

# Eliminating Trade Barriers through Preferential Trade Agreements: Perspectives from South Asia

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[I]n the life of an individual or a nation, a good neighborhood is a universal aspiration . . . . Nowhere in the world are collective efforts more urgent than in South Asia . . . .

—Prime Minister of India, Narendra Modi<sup>1</sup>

Self-reliance means trade, not aid.

—Former Prime Minister of India, Dr. Manmohan Singh<sup>2</sup>

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1. Narendra Modi, Prime Minister, India, Address at 2014 SAARC Summit in Nepal (Nov. 26, 2014).

2. Interview with Manmohan Singh, Former Finance Minister, India (Feb. 6, 2001), [https://www-tc.pbs.org/wgbh/commandingheights/shared/pdf/int\\_manmohansingh.pdf](https://www-tc.pbs.org/wgbh/commandingheights/shared/pdf/int_manmohansingh.pdf).

*Since time immemorial, trade has substantially influenced human life. Trade enthused intercontinental movements of the Asiatic people, Phoenicians, Egyptians, and other ancient societies. From the ancient "Silk Route" to today's electronic "Silk Road" rise in intercontinental trade has coincided with the increase in globalization's pace.<sup>3</sup> Scholars mark the evolution of the modern trade regime primarily by three eras: first, the introduction of mutually binding tariff reductions; second, the institutionalization of international trade; and third, the expansion of traditional trade obligations to include various new requirements, including a more indirect relationship to trade, and streamlined and effective dispute resolution.*

*Several important elements, such as non-discrimination and multilateralism, characterize global trade governance. Yet it is not a static phenomenon and is certainly not limited to the principles of Most-Favored Nation and National Treatment, or reducing tariff barriers. Multilateralism remains an important stimulant in addressing contemporary challenges, such as reducing trade barriers as a means to stem mercantilist tendencies and further global trade governance.*

*Preferential trade agreements have added a desirable wing to competitive trade liberalization through which more than 50% of today's international trade transpires. Notably, the multilevel global trade governance under the auspices of WTO experienced a gradual increase in its complexity as it evolved. In contrast, deeper and easier integration has been witnessed at regional levels. For example, South Asian countries experimented with the South Asian Association for Regional Cooperation (SAARC) to create regional ripples that parallel bilateral and multilateral currents in an effort to further harness the fruits of participatory governance and trade liberalization. South Asia houses a population of roughly 1.67 billion people, including 40% of the world's poor. Yet, it remains one of the least integrated regions. The conundrums of trade barriers have become vital in global trade governance. The study of eliminating trade barriers in a South Asian milieu illustrates the shortcomings as well as lessons to learn and amend.*

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3. See ANUPAM CHANDER, THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD IN COMMERCE 1-3 (2013) (describing the electronic Silk Road as a broad reference to today's realm of cyberspace and e-commerce).

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I. INTRODUCTION

The South Asian Association for Regional Cooperation (SAARC) is a regional intergovernmental association of eight least developed countries (LDCs) and non-least developed countries (non-LDCs) in South Asia: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.<sup>4</sup> These countries share cultural, historical, and family ties and face similar socio-economic and developmental

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4. Classification of Least Developed Countries (LDCs) in SAARC is same as the LDCs designated by the United Nations. The SAARC’s LDC countries are Afghanistan, Bangladesh, Bhutan, the Maldives, and Nepal. SAARC’s non-LDC countries are India, Pakistan, and Sri Lanka. Although the Maldives, as per the United Nations framework, graduated from being a LDC in 2011, the SAARC continued to classify it as LDC and South Asian Free Trade Area (SAFTA) Agreement committed to accord the country treatment “no less favourable than that provided for the Least Developed Contracting States.” See Agreement on South Asian Free Trade Area (SAFTA) arts. 1, 12, Jan. 6, 2004, [http://www.saarc-sec.org/userfiles/safta\\_agreement.pdf](http://www.saarc-sec.org/userfiles/safta_agreement.pdf) [hereinafter SAFTA]; *Least Developed Countries (LDCS)*, UNITED NATIONS [U.N.], <https://www.un.org/development/desa/dpad/least-developed-country-category.html> (last visited Apr. 3, 2017) (“Least Developed Countries (LDCs) are low-income countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets.”); Secretariat of the Comm. for Dev. Policy, Monitoring of Graduate Countries from the Category of Least Developed Countries: Maldives, U.N. Doc. CDP2012/PLEN/12 (Jan. 2012), [http://www.un.org/en/development/desa/policy/cdp/ldc\\_documents/maldives\\_monitoring\\_report\\_2012.pdf](http://www.un.org/en/development/desa/policy/cdp/ldc_documents/maldives_monitoring_report_2012.pdf); *UN Recognition of Least Developed Countries (LDC)*, U.N., <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-recognition-of-LDCs.aspx> (last visited Apr. 3, 2017) (for the Maldives’ graduation from the LDC status in 2011).

challenges. Over the years, the SAARC has initiated various programs in the areas of agriculture, rural development, education, energy, environment, poverty alleviation, biotechnology, and finance for the collective welfare of the people of South Asia.<sup>5</sup>

Preferential trade agreements (PTAs) have emerged as one of the means to further regional progress and strengthen intra-regional association. They offer a model of self-contained trade regimes, distinguishable from the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) regime. The Uruguay Round is the WTO's most defining round with respect to tariff cuts, which included negotiations for trade in goods, services, intellectual property, and investment.<sup>6</sup> However, PTAs have proliferated all over the world. Countries are now pursuing "parallel" trade liberalizations at multilateral, regional, and bilateral levels.

PTAs remain an indispensable vehicle of trade liberalization and examining the reduction of trade barriers at regional and bilateral levels is an important step in the study of global trade liberalization. In this examination, various discourses on the scope and benefits of removal and elimination of tariff and non-tariff trade barriers require consideration. Removal of tariff barriers is important for trade liberalization, but is it the only way? The role of other non-tariff barriers and their importance in trade liberalization demands evaluation. Through these spectrums, the performance of the SAARC's trade liberalization agenda will be explored. This Article examines the hallmarks of other regional trade agreements and assesses how the SAARC can be at the forefront of ambitious regional trading endeavors in the twenty-first century. This Article evaluates the reduction of trade barriers with respect to the SAARC's regional trade agreements over the course of five Parts.

Part I introduces the topic and the scheme of the Article. Part II lays out the background of trade liberalization in the international trade regime. This Part examines the economic foundations of free trade and the relevance of tariffs in attaining freer trade. It further discusses the GATT/WTO regime on trade liberalization from a historical perspective

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5. S. ASIAN ASS'N FOR REG'L COOPERATION [SAARC], BRIEF ON SAARC 2009 (May 8, 2010), [http://www.saarc-sec.org/uploads/publications/file/Brief%20on%20SAARC%202009%20brochure\\_20100508123840.pdf](http://www.saarc-sec.org/uploads/publications/file/Brief%20on%20SAARC%202009%20brochure_20100508123840.pdf) [hereinafter BRIEF ON SAARC 2009].

6. *The Uruguay Round*, WORLD TRADE ORG. [WTO], [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited Apr. 3, 2017).

and concludes by evaluating the ambit of trade liberalization through PTAs in light of GATT/WTO provisions on preferential trading.

Part III examines the SAARC's trade liberalization regime, the journey that began with Bangladesh's 1980 proposal for regional cooperation. Part III also discusses the SAARC's mandate for, and implementation of, trade liberalization in goods and services through three trade instruments: the South Asian Preferential Trading Agreement (SAPTA); the Agreement on South Asian Free Trade Area (SAFTA); and the SAARC Agreement on Trade in Services (SATIS). It concludes with enumerating the challenges faced in regional integration in South Asia.

Part IV assesses the SAARC's accomplishments through the trends of "regional" global governance and reduction of trade barriers achieved in other regions, including Latin America, Southeast Asia, North America, and the European Union. The Part elucidates the elements of global trade governance and its evolution through three eras. Part IV explores ways to further global trade governance through preferential trade agreements. This Part also considers the hurdles in liberalizing trade at the regional level and proposes various ways to address the gaps in trade integration and liberalization with respect to the SAARC's trade mechanisms.

This Part concludes the Article by noting that, despite the existence of many novel and cutting edge preferential trade models, FTAs do not replace the WTO; they complement it. Like the WTO, FTAs are premised on promoting trade as a mean of attaining peace and prosperity.<sup>7</sup> Lastly, the Article highlights the peculiarity of the South Asian region, which houses more than 40% of the world's poor and is afflicted by several non-tariff hurdles, including corruption.<sup>8</sup> However, the South Asian region posits an aspiration to raise the living standards of its people with the help of collective efforts under the auspices of the SAARC to promote peace and welfare and to reduce trade barriers.

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7. JAMES M. ROBERTS & HUMA SATTAR, THE HERITAGE FOUND., INST. FOR ECON. FREEDOM & OPPORTUNITY, SOUTH ASIA: REGIONAL INTEGRATION AND GREATER ECONOMIC FREEDOM WILL BOOST GROWTH AND PROSPERITY 15 (Special Report No. 182, 2016), <http://thf-reports.s3.amazonaws.com/2016/SR182.pdf>.

8. *Id.* at 2.

## II. TRADE LIBERALIZATION AND INTERNATIONAL TRADE

A. *Economic Foundations of Free Trade*

The international economic order revolves around the WTO and the Bretton Woods institutions, like the International Monetary Fund (IMF) and the World Bank. This order is based upon the market economy, promotion of global welfare, and to some extent, the prevention of economic warfare.<sup>9</sup> International trade focuses on the stipulations of “comparative advantage” (i.e., promoting individual cross-border exchanges, specialization, and global welfare).<sup>10</sup> David Ricardo amplified the pioneering views of free trade advocate Adam Smith and proclaimed “comparative advantage” as the way ahead and an alternative to “mercantilism” and “absolute advantage.”<sup>11</sup>

Comparative advantage and free trade’s promotion of society’s net welfare, the allocation of resources, specialization of production, and division of labor coalesce to boost production, efficiency, and consumption.<sup>12</sup> This enhancement, in turn, leads to an increase in the net welfare of a society.<sup>13</sup> The international trade regime, coupled with the pillars of National Treatment (NT) and Most Favored Nation (MFN)

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9. ASIF H. QURESHI & ANDREAS R. ZIEGLER, INTERNATIONAL ECONOMIC LAW 11 (3d ed. 2011).

10. *Id.* at 11-12.

11. *See* RAJ BHALA, INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK 71-77 (vol. I, 4th ed. 2015). In the “economic orthodoxy” of the sixteenth to eighteenth centuries, mercantilism is “an anti-free trade doctrine that calls for government intervention to generate a trade surplus.” *Id.* at 71.

Accordingly, mercantilists seek to maximize wealth by maximizing exports and minimizing imports, and thereby maximize the net outflow of goods, *i.e.*, a positive balance of trade, and the net inflow of payments. Mercantilist trade policy calls for restrictions, such as high tariffs, on imports, and support, such as subsidies, for exports.

*Id.* at 71-72. David Ricardo argued, in regards to the law of “comparative advantage” in contrast to “absolute advantage,” that

international trade is mutually beneficial for countries, even if one has an absolute advantage in the production of goods under the following terms: (1) For the country with an absolute advantage in both goods, Ricardo advised specializing in the production of, and exporting, the good in which it has the greatest absolute advantage[;] (2) For the country with an absolute disadvantage in both goods, Ricardo suggested specializing in the production of, and exporting, the good in which it has the least absolute disadvantage.

*Id.* at 77.

12. *Id.* at 78.

13. *Id.*

standards, seeks to eliminate cross-border impediments, to free global market connectivity from hindrances and to liberalize trade.<sup>14</sup>

*B. Free Trade and Tariffs Interconnection*

Sovereign nations have long used “tariffs” (also known as “custom duties”) to give a price advantage to locally produced goods over similar imports, to shield domestic industries from foreign competition, and to raise revenue by imposing border taxes on incoming foreign commodities.<sup>15</sup> There are three types of tariffs: First, an “*ad valorem*” tariff is based on a fixed percentage of the imported commodity’s value; second, a “specific” tariff is a flat tax per imported item; and third, a “mixed” tariff is a hybrid of both *ad valorem* and specific tariffs.<sup>16</sup> Two of the most important goals of the international trade regime are reducing and binding tariffs, both of which are achieved by including them in Schedules of Concession annexed to the GATT Agreement.<sup>17</sup> Even prior to the GATT/WTO regime, the Havana Charter for the (aborted) International Trade Organization prohibited quantitative restrictions as a general rule. This allowed the use of duties, taxes, or other charges to regulate trade and subsequently reduce the general levels of tariffs as well as other charges on imports and exports on a reciprocal basis.<sup>18</sup>

In the Schedules of Concession, every WTO member is required to document a ceiling (also called a bound tariff), or maximum rate, that may apply to a particular commodity.<sup>19</sup> Once the tariffs are bound, Member States make tariff concessions to their counterparts on the basis of reciprocity.<sup>20</sup> The “tariff list” or “tariff schedule” consolidates an item-by-item list of product categories run by the World Customs Organization (WCO).<sup>21</sup> A Member State may apply tariff rates lower than the bound tariff fixed in the Schedules of Concession, but in no case

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14. QURESHI & ZIEGLER, *supra* note 9, at 12.

15. SIMON LESTER ET AL., WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY 240 (2010); *Tariffs*, WTO, [https://www.wto.org/english/tratop\\_e/tariffs\\_e/tariffs\\_e.htm](https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm) (last visited Apr. 3, 2017) [hereinafter *Tariffs*, WTO].

16. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 259 (Oxford University Press 3d ed. 2015).

17. *Id.* at 260.

18. ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO: PROCEDURES AND PRACTICES 7-10 (2001); Havana Charter for an International Trade Organization art. 17, U.N. Doc. E/CONF. 2/78 (Mar. 28, 1948), [https://treaties.un.org/doc/source/docs/E\\_CONF.2\\_78-E.pdf](https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf).

