THE RESILIENCE OF PROTECTIONISM IN U.S. TRADE POLICY

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ABSTRACT

Since the end of World War II, the global economy has shifted into a multilateral trade system that promotes free trade among sovereign nations. The United States and the United Kingdom were at the forefront of this shift. Against this background, the Brexit vote in the United Kingdom and the presidential election of Donald Trump in the United States came as a surprise to many—especially because of the United States' and United Kingdom's political leaders' vocal opposition to the multilateral trade system, of which the two nations used to be the foremost proponents. These events are particularly startling, but they represent a lesser departure from U.S. trade policy than they seem at first glance. Rather, protectionism has never completely left U.S. trade law and policy. Using the history and practice of antidumping and countervailing measures as examples, this Note argues that protectionism has been resilient in U.S. trade law, despite the country's historical leadership in promoting the World Trade Organization regime.

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CONTENTS

INTRODUCTION		685
I. M	IULTILATERAL TRADE IN THE GLOBAL SYSTEM	687
A	. The Role of the United States in the Rise of	
	Multilateral Trade	687
В	. Free Trade in the Trump Era	695
	1. The United Kingdom and Brexit	696
	2. The Presidential Election in the United States	698
II.PROTECTIONISM VERSUS FREE TRADE		700
A	The History of Protectionism in the United States	701
В	. An Analysis of Protectionism and Free Trade	705
III.U.S. TRADE LAW: PROTECTIONISM PREVAILS		708
A	Subsidies: Unfair Trade Practice or Legitimate	
	Policy Measure?	708
В	. Antidumping in U.S. Trade Law as an Example	
	of Protectionism	711
C	. Countervailing Duties in U.S. Trade Law as an Example of	
	Protectionism	716
CONCLUSION		719

INTRODUCTION

After World War II, global leaders gathered to negotiate the General Agreement on Tariffs and Trade ("GATT"), shifting the global trade system from the traditional bilateral approach to a system that encouraged multilateral free trade agreements. The United States and the United Kingdom were at the forefront of those negotiations and their leaders brought together the most powerful nations of the time to negotiate the establishment of international institutions.¹ Over the upcoming decades, under the GATT framework and eventually under the direction of the World Trade Organization ("WTO"), multilateral agreements became more prevalent, resulting in the increasing integration of domestic economies into the global economy. Furthermore, the regulation of trade in goods under the GATT framework has extended into trade in services and regulations on technical barriers to trade, investment, sanitary and phytosanitary measures, and intellectual property.²

After seventy years under the GATT framework, two of the foremost proponents of the multilateral trade system began to clearly demonstrate their discontent. In June 2016, the United Kingdom voted to leave the European Union in the historic Brexit vote.³ Then, in November, 2016, the United States elected Donald Trump as President following his "Make America Great Again" campaign, which promoted protectionist policies and prioritized the United States' domestic interests over international cooperation and win-win solutions.⁴ Until the final results of both votes were revealed, neither event was clearly anticipated.⁵ These events, however unexpected, were arguably the results of

¹ For further discussion, see *infra* Part I (describing role of United States and United Kingdom in development of multilateral trade system).

² See Overview: A Navigational Guide, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm [https://perma.cc/ZG3T-7Q7K] (last visited Feb. 11, 2019) (outlining WTO and its purposes).

³ *Brexit*, GOV.UK, https://www.gov.uk/government/policies/brexit [https://perma.cc/NV 33-HSDL] (last visited Feb. 11, 2019).

⁴ *People: Donald J. Trump*, WHITE HOUSE (2017), https://www.whitehouse.gov/administration/president-trump [https://perma.cc/YS3F-8A2T] (describing Donald J. Trump and his rise to presidency).

⁵ See Brexit: Europe Stunned by UK Leave Vote, BBC (June 24, 2016), http://www.bbc.com/news/uk-politics-eu-referendum-36616018 [https://perma.cc/AX6B-P8EH] ("A wave of shock is reverberating around Europe as countries across the EU and beyond digest the decision by UK voters to leave the European Union."); Dan Hirschhorn, How Donald Trump Shocked the World, TIME (Nov. 9, 2016) http://time.com/4563946/election-2016-donald-trump-victory-how/ [https://perma.cc/S9S9-VS5P] ("The polls said it wouldn't happen this way. The forecasts said it wouldn't happen this way. Even the betting markets said it wouldn't happen this way."); Euan McKirdy, Barry Neild & Steve Visser, EU Referendum Results: David Cameron to Resign, Markets Tumble, CNN (June 24, 2016), http://www.cnn.com/2016/06/24/europe/uk-eu-referendum-results/index.html [https://perma.cc/UZ7T-UWN2] ("There was a mixture of jubilation and tearful disbelief in the UK as people awoke to the final result of Thursday's extremely close vote, which deeply divided

decades of dissatisfaction with the multilateral trade system. More specifically, multilateral trade has not been universally advantageous to all populations or industries. It has contributed to unequal distribution of wealth and severe losses for certain industries within domestic economies, among other concerns. Furthermore, the protectionism that instigated the GATT negotiations has never been completely abandoned, and the appeal of mercantilism has never completely faded from U.S. trade law.

This Note addresses the changes in the global trade system from overt protectionism to a more covert protectionism, and it highlights the substantive continuity of U.S. trade policies. Part I outlines the current state of multilateral trade in the global system. More specifically, it discusses the role of multilateral trade in the United States and how the recent presidential election confronted the issue. This event is significant because trade is an important economic and political issue for the United States; the current system supports shared interests, and a threat to its stability could seriously compromise those interests. Part II discusses the United States' protectionist policies before World War II and also analyzes concerns with both protectionism and free trade policies. Part III argues that protectionism has prevailed in the United States, despite the United States' simultaneous promulgation of free trade policies. More specifically, this Part argues that the United States' antidumping and countervailing duty laws are examples of how protectionism has been resilient in U.S. trade policy. Despite its role in introducing and popularizing multilateral trade after World War II, the United States continues to employ protectionist policies, as it always has. The recent U.S. presidential election, the current U.S. trade platform, and the Brexit vote are particularly startling, but they represent a lesser departure from historical policy than they seem at first glance. Overall, this Note argues that the recent events do not evince a revival of protectionism, but rather that they demonstrate the resilience⁸ and continuity of protectionist policies in U.S. trade policy.

the nation."); Chris Morris, *Biggest Crisis Yet for Brussels*, BBC (June 24, 2016), http://www.bbc.com/news/uk-politics-eu-referendum-36616018 [https://perma.cc/N4QD-S4MB]; Michael D. Shear, *Presidential Election Live: Donald Trump's Victory*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com/2016/11/08/us/politics/election-live.html.

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⁶ Anne O. Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?*, 13 J. ECON. PERSP. 105, 114 (1999) (describing benefits and harms associated with multilateral trade).

⁷ Salman Ahmed & Alexander Bick, *Trump's National Security Strategy: A New Brand of Mercantilism?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 17, 2017), http://carnegie endowment.org/2017/08/17/trump-s-national-security-strategy-new-brand-of-mercantilism-pub-72816 [https://perma.cc/5VCX-6QJG] ("[President Donald Trump's] forthcoming national security strategy will be closely scrutinized to understand what 'America First' means for the U.S. role in the world ").

⁸ As in Professor Vivien Schmidt and Mark Thatcher's discussion of neo-liberalism's resilience in Europe's political economy, resilience in this context can be characterized by a concept's "endurance, reoccurrence, and adaptability," "dominance" over other options, and

I. MULTILATERAL TRADE IN THE GLOBAL SYSTEM

After World War II, the global community saw an increase in international institutions, including the European Union, the International Monetary Fund, the United Nations, and the World Bank. These institutions would create both binding and nonbinding instruments and policies that would affect global trade policy and direct nations in the creation and maintenance of their domestic trade policies. For instance, the European Union retains the trade negotiation power for all its member states, meaning individual member states cannot negotiate their own trade agreements. 9 After World War II, global leaders recognized the importance of using trade agreements as tools to prevent war and create a new world order. One of the most influential of these tools was the GATT, a framework established in 1947 to regulate and monitor multilateral trade flows. The United States played an instrumental role in the GATT negotiations. Since then, the United States has continually entered into free trade agreements with other nations¹⁰ and used the dispute settlement system as established by GATT, and later the WTO.¹¹ However, more recently, the United States has been more vocal about its discontent with the multilateral trade system, despite its instrumental role in establishing that system.¹²

A. The Role of the United States in the Rise of Multilateral Trade

By the end of the 1930s, World War II had broken out. Congress made concerted efforts initially to remain neutral from the war by passing Neutrality Acts. The Neutrality Acts regulated the export of arms, prohibited loans or sales of securities to belligerents or countries engaged in civil strife, and forbade American vessels from engaging in trade with belligerents.¹³ Despite the

"survival not only in the face of strong challenges but also despite . . . [its] failures." Vivien A. Schmidt & Mark Thatcher, *Theorizing Ideational Continuity: The Resilience of Neo-Liberal Ideas in Europe, in Resilient Liberalism* in Europe's Political Economy 1, 15-16 (Vivien A. Schmidt & Mark Thatcher eds., 2013).

⁹ Thomas Streinz, *Cooperative Brexit: Giving Back Control over Trade Policy*, 15 INT'L J. CONST. L. 271, 271 (2017) (highlighting complexities surrounding Brexit and advocating for cooperative efforts).

¹⁰ For a list of U.S. free trade agreements currently in force, see *Free Trade Agreements*, OFFICE U.S. TRADE REPRESENTATIVE: EXECUTIVE OFFICE PRESIDENT, https://ustr.gov/trade-agreements/free-trade-agreements [https://perma.cc/X962-Z6EK] (last visited Feb. 11, 2019).

¹¹ For a list of disputes involving the United States in the WTO, see *Dispute Settlement: The Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [https://perma.cc/TNM3-SB85] (last visited Feb. 11, 2019).

¹² Ahmed & Bick, *supra* note 7 (discussing President Trump's trade strategy and potential effects of "America First").

¹³ Neutrality Act of 1939, ch. 2, 54 Stat. 4, 4 (codified as amended at 22 U.S.C. § 441 (2018)) ("To preserve the neutrality and the peace of the United States and to secure the safety of its citizens and their interests."); Neutrality Act of 1937, ch. 1, 50 Stat. 3, 3 ("To prohibit the exportation of arms, ammunition, and implements of war from the United States to Spain."); Neutrality Act of 1936, ch. 106, 49 Stat. 1152, 1152 (outlining U.S. neutrality

Neutrality Acts, the United States did not remain completely neutral, particularly with respect to the United Kingdom. For example, in November 1938, during the self-imposed period of neutrality, the United States entered into a trade agreement with Britain to respond to the threat of Nazism spreading throughout Europe. Additionally, President Roosevelt continually opposed the U.S. Congress's isolationist stance. In 1940, he expressed his concern about World War II's threat to global democracy, but Congress maintained its isolationist policies. In 1941, President Roosevelt further conveyed these concerns in his Four Freedoms speech, which promoted the idea that all should be provided freedom of religion, freedom from want, freedom from fear, and freedom of speech and expression. He deemed the elimination of protectionist tariffs an important step towards granting those four freedoms. He nonetheless recognized that the United States could not unilaterally realize the endeavor.

During the summer of 1941, President Roosevelt and the United Kingdom's Prime Minister Churchill met off the coast of Newfoundland. The two leaders used this meeting to discuss their "common cause" and evaluate the situation on the European continent to develop "common strategies" to address any threats to their nations. The meeting resulted in the Atlantic Charter, in which the two leaders "deem[ed] it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world." They expressed their intent "to bring about the

policy); Neutrality Act of 1935, ch. 837, 49 Stat. 1081, 1081 ("[I]t shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to any port of such belligerent states"); see also Aaron Xavier Fellmeth, A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941, 3 BUFF. J. INT'L L. 413, 425-34 (1996-97) (discussing Neutrality Acts from 1935-1939).

- ¹⁴ Charles S. Maier, *The Politics of Productivity: Foundations of American International Economic Policy after World War II*, 31.4 INT'L ORG. 607, 610 (1977) ("The danger of Nazi expansionism further impelled Neville Chamberlain to solicit Washington's cooperation and conclude the Anglo-American trade agreement of November 1938.").
- ¹⁵ Susan Dunn, *The Debate Behind U.S. Intervention in World War II*, ATLANTIC (July 8, 2013), https://www.theatlantic.com/national/archive/2013/07/the-debate-behind-us-interven tion-in-world-war-ii/277572/ [https://perma.cc/FH9H-NKNR] ("In that critical month of May 1940, [President Roosevelt] finally realized that it was probably a question of when, not if, the United States would be drawn into war.").
- ¹⁶ TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE U.N. 27 (1997) ("These were, [President Roosevelt] said, not a vision for 'a distant millenium,' but 'a definite basis for a kind of world attainable in our own time and generation."").
- ¹⁷ Id. at 37 ("The elimination of all such practices was a major goal of the Roosevelt Administration.").
 - ¹⁸ *Id.* at 26 (describing circumstances surrounding signing of the Atlantic Charter).
- ¹⁹ *Id.* (describing "secret rendezous" between Prime Minister Churchill and President Roosevelt).
 - ²⁰ The Atlantic Charter, U.K.-U.S, Aug. 14, 1941, 55 Stat. 1603, 1603, E.A.S. No. 236.

