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*Retooling Trade Agreements for Social Inclusion*

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## Retooling Trade Agreements for Social Inclusion

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*Abstract:* International trade law has been oblivious to social inclusion. It is not the reason for the weakening of the U.S. economy and entrenchments of poverty, but it is nevertheless blamed for them, including the shuttering of factories, joblessness, and even homelessness. Although it is not primarily to blame, it is not wholly innocent either. International trade law plays a powerful role in fomenting the conditions under which people may thrive, implicating social equality and inclusion. This Article addresses why international trade law needs to be structured in ways that support social inclusion if society is to turn the tide against rising neo-nationalism, racism, and authoritarianism. The impacts of trade and rapid technological change on income inequality and the security of work have become politically salient issues in the United States and Europe. They have led to the rise of nativist political parties that threaten to upset the international institutional framework. The outcome could be dire. The Article shows how international economic law can and should be retooled. By doing so, it can: (i) help combat harmful tax competition, avoidance, and evasion; (ii) aid domestic social security and job retraining; (iii) support labor protection; (iv) deter social dumping; and (v) enable industrial policy experimentation for development.

### INTRODUCTION

*“Because NAFTA, signed by her husband, is perhaps the greatest disaster trade deal in the history of the world. Not in this country. It stripped us of manufacturing jobs. We lost our jobs. We lost our money. We lost our plants. It is a disaster. And now she wants to sign TPP.”*

-Donald Trump, Second Presidential Debate, Oct. 9, 2016<sup>2</sup>

When companies lay off thousands of employees, causing ripple effects in local economies, politicians blame “bad trade deals.” The trade establishment

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<sup>2</sup> In fact, the agreement was signed by President George Bush but only approved by both houses of Congress under President William Clinton.

responds, in defense of the *status quo*, that trade is not the problem, but domestic policy is. Yet, international trade is neither wholly to blame nor wholly innocent. How might international trade law be retooled to address issues of social inclusion?

With the election of President Donald Trump in the United States, and the rise of neo-nationalist parties in Europe, the new trade establishment mantra is that trade must be made more “inclusive.” The World Trade Organization (WTO) named the 2016 “WTO Public Forum” “Inclusive Trade.”<sup>3</sup> In 2017, the WTO and International Labor Organization (ILO) issued a joint report entitled “Investing in Skills for Inclusive Trade,”<sup>4</sup> while the WTO joined forces with the World Bank and International Monetary Fund to publish a separate report on trade, economic growth and adjustment facilitation to help those harmed by trade.<sup>5</sup> Social inclusion is the trade community’s new refrain.

But how are the benefits of global trade and the protection of social inclusion to be mutually achieved? This Article’s thesis is that the trade establishment’s traditional approach of calling for complementary domestic policy in parallel to trade liberalization is critical but no longer sufficient, and that trade agreements should be designed, directly and indirectly, to enable domestic policy choices over social policy. Otherwise the multilateral system risks collapse, with dire results. The Article proposes an array of complementary ways that this can be done.

The trade establishment’s traditional approach comprises two steps. In the first step, countries sign *international trade agreements* to combat protectionist pressures and thereby mutually enhance the size of the national economic pie. In the second step, recognizing that trade creates “losers” as well as “winners,” affecting who gets what part of the pie, countries support those harmed through

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<sup>3</sup> WTO Public Forum 2016 Inclusive Trade, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/forums\\_e/public\\_forum16\\_e/public\\_forum16\\_e.html](https://www.wto.org/english/forums_e/public_forum16_e/public_forum16_e.html) (last visited Oct. 13, 2017).

<sup>4</sup> WORLD TRADE ORGANIZATION INTERNATIONAL LABOR OFFICE, INVESTING IN SKILLS FOR INCLUSIVE TRADE (2017), [https://www.wto.org/english/res\\_e/booksp\\_e/investinsskills\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/investinsskills_e.pdf) (last visited Oct. 13, 2017). *See also* International Monetary Fund et al., *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment*, INTERNATIONAL MONETARY FUND (April 10, 2017), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2017/04/08/making-trade-an-engine-of-growth-for-all>.

<sup>5</sup> IMF, World Bank, and WTO, *Making Trade an Engine for Growth. The Case for Trade and for Policies to Facilitate Adjustment 4* (2017) (stressing the benefits of trade for “lower-income households” because of lower prices, while calling for accompanying domestic policies to facilitate worker adjustment “across firms, industries and regions” when they lose their jobs because of trade).