19. BHALA, *supra* note 11, at 650.

20. *Id.*

21. *Id.*

can a State impose a tariff exceeding that amount.<sup>22</sup> GATT Article II expounds the commitment of WTO Members to bind their tariff rates in the Schedules of Concession and mandates the Members accord tariffs no less favorable than those in the appropriate Schedule.<sup>23</sup> The tariff concessions bound in the Schedule extend to other Members on a MFN basis.<sup>24</sup>

Reducing tariffs has been an essential element of GATT/WTO negotiations, and substantial ground has been covered through various trade rounds, including Geneva (1947), Annecy (1949), Torquay (1951), Dillon (1960-61), Kennedy (1964-67), Tokyo (1973-79), and the most defining, Uruguay (1986-1994).<sup>25</sup> The Uruguay Round included substantial negotiations on trade in goods (GATT), services (General Agreement on Trade in Services or GATS), intellectual property (Trade Related Aspects on Intellectual Property Rights or TRIPS), and investment (Agreement on Trade Related Investment Measures or TRIMS).<sup>26</sup> A total of 123 States participated in the Uruguay Round, unlike the previous rounds, such as Dillon Round (twenty-six States) or Kennedy Round (sixty-two States).<sup>27</sup> Moreover, in the initial tariff rounds (those implemented before Kennedy Round), tariff reduction materialized on an item-by-item basis, and the latter rounds implemented a linear cut approach.<sup>28</sup> The result of the Uruguay Round included the States' commitments to cut tariffs (achieving average tariff reductions from 5% to 0% on weighted average), as well as to bind their customs duty rates to levels that were difficult to raise.<sup>29</sup>

As the WTO data suggests, there has been a 15% reduction in average tariffs applied by WTO members between 1996 and 2013. Simultaneously, global trade in goods nearly quadrupled, from US\$5 trillion in 1996 to US\$19 trillion in 2013.<sup>30</sup> Tariff reduction is an

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22. A.K. KOUL, GUIDE TO THE WTO AND GATT: ECONOMICS, LAW AND POLITICS 105 (4th ed. 2013).

23. General Agreement on Tariffs and Trade art. II, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

24. KOUL, *supra* note 22, at 106.

25. *The GATT Years: From Havana to Marrakesh*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Apr. 3, 2017) [hereinafter *The GATT Years*, WTO].

26. *The Uruguay Round*, WTO, *supra* note 6.

27. *The GATT Years*, WTO, *supra* note 25.

28. KOUL, *supra* note 22, at 106.

29. *See id.*; *Tariffs*, WTO, *supra* note 15.

30. WTO, TRADE AND TARIFFS: TRADE GROWS AS TARIFFS DECLINE 2 (2015), [https://www.wto.org/english/thewto\\_e/20y\\_e/wto\\_20\\_brochure\\_e.pdf](https://www.wto.org/english/thewto_e/20y_e/wto_20_brochure_e.pdf).



essential element in boosting global trade, and in the past two decades, WTO members consistently reduced their tariffs despite negotiating high ceilings at the time of joining the WTO.<sup>31</sup>

*C. Ambit of Liberalizing Through Preferential Trade Agreements*

The GATT/WTO trade regime has contributed immensely to the reduction of tariffs. Moreover, as of September 1, 2016, as many as 267 regional trade agreements (RTAs)<sup>32</sup> are in operation worldwide, and WTO Member States have made 424 notifications for goods, services, and accessions.<sup>33</sup> Several nations have been keen to enter preferential trade agreements (PTAs). Of these RTAs, free trade agreements (FTAs) account for almost 90% and customs unions (CUs) for the remaining 10%.<sup>34</sup>

Article XXIV of the GATT and Article V of the GATS provide a mandate for PTAs within the global trade regime.<sup>35</sup> These provisions validate the coexistence of PTAs within the WTO framework, whether in the form of an FTA or a CU. WTO texts elucidate PTAs' intended use, that "the purpose of these should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."<sup>36</sup> The regional trading blocs have always evoked controversies, since in essence they oppose the vital principle of international trade, the MFN clause.<sup>37</sup> However, the aim of

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31. *Id.* at 8.

32. *Regional Trade Agreements: Facts and Figures*, WTO, [https://www.wto.org/english/tratop\\_e/region\\_e/regfac\\_e.htm](https://www.wto.org/english/tratop_e/region_e/regfac_e.htm) (last visited Apr. 3, 2017); *Regional Trade Agreements and Preferential Trade Agreements*, WTO, [https://www.wto.org/english/tratop\\_e/region\\_e/rta\\_pta\\_e.htm](https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm) (last visited Apr. 3, 2017) (In the international trade regime, regional trade agreements [RTAs] "are defined as reciprocal trade agreements between two or more partners." It is an umbrella term, which includes free trade agreements [FTAs] and the customs unions [CUs].); MATSUSHITA ET AL., *supra* note 16, at 548-49 ("The term 'regional integration,' which is often used in literature, is probably misleading: in essence, what the term aims to capture are preferential schemes that deviate from the obligation not to discriminate." The term "preferential trade agreement" is preferred as it "reflects better the objective function of schemes of this type."); DAVID A. GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 7 (1st ed. 2009) (Gantz remarks that "a common market, although not defined in GATT implies, in addition to free movement of goods, mobility of capital and labor as well as coordination of commercial policies.").

33. *Regional Trade Agreements: Facts and Figures*, *supra* note 32.

34. Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHI. J. INT'L L. 597, 601 (2011).

35. GATT, *supra* note 23, arts. V, XXIV.

36. *Id.* art. XXIV.

37. ANSHUMAN GUPTA, SAARC: SAPTA TO SAFTA 53 (2002).

the WTO in allowing the FTA regimes is to expedite the process of dismantling trade-distorting barriers, both tariff and non-tariff.<sup>38</sup>

Professor Jagdish Bhagwati, a prominent international authority on international economic law and former external advisor to the WTO, notes that very few contemplated that the Article XXIV exception would be used except in rare circumstances.<sup>39</sup> It was envisioned that progress toward free trade and extending it to nearly all commodities would discourage States from resorting to Article XXIV exception.<sup>40</sup>

Leading international trade scholar Professor Raj Bhala advocated a three-tier process for “competitive liberalization” by moving as aggressively as possible toward the end of global free trade by simultaneously pursuing trade liberalization at multilateral, regional, and bilateral levels.<sup>41</sup> Professor Bhala denotes this strategy using terms such as “complimentary liberalization” and “parallel liberalization.”<sup>42</sup> Indeed, joining an FTA may lead to some multifaceted benefits, including domestic policy reforms, increased multilateral bargaining power, strategic linkages, more political stake in multilateral negotiations, and enhanced national security.<sup>43</sup>

PTAs create preferential tariffs among trading partners that may be discriminatory or incongruous with the multilateral trading system. Scholars express apprehension regarding States’ overindulgence with FTAs and the potential to create an erosion of the global economic order through: forum shopping for dispute settlement, trade diversion from cost-efficient non-Member States to less efficient Member States, and a chaotic crisscrossing of multiple PTAs with varying tariff trajectories,

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38. GATT, *supra* note 23, art. XXIV.

39. See JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 1-14 (2008). Bhagwati noted that during the 1930s, many countries chose a “tit-for-tat protectionism and the competitive depreciation of currency.” *Id.* at 5. Their intent to “divert limited world demand to one’s own goods to reflate one’s economy, led to extensive use of quotas[.]” This protectionism by nations damaged the world trading system, and instead of a coordinated action to refrain from protectionism and to “increase world aggregate demand,” nations employed “beggar my neighbor [sic] policies.” *Id.* at 7. The arrival of GATT was a departure point as it sought to resurrect multilateralism with the help of a potent MFN clause. *Id.* at 8-9.

40. *Id.* at 9-10.

41. Raj Bhala, *Competitive Liberalization, Competitive Imperialism, and Intellectual Property*, 28 LIVERPOOL L. REV. 77, 78 (2007).

42. *Id.* at 80.

43. John Whalley, *Why Do Countries Seek Regional Trade Agreements?*, 14-34 (Nat’l Bureau of Econ. Research, Working Paper No. 5552, 1996); BHAGWATI, *supra* note 39, at 40-47.

sometimes called the “spaghetti bowl” concern.<sup>44</sup> At the same time, not all PTAs are created equal, and their impact on different Member States may vary and yield uneven benefits.<sup>45</sup> The domestic-level reform strategies also differ from State to State, thus, there is no single yardstick or panacea.<sup>46</sup>

The following Part deliberates liberalization by way of reduction and elimination of tariff barriers in SAARC PTAs and discusses several variables vis-à-vis the tariff barriers. A comparative analysis with selected other FTAs helps highlight how ambitious SAARC’s endeavors are to attain freer trade.

### III. SAARC PREFERENTIAL TRADE AGREEMENTS—PATH TO ELIMINATION OF TRADE BARRIERS

#### A. SAARC’s Mandate

##### 1. Background

In 1980, former Bangladeshi President Zia Ur Rahman proposed that South Asian countries look to the regional collective endeavors of the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) to explore the possibility of regional cooperation with the help of an institutional arrangement.<sup>47</sup> Despite skepticism on the part of some countries, governments began consultations. The foreign secretaries of the original seven South Asian countries (Afghanistan being the last one to join the SAARC in April 2007) first met in April 1981 in Colombo, Sri Lanka.<sup>48</sup> The subsequent deliberations involved identifying broad areas of future cooperation.<sup>49</sup>

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44. BHALA, *supra* note 11, at 829-30; BHAGWATI, *supra* note 39, at 49-50, 61-70; Anne O. Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?*, 13 J. ECON. PERSP. 105, 123 (1999).

45. Krueger, *supra* note 44, at 121.

46. BHALA, *supra* note 11, at 829.

47. RANJIT KUMAR, SOUTH ASIAN UNION: PROBLEMS, POSSIBILITIES AND PROSPECTS 75 (2005).

48. See Declaration of the Fourteenth SAARC Summit, ¶ 1, Apr. 4, 2007, <http://www.saarc-sec.org/userfiles/Summit%20Declarations/14%20-%20New%20Delhi,%2014th%20Summit%203-4%20April%202007.pdf> [hereinafter Declaration Fourteenth SAARC Summit] (the Fourteenth SAARC Summit formally admitted Afghanistan into SAARC); *Afghanistan Inducted as 8th Member: 14th SAARC Summit Begins*, DAWN.COM (Apr. 4, 2007, 12:00 AM), <http://www.dawn.com/news/240651/afghanistan-inducted-as-8th-member-14th-saarc-summit-begins> (It should be noted the Thirteenth SAARC Summit held in Dhaka had already approved Afghanistan’s membership request.).

49. Declaration Fourteenth SAARC Summit, *supra* note 48, at ¶ 1.

The First SAARC Summit held in Dhaka, Bangladesh, in December 1985, declared resolve for regional cooperation, an aim to address shared challenges “in the spirit of friendship, trust and mutual understanding and to the creation of an order based on mutual respect, equity and shared benefits.”<sup>50</sup> The Summit also underlined the SAARC’s objective of regional cooperation as a means to improve the quality of life of their people, accelerate the pace of their economic development, and enhance their national and collective self-reliance.<sup>51</sup> Article I of the SAARC Charter highlights its objectives:

- a) to promote the welfare of the peoples of SOUTH ASIA and to improve their quality of life;
- b) to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials;
- c) to promote and strengthen collective self-reliance among the countries of SOUTH ASIA;
- d) to contribute to mutual trust, understanding and appreciation of one another’s problems;
- e) to promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields;
- f) strengthen cooperation with other developing countries;
- g) strengthen cooperation among themselves in international forums on matters of common interests and;
- h) to cooperate with international and regional organisations with similar aims and purposes.<sup>52</sup>

As of now, the SAARC’s areas of cooperation include agricultural and rural development, poverty alleviation, education, biotechnology, economics and trade, energy, science and technology, tourism, social development, and the environment.<sup>53</sup>

The SAARC has ongoing cooperation with many intergovernmental organizations and United Nations Agencies, such as the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Fund (UNDF), Asian Development Bank (ADB), the European Commission, and the World Bank.<sup>54</sup>

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50. Dhaka Declaration of the First SAARC Summit, ¶ 2, Dec. 8, 1985, <http://www.saarc-sec.org/userfiles/01-Dhaka-1stSummit1985.pdf>.

51. *Id.*

52. Charter of the South Asian Association for Regional Cooperation art. I, Dec. 8 1985, 3 ASIAN Y.B. INT’L L. 473, 473-74 (1993) [hereinafter SAARC Charter].

53. BRIEF ON SAARC 2009, *supra* note 5.

54. *Cooperation with Inter-Governmental Organisations*, SAARC, <http://www.saarc-sec.org/Cooperation-with-Inter-Governmental-Organisations/16/> (last visited Apr. 3, 2017).

Moreover, the SAARC has nine external observers: Australia, China, the EU, Iran, Japan, the Republic of Korea, Mauritius, Myanmar, and the United States.<sup>55</sup>

## 2. Institutional Structure of SAARC

*Secretary General and Secretariat:* The SAARC Secretariat is based in Kathmandu, Nepal. The Council of Ministers, composed of individuals from the Member States, appoints a Secretary General for a three year term.<sup>56</sup> The Secretary General, assisted by eight directors on deputation from the Member States, coordinates and monitors the activities' implementation and facilitates communication between SAARC and its Member States, as well as with other regional organizations.<sup>57</sup>

*Charter Bodies and Other Mechanisms:* As an intergovernmental body, the SAARC's institutional mechanism is run by the public officials and personnel deputed by the respective Member States for a set period. The Charter designates various "charter bodies" and mechanisms to further the cause of the SAARC association. The Council of Ministers comprises the ministers of foreign/external affairs of the Member States. As mandated by Article V of the Charter, the Council holds biannual meetings to facilitate the formulation of policies, review progress of cooperation, establish additional mechanisms under SAARC, if deemed necessary, and investigate other matters of general interest.<sup>58</sup> The Standing Committee reports to the Council and includes the foreign secretaries of SAARC Member States, who conduct overall monitoring and coordination of SAARC's cooperative mechanisms.<sup>59</sup> The Programming Committee complements the Standing Committee in matters relating to the selection of regional projects, cost-sharing among the Member States, mobilization of external resources, intersectoral prioritization of projects, and the review of stipulated activities.<sup>60</sup> The

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55. *SAARC To Have "Meaningful Engagements" with 9 Observer States*, ECON. TIMES (Nov. 24, 2014), [http://economictimes.indiatimes.com/news/politics-and-nation/saarc-to-have-meaningful-engagements-with-9-observer-states/articleshow/45263361.cms?inttarget=no; Cooperation with Observers, SAARC, http://www.saarc-sec.org/Cooperation-with-Observers/13/](http://economictimes.indiatimes.com/news/politics-and-nation/saarc-to-have-meaningful-engagements-with-9-observer-states/articleshow/45263361.cms?inttarget=no;Cooperation%20with%20Observers,SAARC,http://www.saarc-sec.org/Cooperation-with-Observers/13/) (last visited Apr. 3, 2017).