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fullest collaboration between all nations in the *economic* field with the object of securing, for all, improved labor standards, economic advancement and social security "21 The relationship between the United States and the United Kingdom was further enhanced in 1942 when the two nations entered into a Lend-Lease Agreement to exchange defense articles and information with each other. 22 These two agreements would be considered the "groundwork for [the] grand design for trade liberalization" that was developed after World War II. 23 These examples of collaboration between the United States and the United Kingdom demonstrated their desire to strategize about the best economic course that should be followed once the war was over, namely one based on international cooperation.

Towards the end of World War II, the United States stepped onto the global stage with significant wealth.²⁴ Embracing its leadership role, the United States sought to promote its democratic values and international cooperation²⁵ and convened a summit of forty-four nations in Bretton Woods, New Hampshire to share the United States-United Kingdom plans for global economic and trade policy.²⁶ The Allied nations wanted to build on "wartime habits of economic cooperation" to form a comprehensive commercial policy.²⁷ The Bretton Woods conference resulted in drafted agreements to establish the International Monetary Fund and the International Bank for Reconstruction and Development (the precursor to the World Bank), two institutions that would monitor global financial development and exchange rates.²⁸ However, the participating nations still recognized the need for an institution to monitor trade.²⁹ In 1945, Congress

²¹ *Id.* (emphasis added).

²² Lend-Lease Agreement of 1942, U.K.-U.S., Feb. 23, 1942, 56 Stat. 1433, 1433-34, E.A.S. No. 241 (establishing cooperative weapons and war efforts).

²³ BRUCE C. CLUBB, UNITED STATES FOREIGN TRADE LAW 120-21 (1991) (articulating goals and themes of global economic development).

²⁴ Chris Brummer, Minilateralism: How Trade Alliances, Soft Law, and Financial Engineering Are Redefining Economic Statecraft 38 (2014) (highlighting how "United States emerged from the war as the wealthiest country in the world").

²⁵ *Id.* at 39 ("[T]he promotion of Western capitalist democracy was seen as essential in checking the threat of Soviet economic and military expansion.").

²⁶ CLUBB, *supra* note 23, at 123 (describing conference at Bretton Woods); MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE 23 (4th ed. 2013) (discussing U.K. and U.S. efforts to develop "strategies for reconstructing the world economy after the war").

²⁷ Percy W. Bidwell, *A Postwar Commercial Policy for the United States*, 34 Am. Econ. Rev. 340, 349 (1944).

²⁸ CLUBB, *supra* note 23, at 123 ("Although the focus of the IMF was on exchange rates, a principal purpose was to facilitate trade....").

²⁹ *Id.* at 123-24 (noting that IMF and World Bank alone were insufficeint to build effective trade system). The Articles of Agreement of the International Monetary Fund explain that the IMF was meant to "promote international monetary cooperation" and "facilitate the expansion

granted the President the power to negotiate trade agreements and reduce tariffs through the Trade Agreements Extension Act of 1945.³⁰ However, this authorization only lasted until 1948.³¹ Thus, the negotiating nations completed and signed the GATT just before the expiration of the President's negotiating authority.³² The GATT was signed in October 1947 to become effective in January 1948.³³

The framework under the GATT aimed to reduce trade barriers and eliminate discriminatory treatment of imported goods. ³⁴ The GATT's most favored nation ("MFN") and national treatment provisions constitute the fundamental tools through which non-discriminatory treatment of imports is implemented. Article I of the GATT codifies the MFN principle. The MFN provision requires GATT parties to provide all tariff concessions made to one GATT party available to all parties. ³⁵ The MFN principle was not a new concept at the time of the GATT; it had been applied in Europe since before the world wars as a mutually protective measure to ensure the lowest tariffs between trading partners. ³⁶ The United States also began employing the MFN principle after the passage of the Reciprocal Trade Agreement Act of 1934 ("RTAA"). ³⁷ However, preferential trade agreements are a significant exception to the MFN principle. ³⁸ Under

and balanced growth of international trade." Articles of Agreement of the International Monetary Fund, Art. 1, Dec. 27, 1945, 60 Stat. 1401, 205 U.N.T.S. 39.

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³⁰ CLUBB, *supra* note 23, at 124-25 (describing President Roosevelt's power under Trade Agreements Extension Act).

³¹ *Id.* ("[U]nless [the President's] authority was renewed, additional trade agreements would not be possible.").

³² Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 Brook. J. INT'L L. 101, 118-19 (1992).

³³ General Agreement on Tariffs and Trade, pmbl., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 188 [hereinafter GATT] ("[D]irected to the substantial reduction of tariffs and other trade barriers and to the elimination of preferences, on a reciprocal and mutually advantageous basis."); *see also* Clubb, *supra* note 23, at 126 (describing signing of GATT).

 $^{^{34}}$ Trebilcock, Howse & Eliason, supra note 26, at 29 (describing principle of non-discrimination).

³⁵ GATT, *supra* note 33, art. I, para. 1 ("[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."); *see also* CLUBB, *supra* note 23, at 119 n.6 (describing MFN principle); 1 EUGENE T. ROSSIDES & ALEXANDRA MARAVEL, UNITED STATES IMPORT TRADE LAW 2-3 (1998) ("Among the many rules established by the GATT the foremost is the 'most-favored-nation' (MFN) principle.").

³⁶ Krueger, *supra* note 6, at 105.

³⁷ *Id.* ("[In 1923], the United States began to recognize that this unilateral approach was costing much, and gaining little, and U.S. trade negotiators began changing to MFN clauses").

³⁸ GATT, *supra* note 33, art. XXIV, para. 2 (permitting formation of customs unions); *see also* Trebilcock, Howse & Eliason, *supra* note 26, at 83 (highlighting prevalence of

Article XXIV of the GATT, signatory countries are permitted to enter customs unions or free trade areas, in which member nations "substantially eliminate[] duties and other restrictive regulations of commerce" amongst the member nations.³⁹ Preferential and regional trade agreements, such as the agreements creating the European Union, have become increasingly common in recent years.

In addition to the MFN provisions, the GATT applies the principle of national treatment. Under Article III of the GATT, parties agree not to subject imports to internal taxes or "other internal charges" or treatment that is "less favourable than that accorded to like products of national origin."⁴⁰ Thus, GATT parties must treat their imported and domestic producers with the same taxes and treatment. Overall, the MFN and national treatment provisions encourage and regulate free trade among the GATT signatory parties.

The United States was an important player in the negotiation of the GATT and wrote much of the text of the GATT.⁴¹ For instance, the GATT includes an escape clause, allowing nations to withdraw, suspend, or modify trade agreements if unforeseen circumstances are causing "serious injury" to the nation's domestic economy, a provision advanced by U.S. negotiators as an additional protection for GATT contracting parties.⁴² Due to the influence of the United States and Western Europe in the GATT negotiations, the GATT framework was ultimately designed to complement similar economies: "Western liberal economies, composed of price-sensitive, profit-maximizing

preferential trade agreements in international trade); Krueger, *supra* note 6, at 106 (noting that GATT permits free trade agreements).

³⁹ GATT, *supra* note 33, art. XXIV, paras. 3-6 (describing parameters for preferential trade agreement); *see also* TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 83 (describing how preferential trade agreements ("PTAs") "advanc[e] trade liberalization and economic integration among parties to the PTA").

⁴⁰ GATT, *supra* note 33, art. III, para. 1 (outlining national treatment provision).

⁴¹ Richard H. Steinberg, *Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism*, 29 LAW & POL'Y INT'L BUS. 205, 220 (1998) ("The United States authored the text that became the GATT 1947."); *see also* President Harry S. Truman, Charter Proposing an International Trade Organization Transmitted to the Senate, Message to the Congress (Apr. 23, 1949), *in* DEP'T ST. BULL., May 1949, at 601 ("We have learned through bitter experience how necessary it is for nations to approach jointly the task of improving the conditions of world trade. During the 1930's many nations acted independently, each attempting to gain advantage at the expense of others. The result was a vicious circle—with restrictions by one nation provoking more serious restrictions by other nations in retaliation. The end result was a tremendous drop in the volume of international trade which made the general depression worse and injured all countries.").

⁴² GATT, *supra* note 33, art. XIX, para. 1 ("If, as a result of unforseen developments and of the effect of the obligations incurred by a contracting party under this Agreement . . . , the contracting party shall be free . . . to suspend the obligation in whole or in part or to withdraw or modify the concession."); *see also* MICHAEL K. YOUNG, UNITED STATES TRADE LAW AND POLICY 37 (2001) (highlighting GATT's provisions that provide temporary relief in certain circumstances).

firms with little government intervention except for purposes of solving market failures . . . and engaging in modest income redistribution."⁴³

At the time of signing, the negotiating nations intended to engage in subsequent negotiations that would establish the International Trade Organization ("ITO") to enforce the GATT.⁴⁴ The ITO would guide "the conduct of trade relations [as] a forum for trade negotiations and an organ for conciliation and settlement of disputes,"⁴⁵ and the parties intended the GATT to be suspended upon establishment of the ITO.⁴⁶ An ITO Charter was drafted in early 1948.⁴⁷ However, Congress opposed the ITO Charter and ultimately did not ratify it.⁴⁸ Additionally, the United Kingdom opposed the Charter because the Charter provided insufficient protection for the U.K. domestic economy and policies.⁴⁹ This opposition from the United States and the United Kingdom led to the Charter's failure, leaving the GATT as the primary mechanism for trade regulation.⁵⁰

In the 1950s, the United States began losing the absolute "economic superiority" it had gained during World War II and the immediate postwar period.⁵¹ Nonetheless, free trade increased in the global system, and the United States continued its support of trade liberalization.⁵² The United States supported the European Common Market and liberalization of trade in Europe more generally.⁵³ Furthermore, President Kennedy encouraged multilateral trade as a

⁴³ Steinberg, *supra* note 41, at 220.

⁴⁴ Krueger, *supra* note 6, at 105-06 (explaining that GATT was "drawn up as an interim measure" to continue negotiations until ITO charter could be ratified).

⁴⁵ Brand, *supra* note 32, at 120 (citation omitted).

⁴⁶ JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 666 (4th ed. 2015) (stating that "the GATT provided that 'on the day on which the [ITO Charter] enters into force,' GATT's provisions 'shall be suspended and superseded by the corresponding provisions of the charter'").

⁴⁷ Clubb, *supra* note 23, at 128.

⁴⁸ *Id.* at 131 (describing Congress's rejection of Charter).

⁴⁹ John Linarelli, *How Trade Law Changed: Why It Should Change Again*, 65 MERCER L. REV. 621, 646 (2014) (noting United Kingdom's rejection of Charter).

⁵⁰ MICHAEL J. TREBILCOCK, ADVANCED INTRODUCTION TO INTERNATIONAL TRADE LAW 10 (2015) (noting GATT has become "by default the permanent institutional basis for today's world trade regime"); *see also* Linarelli, *supra* note 49, at 647 ("The irony of the ITO's failure is that the parties that really pushed for its adoption—Britain and the United States—were responsible for its failure.").

⁵¹ CLUBB, *supra* note 23, at 165.

⁵² Krueger, *supra* note 6, at 106-07 (highlighting U.S. policy efforts to support trade liberalization); *see also Trade Expansion Act of 1962: Hearing on H.R. 9900 Before the H. Comm. on Ways and Means*, 87th Cong. 2-3 (1962) [hereinafter *1962 Hearings*] (statement of John F. Kennedy, President, United States) (discussing benefits of increased trade to include expanded economy, increased exports, and enhanced domestic industries).