*domestic social policy*.<sup>6</sup> Northern European countries were long viewed as models. Through liberalized trade, they maximized social welfare, and through social policy they ensured domestic fairness, providing social welfare and active job retooling and adjustment policies.

However, structural forces now call the two-step model into question.<sup>7</sup> These structural forces empower capital against labor, on the one hand, and capital against government, on the other. Because technological change enables capital to produce and trade more efficiently from abroad, capital can threaten to offshore jobs if workers insist on higher wages and better working conditions. At the same time, capital plays governments off each other, threatening to invest abroad if taxes on capital are not reduced and if subsidies are not increased. Capital's increased leverage threatens to erode governments' ability to fund social protection and educational and employment policies, while undermining labor's ability to bargain collectively. The result is rising inequality within countries around the world.<sup>8</sup> If governments are unable to coordinate to overcome collective action problems and enable social and developmental policy experimentation, then further trade liberalization will exacerbate the crisis in trade governance's legitimacy. As a result, the current multilateral system is under the greatest challenge since it was created after the devastation of the Great Depression and World War II.

This Article proceeds in five parts. Part I characterizes the fundamental purposes of the WTO and trade agreements, which should be viewed as much broader than trade liberalization. Part II presents the major challenges that the trade system now faces. Part III summarizes critical developments in economic globalization and trade in response to technological change since the WTO was created in 1995. Part IV explains how the trade policy community responded to

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<sup>6</sup> See e.g. IMF, World Bank, and WTO, *Making Trade an Engine*, *supra* note..., at 4 (“[u]nderstanding the various factors driving dislocations is critical to designing appropriate domestic policies to address them”).

<sup>7</sup> See Part II below. In an article written after the mass demonstrations at the WTO Ministerial Meeting in Seattle, I argued that there is sufficient domestic policy space to address labor and environmental concerns as evidenced by the stronger social policies in Europe than in the U.S., but that if such policies were not pursued, the trade regime would face increasing challenges. See Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 *FORDHAM INT. L. J.* 608 (2000). Today, a coordinated response that directly addresses social policy is required, including to counter the rise of neo-nationalists.

<sup>8</sup> BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* 46-117 (2016) (noting waves of relative income inequality and that inequality has generally been increasing within states, with the most dramatic shifts being in Anglo-Saxon countries).

these developments, as encapsulated in the TransPacific Partnership (TPP). Part V contends that trade agreements must be designed and conditioned upon social and developmental policy commitments. They should, in particular, (i) help combat harmful tax competition, avoidance, and evasion; (ii) aid domestic social security and job retraining; (iii) support labor protection; (iv) deter social dumping; and (v) enable industrial policy experimentation for development. It will not be an easy process to retool trade agreements to help ensure social inclusion through these means, but concrete proposals to support social inclusion are needed.

## **I. PURPOSES OF THE WTO AND TRADE AGREEMENTS**

Before addressing how trade agreements might be retooled in light of stagnant wages, insecure employment, rising income and wealth inequality, and political contestation in the United States and Europe, we need to clarify what are and should be the purposes of trade agreements. To characterize their purpose solely as the narrow goal of “free trade” is mistaken. The core purposes of trade agreements rather are four-fold: first, to create a basic framework of rules for ongoing cooperation, planning, and deliberation; second, to enhance standards of living; third, to address the externalities of domestic measures on each other; and fourth, to provide for an independent, neutral, third party decision-maker to resolve disputes regarding the rules’ implementation. These goals are inter-related and should be advanced in a mutually supportive manner.

First, the WTO provides a *multilateral forum* for the creation, revision, and monitoring of compliance with rules for international trade. It is through a basic institutional framework of rules that social cooperation, economic coordination, and business planning take place. Rules and institutions are basic to society. If the international realm is not to be anarchic, giving rise to conflict and potential violence, then rules and institutions are needed. These institutions facilitate cooperation and policy coordination that result in joint gains for countries and their citizens. Such a basic structure of rules and forum for deliberation is a public good. This is the first purpose of a multilateral trade organization such as the WTO, one that comes before the substantive aim of increasing standards of living, because a forum is first required to discuss different views regarding trade policy, the impact of countries’ policies on each other, and the creation, revision, and monitoring of rules in light of these impacts.