56. *SAARC Secretariat*, SAARC, <http://www.saarc-sec.org/SAARC-Secretariat/18/> (last visited Apr. 3, 2017).

57. *Id.*

58. SAARC Charter, *supra* note 52, art. IV.

59. *Id.* art. V.

60. *Programming Committee*, SAARC, <http://www.saarc-sec.org/Programming-Committee/124/> (last visited Apr. 3, 2017).

sectoral Technical Committees focus on implementation, coordination, and monitoring of the programs in their respective areas of cooperation (such as agriculture, health, rural development, and the environment).<sup>61</sup> The Working Groups coordinate, monitor, and evaluate programs in different sectors, in addition to carrying out specific directives from SAARC Charter bodies.<sup>62</sup>

*Regional Centers:* In addition to the Secretariat in Kathmandu, the SAARC established regional centers in different countries to further cooperation in various sectors. These are:

- SAARC Agricultural Centre (Bangladesh),
- SAARC Meteorological Research Centre (Bangladesh),
- SAARC Tuberculosis Centre (Nepal),
- SAARC Documentation Centre (India),
- SAARC Human Resources Development Centre (Pakistan),
- SAARC Coastal Zone Management Centre (Maldives),
- SAARC Information Centre (Nepal),
- SAARC Energy Centre (Pakistan),
- SAARC Disaster Management Centre (India),
- SAARC Forestry Centre (Bhutan), and
- SAARC Cultural Centre (Sri Lanka).<sup>63</sup>

*B. SAARC's Institutional Mechanisms on Trade Liberalization and Cooperation in Trade*

1. South Asian Preferential Trading Arrangement (SAPTA)

During the first five Summits, SAARC countries took a number of measures to strengthen cooperation among themselves, including creating fellowship programs and the SAARC Youth Volunteer program, establishing a South Asian food security reserve, and setting up various regional centers.<sup>64</sup> However, neither the SAARC Charter, nor the declarations of the first five Summits acknowledged the need to liberalize trade.<sup>65</sup> The Sixth SAARC Summit held in Colombo, Sri

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61. SAARC Charter, *supra* note 52, art. VI.

62. *Working Groups*, SAARC, <http://saarc-sec.org/Working-Groups/77/> (last visited Apr. 3, 2017).

63. *Regional Centers*, SAARC, <http://www.saarc-sec.org/Regional-Centers/12/> (last visited Apr. 3, 2017).

64. BRIEF ON SAARC 2009, *supra* note 5.

65. KUMAR, *supra* note 47, at 78-79.

Lanka, in December 1991 first highlighted Member States' commitment to trade liberalization "in such a manner as will ensure that the countries in the region can share the benefits of trade expansion equitably."<sup>66</sup> The Heads of State underscored "the need for vigorously promoting South-South economic cooperation to off-set the negative consequences of international economic developments."<sup>67</sup> They recognized "the importance of securing less restrictive trading and marketing opportunities for their products, more extensive technology and resource transfers to South Asia, debt relief and access on favorable and more concessional terms to resources from multilateral financial institutions."<sup>68</sup> The Summit approved the establishment of an intergovernmental group to formulate an agreement establishing preferential trading agreement, initially proposed by Sri Lanka.<sup>69</sup>

With the Seventh Summit Declaration, the SAARC deliberated pressing international economic issues and recognized the importance of a strengthened and liberalized international trading system.<sup>70</sup> The SAARC viewed the ongoing negotiations of the Uruguay Round under the WTO with optimism and reckoned that its success would translate into further economic growth, aided by doing away with protectionist policies and the gradual removal of trade barriers.<sup>71</sup> The WTO negotiations encouraged SAARC members to carry out a similar venture among themselves.

The SAPTA agreement projected the collective desire of the Member States to promote and sustain mutual trade and economic cooperation within South Asia through the exchange of concessions based on the following principles:

- overall reciprocity and mutuality of advantages;
- negotiating gradual tariff reforms with periodic reviews;
- recognizing the special needs of the LDC States and granting them concrete preferential measures; and

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66. *Id.* at 79.

67. Colombo Declaration of the Sixth SAARC Summit, ¶ 3, Dec. 21, 1991, <http://www.saarc-sec.org/userfiles/06-COLOMBO-6thSummit1991.pdf>.

68. *Id.* ¶ 4.

69. *Id.* ¶¶ 20-21.

70. Declaration of the Seventh SAARC Summit, ¶¶ 53-57, Apr. 11, 1993, <http://www.saarc-sec.org/userfiles/07-Dhaka-7thSummit1993.pdf>.

71. *Id.*

- including all products, manufactures and commodities in their raw, semi-processed and processed forms.<sup>72</sup>

In other words, while balancing the need for equitable benefit to all Contracting States with their respective levels of economic development and external trade policies, the Agreement sought to include all commodities over time, whether in raw, semi-processed, or processed form.<sup>73</sup>

SAPTA provided a platform for SAARC Member States to negotiate tariff concessions, and subsequently agree to a gradual removal of both tariff and non-tariff barriers. The Agreement provided a stimulus to intra-regional trade while covering around 5000 commodities over four rounds of trade negotiations.<sup>74</sup> SAPTA negotiations helped produce the offer of tariff concessions for a total of 226 products in the First Round.<sup>75</sup> The Association's relatively more developed countries (India, Pakistan, and Sri Lanka) offered hundreds of products on concessional tariff (special treatment) to their least developed SAARC counterparts (Bangladesh, Bhutan, Maldives, and Nepal) without any reciprocity requirement.<sup>76</sup> The Second Round of negotiations offered 213 products for concessional tariffs, while 764 products were designated for SAARC's LDCs.<sup>77</sup>

Incidentally, SAARC countries never thought seriously about securing adequate and reciprocal market access from each other, despite their shared regional location.<sup>78</sup> At the time of endorsing SAPTA, SAARC members carried out only 3% of trade among themselves. After SAPTA, the number rose to 5%.<sup>79</sup> These are very inconspicuous numbers for an intra-regional bloc of eight countries, in which one-fifth of the population resides.<sup>80</sup>

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72. Agreement on SAARC Preferential Trading Arrangement art. 3, Apr. 1, 1993, 3 ASIAN Y.B. INT'L L. 481, 482 (1993).

73. *SAARC Preferential Trading Arrangement (SAPTA)*, SAARC, [http://saarc-sec.org/areaofcooperation/detail.php?activity\\_id=4](http://saarc-sec.org/areaofcooperation/detail.php?activity_id=4) (last visited Apr. 3, 2017).

74. *Id.*

75. KUMAR, *supra* note 47, at 80.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*



## 2. Agreement on South Asian Free Trade Area (SAFTA)

SAFTA was envisioned as the first step towards the adoption of various instruments of trade liberalization on a preferential basis, the progression towards the FTAs leading subsequently toward a customs union, a common market, and an economic union.<sup>81</sup> SAFTA was signed during the Twelfth SAARC Summit held in Islamabad, Pakistan, in January 2004, and entered into force in January 2006.<sup>82</sup> Although the path to economic integration culminated nineteen years after the establishment of SAARC, this step gathered momentum toward broadening economic cooperation to ensure equitable distribution of trade benefits.

Article 3 of the SAFTA Agreement laid down various objectives and principles, such as:

- eliminating barriers to trade in, and facilitating the cross-border movement of goods between the territories of the Contracting States;
- promoting conditions of fair competition in the free trade area, and ensuring equitable benefits to all Contracting States, taking into account their respective levels and pattern of economic development;
- creating effective mechanism for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- establishing a framework for further cooperation to expand and enhance the mutual benefits of this Agreement.<sup>83</sup>

Furthermore, the SAFTA Agreement under Article 8, *inter alia*, recommended additional measures, such as: the “harmonization of standards, reciprocal recognition of tests and accreditation of testing laboratories of Contracting States and certification of products”; “simplification and harmonization of customs clearance procedure”; “removal of barriers to intra-SAARC investment”; “harmonization of national customs classification”; “transit facilities for efficient intra-SAARC trade”; “simplification of banking procedures for import financing”; and “simplification of procedures for business visas.”<sup>84</sup>

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81. See SAFTA, *supra* note 4, art. 3.

82. *Id.*

83. *Id.*

84. *Id.*

The SAFTA agreement pledged a governance model for its FTA based on the “existing rights and obligations” of Member States with respect to one another under the GATT/WTO regime.<sup>85</sup> It acknowledged reciprocity, entailed adopting trade facilitation and progressively harmonizing Contracting States’ legislation in relevant areas, and adopted “concrete preferential measures” for LDCs on a non-reciprocal basis.<sup>86</sup>

The Trade Liberalization Program (TLP), under the aegis of SAFTA, authorized Contracting States to a “schedule of tariff reductions.” The following are features of the tariff reductions schedule.

First, non-LDC States had to reduce existing tariff rates by 20%, preferably in equal annual installments, within two years of the agreement’s entrance into force. In the event of actual tariff at less than 20%, annual reduction would materialize on a margin of preference basis of 10% on actual tariff rates for each of the two years.<sup>87</sup> Second, LDC States had to reduce 30% from existing tariff rates within two years from the Agreement’s entrance into force. In these States, should an actual tariff be less than 30%, annual reduction would materialize on a margin of preference basis of 5% on actual tariff rates for each of the two years.<sup>88</sup> Third, non-LDC States were obligated to a subsequent tariff reduction from 20% or below to 0%-5% within a second timeframe of five years, beginning three years from the date of the Agreement’s entry into force. Sri Lanka, as a special case, was given six years to comply with the requirement. Contracting States could adopt reductions in equal annual installments, so long as reductions were not less than 15% annually.<sup>89</sup> Lastly, LDC States had to do a subsequent tariff reduction from 30% or below to 0%-5% within the second timeframe of eight years, beginning three years from the date of the Agreement’s entry into force. The LDC States could adopt reductions in equal annual installments but not reductions of less than 10% annually.<sup>90</sup> Despite a tardy commencement, SAFTA’s tariff reduction agenda was encouraging, particularly the special attention given to the demands of the LDCs in the Association. Moreover, the SAARC implemented a framework of annual review by

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85. *Id.* art. 3.

86. *Id.*

87. *Id.* art. 7(1)(a).

88. *Id.* art. 7(1)(b).

89. *Id.* art. 7(1)(c).

90. *Id.* art. 7(1)(d).

the Committee of Experts of all the Contracting States' notifications "para-tariff" and "non-tariff measures."<sup>91</sup>

The Agreement required the Contracting States to eliminate all quantitative restrictions, except those restrictions otherwise permitted under GATT 1994 with respect to commodities included in SAFTA's TLP.<sup>92</sup> Under the provisions specifying Special and Differential Treatment for the LDC States, the Agreement, *inter alia*, stressed the need for the Contracting States to establish an appropriate mechanism to compensate the LDC States for their loss of customs revenue until alternative domestic arrangements were formulated to address this situation.<sup>93</sup> An anomaly to SAFTA's trade expansion agenda is the non-application of TLP to the tariff lines included in the "Sensitive Lists" as negotiated by the Contracting States.<sup>94</sup> The Sensitive List is supposed to be reviewed at least every four years, and the number of products in the List is subject to a mutually acceptable maximum ceiling, with built-in flexibility to LDC States to seek derogation, with respect to the products of their export interest.<sup>95</sup>

### 3. SAARC Agreement on Trade in Services (SATIS)

To further expand the horizons of intra-SAARC trade both in goods and services, the SAARC Agreement on Trade in Services was signed at the Sixteenth SAARC Summit held in Thimphu, Bhutan, in April 2010 and ratified two years later in November 2012.<sup>96</sup> The objectives of the SATIS Agreement included:

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91. *Id.* art. 7(4); *id.* art. 10 ("The SMC shall be supported by a Committee of Experts (hereinafter referred to as COE) . . . . The COE shall monitor, review and facilitate implementation [of SAFTA's provisions] and undertake any task assigned to it by the SMC. The COE shall submit its report to SMC every six months. The COE will also act as SAFTA's Dispute Settlement Body."); *id.* art. 1(6) ("Para-tariffs mean border charges and fees, other than 'tariffs', on foreign trade transactions of a tariff-like effect which are levied solely on imports, but not those indirect taxes and charges, which are levied in the same manner on like domestic products. Import charges corresponding to specific services rendered are not considered as para-tariff measures[.]"); *id.* art. 1(5) ("Non-tariff measures include any measure, regulation or practice, other than 'tariffs' and 'para-tariffs.'").

92. *Id.* art. 7(5).

93. *Id.* art. 11; SAFTA, Annex III, ¶¶ i-iii, Dec. 1, 2005, [http://www.saarc-sec.org/uploads/document/Annex-III%20of%20SAFTA%20Agreement%20-%20%20MCRL\\_20100413015924.pdf](http://www.saarc-sec.org/uploads/document/Annex-III%20of%20SAFTA%20Agreement%20-%20%20MCRL_20100413015924.pdf).