⁵³ Krueger, *supra* note 6, at 106-07.

means to maintain the United States' superiority.⁵⁴ In 1962, Congress authorized President Kennedy to negotiate with the European Economic Community through the Trade Expansion Act.⁵⁵ Although he was unsuccessful in negotiating a free trade area, President Kennedy did negotiate a reduction in tariffs to further liberalize trade between Europe and the United States.⁵⁶ In the mid-1960s, he also negotiated an Antidumping Code⁵⁷ during the Kennedy Round of the GATT,⁵⁸ although such an agreement was not expressly authorized by Congress.⁵⁹ During the 1970s, Congress again authorized the President to negotiate multilateral and liberalized trade policies at the Tokyo Round of the GATT.⁶⁰ The GATT parties at the Tokyo Round added new restrictions to nontariff barriers, including regulations for codes of conduct.⁶¹ During the Uruguay Round in the 1990s, the GATT parties negotiated additional trade rules, extending regulation into new areas of trade like intellectual property and services.⁶² Most significantly, the Uruguay Round resulted in the establishment

⁵⁴ 1962 Hearings, supra note 52, at 5 (statement of John F. Kennedy, President, United States) ("If we are to retain our leadership, the initiative is up to us. The revolutionary changes which are occurring will not wait for us to make up our minds. The United States has encouraged sweeping changes in free world economic patterns in order to strengthen the forces of freedom. But we cannot ourselves stand still. If we are to lead, we must act. We must adapt our own economy to the imperatives of a changing world, and once more assert our leadership.").

⁵⁵ CLUBB, *supra* note 23, at 167 (illustrating President Kennedy's negotation efforts in Kennedy Round).

⁵⁶ CONG. BUDGET OFFICE, THE GATT NEGOTIATIONS AND U.S. TRADE POLICY 27-29 (1987) (highlighting "[s]ignificant progress on lowering tariffs" from Kennedy Round); CLUBB, *supra* note 23, at 168.

⁵⁷ For further discussion of antidumping laws, see *infra* Section III.B.

⁵⁸ The GATT contracting parties met regularly to negotiate or renegotiate terms, which are known as the "Rounds." Perhaps the most famous is the Uruguay Round, during which the WTO was established. TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 24-25 (discussing advancements made in individual Rounds). In the early 2000s, the Doha Round became the ninth Round and the first Round among WTO member nations. *The Doha Round*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dda_e/dda_e.htm [https://perma.cc/Q7 WE-BC6X] (last visited Feb. 11, 2019) (examining WTO membership trade negotiations in Doha, Qatar). For further information about negotiations during each Round, see GATT BILATERAL NEGOTIATING MATERIAL BY ROUND, WORLD TRADE ORG., https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm [https://perma.cc/78QM-LPPQ] (last visited Feb. 11, 2019).

⁵⁹ CONG. BUDGET OFFICE, *supra* note 56, at 29 (describing Kennedy Round's success in negotiating antidumping agreement that "resolve[d] conflicts over nontariff barriers"); CLUBB, *supra* note 23, at 168.

 $^{^{60}}$ Cong. Budget Office, supra note 56, at 30 (describing Congress's authorization for President to negotiate in Tokyo Round).

⁶¹ *Id.* at 30, 36 (discussing how Tokyo Round addressed nontariff barriers).

⁶² DUNOFF, RATNER & WIPPMAN, *supra* note 46, at 667 (describing Uruguay Round's expansion of trade regulation).

of the WTO, the international institution presently responsible for monitoring trade negotiations, tracking relations between member nations, and resolving disputes between them.⁶³

The United States, again, played an influential role in creating a new international institution: the WTO. One driving force behind creating the WTO was a desire for a more effective system to resolve trade disputes than that which the GATT framework provided. Although the GATT dispute resolution system was relatively successful when compared to other international institutions, ⁶⁴ the United States adamantly advocated that the GATT dispute resolution system was ineffective. ⁶⁵ This discontent emerged in the late 1970s. Congress authorized the United States Trade Representative ("USTR") to determine whether other countries had established trade barriers against the United States and use such information to "persuade" those countries to either remove those barriers or provide compensation to the United States. ⁶⁶ Congress also authorized the USTR to take action against those countries that were "unwilling to comply with United States' demands." ⁶⁷ The United States implemented these measures because, in its view, the GATT did not adequately protect its interests, and the GATT dispute resolution was "too cumbersome." ⁶⁸ Other GATT parties

⁶³ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 40 ("[WTO] has been created to oversee an integrated dispute settlement regime and to undertake a proactive trade policy surveillance role.").

⁶⁴ Approximately eighty percent of international trade disputes submitted to the GATT dispute panel were resolved. For further discussion of the GATT dispute resolution system, see DUNOFF, RATNER & WIPPMAN, *supra* note 46, at 670 (discussing dispute settlement activity through GATT).

⁶⁵ Id. at 670, 674 ("The United States argued... unilateral procedues were necessary because GATT dispute settlement was too cumbersome and too weak to protect U.S. trade interests adequately."). The U.S. government desired a stronger framework than that which the GATT framework provided. The United States was concerned that "[g]overnments [were] increasingly resorting to policies that [were] not regulated by GATT, and that conflict with its principles of open and nondiscriminating trade." Cong. Budget Office, supra note 56, at ix, xvi-xvii. The United States wanted to focus on "how to address the unequal distribution of benefits and losses among different groups in a country, and how to react when another country attempts to promote some of its own industries at the expense of its trading partners." Id. at x. Furthermore, the United States recognized that, despite its role as the "prime motivator for trade liberalization since World War II, the intensity of its push for a new round reflect[ed] concerns about the economic and political ramifications of recent record trade deficits." Id. at 1.

⁶⁶ DUNOFF, RATNER & WIPPMAN, *supra* note 46, at 673-74 (stating that "[a]fter identifying [trade distorting practices], USTR is directed to persuade the other government to eliminate the unfair barriers or provide the United States with compensation").

⁶⁷ *Id.* (stating that "[i]f the other government is unwilling to accede to U.S. demands, USTR may take retaliatory trade action").

⁶⁸ *Id.* at 674 (stating that "[t]he United States argued that these unilateral procedures were necessary because GATT dispute settlement was too cumbersome and too weak to protect U.S. trade interests adequately").

opposed the United States and challenged the U.S. trade practices.⁶⁹ Ultimately, during the Uruguay Round, the GATT parties modified the dispute settlement system significantly within the newly created WTO.⁷⁰ Thus, since the end of World War II, the United States has played an important role in developing the global multilateral trade system.

B. Free Trade in the Trump Era

Since the establishment of the GATT framework, the United States has negotiated several multilateral agreements. In recent decades, the United States has increasingly used the negotiation of regional trade agreements as an important free trade tool. For instance, in the 1990s, the United States entered into the North American Free Trade Agreement ("NAFTA") with Canada and Mexico. In 2013, the United States began negotiating with the European Union for what could be the largest free trade area, the Transatlantic Trade and Investment Partnership ("TTIP"). Despite already low tariffs between the

⁶⁹ *Id.* (stating that "[o]ther governments viewed the new legislation as an unacceptable unilateral attempt by the United States to judge their trade practices and called a special GATT meeting to demand a change in U.S. policy").

⁷⁰ *Id.* at 673 (stating that "GATT parties agreed to a dramatically enhanced dispute resolution system in the DSU"). The new dispute resolution system automatically adopts panel reports unless a consensus of the WTO members rejects the report. Additionally, it includes stricter deadlines, permits sanctions for noncompliance with panel reports, and creates a standing Appellate Body. *Id.* (discussing new dispute resolution system). For further information about WTO dispute settlement, see *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [https://perma.cc/6Y8G-UP6D] (last visited Feb. 11, 2019).

⁷¹ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993); *North American Free Trade Agreement (NAFTA)*, OFFICE OF U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta [https://perma.cc/U2S3-UZQB] (last visited Feb. 11, 2019).

Press Release, Office of the U.S. Trade Representative, Fact Sheet: United States to Negotiate Transatlantic Trade and Investment Partnership with the European Union (Feb. 13, 2013), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/february/US-EU-TTIP [https://perma.cc/S6UG-YMZC] (discussing trade negotiations between United States and European Union); Press Release, Office of the U.S. Trade Representative, U.S.-EU Joint Report on T-TIP Progress to Date (Jan. 17, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0

[[]https://perma.cc/6D7A-QKB3] ("T-TIP would increase the exports and investment flows that fuel our economies and support high-quality jobs on both sides of the Atlantic. It would also enable the EU and the United States, drawing on our common values and interests, to develop and promote together common high standards in the global economy, leveling the playing field for our producers, exporters, and workers. Finally, as EU and U.S. leaders have repeatedly emphasized, T-TIP offers an opportunity to strengthen further the broader transatlantic partnership, based on our shared embrace of democracy, human rights, and the rule of law, which has been an indispensable pillar of global security and prosperity since the end of the Second World War."); see also Jessica Watts, The Transatlantic Trade and

European Union and the United States, TTIP would remove non-tariff barriers, standardize customs practices, and harmonize other regulations.⁷³ The United States also signed the Trans-Pacific Partnership ("TPP") in 2016 with eleven other nations.⁷⁴ Similar regional agreements had become increasingly common throughout the world in the latter half of the twentieth century.⁷⁵

Recently, the focus in trade law has shifted away from tariffs and toward "growing economic imbalances, heightened social and environmental fragilities, [and] persistent financial instability." These regional trade agreements and other free trade agreements commonly address both tariffs and non-tariff barriers, such as import licensing or rules of origin. Despite the continued negotiation and ratification of multilateral trade agreements in recent years, free trade is not without its critics, especially in the United States and the United Kingdom, the two leaders in the post-World War II multilateral trade movement.

1. The United Kingdom and Brexit

The European Union, like the GATT and many other international regulatory institutions, was formed after World War II by nations seeking to prevent further violent conflict. The United Kingdom did not join the European Union until the 1970s and was considered to be an unenthusiastic member of the European Union.⁷⁸ Eventually, U.K. citizens experienced "increasing frustration with the EU's costs, inefficient policies, increasing bureaucracies, and net immigration policy," ultimately resulting in a referendum vote about whether the United

Investment Partnership: An Overly "Ambitious" Attempt to Harmonize Divergent Philosophies on Acceptable Risks in Food Production Without Directly Addressing Areas of Disagreement, 41 N.C. J. INT'L L. 83, 84 (2016) ("If successful, TTIP [would] create the world's largest free trade zone."). However, TTIP negotiations tapered by the end of 2016. Phuong Tran, Brexit: How a Weakened European Union Affects NAFTA, 22 LAW & BUS. REV. Am. 281, 289 (2016) ("There are increasing concerns that TTIP would undermine the EU's food safety, environmental standards, and job security.").

- ⁷³ Watts, *supra* note 72, at 90-91 (discussing both parties' goals and objectives for TTIP).
- ⁷⁴ *TPP: What Is It and Why Does It Matter?*, BBC (Jan. 23, 2017), http://www.bbc.com/news/business-32498715 [https://perma.cc/BLL9-VNQG] (outlining TPP's objectives).
- ⁷⁵ It is arguable whether the rise of regional trade agreements is compatible with free trade. *See* TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 84 (citations omitted) (highlighting arguments by critics of preferential trade agreements that they are a "serious threat to the integrity of the multilateral trade system"); Sungjoon Cho, *Defragmenting World Trade*, 27 Nw. J. INT'L L. & Bus. 39, 42 (2006) (arguing that regional trade agreements have disrupted multilateralism and are "replacing, not complementing, the multilateral trade system").
 - ⁷⁶ DUNOFF, RATNER & WIPPMAN, *supra* note 46, at 665.
- ⁷⁷ For further discussion of nontariff barriers regulated by the WTO, see *Understanding the WTO: The Agreements*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm [https://perma.cc/PY22-6AZM] (last visited Feb. 11, 2019).
- ⁷⁸ JANICE MORPHET, BEYOND BREXIT?: How TO ASSESS THE UK'S FUTURE 12 (2017) (illustrating United Kingdom's hesitation with the European Union); Tran, *supra* note 72, at 281 (highlighting the United Kingdom's current attitude towards the European Union).

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Kingdom should leave the European Union.⁷⁹ The United Kingdom exports significantly to the United States and, prior to the Brexit vote, the United States threatened trade consequences against the United Kingdom should Brexit occur.⁸⁰ Nonetheless, in June 2016, the United Kingdom voted to leave the European Union after nearly fifty years of E.U. membership.⁸¹

The United Kingdom began negotiating its exit with the European Union in March 2017. 82 During these negotiations, the European Union maintains control over the U.K. trade policy, as it does for every European Union member state, until the United Kingdom officially exits the European Union. 83 Additionally, as an E.U. member state, the United Kingdom is integrated into the Common Market, which regulates movement of goods within the European Union and between E.U. and non-E.U. countries. 84 Thus, the United Kingdom must follow these regulations until its final exit. The Brexit negotiations are extremely important for the United Kingdom and the European Union. The United Kingdom obviously wants to have the best agreement for its own citizens, as does the European Union. However, the European Union does not want to

⁷⁹ Tran, *supra* note 72, at 281.