Second and more specifically, trade agreements create rules that can *increase standards of living*, as trade liberalization enables a more efficient use of domestic and global resources. Trade liberalization, however, is not an end in itself but rather a means. The preamble to the Agreement Establishing the WTO specifies that WTO Members' aim is "raising standards of living, ensuring full employment..., and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development."<sup>9</sup> It stresses that this should be done "in a manner consistent with [members'] respective needs and concerns at different levels of development."<sup>10</sup> Through this second statement, the preamble recognizes that one size does not fit all for economic and development policy, and thus agreements should enable members to address their "respective needs and concerns." These needs include protecting the basic social contract within countries, and thus the rules should enable, and not constrain, countries' abilities to address distributional, developmental, and social welfare concerns.

Third, these rules and institutions help countries address the *externalities* of their behavior on each other. Each country's protectionist policies to address its view of its "respective needs" has impacts on others. The predecessor to the WTO, the General Agreement on Tariffs and Trade (GATT), was created in large part out of concerns over tit-for-tat retaliatory protectionist policies in the 1930s that arguably contributed to the deepening of the Great Depression, and was conducive to the rise of extremist political parties that led to World War II.<sup>11</sup> One of the great accomplishments of the institutionalization of trade during the 2007-2008 Great Recession was the ability of the WTO to help coordinate policy and constrain tit-for-tat protectionist policies that would result in mutual harm.<sup>12</sup> Those rules necessarily must strike a balance between economic openness and domestic policy space to respond to the social impacts of trade.

Fourth, the WTO creates a mechanism for *institutionalized dispute settlement* so that political disputes over the implementation and interpretation of

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<sup>9</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994., 1867 U.N.T.S 31874.

<sup>10</sup> *Id.*

<sup>11</sup> DOUGLAS IRWIN, *PEDDLING PROTECTIONISM: SMOOT HAWLEY AND THE GREAT DEPRESSION* (2011).

<sup>12</sup> CHAD P. BOWN, *THE GREAT RECESSION AND IMPORT PROTECTION: THE ROLE OF TEMPORARY TRADE BARRIERS* 1-3 (Chad P. Brown ed., 2011).

agreements are resolved through a neutral third-party legal institution. Opportunistic, self-serving interpretations of rules are thereby constrained, disagreements turned over to a third party, and uncertainties clarified. Legal decision-making is not uncontentious or autonomous from politics, as rules are subject to multiple interpretations and WTO panel and Appellate Body decisions have political effects and are shaped by political contexts.<sup>13</sup> WTO adjudicatory processes must respond to political and social developments or they will be subject to legitimacy challenges.<sup>14</sup> Yet, the process of third party decision-making is comparatively better at ensuring ongoing cooperation than the alternative of foregoing it.

Each of these goals is expressed in the Agreement Establishing the WTO and in the GATT. The GATT, in particular, provided a framework for embedded liberalism where countries could both liberalize trade and retain policy space for domestic social policy.<sup>15</sup> However, trade officials often lose sight of these goals by narrowing the operational goal of trade agreements to that of trade liberalization over which they bargain, or in the case of the WTO secretariat, facilitate bargaining. Alternatively, officials turn to mercantilist bargaining, aiming to expand exports and limit imports. Losing sight of the trading system's broader goals puts the overall trading system, and thus trade liberalization itself, at risk.

Overall, the organizing principle of trade agreements should be to enhance social and individual capacity in support of human flourishing. From that principle, trade agreements should not be assessed solely in terms of their impact on aggregate national and global GDP (the gains from trade), but also in terms of their distributional effects and their implications for social inclusion and social stability.<sup>16</sup> Trade offers considerable opportunities that otherwise would not exist,

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<sup>13</sup> Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, in *THE POLITICS OF INTERNATIONAL LAW* 269-306 (Wayne Sandholtz & Christopher Whytock eds., 2017).

<sup>14</sup> Joost Pauwelyn, *The Transformation of World Trade*, 104 *MICH. L. REV.* 1 (2005); Robert Howse, *The World Trade Organization 20 Years On: Global Governance by the Judiciary*, 27 *EUR. J. INT'L L.* 9 (2016).

<sup>15</sup> John Ruggie, *International regimes, transactions, and change: embedded liberalism in the postwar economic order*, 36 *International Organization* 379 (1982).