94. SAFTA, *supra* note 4, art. 7(3)(a)-(b).

95. *Id.*

96. SAARC Agreement on Trade in Services (SATIS) pmbl., Apr. 29, 2010, [http://saarc-sec.org/uploads/document/SAARC%20Agreement%20on%20Trade%20in%20Services%20\(signed\)\\_20121011091030.pdf](http://saarc-sec.org/uploads/document/SAARC%20Agreement%20on%20Trade%20in%20Services%20(signed)_20121011091030.pdf).

- promoting trade in services among SAARC Members “in a mutually beneficial and equitable manner by establishing a framework for liberalizing and promoting trade in services within the region”;
- liberalizing trade in services with “broad-based and deeper coverage of majority of services sectors/sub-sectors”; and
- negotiating “specific commitments for progressive liberalizing [that] would [be] based on ‘request-and-offer’ approach.”<sup>97</sup>

The SATIS Agreement specified non-applicability to particular categories of government procurement of services, supplied in the exercise of governmental authority and transportation (and non-transportation) air services. This includes domestic and international services other than aircraft repair and maintenance services, and the marketing and sale of air transport and computerized reservation system services.<sup>98</sup>

SATIS seeks cooperation to expand trade in services through the following four mechanisms. The first initiative is to develop regulatory capacity through the exchange of experiences and best practices among the Contracting States’ regulatory bodies.<sup>99</sup> Second, SATIS incorporates working groups for specific sectors of interest comprising the relevant national authorities and stakeholders.<sup>100</sup> Third, it encourages cooperating and coordinating with WTO/GATS negotiations.<sup>101</sup> Fourth, it seeks to constitute a working group under the Heads of SAARC Statistical Organisations (SAARCSTAT) to collect and exchange statistics and regulations to improve collection of trade statistics in services.<sup>102</sup>

The Association, by way of the SATIS Agreement, acknowledged the importance of the services sector and stressed its increasing role in Member States’ trade economics, as well as its immense potential to strengthen intra-regional trade in services in a mutually beneficial way.<sup>103</sup> The provisions on market access amplify TLP’s approval by ensuring that

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97. *Id.* art. 2.

98. *Id.* art. 3.

99. *Id.* art. 21.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* pmb1.

no measures, unless otherwise specified in the “Schedule of Specific Commitments,”<sup>104</sup> shall:

- be maintained or adopted which limit the number of service suppliers through quotas or monopolies;
- put a bar in the form of numerical quotas on the total value of service transactions or assets;
- enforce a quota on the total number of service operations or on the total quantity of service;
- restrict the total number of natural persons that the service supplier may employ; and
- limit the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.<sup>105</sup>

Transparency is paramount in any robust institutional mechanism. The SAARC ensures through SATIS that each contracting state promptly publishes all relevant measures of general application pertaining to the Agreement (unless there is an emergency) at least fourteen days prior to entry into force.<sup>106</sup>

### C. *Challenges in South Asian Regional Integration*

Home to over one and a half billion people and economic growth of 7.1% over the last decade, Asia is increasingly recognized as one of the world’s most dynamic regions.<sup>107</sup> However, maintaining this growth requires a free flow of goods, services, and capital across borders.<sup>108</sup> Although South Asia has great potential for integrating trade, investment, and production space, it remains one of the least integrated areas in the

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104. *See id.* art. 8 (“Each Contracting State shall set out in a schedule the specific commitments it undertakes under Articles 5, 6, and 7. With respect to sectors where such commitments are undertaken, each Schedule shall specify: (a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertakings relating to additional commitments; (d) where appropriate the time-frame for implementation of such commitments; and (e) the date of entry into force of such commitments.”).

105. *Id.* art. 6.

106. *Id.* art. 19.

107. *South Asia Regional Integration*, WORLD BANK, <http://www.worldbank.org/en/programs/south-asia-regional-integration> (last visited Apr. 3, 2017) [hereinafter *Regional Integration*, WORLD BANK].

108. Mustafa Moinuddin, *Economic Integration and Trade Liberalization in South Asia*, ASIA PATHWAYS: BLOG ASIAN DEV. BANK INST. (Aug. 27, 2013), <http://www.asiapathways-adbi.org/2013/08/economic-integration-and-trade-liberalization-in-south-asia/>.

world.<sup>109</sup> Even the economic integration under the auspices of the SAARC was visualized as late as the 1990s. Historically, Asia has substantially relied on access to large markets in Europe and the United States for its commodities and to stimulate growth in production.<sup>110</sup> Even so, the rise of Asia ought to coincide with an endeavor among the Asian countries to cooperate and integrate as a collective market of its own.<sup>111</sup>

The World Bank acknowledges some of the factors limiting intra-regional trade, such as limited transport connectivity, onerous logistics, and regulatory impediments.<sup>112</sup> Incidentally, in 1948, right after the British exit from the Indian Subcontinent, intra-regional trade in the South Asian region (broadly between the current territories of Kabul, Afghanistan, and Chittagong, Bangladesh) was as high as 19%.<sup>113</sup> This double-digit figure declined to a mere 2% by 1967.<sup>114</sup> The factors responsible for this decline include high tariff and non-tariff import barriers and successive governments' adoption of inward-looking and import-substituting policies.<sup>115</sup> In recent years, intra-regional trade has risen but remains far from reaching a double-digit figure. Indeed, historical political tensions, mistrust among South Asian nations, cross-border conflicts, terrorism, and other security conflicts have tempered the attempts to normalize trade relationships in this region.<sup>116</sup> These factors impact trade more within South Asia than trade between South Asia and the other regions across the world.<sup>117</sup> Intra-regional trade within South Asia is minuscule, even in comparison to neighboring South-East Asia.<sup>118</sup> Moreover, South Asian intra-regional investment is less than 1% of overall investment.<sup>119</sup>

Acclaimed author, former United Nations diplomat, and federal Indian minister, Dr. Shashi Tharoor, pointed out that before India set itself on a path of liberalization and sturdy integration into the global

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Regional Integration*, WORLD BANK, *supra* note 107.

113. Rajiv Kumar & Manjeeta Singh, *India's Role in South Asia Trade and Investment Integration 1* (Asian Dev. Bank Working Paper Series on Regional Economic Integration, Paper No. 32, 2009), <https://www.adb.org/sites/default/files/publication/28506/wp32-india-role-south-asia-trade.pdf>.

114. *Id.*

115. *Id.* at 9.

116. *Regional Integration*, WORLD BANK, *supra* note 107.

117. *Id.*

118. *Id.*

119. *Id.*

economic system in the 1990s, under the leadership of former Prime Minister P. V. Narasimha Rao and his then Finance Minister Dr. Manmohan Singh, the country (between the year of independence, 1947, and the late 1980s) reeled under enormous protectionism, industrial inefficiency, and economic stagnation resulting from stern central planning, a state-controlled economy, burgeoning bureaucracy, and the “Licence Raj.”<sup>120</sup> Protectionism, propelled by an ideal of self-sufficiency and nationalism, resulted in distrust of foreign investment and extremely high tariffs, as high as 350% duties for certain imported commodities and, in 1991, a top rate of 300%.<sup>121</sup> The near five decades of economic stifle since India’s independence, however, is the result of historical causes. Bitter experiences of colonial oppression engendered a skepticism toward foreign companies and foreigners drawn to India by investment interests.<sup>122</sup> Tharoor remarked, “Nehru, like many Third World nationalists, saw the imperialism that had subjugated his people as the logical extension of international capitalism, for which he therefore felt a deep mistrust.”<sup>123</sup> Thus, self-sufficiency and non-alignment were the ideals that provided an appropriate platform for nationalistic sentiments. Nehru’s socialism and adherence to principles of self-reliance and distributive justice, to the detriment of economic growth, drove India for the better part of the near half a century following independence to trail “an economic policy of subsidizing unproductivity, regulating stagnation, and distributive poverty.”<sup>124</sup> Unsurprisingly, the annual growth rate of exported manufactured goods was 0.1% until 1985.<sup>125</sup>

Nonetheless, India and South Asia demonstrate impressive growth since the 1990s. The economic growth of constituent countries, particularly India, which accounts for more than three-quarters of the region’s gross domestic product, makes a decisive impact on the region’s overall growth.<sup>126</sup> Other countries, including Bangladesh and Pakistan,

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120. SHASHI THAROOR, *NEHRU: THE INVENTION OF INDIA* 239-45 (2003).

121. *Id.* at 242.

122. *Id.* at 239-40.

123. *Id.* at 240. Jawaharlal Nehru was the central figure in India’s freedom struggle who became the first prime minister of independent India. *Historic Figures: Jawaharlal Nehru (1889-1964)*, BBC, [http://www.bbc.co.uk/history/historic\\_figures/nehru\\_jawaharlal.shtml](http://www.bbc.co.uk/history/historic_figures/nehru_jawaharlal.shtml) (last visited Apr. 3, 2017).

124. THAROOR, *supra* note 120, at 241.

125. *Id.* at 243.

126. Sadiq Ahmed & Ejaz Ghani, *South Asia’s Growth and Regional Integration: An Overview*, in *SOUTH ASIA: GROWTH AND REGIONAL INTEGRATION 3* (Sadiq Ahmed & Ejaz Ghani eds., 2007) (eBook).

have also advanced economically.<sup>127</sup> Scholars observe that first-generation policy reforms, such as greater global integration, economic deregulation, and reducing trade restrictions like import tariffs, triggered this growth in South Asia.<sup>128</sup> Yet, despite making remarkable gains in integrating with the global economy, South Asian intra-regional integration has been limited.<sup>129</sup>

SAARC's regional integration and the prospects of sustainable growth in the region need policy reforms to address the high cost of doing business, weak institutions, weak knowledge economy, and weak infrastructure.<sup>130</sup> These reforms should focus on increasing transparency, developing better governance with stronger checks and balances, expanding market-based allocation of resources, and enhancing public-private partnerships in the provision of infrastructural services.<sup>131</sup> As the biggest economy in the region, India enjoys nearly 80% of South Asia's Gross Domestic Product (GDP).<sup>132</sup> In comparison, the other two sizeable economies in the region, Pakistan and Bangladesh, account for 10% and 7% of the region's GDP, respectively.<sup>133</sup> Quite naturally, some perceive rising trade as a result of the increasing dominance of India and other countries' dependence on it.<sup>134</sup> The sense of distrust among these regional neighbors appears in various instances. For example, Nepal and Bangladesh import certain commodities from suppliers outside SAARC's region despite higher costs, showing reluctance to accept Indian investments.<sup>135</sup> Another example of distrust is Sri Lanka's import of railway coaches from Romania, despite the fact that neighboring India offers better-quality coaches at a much cheaper price.<sup>136</sup>

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127. *Id.*

128. *Id.*

129. *Id.* at 4.

130. *Id.* at 5 (“[H]igh corruption and energy supply have been identified as the two biggest problems faced by the firms in South Asia. . . . The Competitiveness of South Asian is constrained by inadequate education and poor/low level of skill.”).

131. *Id.*

132. THE WORLD BANK, WORLD BANK SOUTH ASIA ECONOMIC UPDATE: MOVING UP, LOOKING EAST 1 (advance ed. 2010), <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1269620455636/69072651275784425763/SAREconomicUpdate7June2010.pdf>.

133. *Id.*

134. Priyanka Kher, *Political Economy of Regional Integration in South Asia* 7 (U.N. Conference Trade and Dev., Background Paper No. RVC 5, 2012), [http://unctad.org/en/PublicationsLibrary/ecide2013misc1\\_bp5.pdf](http://unctad.org/en/PublicationsLibrary/ecide2013misc1_bp5.pdf).

135. *Id.*

136. *Id.*



South Asia is a dynamic region boasting the fastest economic growth in the world.<sup>137</sup> South Asia's growth figure of 6.9% in 2014 was projected to accelerate to 7.1% in 2015.<sup>138</sup> Yet, poverty is widespread; roughly 400 million people in the region, amounting to 40% of the world's poor, live on less than \$1.25 a day.<sup>139</sup> Among other factors, rapid urbanization and uneven development have relegated 200 million people in this region to slums and shanties and have rendered half a billion people without electricity.<sup>140</sup>

Regional integration provides a window to shared prosperity through accelerated economic activities and collective focus on economic growth and poverty alleviation.<sup>141</sup> Regional integration plays a crucial role in the South Asian region as it may help strengthen the region's economic gains against vulnerabilities caused by global economic crises, create more decent jobs by promoting the manufacturing sector, aid individual countries to enhance specific business capacities to gain comparative advantage, boost smaller countries and LDCs responsiveness in the regional market, and contribute long-term peace and stability by ensuring more jobs and sustained growth.<sup>142</sup>

#### IV. A SOUTH ASIAN CASE OF AMBITIOUS PTAS?

##### A. *Discourses on "Regional" Global Governance and Reduction of Trade Barriers*

##### 1. Way Toward Global Trade Governance—the Three Eras of the Global Trade Regime

Trade policy analyst Simon Lester charted the rise of the global trade regime in three eras: first, the domestic trade politics giving way to the tariff truce; second, internationally recognizing the principle of non-discrimination; and third, the era of global governance.<sup>143</sup> Lester dated the successful beginning of the modern trade regime to the Anglo-French

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137. *South Asia*, WORLD BANK, <http://www.worldbank.org/en/about/annual-report/regions/sar> (last visited Apr. 3, 2017).

138. *Id.*

139. *Id.*

140. *Id.*

141. Siromani Dhungana, *One South Asia*, MYREPÚBLICA.COM (June 18, 2016, 8:01 AM), <http://www.myrepublica.com/news/382>.