⁸⁰ Bill Wilson, *TTIP: What Is the Future for UK-US Trade?*, BBC NEWS (Apr. 24, 2016), http://www.bbc.com/news/business-36123622 [https://perma.cc/UD4E-3E7P] (discussing President Obama's threatened trade consequences if United Kingdom voted to leave European Union). However, these threats have been criticized. *See* STEWART PATRICK, THE SOVEREIGNTY WARS: RECONCILING AMERICA WITH THE WORLD 220 (2018) ("Brexit's champions may have been shortsighted and undiplomatic. But their critique of U.S. hypocrisy hit the mark: Americans who counseled the United Kingdom to remain in the EU were indeed asking Brits to accept infringements on their sovereignty-as-authority that few U.S. citizens would countenance.").

⁸¹ Brexit, supra note 3.

⁸² For the current status of Brexit negotiations, see *Department for Exiting the European Union*, GOV.UK, https://www.gov.uk/government/organisations/department-for-exiting-the-european-union [https://perma.cc/JUM8-QBN9] (last visited Feb. 11, 2019) (highlighting British negotiations with the European Union).

⁸³ MORPHET, *supra* note 78, at 91 (noting United Kingdom's trade powers are controlled by the European Union). Although the United Kingdom voted to leave the European Union in June 2016, it did not officially provide notice to the European Union pursuant to Article 50 of the Treaty of Lisbon until March 2017. From March 2017, the United Kingdom and European Union have two years to negotiate the United Kingdom's exit before E.U. policies become ineffective with respect to the United Kingdom. Thus, the United Kingdom retains its responsibilities within the European Union until its official exit. PATRICK, *supra* note 80, at 219-21 (discussing United Kingdom's obligations within the European Union). The European Union retains exclusive power over trade policy of its member states. Tran, *supra* note 72, at 283 ("Only the EU, not individual member countries, can legislate on trade matters and international trade agreements.").

⁸⁴ Alex Stojanovic & Jill Rutter, *Frictionless Trade?: What Brexit Means for Cross-Border Trade in Goods*, INST. FOR THE GOV'T (Aug. 17, 2017), https://www.instituteforgovernment.org.uk/publications/frictionless-trade-brexit-august-2017 [https://perma.cc/4LEM-CKEW] (describing Brexit's impact on international trade).

encourage other member states to follow the United Kingdom's lead. Nevertheless, the Brexit vote demonstrated to the world that the United Kingdom viewed international interference with its domestic policies with increasing skepticism.

2. The Presidential Election in the United States

Meanwhile in the United States, then-presidential candidate Donald Trump progressed with his "Make America Great Again" campaign, which aimed to reach the many Americans who were disillusioned by globalization and the United States' international involvement. Districts that favored President Trump were characterized by shortages of low-skilled farm jobs, decreasing availability of high paying blue-collar jobs, and decreasing wages. Like Brexit, President Trump's election came as a surprise to many. In the first year of his presidency, Donald Trump was clear about his position on trade. In January 2017, he withdrew from TPP, "signal[ing] that he plans to follow through on promises to take a more aggressive stance against foreign competitors as part of his 'America First' approach." In May 2017, the USTR notified Congress of its intent to renegotiate NAFTA.

⁸⁵ Karlyn Bowman, *Who Were Donald Trump's Voters? Now We Know*, FORBES (June 23, 2017, 1:19 PM), https://www.forbes.com/sites/bowmanmarsico/2017/06/23/who-were-don ald-trumps-voters-now-we-know/#174c3b783894 [http://perma.cc/2FW7-BZN5] (finding "American perservationalists" who are skeptical of immigration and free trade make up the "core group [of voters] who propelled Trump to the nomination").

⁸⁶ Duncan Kennedy, A Left of Liberal Interpretation of Trump's "Big" Win, Part One: Neoliberalism, 1 Nev. L.J. Forum 98, 102 (2017) (summarizing state of job growth and creation in red states and red areas in blue states). Kennedy also asserts that there is an agreement between both liberal and conservative scholars that "there is a white, ex-working class increasingly isolated from what is happening to everyone else and trapped . . . at the bottom." Id. at 103.

⁸⁷ See supra note 5 and accompanying text (collecting sources which reported on sensation of shock after President Trump's election victory).

⁸⁸ Peter Baker, *Trump Abolishes Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES, Jan. 23, 2017, at A1. At the Asia-Pacific gathering in November 2017, Trump "vowed to protect American interests against foreign exploitation, preaching a starkly unilateralist approach to a group of leaders who once pinned their economic hopes on a regional trade pact led by the United States." Julie Hirschfield Davis & Mark Landler, *Trump Pitches 'America First' Trade Policy at Asia-Pacific Gathering*, N.Y. TIMES, Nov. 10, 2017, at A1.

⁸⁹ North American Free Trade Agreement (NAFTA), supra note 71 ("On May 18, 2017, following consultations with relevant Congressional committees, U.S. Trade Representative Robert Lighthizer informed Congress that the President intends to commence negotiations with Canada and Mexico with respect to the NAFTA."). In November 2018, the United States, Canada, and Mexico signed the newly negotiated U.S. Mexico Canada Agreement ("USCMA"), replacing NAFTA. Bill Chappell, USMCA: Trump Signs New Trade Agreement with Mexico and Canada to Replace NAFTA, NPR (Nov. 30, 2018, 8:35 AM),

appear to have stalled.⁹⁰ President Trump's policies to put "America First" indicate that the United States may be losing interest in being the "world's policeman." President Trump's national security advisor and his chief economic advisor asserted that "America First signals the restoration of American leadership and our government's traditional role overseas—to use diplomatic, economic, and military resources of the U.S. to enhance American security, promote American prosperity, and extend American influence around the world" and that "America First does not mean America Alone." In his first State of the Union address, President Trump expressed that the United States has "finally turned the page on decades of unfair trade deals that sacrificed our prosperity and shipped away our companies, our jobs, and our Nation's wealth. . . . [W]e will protect American workers and American intellectual

https://www.npr.org/2018/11/30/672150010/usmca-trump-signs-new-trade-agreement-with-mexico-and-canada~[https://perma.cc/T2GZ-EL3Z].

⁹⁰ Although it appears President Trump may be willing to negotiate a trade agreement with the European Union, movement on TTIP, specifically, seems to have stalled. Richard Bravo & Julia Chatterley, *Trump Is Willing to Reopen TTIP amid EU-US Trade Dispute, Ross Says*, BLOOMBERG (Mar. 29, 2018, 10:37 AM), https://www.bloomberg.com/news/articles/2018-03-29/trump-willing-to-reopen-ttip-amid-eu-u-s-trade-spat-ross-says ("President Donald Trump is willing to reopen negotiations with the European Union over the stalled Trans-Atlantic Trade and Investment Partnership agreement, which stalled following his election, according to U.S. Commerce Secretary Wilber Ross.").

⁹¹ Morphet, supra note 78, at 36; *see* also DONALD J. TRUMP, https://www.donaldjtrump.com/about [http://perma.cc/RG95-K7ZA] (last visited Feb. 11, 2019) ("President Trump is working hard to implement his 'America First' platform, continuing his promise to the American people to lower taxes, repeal and replace Obamacare, end stifling regulations, protect our borders, keep jobs in our country, take care of our veterans, strengthen our military and law enforcement, and renegotiate bad trade deals, creating a government of, by and for the people. He is making America First, again, restoring our nation's faith, ushering in a bright, new future now and for generations to come.' (emphasis added)); U.S. Trade Representative, The President's 2017 Trade Policy AGENDA, https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I% 20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf [http://perma.cc/4WP7 -WL38] (highlighting the Trump Administration's trade priorities as: "(1) defend U.S. national sovereignty over trade policy; (2) strictly enforce U.S. trade laws; (3) use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property rights; and (4) negotiate new and better trade deals with countries in key markets around the world"). At the G20 summit in July 2017, CNN reported that "[1]eaders appeared to be at an impasse over trade and climate change, with German Chancellor Angela Merkel making clear that the US' stance on the key issues were threatening to derail progress and that talks had been difficult." Nic Robertson & Angela Dewan, G20: World Leaders at Odds with Trump on Trade, Climate, CNN (July 8, 2017, 9:02 AM), http://www.cnn.com/ 2017/07/08/europe/g20-trump-merkel-trade-climate-change/index.html [https://perma.cc/7H 9H-AYXJ].

⁹² H.R. McMaster & Gary D. Cohn, Opinion, America First Doesn't Mean America Alone, WALL STREET J., May 31, 2017, at A17. property, through strong enforcement of *our* trade rules."⁹³ In March 2018, President Trump imposed tariffs on aluminum and steel imports to address national security concerns, an action viewed by free trade proponents as dangerous.⁹⁴ Overall, President Trump's actions and statements suggest that he will continue to pursue policies through which the United States will protect its domestic interests, even if those efforts may be contrary to means that are more cooperative with other international actors.

Both Brexit leaders and Trump campaigners were successful in their effort "to tap into voter discontent and class resentment." The United States has long opposed complete submission "to the political authority of any supranational body." President Trump's platform utilized this opposition as a selling point, criticizing the international trade agreements (and other international agreements) negotiated before and during the Obama Administration as fuel for his campaign fire, ultimately resulting in a successful election. In contrast to the U.S. government that led the GATT negotiations, the current administration has been actively seeking ways to reduce and limit free trade.

II. PROTECTIONISM VERSUS FREE TRADE

Despite its important role as the promoter of multilateral trade after World War II, the United States has long employed protectionist trade laws and policies. In reality, before World War II, the United States had a long history of isolationist policies (trade and otherwise) in relation to the rest of the world. More specifically, the extremely protectionist Smoot-Hawley Tariff Act of 1930 led to devastating international economic disorder, deepening the already serious global depression. Once the War came to an end, multilateral

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⁹³ Press Release, White House, President Donald J. Trump's State of the Union Address (Jan. 30, 2018) (emphasis added), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/ [https://perma.cc/D46P-ZXQE] ("The era of economic surrender is over. From now on, we expect trading relationships to be fair and reciprocal. We will work to fix bad trade deals and negotiate new ones.").

⁹⁴ The Latest: Trump Orders Tariffs on Steel, Aluminum Imports, AP (Mar. 9, 2018), https://www.apnews.com/472d4cee3e384453ad8adc2ed67be2f6 [https://perma.cc/5N5P-UYN9] (outlining President Trump's imposition of twenty-five percent tariff on steel imports and ten percent tariff on aluminum imports); The Threat to World Trade: The Rules-Based System Is in Grave Danger, Economist (Mar. 8, 2018), https://www.economist.com/news/leaders/21738362-donald-trumps-tariffs-steel-and-aluminium-would-be-just-start-rules-based-system ("For the first time in decades, [rules-based free trade's] biggest foe is in the man in the Oval Office.").

⁹⁵ PATRICK, supra note 80, at 218.

⁹⁶ *Id.* at 221.

⁹⁷ Brand, *supra* note 32, at 104 ("Throughout United States history, the tension between protection of domestic industries and a desire for efficient access to goods and services at the lowest possible costs has defined fluctuations in trade policy." (footnote omitted)).

⁹⁸ Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1202-1683g (2012)); Douglas A. Irwin, *From Smoot-Hawley to*

agreements gained popularity as a reaction to decades of protectionism that produced less than ideal, if not devastating, global economic circumstances. Global leaders preached the importance of international cooperation in trade. However, neither protectionist nor free trade policies are perfect. Rather, they both come with potential harms and benefits.

A. The History of Protectionism in the United States

Many protectionist policies are rooted in mercantilist ideals. Mercantilism was based on the theory that government should regulate international trade by maintaining the balance of trade, discouraging imports and protecting domestic industries, and promoting domestic production through subsidies. ¹⁰¹ Mercantilist policies intended to increase the trade surplus in order to increase the nation's wealth. ¹⁰² Overall, "mercantilism was fundamentally nationalist." ¹⁰³ Nonetheless, traditional mercantilism began to decline by the end of the eighteenth century as the benefits of more liberalized trade and specialization became increasingly recognized. ¹⁰⁴ However, it did not disappear from the discourse on political economy, nor did states completely abandon protectionist policies. ¹⁰⁵

Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s 16 (Nat'l Bureau of Econ. Research, Working Paper No. 5895, 1997) ("Smoot-Hawley became infamous . . . for poisoning international trade relations by triggering a wave of foreign tariffs that put world commerce on a downward spiral, and even for turning a modest recession into the Great Depression.").