<sup>16</sup> A 2016 report of the International Trade Commission finds that the bilateral and regional trade agreements add only 0.2% per year to U.S. GDP. See U.S. Int'l Trade Comm'n, Pub. No. 4614, *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures*, 2016 Report 21 (2016). See also *Rep. Levin: ITC Report Fails to Evaluate Real Impact of Trade*

especially for those in countries with small domestic markets, that lack capital, and that require advanced technology. The rapid growth of the middle classes in China, India, and other Asian economies attests to trade's benefits.<sup>17</sup> In the last 35 years, over 850 million Chinese have risen out of poverty through trade-generated economic growth.<sup>18</sup> Between 2000 and 2012, there was a 65% reduction in the mortality rate of children under five years old in China, which is just one of many indicators of globalization's potential benefits.<sup>19</sup> These developments are not to be taken lightly.

At the same time, the current trade law system, particularly on account of technological developments, privileges capital over labor, and creates widespread and growing job insecurity and income inequality within countries. These shifts have become politically explosive in the U.S. and Europe where post-World War II social bargains protecting labor and social welfare have eroded.<sup>20</sup> Gains in GDP can, in theory, be redistributed, but in practice are not.

Liberalized trade policy is not as an end in itself, but a means to enhance human and social capacity and flourishing. If this organizing principle is not advanced, the global system will be at risk. When trade flows threaten to undermine the social contract within countries, new thinking on trade law and policy is required.

## II. MAIN CHALLENGES TO THE SYSTEM

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*Agreements: Press Release, Ways and Means Committee Democrats* (June 29, 2016), <https://democrats-waysandmeans.house.gov/media-center/press-releases/rep-levin-itc-report-fails-evaluate-real-impact-trade-agreements> (criticizing the report for failing to take into account transition costs associated for communities).

<sup>17</sup> BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* (2016).

<sup>18</sup> As a result, only around 25 million Chinese live beneath the poverty line today, which figure is declining. *See* DataBank: Poverty and Equity, THE WORLD BANK GROUP, <http://databank.worldbank.org/data/reports.aspx?source=poverty-and-equity-database> (last visited Feb 26., 2018) (number of poor at \$1.90 per day at 2011 PPP). Yan Guo & Hui Yin, *Reducing Child Mortality in China: Successes and Challenges*, THE LANCET (Jan. 16, 2016), [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(15\)00555-3.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)00555-3.pdf) (noting a 65% reduction in under-5-year-old mortality rate in China between 2000 and 2012).

<sup>19</sup> *Id.*

<sup>20</sup> *Cf* JACOB HACKER AND PAUL PIERSON, *WINNER-TAKE ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010) (on the United States) and WOLFGANG STREECK, *RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY* (2008) (on Germany).

There are at least three competing approaches to assessing the winners and losers from economic globalization, as nicely captured in a recent essay by Nicolas Lamp.<sup>21</sup> The first, which dominates the news, is the Trump administration’s neo-nationalist narrative. It views trade as a zero-sum game and “pits workers in developed countries against workers in developing countries, such as Mexico and China.”<sup>22</sup> It contends that those workers are “stealing” American jobs and that those countries are “cheating.” The second narrative is the trade establishment’s two-step approach that we examined above, which contends that developed and developing countries mutually benefit from trade and that it is for domestic policy to help workers that lose their jobs.

The third narrative, reflected in this Article, is not state-centric like the first two, but rather views issues in distributional terms in light of the advantages that economic globalization has provided to capital in relation to others, and in particular labor—the working and middle class. The state has always been the key intermediary to ensure social harmony, including between capital and labor. From this third vantage, economic globalization constrains states’ ability to play that role, thus requiring a coordinated response. As markets globalize, there is pressure for states to work together or to draw inwards to address social inclusion concerns.

Law, as rules of the game, always reflects political choices that inevitably have distributive effects, as legal realists have long noted.<sup>23</sup> There is no such thing as a neutral rule, since there are always winners and losers from a rule’s application. A world without rules, however, is a chaotic one and so rules must be laid down. They may be bargained around or ignored, but they also structure outcomes.<sup>24</sup>

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<sup>21</sup> Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements*

<sup>22</sup> *Id.*

<sup>23</sup> Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

<sup>24</sup> Robert Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW. AND SOC’Y. REV. 95 (1974). Robert C. Ellickson, *Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