142. *Id.*

143. See Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 211-40 (2011).

Treaty of Commerce of 1860, which was based on the idea of mutually binding tariff reductions.<sup>144</sup> Lester noted that, not only did the Treaty provide a core framework of commitment to lower tariffs to the ensuing international trade agreement, but also marked a beginning to “pull trade policy away from its almost exclusively domestic character, in which national governments decided on their own how high tariffs should be, towards a more international, and legal orientation.”<sup>145</sup>

The second era started with institutionalization. First, institutionalization began under the League of Nations and then GATT, and exceeded the earlier tariff reduction agreements to encompass rules of non-discrimination against foreign products, transparency of domestic laws, regulations and their proper administration; rules for customs valuation, restrictions on the use of subsidies, restrictions on the use of anti-dumping, and countervailing duties.<sup>146</sup>

The completion of the North American Free Trade Agreement (NAFTA) and the WTO agreement marked the beginning of the third era, when traditional trade obligations expanded by including various new requirements with a more indirect relationship to trade, improving access to foreign markets, streamlining effective dispute resolution, and embracing rules on investment and intellectual property.<sup>147</sup>

Trade commentators argue that, notwithstanding the adeptly inscribed beneficence of the global trade regime in augmenting trade since the end of the World War II, the regime has never completely distanced itself from “the mercantilist past, its mono-linear conception of production and trading patterns, and its state-centric, top-down paradigm of rule-making.”<sup>148</sup> Although the Bretton Woods planners repudiated mercantilist policies on the whole, they also adopted certain rules that preserved the mercantilist system to some extent while transitioning toward free trade.<sup>149</sup> The GATT negotiations witnessed a *quid pro quo* arrangement whereby nations clasped protectionism until they saw approving reciprocity.<sup>150</sup> In other words, mercantilist concerns of negotiating tariff reductions based on favorable reciprocal giveaways

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144. *Id.* at 213.

145. *Id.* at 214.

146. *Id.*

147. *Id.* at 215.

148. Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passé?*, 53 VA. J. INT'L L. 623, 623 (2013).

149. *Id.* at 629.

150. *Id.*

propelled GATT's mission of combatting mercantilism and negotiations to reduce trade barriers.<sup>151</sup>

In today's world, trading countries have progressed beyond trading goods *per se*, and the global trade regime now embraces a variety of elements including global sourcing, cross-border investment, and constantly upgrading technologies.<sup>152</sup> Scholars cite the deep-rooted mercantilist tendency as the prime obstacle in the Doha Round of trade negotiations, observing that the main stakeholders in developed countries increasingly consider the Doha mandate as "mere charity," considering the WTO's emphasis on international trade in promoting economic development and poverty alleviation, and therefore, a priority for enhanced market access, sustainably financed technical assistance, and resultant protections for the developing countries.<sup>153</sup> Employing the mercantilist rationale, developed countries like the United States, square the lowering of their own agricultural protectionism with such special protections to developing countries. This includes India, which, in contrast, seeks protection on the basis of non-mercantilist wants, for example, considerations such as food, livelihood, and security.<sup>154</sup> Today's trade order is drastically different than it was at the time of GATT's establishment, marking a shift from the traditional trade pattern of "nation to nation, raw material to manufacturing bases" to the current "proliferation of global sourcing or global supply chains ('multilocation' production)" with a myriad of trade pursuits.<sup>155</sup> Whereas global business shows changing trade patterns by more decentralization and less territorialism, while remaining integrated in terms of space-of-flows operating in real time, the trade rules have not changed.<sup>156</sup> A growing critique that the world trade rules are failing to keep abreast with the global marketplace is not a secret.<sup>157</sup>

Lester noted that global governance did not begin in the third era of trade regime; the prior two eras also exhibited these characteristics to a limited extent.<sup>158</sup> The third era not only went far beyond tariffs, quotas,

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151. *Id.* at 632.

152. *Id.*

153. *Id.* at 634-36; *see also* World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (Doha Declaration).

154. Cho & Kelly, *supra* note 148, at 635.

155. *Id.* at 636-39.

156. *Id.*

157. *Id.* at 623.

158. Lester, *supra* note 143, at 221.

and rules on non-discrimination, but differed from previous eras mainly in scope and enforcement power.<sup>159</sup>

## 2. Global Trade Governance—Elements and Factors to Consider

Considering the trading system's changed nature, it is imperative to account for the additional changing nature of trade barriers. Although, being the traditional mode of trade barrier, tariffs' general decline pursuant to a series of trade rounds did not stop the emergence of various non-tariff barriers.<sup>160</sup> The rules pertaining to "valuation," "customs clearance," "product standards," and "country of origin" are anachronistic, and therefore, they continually pose hurdles under contemporary trade practices.<sup>161</sup>

A multilayered trade governance model is essential to cater to the changing realities of global trade. Lester laid out the important elements of the third era of global trade governance: non-discrimination; reducing non-discriminatory trade barriers; harmonization of national laws or mutual recognition; good governance; efficient, effective, and reasonable law making; free movement of labor; promotion of competitive markets; free movement of capital through foreign investment; intellectual property protection; labor rights and environmental protection; and multilateralism or anti-unilateralism.<sup>162</sup>

These elements overlap and influence one another. For example, harmonization of laws can prevent regulations from being used as disguised protection, and coupled with good governance,<sup>163</sup> this harmonization can help prevent non-discriminatory trade barriers and limit protectionism.<sup>164</sup> Given that efforts to combat protectionism and discrimination foster economic efficiency, other interventions such as introducing anti-trust/anti-competition norms and free market policies go a long way.<sup>165</sup>

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159. *Id.* at 222.

160. Cho & Kelly, *supra* note 148, at 642.

161. *Id.* at 643.

162. *See* Lester, *supra* note 143, at 222-41.

163. *See* U.N. ECON. & SOC. COMM'N FOR ASIA & THE PACIFIC, WHAT IS GOOD GOVERNANCE? (July 10, 2009), <http://www.unescap.org/sites/default/files/good-governance.pdf> (Good governance itself is a broad framework. The U.N. defines it as "the process of decision-making and the process by which decisions are implemented or not implemented" and suggests eight major characteristics. Good governance is "participatory, consensus oriented, transparent, responsive, effective and efficient, equitable and inclusive, and follows the rule of law.").

164. Lester, *supra* note 143, at 222.

165. *Id.* at 263-66.

International trade law is, by and large, the product of state-centered and top-down treaty making.<sup>166</sup> The treaty making process is a consensus-building exercise that involves an enormous amount of diplomatic and political effort and enthralling credibility for liberalization commitments among sovereign states. In certain areas of law such as financial regulation, exercising “soft” law<sup>167</sup> in addition to “hard” treaty law is both more frequent and better promoted.<sup>168</sup> The “top-down” and “state-centered approach” of the treaty making process is perhaps insufficient in certain areas of international trade law, specifically in areas necessitating intricate and technical rules, for example, the customs guidelines.<sup>169</sup> Laura Lavia Haidempergher cited this issue in the governance model of *Mercado Común del Sur* (MERCOSUR or the Common Market of the South), a model that bases the integration process on a top-down, rather than a bottom-up, scheme and displays a resulting dissociation between the speeds of legal and commercial integration.<sup>170</sup> Cho and Claire opined that, like financial regulators, domestic legislators and trade regulators had apprehensions in committing to complex rules *ex ante* in an uncertain world, and soft law commitments allow regulators and innovators to overcome their initial apprehension to develop rules.<sup>171</sup> They suggested that the global trade regime needs an innovative bottom-up approach, as the top-down model was becoming increasingly ill-suited for many of the regime’s new challenges.<sup>172</sup>

Sonia E. Rolland, a law professor with expertise on the WTO, sheds light on another aspect of trade liberalization, stating that the WTO’s approach to trade liberalization is producer-oriented, as it prioritizes

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166. Cho & Kelly, *supra* note 148, at 639.

167. *Soft Law and Legal Definition*, USLEGAL.COM, <https://definitions.uslegal.com/s/soft-law> (last visited Apr. 3, 2017) (“Soft laws refers to rules that are neither strictly binding in nature nor completely lacking legal significance. In the context of international law, soft law refers to guidelines, policy declarations or codes of conduct which set standards of conduct. However, they are not directly enforceable” unlike binding hard laws such as treaties or international agreements); see generally Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707 (2010); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 187-88 (2010) (highlighting the role of soft law in international law and international governance).

168. Cho & Kelly, *supra* note 148, at 640.

169. *Id.* at 641.

170. Laura Lavia Haidempergher, *An Introduction to Mercosur*, 44 INT’L L. NEWS 31, 34 (2015).

171. Cho & Kelly, *supra* note 148, at 641.

172. *Id.* at 642.

ensuring that goods and services can be offered across borders with minimal discrimination and administrative barriers; however, consumers as a legal category are virtually absent from WTO agreements.<sup>173</sup> Consumers undoubtedly benefit from trade liberalization as they have access to a greater variety of goods and services at a cheaper price, but such benefits do not address the full spectrum of consumer interests.<sup>174</sup> Consumer interests include more than just the quantity, quality, and price of goods, but also include protection from product liabilities, privacy protections, preservation of legal interests (e.g., bans or restrictions on unfair credit or contract terms), and regulations of deceptive and unfair practices in commerce.<sup>175</sup>

The WTO regime, considering its theoretical foundation in “classical liberal economics,” has not done much to respond to these matters.<sup>176</sup> Although the WTO regime has the MFN and NT principles in place to address “unfavorable discrimination” (between comparable products/services from differing nations) and “less favorable treatment” (toward imported goods/services, in contrast to equivalent nationally sourced commodities), it does not limit producers or sellers from discriminating between domestic and foreign consumers to obtain greater earnings.<sup>177</sup> For example, in India, museums levy higher entry fees on most foreign nationals than on domestic visitors.<sup>178</sup> Rolland noted: “although these consumer issues are typically not articulated as trade concerns, they are, in fact, consumer-oriented trade barriers that the producer-oriented regime does not capture.”<sup>179</sup> She further stated that “the state may have other policy reasons for allowing or implementing the differential pricing, which trump trade liberalizing concerns.”<sup>180</sup>

Global trade governance is not a static phenomenon and certainly is not limited to the MFN and NT principles and reducing tariff barriers. As discussed above, addressing contemporary challenges, such as by reducing non-tariff trade barriers, helps stem the mercantilist tendency and furthers the cause of global trade governance. In doing so, multilateralism remains as an important stimulant.

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173. Sonia E. Rolland, *Are Consumer-Oriented Rules the New Frontier of Trade Liberalization?*, 55 HARV. INT'L L.J. 361, 361-62 (2014).

174. *Id.*

175. *Id.* at 363.

176. *Id.*

177. *Id.* at 365.

178. *Id.*

179. *Id.*

180. *Id.*

### 3. Furthering Global Trade Governance Through PTAs

Caroline Freund, a senior fellow at the Peterson Institute for International Economics, and Emanuel Ornelas, a professor and economist, noted, “[T]he formation of regional trade agreements has been, by far, the most popular form of reciprocal trade liberalization in the past 15 years.”<sup>181</sup> The average WTO member now has agreements with more than fifteen countries, and therefore, reflects the trend of growing regionalism.<sup>182</sup> The PTAs are flourishing in the gap left between the global trading system and States’ action. Badar Alam Iqbal analogized FTAs to “flying geese that made cooperative efforts to reach a desirable destination.”<sup>183</sup> With the growing onus on a preferential trading scheme, the regional governance level forms an important link in the chain of global trade governance. This Section attempts to approach the governance patterns through a variety of factors that enable PTAs to play an important role.

First, trade commentators Sungjoon Cho and Claire Kelly note that the Rules of Origin (ROO)<sup>184</sup> are an important element to “preserve the mercantilist bargain of managed trade.”<sup>185</sup> There are two types of rules: first, “non-preferential” rules that apply in the ordinary course where there is no claim of special treatment under a regional trade agreement; and second, “preferential” rules that apply when there is a claim for special treatment under a regional trade agreement.<sup>186</sup> Cho and Kelly observe that non-preferential rules of origin intend to protect bargain trading among GATT members.<sup>187</sup> On the other hand, rules of origin allow States to favor certain countries by according better market access, such as zero tariffs, to their imports.<sup>188</sup> The authors further note that this discriminatory mechanism is crucial to administering an RTA, and

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181. Caroline Freund & Emanuel Ornelas, *Regional Trade Agreements*, 2 ANN. REV. ECON. 139, 139 (2010).

182. *Id.* at 140.

183. Badar Alam Iqbal, *Is SAFTA a Myth or Reality?*, 13 J. WORLD INV. & TRADE 103, 104 (2012).

184. See *Technical Information on Rules of Origin*, WTO, [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm) (last visited Apr. 3, 2017) (“Rules of Origin [ROO] are the criteria needed to determine the national source of a product.” Since duties, other various measures and restrictions depend upon the source of imports, ROO are very important. In absence of any specific provision in GATT, each GATT Contracting Party is “free to determine its own origin rules,” which therefore could lead to its misuse as a trade barrier.).

185. Cho & Kelly, *supra* note 148, at 649.

186. *Id.*

187. *Id.*

188. *Id.*

sustainable only when members can screen out goods from Member States that are eligible for duty-free treatment, in favor of securing goods from non-Member States still subject to tariffs.<sup>189</sup>

ROOs in most preferential arrangements have been termed as manipulative and messy because they have “deprived many developing countries of their comparative advantage stemming from their natural endowments (such as good quality raw materials) and cheap labor.”<sup>190</sup> The present complicated and unintelligible regime of ROO is an anomaly due to its multi-locational manufacturing based on global supply chains. For instance, as per the “yarn-forward” rule, Mexican producers did not qualify for duty-free access to the U.S. market under NAFTA because they procured Indian yarns in their manufacturing rather than using yarns sourced from NAFTA countries.<sup>191</sup> Such a rule hampers the spirit of free trade as it strips Mexican textile producers, Indian yarn producers, and U.S. textile consumers of considerable economic welfare.<sup>192</sup>

Critics characterize ROO systems as outdated largely because they “stem from a fundamental conception of trade that simply no longer holds true, i.e., the single-country production model.”<sup>193</sup> Incidentally, because every country is entitled to MFN status, the non-preferential rules no longer serve that purpose in any meaningful way.<sup>194</sup> Therefore, the negotiators and policy-makers must revisit this ROO framework as much in the PTAs, to simplify it and ensure its consistency with contemporary multi-locational trading system. Even the countries negotiating the Trans-Pacific Partnership (TPP) Agreement by and large support more liberal ROOs, oppose product or country-specific ROOs, and are pushing for region-wide rules instead.<sup>195</sup>

Former WTO Director General Pascal Lamy, in his 2010 speech before the French Senate, stated:

[T]he concept of country of origin for manufactured goods has gradually become obsolete as the various operations, from the design of the product to the manufacture of the components, assembly and marketing have

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189. *Id.*

190. *Id.* at 651.