- ⁹⁹ Peter M. Gerhart, *The World Trade Organization and Participatory Democracy: The Historical Evidence*, 37 VAND. J. TRANSNAT'L L. 897, 907-08 (2004) (discussing how world leaders sought economic security after World War II through multilateral institutions).
- ¹⁰⁰ Truman, *supra* note 41, at 601 ("We have learned through bitter experience how necessary it is for nations to approach jointly the task of improving the conditions of world trade.").
- ¹⁰¹ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 2 (explaining mercantilists advocated for government regulation of trade to "maintian a favorable blance of trade" and "promote processing or manufacturing for raw mateirals at home"); Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passé?*, 53 VA. J. INT'L L. 623, 630 (2013) (reciting basic tenets of mercantilism as regulating trade, discouraging imports, and encouraging exports).
- ¹⁰² Linarelli, *supra* note 49, at 630 ("Mercantilism sought the maximization of the trade surplus for a country in order to maximize the circulation of monetary gold in that country.").
 - ¹⁰³ Ahmed & Bick, *supra* note 7, at 6 (citation omitted).
- ¹⁰⁴ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 2 (noting how mercantilism was "fundamentally attacked and undermined" by end of eighteenth century).
- ¹⁰⁵ Cho & Kelly, *supra* note 101, at 624 ("[I]n order to transition away from a mercantilist system, [post-World War II nations] adopted rules that preserved that mercantilist system, at least to some extent." (citation omitted)).

In the beginning of the twentieth century, the United States focused primarily on its domestic industries. ¹⁰⁶ Congress passed the Antidumping Act in 1916, which protected the United States' domestic industries by preventing imports from being sold in the United States for cheaper prices than what the foreign companies sold them in their home markets. ¹⁰⁷ Additionally, while tariffs had historically been an important source of revenue for the United States, they gradually became more useful as a tool to protect domestic business. ¹⁰⁸ In the early twentieth century, the United States employed several protectionist trade policies. ¹⁰⁹ The United States insisted on using tariff schedules, as opposed to other more globally cooperative measures. ¹¹⁰ The United States also subsidized exports and depreciated currency to promote exports and discourage imports. ¹¹¹ Eventually, the U.S. industry began maturing, and the United States became a major creditor, especially to a debt-ridden Europe. ¹¹² However, by the outbreak of World War I, most nations returned to the implementation of more protectionist policies. ¹¹³

Between World War I and World War II, the global economy fell into disarray. ¹¹⁴ With the onset of the Great Depression, nations sought ways to rebuild their domestic economies. A small portion of the U.S. gross domestic product came from foreign trade, so the United States determined that closing off its economy was the appropriate solution. ¹¹⁵ Congress passed the Smoot-Hawley Act in 1930 against the advice of economists. ¹¹⁶ The Smoot-Hawley Act

¹⁰⁶ Gerhart, *supra* note 99, at 913-14 (explaining that, as U.S. industry developed, the United States frequently used tariffs to protect domestic industries and wages).

¹⁰⁷ Antidumping Act of 1916, Pub. L. No. 64-271, tit. VIII, 39 Stat. 798; Brand, *supra* note 32, at 114-15 (noting that the Antidumping Act penalized imports sold at prices "substantially less than the actual market value"). For a discussion of antidumping policies, see *infra* Section III.B.

¹⁰⁸ Brand, *supra* note 32, at 102-03 (chronicling historical change from tariffs as revenue source to tool of economic protectionist policy in early twentieth century).

¹⁰⁹ See id. at 111 (listing examples).

¹¹⁰ Krueger, *supra* note 6, at 105 (comparing trend in Europe toward using "most favored nations" clauses, while "United States . . . insist[ed] on bargaining over tariff structures one country at a time").

¹¹¹ DUNOFF, RATNER & WIPPMAN, *supra* note 46, at 666.

¹¹² Brand, *supra* note 32, at 109 (explaining that even while income tax replaced tariffs as primary source of revenue, protectionist sentiments remained).

¹¹³ *Id.* at 110 ("By World War I, all the major trading nations had moved away from free trade to various levels of protectionism.").

 $^{^{114}}$ Irwin, supra note 98, at 16-18 (describing economic distress that Smoot-Hawley exacerbated).

¹¹⁵ GAIL E. MAKINEN, CONG. RESEARCH SERV., 94-518E, THE SMOOT-HAWLEY TARIFF AND THE GREAT DEPRESSION OF 1929-1933, CRS-2 (1994) (explaining that Smoot-Hawley "should have expanded GDP in the short term").

¹¹⁶ 72 CONG. REC. S8,327-30 (daily ed. May 5, 1930) (recording statements of 1,028 economists who opposed the Smoot-Hawley Act because they were "convinced that increased

raised the tariffs on imports to around sixty percent, an unprecedented level. ¹¹⁷ This protectionism was based on the idea that imports would threaten the American economy—by increasing exports and reducing imports, the economy could bounce back. ¹¹⁸ Instead of helping the United States, Smoot-Hawley did the opposite; although not the cause of the Great Depression, it is generally agreed that Smoot-Hawley intensified the economic downturn. ¹¹⁹

After the United States passed Smoot-Hawley, other countries passed similar tariffs in response. ¹²⁰ This chain reaction of protectionism instigated by the U.S. trade policy illustrated an important lesson: such blatant acts of protectionism would lead to retaliation. ¹²¹ Although this leaves both countries in a worse state, retaliation can be a "natural political reaction" because the system is lacking in other effective mechanisms of redress. ¹²² Smoot-Hawley became infamous for decreasing U.S. trade by forty percent and triggering retaliatory trade actions around the world that were unhealthy for the whole system. ¹²³ Ultimately, Smoot-Hawley would "bear[] part of the responsibility for the collapse of trade in the early 1930s." ¹²⁴

After several years under Smoot-Hawley and facing a worsened depression, Congress shifted trade policy through the passage of the RTAA. ¹²⁵ The RTAA authorized the President to negotiate trade agreements and modify tariffs. ¹²⁶ The United States then entered into over thirty bilateral trade agreements under the

protective duties would be a mistake"); *see also* Frank Whitson Fetter, *The Economists' Tariff Protest of 1930*, 32 Am. ECON. REV. 355, 355 (1942) (commenting on uniqueness of "almost unanimous opinion" by economists on issue of public policy).

- ¹¹⁷ Smoot-Hartley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1202-1683g (2012)); *see also* CLUBB, *supra* note 23, at 155 ("The last tariff to be enacted under this system [requiring a vote by each congressman and senator] was the Tariff Act of 1930 (the Smoot-Hawley Act)."); CONG. BUDGET OFFICE, *supra* note 56, at 25 ("The Smoot-Hawley Tariff Code of 1930 raised the average tariff rate on U.S. dutiable imports to almost 60 percent.").
- 118 Bidwell, *supra* note 27, at 340-41 (describing mercantilist undertones of Smoot-Hawley).
- ¹¹⁹ MAKINEN, *supra* note 115, at i (arguing Smoot-Hawley deepened already existing depression).
 - ¹²⁰ Brand, *supra* note 32, at 111 (highlighting global response to Smoot-Hawley).
- ¹²¹ Gerhart, *supra* note 99, at 907 ("When the policy of one country adversely affects another, the other country is likely to take retaliatory actions because retaliation is a potent way by which a form of redress may be sought.").
- ¹²² *Id.* ("Although [the implementation of retaliatory tariffs is] counterproductive (because it leaves both countries worse off and leads to counter-retaliation), in the absence of any other mechanism for objecting to the harmful policy of another country, retaliation is a natural political reaction.").
 - ¹²³ Irwin, *supra* note 98, at 16.
 - ¹²⁴ *Id.* at 17.
 - ¹²⁵ *Id.* at 23 (describing RTAA's passing by large majority in both houses of Congress).
 - ¹²⁶ Brand, *supra* note 32, at 111.

RTAA's authority.¹²⁷ The shift to the RTAA demonstrated that U.S. leaders were beginning to adopt a more internationalist stance with respect to trade policy.¹²⁸ Overall, the RTAA allowed the President to engage in more internationally cooperative arrangements that were still in the nation's best interest.¹²⁹ Nonetheless, while the RTAA increased the United States' cooperation with other nations, World War II fractured the collaborative system that was being built.¹³⁰

After World War II, global leaders began negotiating international policies for various issues, including trade. Global leaders argued that free trade was the appropriate solution.¹³¹ The United States engaged in trade negotiations that reduced tariff rates by about seventy-five percent.¹³² The United States also shifted its trade policy away from "[r]igid and uncompromising protectionism" and "[t]ariff autonomy."¹³³ The United States transformed from "an inward-looking, isolationist, and protectionist country into one focused both on international economic affairs and on exports. In the process, the United States took the leadership role in international economic policy."¹³⁴ However, the United States still did not entirely abandon its protectionist history. The United States and other leaders still recognized the values of mercantilist policies and were unwilling to relinquish control entirely.¹³⁵ They understood that some domestic protections would need to remain as trade liberalized in the global

¹²⁷ Id. at 113.

¹²⁸ Gerhart, *supra* note 99, at 909 ("[T]he Reciprocal Trade Agreements Act of 1934 (RTAA) turned the United States from an inward-looking, isolationist, and protectionist country into one focused both on international economic affais and on exports.").

¹²⁹ *Id.* at 917 (summarizing four major effects of RTAA, including enabling the president to have more internationally cooperative stance).

¹³⁰ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 23 (noting how "outbreak of the Second World War decisively shattered vision of a more cooperative international trading environment").

¹³¹ Truman, *supra* note 41, at 601 ("During the 1930's many nations acted independently, each attempting to gain advantage at the expense of others. The result was a vicious circle—with restrictions by one nation provoking more serious restrictions by other nations in retaliation. The end result was a tremendous drop in the volume of international trade which made the general depression worse and injured all countries.").

¹³² CONG. BUDGET OFFICE, *supra* note 56, at 28.

¹³³ Bidwell, *supra* note 27, at 340-41 (citing "[r]igid and uncompromising protectionism" and "[t]ariff autonomy" as being among key aspects of pre-war U.S. trade policy).

¹³⁴ Gerhart, *supra* note 99, at 909.

¹³⁵ Cho & Kelly, *supra* note 101, at 629-30 ("While the Bretton Woods architects rejected mercantilist policies in principle, they could not step away from them completely and immediately.").

system. 136 Thus, "[while] the postwar trade rules embraced the principle of comparative advantage, they did not fully implement it." 137

B. An Analysis of Protectionism and Free Trade

Theoretically and practically, protectionism can be beneficial. Protectionism can redistribute wealth, offset subsidies provided by foreign governments or other methods of unfair foreign competition, protect domestic jobs, reduce trade deficits, and support emerging industries. Protectionism can provide "large benefits to a small number of people," while only causing a "slight loss" to a larger number of consumers. Generally, "[p]rotectionism protects one group—some special interest—at the expense of the general public." Overall, the benefits of protectionism are to protect certain domestic industries that could be adversely affected by foreign-produced goods that are available at cheaper prices than those provided by domestic producers.

However, protectionism has faced significant criticism. Protectionism is particularly problematic in the historical context of the United States, and the effects of Smoot-Hawley present a strong argument against strict protectionist policies. ¹⁴¹ The extreme protectionism employed by the United States instigated a series of retaliatory protectionist policies around the world that worsened the Great Depression. ¹⁴² Although such overt protectionism by the United States has been much less prevalent since the end of World War II, it has never been fully abandoned in either theory or policy. ¹⁴³ The recent election and current trade platform in the United States seem to demonstrate an increased protectionist stance. Additionally, as discussed above, the United States appears to be taking

¹³⁶ *Id.* at 636 (noting how leaders recognized need for mercantilist principles to remain in global trade framework).

¹³⁷ *Id.* at 624.

¹³⁸ VIVIAN C. JONES, CONG. RESEARCH SERV., RL32371, TRADE REMEDIES: A PRIMER 2 (2011) (noting that members of Congress "assert that the U.S. use of trade remedies is necessary to protect U.S. firms and workers from unfair international competition"); Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 542-49 (1993) (highlighting benefits of protectionism).

¹³⁹ McGee, *supra* note 138, at 541 (quoting VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 379 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley 1971) (1927)).

¹⁴⁰ *Id.* at 539.

¹⁴¹ Cho & Kelly, *supra* note 101, at 631 ("As a striking reincarnation of mercantilism, the Act raised the import duties of more than 20,000 items and immediately invited reciprocal measures from major trading partners, starting with the United Kingdom. The spiral effect of economic balkanization was indescribable: world trade shrunk by two-thirds. Furthermore, economic miseries bred totalitarianism and eventually led to the Second World War.").

¹⁴² Id.

¹⁴³ *Id.* at 632 ("Ironically, the GATT in its very architecture betrayed a mercantilist nature despite its ostensible antimercantilist (trade-liberalization) mission.").

a step back from its previous leadership role within the international trade system. 144

However, it would be dangerous for the United States to assert that it "can as a blanket matter back away from multilateral institutions like the United Nations without damaging its own interests." Additionally, the United States is not necessarily in the same position of power as it was when the GATT was first negotiated. While it is undeniable that the United States has significant power, global power is more evenly distributed around the world, and the United States does not hold the same absolute influence it held at the end of World War II. "[T]he Trump administration's initial instinct to dismantle and renegotiate existing international arrangements [is] deeply problematic, since there [is] little guarantee that any new arrangements would be as favorable to U.S. interests and preferences as those frameworks that had been negotiated at the height of U.S. power." Thus, protectionism may not be very beneficial, especially for the United States.