In the context of trade, economic theory has long acknowledged that there are winners and losers.<sup>25</sup> But more recently, distributive issues have become salient. In the United States, for example, wages stagnated for most Americans, job tenure became precarious, and the share of U.S. wealth held by the top 1% of Americans rose to over 40%, which is more than the bottom 90% of Americans combined.<sup>26</sup> Although the figures are not as bad in continental Europe, inequality has also risen significantly. In France, “[b]etween 1983 and 2015, the average income of the richest 1% has risen by 100% (above inflation) and that of the 0.1% richest by 150%, as compared with barely 25% for the rest of the population (or less than 1% per annum).”<sup>27</sup> Even in a more egalitarian country like Germany with significantly greater social transfers, income inequality has gone up significantly not only before transfers, but also after them.<sup>28</sup> At the same time, a rising middle class in China and a handful of other developing countries has greatly benefited from trade and gained the most from economic globalization, so that inequality among countries has decreased.<sup>29</sup> Nonetheless, economic globalization, especially of capital, has led to increasing inequality within countries generally, threatening domestic social stability and international cooperation and peace.<sup>30</sup> Internal and external policy are thus entwined.

Three main challenges for the trading system in light of globalization are: (1) that of the fiscal state and the state’s financing of social policy; (2) that of labor

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<sup>25</sup> See Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 REV. ECON. STUD. 58 (1941).

<sup>26</sup> Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States since 1913: Evidence from Capitalized Income Tax Data*, (National Bureau of Economic Research Working Paper 20625, 2014). See also, AFL-CIO, *Making NAFTA Work*, *supra* note..., at 24 (2017) (a chart on “Decline in Labor Share of Income, 1970-2014,” based on ILO and OECD data, with the data on Mexico being for the 1995-2012 period).

<sup>27</sup> Thomas Piketty, *Inequality in France*, April 18, 2017, at <http://piketty.blog.lemonde.fr/2017/04/18/inequality-in-france/>. In 2010, the top 1% in France owned about 24% of French wealth. See Thomas Piketty, *CAPITAL IN THE TWENTY-FIRST CENTURY* 340 (2014).

<sup>28</sup> BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* 108 (2016). In Germany, the top 1% owned 31.4% of the wealth in 2010. See Stefan Bach, Andreas Thiemann & Aline Zucco, *Looking for the Missing Rich: Tracing the Top Tail of the Wealth Distribution*, 20 SSRN Electronic Journal (2018) [https://www.diw.de/documents/publikationen/73/diw\\_01.c.575768.de/dp1717.pdf](https://www.diw.de/documents/publikationen/73/diw_01.c.575768.de/dp1717.pdf)

<sup>29</sup> See MILANOVIC, *GLOBAL INEQUALITY*, *supra* note...

<sup>30</sup> *Id.* On why inequality matters, see T.M. SCANLON, *WHY DOES INEQUALITY MATTER?* (2018) (in terms of status, economic control, equal opportunity, political influence, equal concern, and fair distribution).

rights and the social contract in light of capital's ability to invest and trade from third countries; and (3) the need for flexibility for experimentation in development policy.<sup>31</sup> The first reflects changes in the relation between global capital and the state, the second the relation between global capital and labor, and the third the relation of international rules and national development policy.

First, liberalized trade will only be supported politically—and should only be ethically—if the gains from trade are inclusively shared. Where trade contributes to increased inequality within states, precarious job security, and the erosion of domestic social institutions, something must be done, even if (in fact) trade is not the primary culprit. The simple recipe that the gains from trade must compensate the “losers” is never implemented, and, in any case, fails to address broader systemic concerns regarding social ordering and the legitimation of capitalism through state institutions.<sup>32</sup> To support social inclusion, the state needs revenue, and conversely, to obtain revenue, states benefit from increased labor market participation.<sup>33</sup> Yet, states increasingly have gone into ever greater indebtedness to finance commitments, including because of massive bail outs of banks.<sup>34</sup> In a world in which capital is mobile, when states consider raising taxes on it, they risk losing investment and thus revenue, and so the state is squeezed.<sup>35</sup> Taxes are rather applied to labor and consumption,<sup>36</sup> potentially exacerbating wealth and income

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<sup>31</sup> These challenges are captured in the work of the economist Dani Rodrik and the sociologist Wolfgang Streeck. See e.g., DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR* (1997); DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011); DANI RODRIK, *STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY* (2017); STREECK, *RE-FORMING CAPITALISM*, *supra* note...; WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* (2014). In contrast, the WTO, through the jurisprudence of its Appellate Body, has been much more conducive for facilitating good governance on environmental and consumer issues. See e.g., Howse, *supra* note...; Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 *Law & Contemporary Problems* 237 (2016).