191. *Id.*

192. *Id.*

193. *Id.* at 654.

194. *Id.* at 653-54.

195. Claude Barfield, *The TPP: A Model for 21st Century Trade Agreements?*, EAST ASIA F. (July 25, 2011), <http://www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements/> (Barfield mentioned that the “U.S. has always pressed for protectionist [ROOs] for its sensitive products. As a result, “U.S. negotiators have been pushing for narrow, product-specific ROOs with high threshold levels for determining eligibility.”).



spread across the world, creating international production chains. Nowadays, more and more products are “Made in the World” rather than “Made in the UK” or “Made in France.” . . .

What we call “Made in China” is indeed assembled in China, but what makes up the commercial value of the product comes from the numerous countries that preceded its assembly in China in the global value chain, from its design to the manufacture of the different components and the organization of the logistical support to the chain as a whole. In other words, the production of goods and services can no longer be considered “mono-located,” but rather, “multi-located.” . . .

[T]ime has come to explore new channels so that accounting and statistical systems can take account of the new geography of international trade in an economy which, in the words of the American Tom Friedman, has flattened under the influence of globalization and internationalization of production relations. In today’s world, the old mercantilist notion of “us” against “them,” of “resident” against “rest of world,” has lost much of its meaning.<sup>196</sup>

Pascal Lamy proposed a way forward in ROOs with his idea of “Made in the World” as a method of evaluating trade based on its value, rather than by its country of origin. The WTO has since begun to push the concept by launching a website and forum and facilitating a dialogue based on the idea of “Made in the World.”<sup>197</sup>

Second, the global and regional trade regime needs the bottom-up approach running alongside the top-down model. Although agreements regulate trade, the market drives trade. Scholars propose an agenda to modernize global trading rules with the help of “trade networks” as a bottom-up approach.<sup>198</sup> A trade network may allude to an amalgam of “public and private networks composed of customs officials on the one hand, and private lawyers, academics, and transnational businesses on the other.”<sup>199</sup> Such diversity in stakeholders includes both public (regulators) and private (regulatees) players’ voices in trade matters, sharing their knowledge and concerns on particular technical issues and potentially

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196. Pascal Lamy, Director-General, WTO, Speech to French Senate: Globalization of the Industrial Production Chains and Measuring International Trade in Value Added (Oct. 15, 2010), [https://www.wto.org/english/news\\_e/spl\\_e/spl174\\_e.htm](https://www.wto.org/english/news_e/spl_e/spl174_e.htm); WTO, MADE IN THE WORLD INITIATIVE (MIWI): A PARADIGM SHIFT TO ANALYZING TRADE, [https://www.wto.org/english/res\\_e/status\\_e/miwi\\_e/flyer\\_miwi\\_e.pdf](https://www.wto.org/english/res_e/status_e/miwi_e/flyer_miwi_e.pdf) (last visited Apr. 3, 2017).

197. “*Global Value Chains*,” WTO, [https://www.wto.org/english/res\\_e/status\\_e/miwi\\_e/miwi\\_e.htm](https://www.wto.org/english/res_e/status_e/miwi_e/miwi_e.htm) (last visited Apr. 3, 2017).

198. Cho & Kelly, *supra* note 148, at 655.

199. *Id.* at 656.

generating certain soft law in the form of guidelines and recommendations.<sup>200</sup>

Third, consumer interests require due consideration in the multilateral trading regime as, after all, they are the ultimate beneficiaries of the whole trade arrangement. Sonia Rolland cites the instance of the European Union's (EU) trade liberalization and integration model operating since the 1970s and observes that the EU had alternative approaches to allocating the burdens and benefits of trade liberalization between producers, consumers, and workers.<sup>201</sup> Within the EU, free movement of persons has been a key component of liberalization and a means of efficiently allocating labor and capital.<sup>202</sup> For example, EU universities cannot charge higher tuition to nationals of other EU countries than they charge their domestic students, and museums cannot charge higher entrance fees to other EU visitors than they charge locals.<sup>203</sup> Another instance relating consumer interests and trade liberalization is the EU directive on distributorship, which allows distributors a geographic allocation of markets, given that distributors allow consumers to potentially buy cheaper goods in other EU markets.<sup>204</sup> EU trade integration is an illustration of both consumer and producer interests furthering the cause for trade liberalization. To implement such rules, multilateral international cooperation is imperative.

Fourth, free movement of capital is an important element of encouraging deeper trade integration, as well as an important dimension of world trade law, that the WTO fails to emphasize.<sup>205</sup> Two methods of trading commodities overseas are suggested: first, "produc[ing] them in your home country and then ship them overseas"; and second, "set[ting] up operations abroad to make the products there."<sup>206</sup> Bilateral Investment Treaties (BITs) are the primary tool for protecting foreign investment. Securing capital and investment is becoming pivotal for international trade, and there have been attempts to incorporate relevant rules into trade agreements.<sup>207</sup> For example, Chapter 11 of NAFTA on investment lays the framework for non-discriminatory treatment, fair and equitable

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200. *Id.*

201. Rolland, *supra* note 173, at 363.

202. *Id.*

203. *See id.* at 363; Case C-45/93, *Comm'n v. Spain*, 1994 E.C.R. I-911, I-921-22.

204. Commission Regulation 330/2010, art. 2, 2010 O.J. (L 120) 14.

205. Bryan Schwartz, *Reinvigorating the World Trade System*, 13 *ASPER REV. INT'L BUS. & TRADE L.* 1, 16 (2013).

206. Lester, *supra* note 143, at 233.

207. *Id.*

treatment, and compensation for expropriation.<sup>208</sup> NAFTA sets the benchmark for preferential trading regimes around the world to encompass investment protection alongside trade agreements.

Fifth, although labor rights and environmental protection are thorny reform areas, they remain important pillars of the third era of global governance. Traditionally, these two have been antagonistic to trade. For example, laws promulgated to protect the environment or labor rights may be considered violations of trade rules. The quest to increase trade prompts arguments concerning a race to the bottom, causing countries to disregard the environment and offer minimal labor protection.<sup>209</sup> Nonetheless, NAFTA was the first PTA to address these concerns and more recent ones such as the Dominican Republic-Central America FTA (CAFTA-DR), which lays guidelines to:

- not fail to effectively enforce its own labor laws in a manner affecting trade;
- strive to ensure that both International Labor Organization (ILO) core labor principles and internationally recognized worker rights are recognized and protected by domestic law;
- strive to not waive or derogate from its own labor laws to encourage trade or investment; ensure fair, equitable and transparent enforcement of its labor laws;
- establish a Labor Affairs Council; and
- establish mechanisms for cooperative activities and labor-related trade capacity building with the other countries.<sup>210</sup>

The CAFTA-DR Agreement lays some guidelines with respect to the environment, but they are not as strong as those for labor protection.<sup>211</sup> Yet, the agreement provides for voluntary mechanisms to enhance environmental performance and establishes the Environmental Affairs Council, opportunities for public participation, and collaborative environmental consultations.<sup>212</sup>

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208. North American Free Trade Agreement art. 1110, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

209. Lester, *supra* note 143, at 237.

210. *Id.*; Central America-Dom. Rep.-U.S. Free Trade Agreement, art. 16.2, Aug. 5, 2004, [https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file320\\_3936.pdf](https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf) [hereinafter CAFTA-DR].

211. *Id.* art. 17.1.

212. *Id.*

Brazilian international law expert Professor Alberto do Amaral Júnior noted that the multi-level global trade governance displays a gradual increase in complexity as it evolves.<sup>213</sup> He noted three outright layers of global trade governance. First, despite the WTO's status as the major guardian of economic liberalization rules, its strength has been progressively undermined since the 1990s and its legacy rendered obsolete as a result of the gulf formed between the plethora of regulatory demands from developed and developing countries and the WTO's capacity to respond.<sup>214</sup> Second, he notes the so-called "mega-agreements," which gathered developed and developing countries and concentrated the most relevant share of the world economy.<sup>215</sup> He describes the third layer as the multitude of preferential trade agreements of a lesser scale, which have varying sizes and degrees of normative depth.<sup>216</sup> He notes that, while the WTO became the venue of low-intensity regulation, PTAs and mega-agreements enacted high-intensity regulation.<sup>217</sup> Nevertheless, centralization and de-centralization coexist and complement one another.<sup>218</sup>

Deeper integration is easier at the regional level than at the multilateral level, as regional negotiations tend to be faster than multilateral. Notably, WTO Member States "seem incapable of marshalling the policies and political will needed to move the multilateral trade agenda forward."<sup>219</sup> A leading expert on WTO and trade matters, Margaret Liang, opines that, considering the role of PTAs in trade liberalization since the Uruguay Round, WTO states have yet to readily accept that trade liberalization is increasingly performed through the "plurilateral" approach of PTAs, and not multilaterally at the WTO.<sup>220</sup>

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213. See Alberto do Amaral Júnior, *Is Trade Governance Changing?*, 12 BRAZ. J. INT'L L. 371, 371-73 (2015).

214. *Id.* at 379.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Leal-Arcas, *supra* note 34, at 621-22.

220. See Margaret Liang, *The International Trading System Post-Bali: The Need for a New Paradigm*, 9 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 351, 359-64 (2014); Matthias Helble & Ganeshan Wignaraja, *Plurilateral Trade Agreements: An Overlooked but Powerful Force for International Trade Opening for Asia?*, ASIAN DEV. BANK INST.: ASIA PATHWAYS BLOG (Feb. 10, 2015), <https://www.asiapathways-adbi.org/2015/02/plurilateral-trade-agreements-an-overlooked-but-powerful-force-for-international-trade-opening-for-asia/>. "Plurilateral" agreements are slightly different from multilateral agreements. Plurilateral agreements are narrower than multilateral ones whereby a subset of few WTO member countries [three or more] have the flexibility to get together for rulemaking for specific issues/areas under the auspices of the WTO

She suggests a possible solution to “multi-lateralize” regionalism in order to provide greater coherence between PTAs and the WTO.<sup>221</sup> According to Liang, another approach is to “identify new trading rules (e.g., investment and competition policy) and technical standards commonly found among PTAs and co-opt them into the WTO system.”<sup>222</sup> The preferential trading arrangements have furthered the multilateral liberalization process, but there are many non-tariff trade barriers<sup>223</sup> that require a full implementation of multi-level global trade governance, a simplified and efficient “third” era of trade governance.

*B. SAARC’s Milestones and Challenges in Expanding Trade Through PTA and Liberalization*

Thanks to TLP, exports under SAFTA are increasing.<sup>224</sup> By September 20, 2013, the overall FOB, or free-on-board, value of exports by contracting states reached US\$3 billion since July 2006, at TLP’s launch.<sup>225</sup> Yet some consider that SAFTA has had remarkable, but only partial, achievements.<sup>226</sup>

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without requiring the larger consensus-building of all WTO members. See Michitaka Nakatomi, *Plurilateral Agreements: A Viable Alternative to the World Trade Organization?* 8 (Asian Dev. Bank Inst., Working Paper No. 439, 2013), <https://www.adb.org/sites/default/files/publication/156294/adbi-wp439.pdf>. They can be “issue-based” [i.e., Government Procurement, Information Technology Agreement, Financial Service Agreement, and Basic Telecommunications Agreement] or “country-based” [i.e., RTAs and FTAs whereby contracting countries agree to liberalize trade in all or sectoral areas]. *Id.* Although plurilateral liberalization may not be the foremost liberalization, it is deemed as a well-received trend to expand international trading, if it adheres to the MFN principle. *Id.* at 7. See also Meredith K. Lewis, *Plurilateral Trade Negotiations: Supplanting or Supplementing the Multilateral Trading System?*, INSIGHTS (July 12, 2013), <https://www.asil.org/insights/volume/17/issue/17/plurilateral-trade-negotiations-supplanting-or-supplementing> (explaining implications arising from proliferation of plurilateral agreements, such as further fragmentation of the global trade regime and potential inconsistency in regional dispute settlement jurisprudence).

221. Liang, *supra* note 220, at 356.

222. *Id.*

223. See Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER J. INT’L ECON. L. 2, 3 (2014). Much like the smaller preferential trade agreements, even mega agreements such as the much anticipated TPP’s negotiating objectives *inter alia* “focus on the elimination or reduction of tariff and non-tariff barriers (NTBs) for all goods (agricultural and industrial) in the Harmonized Tariff Schedule (HTS), and on liberalizing foreign direct investment (FDI).” *Id.* It, therefore, covers the “conventional issues of tariffs and NTBs, customs, and the rules of origin (ROOs).” It has a “single tariff schedule and common rules of origin” and “promotes regulatory coherence in respect of standards.” *Id.* at 5.

224. *South Asian Free Trade Area (SAFTA)*, SAARC, [http://saarc-sec.org/areaof-cooperation/detail.php?activity\\_id=5](http://saarc-sec.org/areaof-cooperation/detail.php?activity_id=5) (last visited Apr. 3, 2017).