Like protectionism, free trade also has both pros and cons. From an economic standpoint, free trade promotes and permits international specialization, ultimately increasing the efficiency of global markets and production. ¹⁴⁸ International specialization would then increase aggregate wealth and global welfare. ¹⁴⁹ Politically, free trade would create a prisoner's dilemma, in which nations are incentivized to cooperate because noncooperation has an increased cost. ¹⁵⁰ Free trade provides an increased range of products, increased productivity, and increased consumer benefits, while also stimulating economic growth. ¹⁵¹ Additionally, free trade allows small economies to contribute raw materials and labor while also realizing their comparative advantage at certain stages of production. ¹⁵² Ideally, free trade would permit nations to contribute to their most competitive industries to create a more efficient and prosperous global economy.

¹⁴⁴ See supra notes 88-92 and accompanying text.

¹⁴⁵ PATRICK, supra note 80, at 246.

¹⁴⁶ *Id.* at 246-47 (noting that United States is "globally dominant power facing relative (though not absolute) decline, at least in its share of the world economy").

¹⁴⁷ *Id*.

¹⁴⁸ DUNOFF, RATNER & WIPPMAN, *supra* note 46, at 666 ("[I]n the absence of trade restrictions, each state would specialize in the production of goods that it could make more efficiently than other states.").

¹⁴⁹ *Id.* This theory is known as the economic theory of comparative advantage. *Id.*

¹⁵⁰ Id.

¹⁵¹ CONG. BUDGET OFFICE, *supra* note 56, at 2-3 (highlighting benefits of free trade).

¹⁵² Cho, *supra* note 75, at 40 ("Globalization offers a worldwide 'production value chain' which enables even small economies to take part in the global commerce by offering raw materials or labor. In fact, small economies hold a comparative advantage at certain stages of the international manufacturing process.").

However, free trade, as it has been implemented, has not come without costs. One of the strongest criticisms is that free trade results in the unequal distribution of wealth because only the most competitive can survive the process of international specialization. 153 Free trade also results in government protection for industries that are failing in comparison to international counterparts, despite the negative impact that such protections could have on consumers.¹⁵⁴ Additionally, free trade is inhibited by various barriers, including the many existing regional trade agreements that provide preferential treatment to their members over non-member countries. 155 Opponents of free trade are also concerned with imports from countries whose environmental, health and safety, and labor standards are below the required domestic levels, 156 an erosion of economic self-sufficiency, and the need for human rights protections that may be lacking in countries that produce at low cost. 157 Furthermore, the theory of comparative advantage "is based upon the assumption that those who control scarce resources will move those resources to the production of goods in which their nation holds a comparative advantage. In market economic systems (those systems consistent with GATT concepts), those who control the scarce resources are private parties." ¹⁵⁸ However, private parties are not directly involved with the rulemaking process, being granted "indirect access only when their governments have established administrative procedures." ¹⁵⁹ Thus, the free trade system, at least in its current state, has many imperfections that have fueled a significant opposition to free trade in general.

¹⁵³ CONG. BUDGET OFFICE, *supra* note 56, at 3-4 (describing harms caused by free trade as it has been implemented); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 248 (2002) ("[F]or millions of people globalization has not worked. Many have actually been made worse off, as they have seen their jobs destroyed and their lives become more insecure. They have felt increasingly powerless against forces beyond their control.").

¹⁵⁴ CONG. BUDGET OFFICE, *supra* note 56, at 3-4 (noting how "governments often try to protect these weaker segments of the economy from foreign competitors at a net cost to the economy as a whole," resulting in higher prices and lower productivity).

¹⁵⁵ Cho, *supra* note 75, at 40 (highlighting how regional trading blocs use trade barriers against non-members, "thus compartmentalizing the global market").

¹⁵⁶ This is known as "social dumping." The fear is that it will then lead to a race to the bottom because developed countries cannot remain competitive if developing countries do not increase costs of their products through increased regulation for social concerns. Robert Howse, From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime, 96 Am. J. INT'L L. 94, 103 (2002) (highlighting implications of "race to the bottom").

¹⁵⁷ MICHAEL J. TREBILCOCK, UNDERSTANDING TRADE LAW 9 (2011) (objecting to free trade because it "trumps environmental, health and safety, labour standards, and human rights concerns" and "undermines economic self-sufficiency").

¹⁵⁸ Brand, *supra* note 32, at 139.

¹⁵⁹ Id. at 140.

III. U.S. TRADE LAW: PROTECTIONISM PREVAILS

The actions the United States has taken following President Trump's election have been viewed as a revival of mercantilism. ¹⁶⁰ This is not the first time that mercantilist principles have re-emerged in the United States. "Historically, interest in mercantilism has tended to resurface in moments of profound upheaval, when accepted ideas on the relationship between politics and economics are thrown into question." ¹⁶¹ Thus, President Trump's platform and recent events, more generally, are not a resurrection of protectionism because protectionism never died. Instead, a "mercantilist legacy" has impeded and continues to impede the goal of a completely free trade system. ¹⁶² The United States' continuous antidumping duties and countervailing measures are examples of how protectionism has remained a part of U.S. trade law, thus undermining the overall effectiveness of multilateral trade. ¹⁶³

A. Subsidies: Unfair Trade Practice or Legitimate Policy Measure?

Trade remedy laws, like antidumping measures and countervailing duties, were originally designed to protect domestic firms against unfair competition from foreign firms that can sell their products at lower prices than domestic producers. These lower prices could be caused by more efficient production or by subsidization to that foreign producer by its government. Subsidies are "a financial contribution by a government or public body...which confers a

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¹⁶⁰ See, e.g., Binyamin Appelbaum, Donald Trump Is Breaking with 200 Years of Economic Orthodoxy on Trade, N.Y. TIMES, Mar. 11, 2016, at A18 ("Now Mr. Trump is bringing mercantilism back."); Tom Miles, Wider Benefits Seen in Trade Deals, Challenging Trump-Style Mercantilism, REUTERS (Oct. 4, 2017, 6:23 AM), https://www.reuters.com/article/us-trade-competition/wider-benefits-seen-in-trade-deals-challenging-trump-style-mercantilism-idUSKCN1C919V [https://perma.cc/CCF4-QPGF] ("Mercantilism is associated with attempts to use trade to gain economic advantage over other nations, epitomized by Trump's policies to 'make America great again."").

¹⁶¹ Ahmed & Bick, *supra* note 7, at 4 (citing Philip J. Stern & Carl Wennerlind, Mercantilism Reimagined: Political Economy in Early Modern Britain and Its Empire 5-6 (2014)).

¹⁶² Cho & Kelly, *supra* note 101, at 628-29 ("[A] certain normative tension nonetheless exists around the new trade realities, such as global supply chains, due to the anachronism precipitated by the mercantilist legacy within the trading system.").

¹⁶³ The three predominant trade remedies that could be considered protectionist are safeguards, antidumping measures, and countervailing duties. This Note focuses on antidumping measures and countervailing duties because they are presumed to respond to unfair trade practices. Safeguards, on the other hand, are measures enacted in response to an emergency and unfair trade practices do not necessiate them. For more discussion of safeguards, see Trebilcock, Howse & Eliason, *supra* note 26, at 411-33.

¹⁶⁴ Laura Rovegno, *Trade Protection and Market Power: Evidence from US Antidumping and Countervailing Duties*, 149 REV. WORLD ECON. 443, 444 (2013) (noting how antidumping and countervailing duties were imposed to protect against cheap imports).

benefit."¹⁶⁵ Subsidies could be considered unfair trade practices because they allow foreign producers to sell their products below cost, a price unsubsidized producers cannot afford. Thus, without regulation of subsidies, fair competition and market efficiency are jeopardized. ¹⁶⁷

The WTO regulates subsidies through the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), which defines a subsidy as a "financial contribution" by a public entity and requires that the industry be conferred a benefit.¹⁶⁸ Under the SCM Agreement, subsidies must be specific: "specific to an enterprise; specific to an industry; specific to a region; or specifically prohibited."169 WTO parties are also required to notify the other parties about the extent, nature, and effect of any planned subsidization. ¹⁷⁰ The SCM Agreement classifies subsidies as prohibited, nonactionable, or actionable.¹⁷¹ Prohibited subsidies are "subsidies contingent upon export performance or the use of domestic over imported goods," prohibited because of their "inherently trade distorting" nature. 172 Nonactionable subsidies cannot be challenged, although recommendations can be made to revise such subsidies if they are "causing serious adverse effects to a domestic industry" of a WTO member.¹⁷³ All other subsidies are actionable.¹⁷⁴ Under the SCM Agreement, WTO members agree to not subsidize in a manner that would "cause 'adverse effects' to the interests of other WTO members."175

¹⁶⁵ Jones, *supra* note 138, at 7 (defining subsidy in GATT).

¹⁶⁶ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 364 (illustrating how subsidies "distort trade flows").

¹⁶⁷ Gary Clyde Hufbauer & Joanna Shelton Erb, Subsidies in International Trade 8 (1984) (noting issues with subsidies); Gurwinder Singh, Subsidies in the Context of the WTO's Free Trade System: A Legal and Economic Analysis 47 (2017) ("The unregulated use of subsidies undermines the norms of fair competition that support production and supply of goods to the consumers, both at the domestic level and abroad, within the price range resultantly fixed by market forces of demand and supply. In the long run, the trade practice of subsidies also prevents markets from attaining optimal-resource allocation.").

¹⁶⁸ Wentong Zheng, *Counting Once, Counting Twice: The Precarious State of Subsidy Regulation*, 49 STAN. J. INT'L L. 427, 434 (2013) (quoting Marrakesh Agreement Establishing the World Trade Organization, art. 2.1, Apr. 15, 1994, 1864 U.N.T.S. 154).

¹⁶⁹ JANE M. SMITH, AM. LAW DIV., CONG. RESEARCH SERV., CRS-2014-AML-0291, NON-AGRICULTURAL SUBSIDIES AND INTERNATIONAL TRADE LAW 1 (2014).

¹⁷⁰ GATT, *supra* note 33, art. XVI (outlining requirements when imposing subsidies).

¹⁷¹ J.F. Hornbeck, Cong. Research Serv. RL96-487E, Subsidies, Countervailing Duties, and the World Trade Organization 17 (1996).

¹⁷² Trebilcock, Howse & Eliason, *supra* note 26, at 376.

 $^{^{173}}$ Id. at 375 (noting that non-actionable subsidies cannot be challenged, although recommendations can be made that they should be changed under limited circumstances). The category of nonactionable subsidies expired in 2000. Id.

¹⁷⁴ *Id.* at 380.

¹⁷⁵ *Id*.

Under the SCM Agreement, developing countries are afforded specific concessions; they are permitted to impose export subsidies for certain industries. Peveloping countries are also afforded special and differential treatment through the Enabling Clause in the GATT, under which they are permitted additional concessions in the implementation of agreements including delayed schedules for tariff reduction. Under the Enabling Clause, developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs."

Subsidies can provide social and economic benefits to developing nations. They allow infant industries to develop. ¹⁷⁹ For example, under a policy of import substitution industrialization ("ISI"), developing countries could raise barriers to imports and attempt to meet domestic demand through domestic production. ¹⁸⁰ Subsidies and protectionist policies could stimulate the growth of domestic industries. ¹⁸¹ Subsidies in the agricultural industry can provide food security and price certainty for developing countries. ¹⁸² Developed nations also benefit from subsidies. Subsidies can provide security for industries and help domestic producers maintain a competitive edge in the market. ¹⁸³ The United States, for example, subsidizes research and development in the energy, steel, and agricultural industries. ¹⁸⁴

¹⁷⁶ *Id.* at 388 (justifying concession as playing "important role in economic development programs of developing country Members").

¹⁷⁷ Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, ¶ 3, L/4903 (Nov. 28, 1979), GATT BISD (26th Supp.), at 203-04 (1980) [hereinafter Enabling Clause] (implementing more lenient policies for developing countries).

¹⁷⁸ *Id.* at 204.

¹⁷⁹ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 622 ("[T]emporary protectionism was required for these fledgling manufacturing industries . . . [to] become competitive in both domestic and export markets.").

¹⁸⁰ See id. at 622-24 (analyzing various rationales underlying ISI).