<sup>32</sup> RODRIK, *THE GLOBALIZATION PARADOX*, *supra* n. 18; STREECK, *RE-FORMING CAPITALISM*, *supra* note....

<sup>33</sup> See e.g. ANTON HEMERIJCK, *CHANGING WELFARE STATES* 223, 243 (2013).

<sup>34</sup> Cf. STREECK, *RE-FORMING CAPITALISM*, *supra* note... at 6 (“tempting governments to satisfy current claims by intertemporal redistribution, mobilizing resources from future instead of present citizens”); and... (debt exploding following the 2007 financial crisis).

<sup>35</sup> Of course, small states acting as tax havens can benefit, as does capital. See Philipp Genschel and Peter Schwarz, *Tax Competition: A Literature Review*, 9 *Socio-Economic Review* 339 (2011)

<sup>36</sup> *Id.*; Thomas Rixen & Peter Dietsch, eds., *Global Tax Governance: What is Wrong with It and How to Fix It* (2016).

inequality.<sup>37</sup> Trade policy thus implicates tax policy and their interdependence needs to be addressed in a coordinated manner.

Some contend that the two-step model has not failed.<sup>38</sup> Others fear loading too much into trade agreements and thus prefer to rely on a two-step model.<sup>39</sup> Yet, the empirical evidence shows that redistribution is not occurring, that inequality within countries has risen to the highest level since the 1930s, and that trade is an important cause of economic harm to communities that depended on high-wage manufacturing jobs.<sup>40</sup> Politically, trade is frequently blamed by political leaders, labor unions, and other social actors for harm to U.S. workers.<sup>41</sup> Thus, for those who understand the importance of trade for overall national welfare, something must be done to preserve the overall system by ensuring that trade's benefits are broadly and fairly spread.

Second, trade places products produced under different standards in competition with each other. At times, lower wages and standards simply reflect lower productivity, but at others, they reflect labor exploitation. Within federal countries, such as the United States, or customs unions, such as the European Union, a basic floor is created that all producers must meet in terms of labor rights, environmental protection, and other regulation. Investors are thus less able to threaten to move elsewhere to constrain regulation, although this has become a greater problem in the E.U. with its expansion in membership (especially to the

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<sup>37</sup> Regressive taxation has this effect, everything else being equal. On the other hand, if the tax revenue is spent in a redistributive manner, then the net effect can still be progressive.

<sup>38</sup> N. G. Mankiw, *Reviewing the Tenets of Free Trade*, N.Y. TIMES (Feb. 18, 2018), [https://scholar.harvard.edu/files/mankiw/files/reviewing\\_the\\_tenets\\_of\\_free\\_trade.pdf](https://scholar.harvard.edu/files/mankiw/files/reviewing_the_tenets_of_free_trade.pdf).

<sup>39</sup> Ryan Bourne, *The 'level playing field' line is a poor excuse for protectionism*, CATO INSTITUTE – CITY A.M. COMMENTARIES (Dec. 12, 2017), <http://www.cityam.com/277335/level-playing-field-line-poor-excuse-protectionism>. At times, these commentators' positions are called into question by their opposition to domestic redistributive policies generally. See e.g., Michael Tanner, *Five Myths about Economic Inequality in America*, CATO INSTITUTE - CATO POLICY ANALYSIS (Sept. 7, 2016), <https://www.cato.org/publications/policy-analysis/five-myths-about-economic-inequality-america>; and Daniel Griswold, *Anything-but-Straight Talk on Trade*, NATIONAL REVIEW (Feb. 1, 2018), <https://www.nationalreview.com/2018/02/dani-rodrik-straight-talk-trade-dishonest-attack-free-markets/>.

<sup>40</sup> See David Autor, David Dorn & Gordon Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121 (2013); and Thomas Piketty, *CAPITAL IN THE TWENTY-FIRST CENTURY* 430-467 (2014).

<sup>41</sup> President Trump, for example, repeatedly deploys a rhetoric of foreigners "stealing" American jobs. See Lamp, *How Should We Think about the Winners and Losers* (on the Trump narrative and its implications).

East), and it remains an issue in the U.S. as states compete to attract capital by lowering standards and granting massive tax incentives.<sup>42</sup> In comparison, nonetheless, the concerns are greater at the global level, are not addressed in the WTO agreements, and are only weakly addressed in other trade agreements. As economies integrate so that trade affects larger numbers of workers, and as technological advances enable the offshoring of ever more jobs, a larger swathe of the U.S. and European population is affected.<sup>43</sup> The WTO agreements provide some adjustment protection from trade effects in the form of antidumping, countervailing duty, and safeguard law. These WTO agreements, however, only indirectly address the core issue of maintaining the broader social compact within a country, and, in particular, the plight of workers in relation to capital.

