and unlimited freedom of action are increasingly a wishful thinking. It is no longer true, at least economically, that "the parliament can do everything but make a woman a man and a man a woman."[102]

All in all, it seems that even in trade, you cannot have your cake and eat it too. The choice is not between a share in a common cake and having your own cake. It is between eating a cake and eating a cookie. Not a difficult choice, I would say…

102. Jean-Louis de Lolme, THE CONSTITUTION OF ENGLAND: OR AN ACCOUNT OF ENGLISH GOVERNMENT (1775).