¹⁸¹ *Id.* at 622 (discussing theory that ISI would catalyze development of economy). The success of ISI is not clear. The countries that were successful after employing other policies also combined such practices with significant state regulation (i.e., the Asian tigers). These interventions may have distorted the actual success of those policies compared to ISI. *Id.* at 625-27 ("[N]ot all econometric studies have found a causal connection between trade openness and growth." (footnote omitted)); Howse, *supra* note 156, at 104-05 ("[E]conomic success of the Asian tigers could be attributed to openness in trade policy, as opposed to [ISI] development policies. However, it turned out that a range of interventionist government policy instruments may well have been crucial to the success of at least some of the Asian tigers").

 $^{^{182}}$ SINGH, supra note 167, at 140-41 (noting that rationale for agricultural subsidies includes addressing food security and price volatility).

¹⁸³ *Id.* at 198 (analyzing benefits and harms of subsidies).

¹⁸⁴ Id. at 60, 98, 110 (discussing trade disputes involving various U.S. subsidies).

Agricultural subsidies by developed nations have been particularly controversial. While developing nations have attempted to negotiate changes in the agricultural policies of developed nations, these negotiations have not had a large impact. 185 The Agreement on Agriculture's Article 15 provides developing nations with special and differential treatment with respect to "investment subsidies generally available to agriculture; agricultural input subsidies generally available to low-income or resource-poor producers; and domestic support to producers to encourage them to diversify from growing illicit narcotic crops."186 However, agricultural subsidies by developed nations are poorly regulated; this inhibits agricultural imports from developing nations whose economies are flush with agricultural products. 187 Thus, developed nations maintain dominance in the agricultural market and provide security to their agricultural industries.¹⁸⁸ Overall, agricultural subsidies are a "matter of necessity" for developing countries while they are a "matter of trade advantage" for developed countries. 189 Nonetheless, while subsidies have the potential to distort trade and competition, they are still prevalent. 190

B. Antidumping in U.S. Trade Law as an Example of Protectionism

To remedy unfair distortions of trade by foreign producers, U.S. trade law has persistently used antidumping laws, which are arguably a form of protectionism no less potent than subsidization.¹⁹¹ Antidumping laws place duties on imports that are "sold at 'less than fair value'" and injure a domestic industry of the country receiving the imports.¹⁹² The dumping of a product into another nation's market is a form of "international price discrimination."¹⁹³ Dumping results in an export price "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."¹⁹⁴ Foreign producers that engage in dumping export their products at lower prices

¹⁸⁵ *Id.* at 28, 178 (highlighing unsucessful negotiations on agricultural subsidies).

¹⁸⁶ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 648-49.

 $^{^{187}}$ SINGH, supra note 167, at 28, 135, 163 (explaining global economic impact of agricultural subsidies).

¹⁸⁸ *Id.* at 113, 218 (explaining that developed countries use subsidies to "dominate the agricultural market" and "provide a safety net to the farm sector").

¹⁸⁹ *Id.* at 135-36 (comparing justifications for agricultural subsidies).

¹⁹⁰ *Id.* at 135 (contending agricultural subsidies reduce export opportunities of developing nations, creating trade distortions).

¹⁹¹ Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C. L. REV. 357, 367 (2009) ("[T]he very history of antidumping reveals that the major purpose of the antidumping statute is sheer protectionism" (citation omitted)).

 $^{^{192}}$ Wentong Zheng, Reforming Trade Remedies, 34 MICH. J. INT'L L. 151, 153 (2012).

¹⁹³ Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1, 8-9 (1995) (footnote omitted).

¹⁹⁴ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 336 (citation omitted).

in order to undercut the domestic producers; the cheaper imported goods become more desirable to consumers, and the more expensive domestic goods are no longer competitive. ¹⁹⁵ Once domestic producers are driven out of the market, foreign producers can then become the primary and only producer, allowing them to set the price at any amount. ¹⁹⁶ This phenomenon has led to extensive government regulation. ¹⁹⁷

During the 1970s and 1980s, antidumping laws became increasingly more common, and, by the 1980s, the United States was using antidumping laws as "its weapon of choice." As noted above, antidumping laws in the United States date back to the early twentieth century, and Congress passed the first antidumping statute in 1916. 199 Congress later passed the Continued Dumping and Subsidy Offset Act of 2000, also known as the Byrd Amendment, which amended the Tariff Act of 1930 to redistribute duties collected under antidumping and countervailing duty laws to domestic producers that were "injured" by those imports. 200 The WTO held both the Antidumping Act and the Continued Dumping and Subsidy Offset Act to be inconsistent with the GATT. 201

The GATT addresses the issue of dumping and the imposition of antidumping measures in Article VI.²⁰² In order for a GATT party to levy an antidumping duty on an imported product, the party must determine that the dumped products "cause or threaten material injury to an established domestic industry, or is such as to prevent or materially retard the establishment of a domestic industry."²⁰³ As discussed above, during the Kennedy Round, the GATT contracting parties negotiated the Antidumping Code which preferred "the imposition of a duty that is less than the dumping margin when the lesser duty will alleviate the injury."²⁰⁴

¹⁹⁵ SINGH, *supra* note 167, at 206 (describing dumping as anticompetitive policy aimed at achieving market monopoly).

 $^{^{196}}$ Id. ("Such trade practices are often adopted with the intention of subsequently raising prices of the concerned product in the foreign market").

¹⁹⁷ Bhala, *supra* note 193, at 3-4 (detailing global rise of antidumping regulations).

¹⁹⁸ *Id.* (footnote omitted) (finding United States more than doubled percentage of imports covered by antidumping orders between 1980 and 1990); *see also* TREBILCOCK, *supra* note 157, at 61 (identifying antidumping regimes as "protectionist remedy of choice").

¹⁹⁹ Antidumping Act of 1916, Pub. L. No. 64-271, tit. VIII, 39 Stat. 798; *see also* Cho, *supra* note 191, at 364 (attributing the Antidumping Act of 1916 to antitrust sentiments in late nineteenth century).

 $^{^{200}}$ Jones, *supra* note 138, at 20 (reporting annual redistributions of hundreds of millions of dollars between 2001 and 2009).

²⁰¹ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 344 (noting challengers alleged the United States imposed dumping penalties other than those allowed under GATT).

²⁰² GATT, *supra* note 33, art. VI, para. 1 (detailing criteria to establish existence of dumping); *see also* Trebilcock, Howse & Eliason, *supra* note 26, at 334.

²⁰³ GATT, *supra* note 33, art. VI, para. 5 (establishing further that this requirement may only be waived by agreement and in very limited circumstances).

²⁰⁴ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 334 (footnote omitted).

After the Kennedy Round, Congress was unwilling to change the stricter antidumping laws that were already in place in the United States. ²⁰⁵ As a result, the GATT parties strengthened the antidumping protections further during the Tokyo Round to be more in line with the U.S. position. ²⁰⁶ The parties also revised the Code's determinations of "injury" and "causation." ²⁰⁷ The GATT's antidumping provisions were still insufficient from the U.S. perspective, and U.S. antidumping laws are generally considered to be stricter than their international counterparts. ²⁰⁸ Nonetheless, the Antidumping Code after the Uruguay Round was the most detailed of the codes previously negotiated. ²⁰⁹

Antidumping laws, and trade remedy laws under the GATT framework more generally, were created under the assumption that "goods are produced all over the world in market economies." One difficulty in applying these laws occurs when non-market economies enter the fold because they do not have "markets to distort." Governments of non-market economies are assumed to manipulate prices, so countries importing from non-market economies are permitted to calculate the antidumping duty with more flexibility. This issue is highlighted by China's entry into the WTO. When China joined in 2001, it was given a fifteen-year period in which it was expected to move towards a market economy. During this period, other nations could continue to apply higher duties than those that can normally be applied under the WTO framework, an opportunity of which the United States took advantage. Since that period

²⁰⁵ Id. at 335.

²⁰⁶ *Id.* ("[T]he 1979 Code only specified that any 'injuries casued by other factors must not be attributed to the dumped imports', making it more consistent with the U.S. position." (footnote omitted)).

²⁰⁷ *Id.* (noting broad support for both revisions).

²⁰⁸ See id. at 336-39 (analyzing several trade disputes involving strict U.S. antidumping standards).

²⁰⁹ TREBILCOCK, *supra* note 157, at 62.

²¹⁰ Elliot J. Feldman & John J. Burke, *Testing the Limits of Trade Law Rationality: The* GPX *Case and Subsidies in Non-Market Economies*, 62 Am. U. L. Rev. 787, 803 (2013) (footnote omitted).

²¹¹ *Id.* at 788 (describing difficulty in combating unfair trade practices used by countries with non-market economies).

²¹² Joel Trachtman, *Is China a Non-Market Economy, and Why Does It Matter?*, ECONOFACT (Apr. 12, 2017), http://econofact.org/is-china-a-non-market-economy-and-whydoes-it-matter [https://perma.cc/JDA5-T2R4] ("An importing country has greater flexibility to use arbitrarily-selected high third country prices as a reference for determining dumping by exporters from [non-market economies] than it does for exporters from market economies.").

²¹³ *Id.* (discussing unmet expectation of liberalization of Chinese economy).

²¹⁴ Minsoo Lee, Donghyun Park & Antonio Saravia, *Trade Effects of US Antidumping Actions Against China*, 31 ASIAN ECON. J. 3, 4 (2017) ("[T]he US Department of Commerce (DOC) finds consistently higher dumping margins for imports from China than for imports from market economies because of the non-market economy methodology that it can apply to

ended in 2016, the United States has made it clear that it still considers China to be a non-market economy in an attempt to justify its disparate treatment of China, which includes the imposition of antidumping duties. Other nations have recognized China as a market economy, but if the United States were to do so, its permissible trade remedies would become more limited. However, China argues that its price calculations are fair representations of the cost of production. In this instance, the United States is either maintaining a competitive environment for domestic producers facing distorted Chinese imports, or it is acting in an unduly protectionist manner to shelter its domestic producers.

Antidumping measures have benefits. They provide protection to a domestic producer if a foreign competitor unfairly threatens competition, a position the United States asserts against Chinese imports.²¹⁹ The option to dump creates an opportunity for a monopolistic entity to decrease its output and be more discriminatory in pricing.²²⁰ To address this, antidumping measures protect domestic industries from adverse impacts caused by the predatory pricing of

China."); Douglas Bulloch, *China Is Not a Market Economy, and the WTO Won't Survive Recognizing It as Such*, FORBES (Dec. 8, 2017, 4:01 AM), https://www.forbes.com/sites/douglasbulloch/2017/12/08/china-is-not-a-market-economy-and-the-wto-wont-survive-recognising-it-as-such/ [https://perma.cc/RV63-A27W] (detailing U.S. opposition to recognizing China as market economy and surrendering opportunity for increased duties).

²¹⁵ Bulloch, *supra* note 214 (observing similar E.U. standpoint); David Lawder, *U.S. Formally Opposes China Market Economy Status at WTO*, REUTERS (Nov. 30, 2017, 3:37 PM), https://www.reuters.com/article/us-usa-china-trade-wto/u-s-formally-opposes-china-market-economy-status-at-wto-idUSKBN1DU2VH [https://perma.cc/2TZW-D52A] (discussing U.S. support for European Union in E.U. trade dispute with China).

²¹⁶ Bulloch, *supra* note 214 ("[The United States] remain[s] implacably opposed for the simple reason that this would restrict anti-dumping measures against China's vast export surplus.").

²¹⁷ See Sarah Hsu, Rejecting China's Market Economy Status Could Have Huge Implications for U.S.-China Trade, FORBES (Dec. 4, 2017, 8:00 AM), https://www.forbes.com/sites/sarahsu/2017/12/04/u-s-rejection-of-china-market-economy-status-will-damage-trade-relations/ [https://perma.cc/5EHB-NKKD] (reporting China's "strong dissatisfaction and firm opposition" to U.S. assertion of price distortions).

²¹⁸ See Trachtman, supra note 212 (noting U.S. measures are meant to reduce impact of artificially low Chinese prices on U.S. industries); see also China Airs 'Strong Dissatisfaction' over U.S. Statement to WTO: Xinhua, REUTERS (Dec. 2, 2017, 5:49 AM), https://www.reuters.com/article/us-china-trade/china-airs-strong-dissatisfaction-over-us-statement-to-wto-xinhua-idUSKBN1DW0AP [https://perma.cc/EZ73-SFN4] (reporting Chinese allegation that "some countries were trying to 'skirt their responsibility' under WTO rules").

 219 Trachtman, supra note 212 (surveying each party's rationale in disputing whether China is non-market economy).

²²⁰ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 352 (examining societal costs of dumping, including artificial scarcity of goods).