Third, although the WTO recognizes that the rules must respect Members' "respective needs," and thus one size does not fit all, the WTO takes some industrial policy options off the table, which Dani Rodrik and other economists have criticized for limiting options for development.<sup>44</sup> There is not one way for a country to develop, and no single person or organization has an answer. Thus, experimentation is required. Some rules are needed because of externality problems (as noted in Part I), but WTO rules generally reflect the interests of more powerful WTO members (such as the U.S. and E.U.) that have limited some industrial policy options for less industrialized countries.

These challenges arise because of economic globalization, on the one hand, and the rules that facilitate it, on the other hand. Thus, the structural forces should not be viewed apart from political choices in the setting of rules. States now face three stylized choices.<sup>45</sup> First, they can proceed with the *status quo* under a two-step model, while potentially further facilitating economic globalization through regional trade agreements. Second, they can undermine international institutions

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<sup>42</sup> See e.g., Svetla Trifonova Marinova & Marin Alexandrov Marinov, *Motives and Strategies for Foreign Direct Investment in Central and Eastern Europe*, in FOREIGN DIRECT INVESTMENT IN CENTRAL AND EASTERN EUROPE 93, 95, 101 (Svetla Trifonova Marinova ed., 2003); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 382–405 (1996); Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 445, 454 (1995).

<sup>43</sup> See e.g., RICHARD BALDWIN, THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION (2016); Alan Blinder, *Offshoring: The Next Industrial Revolution*, FOREIGN AFFAIRS (March/April 2006).

<sup>44</sup> RODRIK, THE GLOBALIZATION PARADOX, *supra* n. 18; HA-JOON CHANG, KICKING AWAY THE LADDER (2002).

<sup>45</sup> See Lamp, *supra* note....

and renationalize their economies per the Trump neo-nationalist narrative. Or third, they can continue to engage in international cooperation and retool trade agreements to facilitate policies of social inclusion, as this Article proposes. We next address the rise of global value chains as facilitated by new trade agreements (Parts III and IV), before turning to an array of ways that trade agreements can be retooled to facilitate policies of social inclusion (Part V).

### III. WHAT'S NEW IN ECONOMIC GLOBALIZATION SINCE 1995

Globalization intensified in the 2000s. Revolutions in transport and information and communication technologies led to the unbundling of production.<sup>46</sup> This “great unbundling” catalyzed new trade in the tasks comprising the production of a final good, so that the actual traded good included manufacturing and services from multiple countries.<sup>47</sup> Trade accordingly was re-conceptualized as “trading tasks,” in contrast to trading products.<sup>48</sup> Such trade in tasks put a broader array of jobs in global competition.

Economists have long contended that technological change is a much more important cause of job insecurity and job loss than trade,<sup>49</sup> and that remains the predominant position.<sup>50</sup> International economics and trade law casebooks point to the discrepancy of public attitudes toward technology and trade through parables that depict technology and trade effects as both separable and synonymous. In one often used parable, an entrepreneur declares that he has found a way to transform wheat into cars, thereby significantly lowering the cost of production, decreasing the cost of cars for consumers, and thus increasing standards of living.<sup>51</sup> A

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<sup>46</sup> BALDWIN, THE GREAT CONVERGENCE, *supra* note...

<sup>47</sup> *The Great Unbundling*, THE ECONOMIST (Jan. 18, 2007), <http://www.economist.com/node/8559758>.

<sup>48</sup> Gene M. Grossman & Esteban Rossi-Hansberg, *Trading Tasks: A Simple Theory of Offshoring* (National Bureau of Economic Research Working Paper No. 12721, 2006), <http://www.nber.org/papers/w12721>.

<sup>49</sup> Paul Krugman & Robert Lawrence, *Trade, Jobs and Wages*, in POP INTERNATIONALISM 35 (Paul Krugman ed., 1997).

<sup>50</sup> WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2017: TRADE, TECHNOLOGY AND JOBS 9 (2017) (“[F]actors other than trade, such as technological change, may explain up to 80 per cent or more of the decline in manufacturing jobs in the United States.”).