225. *Id.*

226. KUMAR, *supra* note 47, at 89-90.

The Asian Development Bank data shows that the figure of South-Asian intra-region trade has risen from 2% from 1967, but it remains below 6%. South Asia's intra-region trade vis-à-vis its global trade rose from 4.55% in 2010 to 5.58% in 2015.<sup>227</sup> In contrast, the Association of Southeast Asian Nations (ASEAN) boasts an impressive intra-regional trade figure of approximately 24% (between 24.64% in 2010 to 23.56% in 2015) of its total trade with the rest of the world.<sup>228</sup>

Comparing the trade volume of regional trading blocs in other parts of the world such as NAFTA (total trade rising from US\$1348.9 billion in 2000 to US\$2399.9 billion in 2014), MERCOSUR (total trade rising from US\$42.3 billion in 2000 to US\$108.0 billion in 2014), the EU (total trade rising from US\$3347.6 billion in 2000 to US\$7800.2 billion in 2014), and ASEAN (total trade rising from US\$185.2 billion in 2000 to US\$608.4 billion in 2014), displays that South Asia (total trade rising from US\$6.3 billion in 2000 to US\$51.3 billion in 2014) remains an underperformer.<sup>229</sup> Despite the comparatively low trade volume within South Asia, trade volume within the region actually increased by eight fold between 2000 and 2014. Nonetheless, coupled with the unilateral trade policy liberalization in the individual countries, regional collaboration has redirected trade discourses on a more hopeful path since the 1990s.<sup>230</sup>

Raj Bhala summarizes four important variables to determine an FTA's ambition.<sup>231</sup> First, the greater the number of parties, the more ambitious the FTA may become.<sup>232</sup> Second, comprehensiveness revolves around the number of tariff lines the FTA covers and, at the same time, how many sensitive product categories it exempts.<sup>233</sup> Regarding services, this assessment refers to the number of covered sectors and sub-sectors, the modes of service supply, and the number of commitments made.<sup>234</sup> The FTA is more ambitious if the number of commitments is high, the

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227. Data generated from *Integration Indicators*, ASIA REGIONAL INTEGRATION CTR. [ARIC], ASIAN DEV. BANK, <https://aric.adb.org> (last visited Apr. 3, 2017) [hereinafter *Indicators*, ARIC].

228. *Id.*

229. Data generated from *Statistics Database*, WTO, <http://stat.wto.org/Home/WSDBHome.aspx?Language=> (last visited Apr. 3, 2017) [hereinafter *Statistics*, WTO]; *Indicators*, ARIC, *supra* note 227.

230. Kumar & Singh, *supra* note 113, at 9.

231. RAJ BHALA, INTERNATIONAL TRADE LAW: IN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK 973-77 (vol. II, 4th ed. 2015).

232. *Id.* at 975.

233. *Id.*

234. *Id.*

number of modes covered by those commitments is greater, and if it uses a “Negative List.”<sup>235</sup> Third, the timing is crucial, in terms of the duration that the FTA takes to bring down tariff and non-tariff barriers.<sup>236</sup> The sooner these barriers are eliminated, the better it is.<sup>237</sup> Fourth, the FTA ought to be composed of novel mechanisms, to cover not only the tariff barriers, but also the behind the border, non-obvious, and inconspicuous measures, such as Sanitary and Phyto-sanitary (SPS) and Technical Barriers to Trade (TBT).<sup>238</sup>

For an agenda to be executed efficiently, a streamlined schedule or timetable is important. This timing component, although crucial for an ambitious FTA, has been overlooked. Like SAFTA, the implementation of SATIS has been slow. Member States notified their ratification two and a half years (November 2012) after the agreement came into effect.<sup>239</sup> This instance is cited as a typical characteristic of the slow movement of South Asia’s economic integration agenda.<sup>240</sup> Under SAARC, the first round of concessions occurred when SAPTA became operational in 1995.<sup>241</sup> Between 1995 and 1999, two more rounds of tariff reductions were completed. Nevertheless, these three rounds of tariff concessions barely influenced trade integration within South Asia.<sup>242</sup>

SAFTA had many inherent flaws. Many important trade sectors were ignored due to slow, tedious, commodity-by-commodity negotiations and an avoidance of even an agenda of removal of non-tariff barriers.<sup>243</sup> There were occasions of unthoughtful tariff concessions. For instance, Sri Lanka was accorded ample concessions to export snow ploughs, although, unluckily, the production of snow ploughs did not occur in the country.<sup>244</sup> Out of this situation, a new term, “snow plough

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235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *SAARC Agreement on Trade in Services: Tardy Progress*, DAILYMIRROR.COM (Nov. 24, 2011), <http://www.dailymirror.lk/57189/saarc-agreement-on-trade-in-services-tardy-progress>.

240. *Id.*

241. Prema-chandra Athukorala, *Intra-Regional FDI and Economic Integration in South Asia: Trends, Patterns and Prospects* 8-9 (U.N. Conference Trade and Dev., Background Paper No. RVC 7, 2013), [http://unctad.org/en/PublicationsLibrary/ecide2013misc1\\_bp7.pdf](http://unctad.org/en/PublicationsLibrary/ecide2013misc1_bp7.pdf).

242. *Id.*

243. *Id.*

244. Nihal Rodrigo, *SAARC as an Institutional Framework for Cooperation in South Asia*, in *SOUTH ASIA IN THE WORLD: PROBLEM SOLVING PERSPECTIVES ON SECURITY, SUSTAINABLE DEVELOPMENT, AND GOOD GOVERNANCE* 281 (Ramesh Thakur & Oddny Wiggen eds., 2004).

syndrome,” was coined.<sup>245</sup> Indeed, SAPTA’s tardy progress prompted many Member States to engage a “fast-track” trade liberalization by way of bilateral trade agreements, such as “India-Bhutan FTA,” “India-Sri Lanka FTA,” and “Pakistan-Sri Lanka FTA.”<sup>246</sup>

Article 7 of SAFTA lays a two stage tariff reduction program to achieve a tariff regime of below 5% for India, Pakistan, and Sri Lanka by 2015, and for the remaining Member States by 2018.<sup>247</sup> Effectuating these stipulated tariff reduction programs has hitherto made inadequate progress.<sup>248</sup> Also, there have been reservations that free trade may not be attained even when the proposed tariff reduction program is fully implemented. This incredulity that belongs to all the Contracting States retaining a long list of sensitive products in efforts to shield their specific economic sectors from SAFTA’s duty exemption.<sup>249</sup> As of 2013, approximately 53% of intra-SAARC imports are restricted under the Sensitive List.<sup>250</sup> Moreover, some countries imposed various para-tariffs, which virtually counter-balance the Contracting States’ limited tariff concessions offered to SAFTA.<sup>251</sup>

The protection afforded to every Member State’s sensitive commodities through sustaining the “Sensitive/Negative” lists is another proviso of SAFTA’s TLP influence on trade.<sup>252</sup> In addition to the top-down mechanism of tariff reduction with different scheduled concessions for developing and least-developing states, the Sensitive Lists cover roughly 20% of the tariff lines.<sup>253</sup> This percentage implies that the Sensitive Lists blanket a substantial trade proportion not bound by tariff reductions.<sup>254</sup> If the number of items on the Sensitive Lists is not downsized, SAFTA’s trade agenda may not yield optimal effectiveness.<sup>255</sup>

Another concern for SAARC’s LDC Members regards SAFTA not fetching them a good bargain with respect to an FTA. Nepal and India, as neighbors, share trading relations that precede SAARC. They also

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245. *Id.*

246. Athukorala, *supra* note 241, at 10.

247. SAFTA, *supra* note 4, art. 7.

248. Athukorala, *supra* note 241, at 9.

249. *Id.*

250. *Id.*

251. *Id.*

252. Shahid Kardar, *South Asia—Intraregional Cooperation: The Way Forward* 7 (Aug. 2011) (study), <https://www.adb.org/sites/default/files/linked-documents/rcs-south-asia-2011-2015-oth-02.pdf>.

253. *Id.* at 8.

254. *Id.*

255. *Id.*



have bilateral agreements. Nepalese scholars observe that Nepal has benefitted regardless from “basic customs duty-free market access to the Indian market in almost all products, subject to ROO.”<sup>256</sup> SAFTA, having the same ROO as Nepal-India Trade Treaty, is therefore just as burdensome and does not offer Nepal additional market access in the Indian market, the biggest in the region.<sup>257</sup> In contrast, as a result of an FTA with India, Bhutan (another LDC in the region) enjoys duty-free access without quantitative restrictions or ROO in the Indian market.<sup>258</sup> Therefore, the SAARC has yet to address the anomalies between bilateral and multilateral trade in the region, which may restrict the yields of its FTAs.

Although promotion of investment is a central component in many regional trade agreements, SAFTA fails to deal with the liberalization of investment, except by enumerating it as an “Additional Measure” under Article 8.<sup>259</sup> Nonetheless, the SAARC set up a Group of Eminent Persons (GEP) in 1997 that recommended the creation of a Common Investment Area.<sup>260</sup> Many proposals to streamline intra-regional investment emerged and India even drafted an investment agreement; however, as of 2013, no progress was registered.<sup>261</sup>

SAFTA's features on TLP, technical assistance for LDCs, and non-tariff barriers are encouraging. SAFTA has been ambitious in honoring the schedule of tariff reduction, which included tariff reduction by developing States to 20% and tariff reduction by LDCs to 30% by 2008.<sup>262</sup> Empirical studies conducted on the net impact of SAFTA show its benefit.<sup>263</sup> Although LDCs' gains were modest in the first phase of liberalization, it is suggested that the benefits would be more significant in the second phase, with the proviso that there is total liberalization.<sup>264</sup>

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256. Ratnakar Adhikari & Paras Kharel, *Nepal and SAFTA: Issue, Prospects and Challenges*, in REGIONAL INTEGRATION IN SOUTH ASIA: TRENDS, CHALLENGES AND PROSPECTS 8 (Mohammad A. Razzaque & Yarendra Basnet eds., 2014); see also Twelfth Meeting of the Committee of Experts on South Asian Free Trade (SAFTA), *SAFTA Rules of Origin*, SAFTA, annex IV (Dec. 1, 2005), [http://saarc-sec.org/uploads/document/Annex-IV%20of%20SAFTA%20Agreement%20-%20SAFTA%20Rules%20of%20Origin\\_20100413015905.pdf](http://saarc-sec.org/uploads/document/Annex-IV%20of%20SAFTA%20Agreement%20-%20SAFTA%20Rules%20of%20Origin_20100413015905.pdf).

257. Adhikari & Kharel, *supra* note 256, at 8.

258. *Id.*

259. Athukorala, *supra* note 241, at 10.

260. *Id.* at 10.

261. *Id.*

262. SAFTA, *supra* note 4, art. 7.

263. ASIAN DEV. BANK & U.N. CONFERENCE ON TRADE AND DEV., QUANTIFICATION OF BENEFITS FROM ECONOMIC COOPERATION IN SOUTH ASIA 53 (2008) (ebook), <http://www.gsid.nagoya-u.ac.jp/sotsubo/SouthAsian-Quantification-Benefits.pdf>.

264. *Id.*

*C. Future Path of SAARC's Trade Liberalization with Respect to Global Trends*

Regional trade agreements are an important part of today's international trade regime as they are the actors that handle more than 50% of actual international trade.<sup>265</sup> Thus, trade is a critical element in regional integration. However, it is interrelated with many other dimensions that also warrant due attention. The SAARC's progress in terms of liberalization and the elimination of barriers exhibits that greater milestones need to be realized to prove SAFTA and SATIS as ambitious free trade endeavors. The Lead Economist in the World Bank's South Asia Regional Cooperation and Integration Unit, Sanjay Kathuria, surmises that "regional integration is a long and incremental process" and regional agreements "suffer from a gap between intentions and implementation."<sup>266</sup> In addition to timely implementation of the tariff reduction schedule (although the allocated time frame is long, and its concessions may be outsmarted earlier by way of South Asian bilateral agreements), or elimination, there are several additional ways to address these gaps with respect to the SAARC.

First, a credible institutional mechanism, preferably at SAARC secretariat, is necessary to oversee conformity and corollaries.<sup>267</sup> In addition to significant perseverance, institutional development, strengthened monitoring, and stronger political resoluteness are desirable to improve regional outcomes by increased trade volumes.<sup>268</sup> Second, the role of trade facilitation is vital to broadening and deepening South Asian economic integration. The stagnation of intra-regional trade in South Asia suggests that trade impulses from mutual tariff reduction may have exhausted.<sup>269</sup> In other words, tariff reduction or elimination may not completely liberalize regional trade. Further, unilateral liberalization performed by several South Asian countries seems to have implicitly undermined SAFTA's trade liberalization benefits.<sup>270</sup> Therefore, there is a

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265. Sanjay Kathuria, *5 Lessons on Regional Integration*, WORLD ECON. F. (July 23, 2015), <https://www.wforum.org/agenda/2015/07/5-lessons-on-regional-integration/>.

266. *Id.*

267. *Id.*

268. *Id.*

269. Kumar & Singh, *supra* note 113, at 9.

270. *Id.* at 10.

need to identify and address the non-tariff barriers to improve the trade facilitation process.<sup>271</sup>

Experts in international economics, John Gilbert and Nilanjan Banik, note that shortfall in trade facilitation and deficiencies in physical infrastructure accessibility increase trade costs.<sup>272</sup> High logistical costs, slow application of SPS measures and technical standards, inadequate infrastructure, requirements of endless documentation, cumbersome transit process, and bribes are all impediments to cross-border trade.<sup>273</sup> Each of these hindrances prevails at varying degrees across South Asia. The Federation of Indian Chambers of Commerce and Industry (FICCI) also gives valuable suggestions such as: easing visa regulations; linkage of physical infrastructure (roads, railways, shipping, and air links); harmonization of customs, banking, insurance, quality standards, and arbitration procedures for easy conduct of trade throughout the region; and proposal of a SAARC Agreement on Investment Promotion and Protection.<sup>274</sup> The decision to establish the SAARC Standards Coordination Board is positive. The Board is stipulated to function as a precursor to the SAARC Regional Standards Body (to achieve uniform quality standardization within South Asia).<sup>275</sup>

Third, downsizing the size of Sensitive Lists is necessary to increase the volume of regional trade efforts. Some steps have been taken in this direction. The Working Group on Reduction in the Sensitive Lists attempted to narrow down SAFTA's Sensitive Lists by 20%.<sup>276</sup> The Maldives made a reduction of 78% (bringing tariff lines down from 681 to 152), and India reduced its Sensitive List for LDC States by 95% (by reducing tariff lines from 480 to 25).<sup>277</sup> The implementation of Phase-II Revision began in 2012 with a stipulated time frame to implement the phase out for the tariff lines.<sup>278</sup> The non-LDC countries have a time frame

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271. ASIAN DEV. BANK, DEVELOPMENT PARTNERSHIP PROGRAM FOR SOUTH ASIA: STUDY ON INTRAREGIONAL TRADE AND INVESTMENT IN SOUTH ASIA *passim* (2009) (ebook), <https://www.adb.org/sites/default/files/publication/28658/intraregional-trade-investment.pdf>.