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foreign industries.²²¹ Moreover, if a foreign government is subsidizing an industry, the importing country has the flexibility to consider this subsidization when calculating the antidumping duty.²²² Antidumping laws in the United States were first enacted "out of a concern for predatory pricing by foreign competitors,"²²³ with the U.S. steel industry being a strong proponent of continued antidumping measures.²²⁴ The steel industry receives significant protection through trade remedy laws.²²⁵ Overall, the arguments for antidumping laws mirror the arguments for protectionist trade policies.²²⁶

However, antidumping laws are criticized. Economists assert that antidumping laws are inefficient and lack "sound economic rationales" because price discrimination in some capacity makes the market efficient.²²⁷ U.S. antidumping laws, in particular, have blurred the distinction between competitive and predatory pricing, eliminating one economic justification for their use.²²⁸ Antidumping laws adversely impact consumers by reducing foreign competition and increasing prices.²²⁹ They provide a "faulty safety valve" because they set "arbitrary levels" of protection for domestic industries.²³⁰ Antidumping laws have also been criticized not just for their political and

²²¹ JONES, *supra* note 138, at 1 (describing U.S. trade remedy legislation and justifications).

²²² Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 514 (2018) ("This flexibility allows governments to use antidumping duties to respond to prices that are artificially low due to another government's financial support.").

²²³ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 355.

²²⁴ N. Gregory Mankiw & Phillip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, 84 FOREIGN AFF. 107, 113 (2005) (observing U.S. steel industry has accounted for almost half of U.S. antidumping tariffs since 1970).

²²⁵ Bruce A. Blonigen, Benjamin Liebman & Wesley W. Wilson, *Antidumping and Production-Line Exit: The Case of the US Steel Industry*, 42 Rev. INDUS. ORG. 395, 396 (2013) (reporting at least one-third of all U.S. trade remedy orders protect steel industry).

 $^{^{226}}$ See Mankiw & Swagel, supra note 224, at 108 (describing antidumping policy as "little more than an opaque way of protecting favored industries").

²²⁷ Cho, *supra* note 191, at 372 (stating economic harms of antidumping including inefficiency and costs to consumers); Zheng, *supra* note 192, at 155, 160 (noting antidumping's "near-unanimous disapproval from scholars").

²²⁸ Mankiw & Swagel, *supra* note 224, at 111 (explaining how predatory pricing harms domestic competitors and consumers).

²²⁹ See Lee, Park & Saravia, *supra* note 214, at 4 ("The asymmetry in the incentives of producers and consumers to successfully lobby for protectionist measures is perhaps the most prominent explanation for why countries engage in protectionism despite the net loss of welfare."); Mankiw & Swagel, *supra* note 224, at 115 (noting higher prices for consumers as a harm of antidumping laws); Zheng, *supra* note 192, at 163 (providing high net welfare cost of antidumping).

²³⁰ Zheng, *supra* note 192, at 167 (identifying defects of antidumping laws as first step in reforming it as "better safety valve").

retaliatory nature,²³¹ but also for their threat to the WTO's effectiveness.²³² They allow inefficient producers to survive in a market in which they are no longer the most competitive, threatening free trade by inhibiting countries' specialization in their most efficient sectors.²³³ Free trade intends to remove trade barriers, but antidumping laws create duties that could be ten to twenty times higher than a normal tariff would be.²³⁴ Thus, antidumping laws have become a method for "special interests to shield themselves from competition at the expense of both American consumers and other American companies."²³⁵

Despite these criticisms, antidumping laws are still employed to protect domestic industries from foreign competition. Professor Sungjoon Cho argues that "the very history of antidumping reveals that the major purpose of the antidumping statute is sheer protectionism"²³⁶ The United States has continually employed protectionist policies through antidumping laws, despite the proliferation of free trade agreements and the United States' role in the movement towards free trade.

C. Countervailing Duties in U.S. Trade Law as an Example of Protectionism

Similar to the antidumping laws, the use of countervailing duties in U.S. trade law is an example of how protectionism has prevailed in the free trade era. Countervailing duties are levied on imports from foreign producers when a foreign government or other public entity has subsidized that producer.²³⁷ Thus, a countervailing duty purports to offset "countervailing benefits" that the foreign subsidy has provided to the foreign industry.²³⁸ Congress enacted its first law imposing countervailing duties in 1890 to offset European subsidies in the sugar industry.²³⁹ The framework for the current countervailing duty statute can be found in the Tariff Act of 1930,²⁴⁰ which was amended in 1979 through the

²³¹ *Id.* at 156 (providing additional criticisms of antidumping including "bias in administration" and "strategic or retaliatory nature").

²³² Mankiw & Swagel, *supra* note 224, at 115 (noting antidumping's downfalls in international trade negotiations).

²³³ *Id.* at 108 (explaining antidumping's threat to free trade).

 $^{^{234}}$ *Id.* at 112 (highlighting substantial impact of tariffs on trade and difficulty in removing tariffs).

²³⁵ *Id.* at 107.

²³⁶ Cho, *supra* note 191, at 367.

²³⁷ JONES, *supra* note 138, at 32 (summarizing U.S. trade remedy laws).

²³⁸ Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 199 (1989).

²³⁹ Zheng, *supra* note 168, at 428-29 (recalling first countervailing duty legislation designed to offset effect of subsidies on beet sugar).

²⁴⁰ Id. at 432.

Trade Agreements Act.²⁴¹ Under the Tariff Act, "a countervailing duty [is] imposed on imported goods when it is found that the country is directly or indirectly subsidizing the manufacture, production or exportation of goods imported into the USA."²⁴² A countervailing duty can be imposed even when a foreign subsidy is indirectly applied to the industry and a material injury to a domestic industry exists.²⁴³ Additionally, as discussed above, Congress passed the Continued Dumping and Subsidy Offset Act of 2000, which has since been repealed after a finding that it violated the WTO Subsidies Agreements.²⁴⁴ More recently, during the Obama Administration, Congress passed a law permitting the imposition of countervailing duties on non-market economies, aiming to combat cheap imports from Chinese producers.²⁴⁵

Countervailing duties were among the most frequently used measures on imports in the 1970s and 1980s, especially by the United States. ²⁴⁶ Furthermore, "[t]he United States pursues countervailing duty cases more aggressively than many other countries." ²⁴⁷ Between 1979 and 1988, the United States filed 371 countervailing duty actions for import relief while all other countries combined filed fifty-eight actions. ²⁴⁸ While many other nations regularly employ subsidies for their domestic industries, the United States generally views subsidies as "instruments that illegitimately distort international trade," ²⁴⁹ although it also subsidizes several of its industries as discussed above.

Under Article VI of the GATT, parties can impose countervailing duties but not "in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or

²⁴¹ Trade Agreement Act of 1979, 19 U.S.C. §§ 2501-2581 (2018) (codifying amendments to Tariff Act of 1930); *see also* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 275 (3d ed. 2005).

²⁴² Trebilcock & Howse, *supra* note 241, at 276 (citation omitted).

²⁴³ *Id.* at 277-79 (describing how injury test ensures that duties are imposed only when nexus exists between foreign practice and harm suffered in domestic industry).

²⁴⁴ JONES, *supra* note 138, at 20 (discussing controversies surrounding Continued Dumping and Subsidy Offset Act).

²⁴⁵ Doug Palmer, U.S. Bill Targeting Chinese Subsidies Goes to Obama, REUTERS (Mar. 6, 2012, 2:59 PM), https://www.reuters.com/article/usa-china-trade/u-s-bill-targeting-chinese-subsidies-goes-to-obama-idINDEE8250HE20120306 [https://perma.cc/6MDC-ZEEH] (describing bill allowing United States to impose duties on Chinese goods).

²⁴⁶ Trebilcock, Howse & Eliason, *supra* note 26, at 364.

²⁴⁷ HORNBECK, *supra* note 171, at 11.

²⁴⁸ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 364 n.5 (citing Patrick A. Messerlin, *Antidumping*, *in* COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS 108, 110 (Jeffrey J. Schott ed., 1990)) (illustrating United States as predominant user of countervailing duties).

²⁴⁹ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 364 (presenting the United States' views on subsidies compared to other countries' views).

export of such product in the country of origin "250 During the Tokyo Round, the GATT parties negotiated a Subsidies Code that required the importing nation to demonstrate that an injury exists before the duty can be imposed. The Code also prohibited the use of export subsidies, except for certain products. However, the GATT parties did not define subsidy in the Code until later. During the Uruguay Round, the contracting parties negotiated the SCM Agreement, which provided more extensive subsidy regulations. Later 1949 and 1949 are represented to the SCM Agreement, which provided more extensive subsidy regulations.

As a domestic policy instrument, countervailing duties have obvious benefits. As previously mentioned, subsidies lead to market inefficiencies by permitting industries that are not the most efficient to continue to produce.²⁵⁵ In order to correct these market inefficiencies, countries receiving the subsidized imports can impose countervailing duties.²⁵⁶ Countervailing duties protect consumers from foreign industries that can engage in predatory pricing because the government subsidizes the costs of production.²⁵⁷ Additionally, countervailing duties can be justified under the rationale of fairness: subsidies are an unfair trading practice and countervailing duties provide domestic industries with a "level playing field."²⁵⁸ In summary, countervailing duties are meant to provide domestic industries with similar advantages as those received by the foreign subsidized industry.

However, countervailing duties can be harmful for two main reasons: first, they may increase tensions between nations because they are protectionist; second, they are not tailored closely enough to distortionary subsidies.²⁵⁹ Countervailing duties increase the costs to consumers by allowing domestic producers with higher production costs to continue to compete in the market and by reducing foreign competition.²⁶⁰ The United States has also been criticized

²⁵⁰ GATT, *supra* note 33, art. VI, para. 2; *see also* Zheng, *supra* note 168, at 432 (referencing GATT article VI).

²⁵¹ Zheng, *supra* note 168, at 433 (noting limitations on levying countervailing duties).

²⁵² *Id*.

²⁵³ *Id.* at 434 (stating first definition of "subsidy" was provided under SCM Agreement).

²⁵⁴ *Id.* (outlining SCM Agreement and its provisions).

 $^{^{255}}$ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 389 (presenting rationales for regulating subsidies).

²⁵⁶ *Id.* at 389-90 (presenting possible remedies to offset "effects of trade distortions").

²⁵⁷ *Id.* at 390 (suggesting additional efficiency argument that concerns over predation do not justify existing countervailing duty laws).

 $^{^{258}}$ *Id.* at 390-91 (discussing how countervailing duties may "increase potential gains from trade").

²⁵⁹ *Id.* at 392 (noting issues with laws on subsidies and possible reforms).

 $^{^{260}\,}$ HORNBECK, supra note 171, at 6 (noting taxpayer cost of supporting production through subsidy itself).

for focusing its trade remedies against developing countries.²⁶¹ Similar to antidumping measures, countervailing duties create a barrier to imports that may have a more competitive price or could be made more efficiently, potentially disrupting the effectiveness of the free trade system.

Since the GATT framework was first established, the United States has been determined to pursue comprehensive trade remedy laws, such as countervailing duties and antidumping measures. By identifying "inappropriate" policies of other countries, the United States was able to portray those as "barriers to market access" and create remedies to address them. While these trade remedies were originally conceived to combat unfair trade policies, they have arguably become unfair trade practices on their own. The United States has been persistent, even aggressive, in its usage of countervailing duties and antidumping measures. Thus, while freer trade could economically benefit the global system, "political barriers still remain" to actual free trade.

CONCLUSION

At first glance, the U.S. trade policy currently appears to be at a crossroads. President Trump's "America First" policies are in stark contrast to the more liberal policies of the previous administration. During the Obama Administration, the President underwent negotiations in the East and West to create large and comprehensive free trade agreements. Conversely, the Trump Administration appears to be taking every step to dismantle those agreements. While these actions are by no means insignificant, they are not nearly as large a departure from U.S. trade policy as they may seem. Even after leading the world into negotiations of groundbreaking free trade agreements, the United States has continually advocated for international trade policies that could easily be considered protectionist. As evidenced by its role in the proliferation of antidumping and countervailing measures and its consistent usage of both, the United States has allowed its protectionist policies of the past to continue. Although nowhere near the isolationist nation it was in the past, the United States has not only allowed protectionist tools in trade law to remain resilient, but has *led* the West in the implementation of such tools.

²⁶¹ TREBILCOCK, HOWSE & ELIASON, *supra* note 26, at 606-07 (explaining high barriers to exports of goods and services from developing countries); *cf.* STIGLITZ, *supra* note 153, at 6 (noting how Western nations have "pushed poor countries to eliminate tariff barriers, but kept up their own barriers, preventing developing countries from exporting their agricultural products and so depriving them of desperately needed export income").

²⁶² HORNBECK, *supra* note 171, at 16.

²⁶³ Howse, *supra* note 156, at 101 (presenting the United States' role in "rewriting the rules of the game for multilateral trade").

²⁶⁴ Rovegno, *supra* note 164, at 444 (suggesting effect of trade remedies on protecting domestic producers and disrupting competition).

²⁶⁵ SINGH, *supra* note 167, at 13.