272. Nilanjan Banik & John Gilbert, *Regional Integration and Trade Costs in South Asia* 8-9 (Asian Dev. Bank Institute, Working Paper No. 127, 2008), <https://www.adb.org/sites/default/files/publication/155982/adbi-wp127.pdf>.

273. *Id.*; see also Adhikari & Kharel, *supra* note 256, at 8 (for the Nepalese perspective on trade constraints in South Asia).

274. KUMAR, *supra* note 47, at 87-88; *FICCI Sets Agenda for SAARC*, HINDU BUS. LINE (Jan. 3, 2002), <http://www.thehindubusinessline.com/2002/01/04/stories/2002010400940200.htm>.

275. Kumar & Singh, *supra* note 113, at 23.

276. *Revised Sensitive Lists Under SAFTA (Phase II)*, SAARC, [http://www.saarc-sec.org/areaofcooperation/detail.php?activity\\_id=35](http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=35) (last visited Apr. 3, 2017).

277. *Id.*

278. *Id.*

of three years (except Sri Lanka, which has a six-year time frame), and the LDC countries have eight years to do the same.<sup>279</sup> Also in 2012, negotiations began for further reduction of the Sensitive Lists.<sup>280</sup> Reducing tariff lines is a very promising step, provided the reductions are realized in the stipulated timeframe.

A fourth component is to expand focus from trade in goods to trade in other significant areas. One of the fundamental hindrances restricting the intra-Asian RTAs' efficacy is that such integration selectively centers on liberalization concerning market access for goods and ignores or undermines other trade sectors, namely non-tariff barriers, services, investment, intellectual property, government procurement, and competition policy.<sup>281</sup> All these areas are growing increasingly important and cannot be ignored for long. Cross-border investments have surfaced as a major feature of globalization and catalyst for trade in both goods and services.<sup>282</sup> Foreign Direct Investment (FDI) has been a pivotal vehicle of external financing and development for developing countries.<sup>283</sup> With the right policies, FDI may leave long lasting benefits on a country's manufacturing potential and infrastructure, create new jobs, and provide additional tax revenue.<sup>284</sup> Therefore, it is time for the SAARC to incorporate a South Asian investment regime that not only focuses on intra-regional investment and capital flows but also includes other factors that influence investment. Such strategies include developing strong, regional financial and banking institutions, determining and mitigating barriers to capital movement, encouraging macroeconomic stability, as well as establishing general or investor-state

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279. *Id.*

280. *Id.*

281. Bryan Mercurio, *Trade Liberalisation in Asia: Why Intra-Asian Free Trade Agreements Are Not Utilised by the Business Community*, 6 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 109, 111-12 (2011).

282. Robert Kimmitt et al., *Money and Borders: Cross-border Investments in a Changing Global Marketplace*, DELOITTE U. PRESS (Jan. 1, 2010), <https://dupress.deloitte.com/dup-us-en/deloitte-review/issue-6/money-and-borders-cross-border-investments-in-a-changing-global-market-place.html>.

283. ORG. FOR ECON. COOPERATION & DEV. [OECD], FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS *passim* (2002), <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf> [hereinafter OECD, FDI]; Tim Büthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreement?*, 52 AM. J. POL. SCI. 741, 741-47 (2008) (PTAs "provide mechanisms for making commitments to foreign investors about the treatment of their assets, thus reassuring investors and increasing investment." In other words, by entering into PTAs, participant countries may attract foreign direct investment from third party countries.).

284. OECD, FDI, *supra* note 283, at 17, 25, 32.

dispute settlement, minimum standards of protection, and rules for compensation and expropriation.

Fifth, there is a need to concentrate on trade creation and avoid diluting the fruits of trade liberalization by indulging in trade diversion. B. A. Iqbal noted that, apart from increasing overall quality of goods to global standards, development of infrastructure is required on a priority basis to link countries and facilitate the easy flow of goods, making South Asia as transit point between the East and the West.<sup>285</sup>

Sixth, whether in Latin America or South Asia, non-tariff trade barriers have evolved into an area of serious concern.<sup>286</sup> Eventually, they will pose obstacles to the overall framework of regional and global trade governance. Efficient reduction and elimination of non-trade tariff barriers will translate into stronger regional global trade governance through PTAs.

Seventh, the SAARC must make timely and consistent progress to meet the milestones of an FTA, a Customs Union, a Common Market, and a Common Economic and Monetary Union to envisage the South Asian Economic Union (SAEU). Trade liberalization is sought as a stepping stone for greater cooperation and a step toward setting up a SAEU along the lines of the EU.<sup>287</sup>

Lastly, the process requires patience, yet countries must also be ambitious. Given the challenges and circumstances of South Asia, SAARC's performance as a trading bloc is not quite so disheartening. Steady implementation of the timeframe is indispensable to attaining the milestones mandated by the SAARC agenda. Lack of ambition is characterized as one of the foremost impediments to intra-Asian RTAs, that have the result that "liberalization commitments are often not deep enough to be meaningful or are otherwise stymied by the presence of significant exclusions and non-tariff barriers which reduce the impact of

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285. Iqbal, *supra* note 183, at 119.

286. *Id.* at 120; Haidempergher, *supra* note 170, at 34.

287. See generally SAARC, CUSTOMS ACTION PLAN ON CO-OPERATION, UNIFORMITY AND HARMONY FOR CUSTOMS ADMINISTRATIONS OF SAARC MEMBER COUNTRIES (1997), [http://saarc-sec.org/uploads/document/Customs%20Action%20Plan\\_20110821034407.pdf](http://saarc-sec.org/uploads/document/Customs%20Action%20Plan_20110821034407.pdf) (SAARC's *Custom Action Plan* was adopted as early as 1997); SAARC, SAARC AGREEMENT ON MUTUAL ADMINISTRATIVE ASSISTANCE IN CUSTOMS MATTERS (2005), [http://saarc-sec.org/uploads/document/Agreement%20on%20Customs%20Matters\\_20110821034137.pdf](http://saarc-sec.org/uploads/document/Agreement%20on%20Customs%20Matters_20110821034137.pdf) (Later in 2005, SAARC finalized the *Agreement on Mutual Administrative Assistance in Customs Matters*); *Customs Cooperation*, SAARC, [http://saarc-sec.org/areaofcooperation/detail.php?activity\\_id=42](http://saarc-sec.org/areaofcooperation/detail.php?activity_id=42) (last visited Apr. 3, 2017) (The Cooperation in the field of Customs is carried out through the Group on Customs Cooperation [GCC]. Over time, various rounds of meetings have materialized on customs cooperation.).

the RTA.<sup>288</sup> In order to improve low sectoral coverage and the high number of exceptions and exclusions, SAPTA calls for stronger efforts.<sup>289</sup> RTAs across the world keep up with new challenges by streamlining trade mechanisms and eliminating non-tariff barriers. For example, the majority of the ASEAN countries set up Trade Information Portals (TIP) or Single Window systems, which improve trade facilitation and bring down transactional expenses and thus contribute to intra-ASEAN trade growth.<sup>290</sup> TIPs are an efficient medium for traders to access electronically all the documents required for government approval.<sup>291</sup> The Single Window mechanism facilitates electronic compliance of regulatory documents from a single location.<sup>292</sup> With the 2002 Residence Agreement, MERCOSUR eased the mobility of workers (nationals of Member States) to obtain residence and work permits in other Member States for a period of two years, after which the temporary permit could be converted into a permanent one.<sup>293</sup> The Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), and Southern African Development Community (SADC), as a conglomerate, sought economic integration and a common market for its Member States, and in the process, implemented an active web-based procedure to identify, monitor, and eliminate non-tariff barriers.<sup>294</sup> NAFTA came into

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288. Mercurio, *supra* note 281, at 112.

289. *See id.* at 125-26.

290. Kathuria, *supra* note 265.

291. *Id.*

292. *Id.*

293. *Id.*; *see also* Diego Acosta, *Is Free Movement in Europe and Anomaly? The New Open Borders Policy in South America*, EU L. ANALYSIS BLOG (Nov. 14, 2014), <http://eulawanalysis.blogspot.com/2014/11/is-free-movement-in-europe-anomaly-new.html> (Implemented in 2009, the MERCOSUR Residence Agreement facilitates the transformation from the temporary two-year residency permit to a permanent one, provided the worker has a clean criminal record and can prove authorized means of sustenance for him/herself and any other family members. The Agreement also grants an array of protections, such as the “right to work and equal treatment in working conditions, family reunion [and] access to education for children.”); Diego Acosta, *Free Movement in South America: The Emergence of an Alternative Model?*, MIGRATION POL’Y INST. (Aug. 23, 2016), <http://www.migrationpolicy.org/article/free-movement-south-america-emergence-alternative-model> (Although approximately 2 million workers acquired the temporary residency permit across the MERCOSUR territory between 2004 and 2013, the implementation of the Agreement by Member States has been uneven. For instance, Uruguay instantly accords permanent residency to applicants from other MERCOSUR Member States, without first requiring them to go through the two-year temporary residency prerequisite. Another Member State, Chile has not extended the Agreement to nationals of the other MERCOSUR Member States Ecuador, Peru, and Colombia despite a considerable number of them residing in Chile.).

294. Kathuria, *supra* note 265; *see also* *The Mechanism for Reporting, Monitoring & Eliminating Non-tariff Barriers*, TRADEBARRIERS.ORG, <http://www.tradebarriers.org/about> (last visited Apr. 3, 2017).

effect in 1994, creating one of the largest free trade zones.<sup>295</sup> NAFTA added many laurels to RTA success stories from across the world through several innovations: establishing an efficient dispute settlement system, liberalizing FDI and side agreements on labor and environment, removing barriers to investment, and providing protection to all forms of investments, such as contracts, debts, and intellectual property rights, among others.<sup>296</sup> Notwithstanding the United States' withdrawal from the TPP, the agreement's leaked provisions show several revolutionary elements including strategies for improved transparency and risk management techniques.<sup>297</sup> SAARC may benefit from evaluating these best practices of other RTAs and help introduce them in South Asia.

## V. CONCLUSION

The EU and other experiments in regional trade show that RTAs are not a substitute for the WTO but a complement to it. In a way, RTAs encourage the WTO's trade liberalization agenda by exploring mechanisms to reduce and gradually eliminate trade barriers regionally. One of the premises on which the WTO rests is to promote trade as a means of attaining peace and prosperity. In a very poor region, SAARC supplements this effort to enhance prospects of poverty reduction and shared growth by way of regional economic integration.

Thanks to the SAARC's preferential arrangements, trade liberalization received a stimulus through SAPTA that proceeded to SAFTA and SATIS. Removal of trade barriers is an essential feature of the international trade regime. Like GATT/WTO regime, the SAARC also pursues trade liberalization to boost cross-border trade in the Subcontinent. Although tariffs eventually burden the end consumer, they generally are viewed as a double-edged sword. For example, lowering tariffs on rice imports after the 2010 earthquake in Haiti proved disastrous for the local population, 50%-60% of which relied on subsistence agriculture.<sup>298</sup> Despite a modest beginning, SAFTA

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295. *NAFTA*, NAFTANOW.ORG, <http://www.naftanow.org> (last visited Apr. 3, 2017).

296. *Id.*

297. Divesh Kaul, *Trans-Pacific Partnership Trump(ed)*, CITIZEN (Mar. 6, 2017), <http://www.thecitizen.in/index.php/NewsDetail/index/4/10090/Trans-Pacific-Partnership-Trumped> (for a concise brief on America's withdrawal from the TPP by the author of this Article).

298. See Maura R. O'Connor, *Subsidizing Starvation: How American Tax Dollars Are Keeping Arkansas Rice Growers Fat on the Farm and Starving Millions of Haitians*, FOREIGN POL'Y (Jan. 11, 2013), <http://foreignpolicy.com/2013/01/11/subsidizing-starvation/>; Haiti Grassroots Watch, *Haiti: Aid or Trade? The Nefarious Effects of U.S. Policies*,

successfully set a path of tariff reduction for its LDC and non-LDC Member States with varied timeframes for implementation. Given the historical hostilities in the Subcontinent, asymmetrical economies, and several other challenges, the SAARC has faced many obstacles, and intra-regional integration is limited.

TLP is a step in the right direction. Yet, intra-regional trade remains below 6%. The tariff-reduction agenda must be followed in a time-bound manner. This Article expresses that FTAs entail complex rules of origin. Although, integration at customs level in SAARC currently appears a distant milestone, a certain harmonization in common external tariffs may mitigate these complexities of rules of origin.

This Article also indicates that removal of tariff barriers is not the single way out to liberalize trade in South Asia. There is a great need to continue to work to ease the cross-border trade in the region. All the benefits of liberalized tariffs will not make any impact on trade if a commodity is stuck at the border, delayed in customs clearance, SPS, or other TBT lapses. These procedural delays, sometimes lasting months, may lead to a commodity's expiration or render it unsuitable for consumption. RTAs in other regions have taken several steps to eliminate non-tariff barriers.

Therefore, the need of the hour is not only to liberalize but also to be effective, transparent, consistent, and predictable. These features have slowly emerged as international best practices. There is an additional need to set up a credible institutional mechanism and harmonize SAARC level standards to enjoy tariff reduction benefits.

The SAARC's free trade agreements do not have to embrace the international best practices exclusively or follow the mandated time-frame strictly. To effectively harness the fruits of trade liberalization, the "parallel" waves of liberalization caused by unilateral, bilateral, and multilateral removal of trade barriers must be regulated under the auspices of SAARC. Critics of preferential trading arrangements cite Jagdish Bhagwati's term "spaghetti bowl" to convey the web of varying tariffs and rules that may be carved out by various RTAs. South Asia faces its share of challenges, but one hopes that the SAARC efficiently and consistently tackles such challenges and emerges as one of the institutional leaders of the twenty-first century.