<sup>51</sup> JOOST H.B. PAUWELYN, ANDREW GUZMAN & ROBERT HILLMAN, INTERNATIONAL TRADE LAW 12-13 (3d ed. 2016). The example comes from JAMES INGRAM, INTERNATIONAL ECONOMICS (1983) (cited in KRUGMAN, POP INTERNATIONALISM, *supra* n. 27 at 119).

competitor, however, discovers that the purported production facilities are in fact empty and that the lower cost production comes from trading domestic-produced wheat for foreign-produced cars. The discovery leads to public outcry, and the entrepreneur falls from public acclaim to disgrace. The implicit moral is that trade and technology have the same beneficial effects and should equally be embraced.

However, trade differs from technology in a number of ways, as Rodrik points out.<sup>52</sup> First, trade involves competition with products produced in ways that can violate national norms and social bargains (such as regarding labor rights) so that people view trade differently than technological change. Second, while consumers generally gain from trade and technological advances, it can be plausibly argued, at least in industrial economies, that those adversely affected by trade—i.e. low-skilled, poorly educated workers—are more systematically targeted.<sup>53</sup> When policy choices create risks that are not randomly allocated, but rather repeatedly hit specific groups, it is unfair. Even if technology also systematically and adversely affects discrete segments of a polity, trade is perceived to do so to a much greater extent. Third, technological change is not self-limiting in its impact, unlike trade where, as trade is liberalized, there are diminishing returns for national welfare while the adverse effects on particular groups increase. The overall gains of moving to zero percent tariffs in the U.S. are now estimated to be in the tenths of one percent of U.S. gross domestic product.<sup>54</sup> In contrast, the benefits from technological change do not diminish, but rather continue with new innovations. The balancing of benefits against costs thus differs as trade liberalization deepens.

In the end, whatever one's view of trade and technology, the two are intricately linked.<sup>55</sup> Technological change catalyzed the unbundling of production among countries, stimulating greater competition among producers through offshoring. Companies that do not offshore production are pressed to reduce labor costs through technological innovation to stay competitive. As a result,

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<sup>52</sup> RODRIK, *THE GLOBALIZATION PARADOX*, *supra* n. 18, at 59-60.

<sup>53</sup> Rodrik maintains that, in contrast, it appears that “the adverse effects of new technology hit different groups over time... so that most, if not all people are better off over the long run.” *Id.* at 59.

<sup>54</sup> *Id.* at 60.

<sup>55</sup> Mai Chi Dao, Mitali Das, Zsoka Koczan, & Weicheng Lian, *Understanding the Downward Trend in Labor Income Shares*, in *WORLD ECONOMIC OUTLOOK* 124 (International Monetary Fund ed., 2017).

employment in an increasing number of tasks is less secure, and an increasing number of jobs risk being offshored or replaced by technology at any time.

#### IV. THE TRADE LAW RESPONSE TO GVCs: THE TPP

Many economists trumpeted technology-induced changes in the nature of trade as the global value chain (GVC) revolution.<sup>56</sup> They welcomed global value chains as the path of development for the developing world, and they viewed WTO rules as obsolete.<sup>57</sup> They thus supported a web of new bilateral and plurilateral trade agreements that would facilitate more efficient GVC operation. The agreements were to include commitments to low and preferably zero percent tariffs; efficient, transparent, and low-cost customs administration to get parts quickly across borders; investment protection; enhanced intellectual property protection; liberalization of services (including visas for temporary entry of business persons); harmonization and mutual recognition of regulatory standards to eliminate non-tariff barriers to trade; and competition norms to address abuses where GVCs operate. Conflict over expanding the WTO's mandate to address two of these issue areas—investment law and competition law—helped trigger the collapse of the WTO ministerial meeting in Cancun in 2003. After that, negotiations over GVC-related issues were discontinued in the WTO and migrated to bilateral and plurilateral trade agreements, with the U.S. often taking the lead.

The most famous (or infamous) of the ensuing agreements was the TPP, which could be viewed as a mechanism to support GVCs, benefitting U.S. capital. When including the U.S. and combined with a Transatlantic Trade and Investment Partnership (TTIP) between the U.S. and European Union (E.U.), these agreements were to have included countries comprising approximately eighty percent of global GDP in nominal terms, covered over sixty percent of global trade, and become templates for the global trading system.<sup>58</sup> The TPP included extensive chapters covering the following issues that facilitate GVCs:

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<sup>56</sup> See, e.g., BALDWIN, *THE GREAT CONVERGENCE*, *supra* n. 24. The head of the WTO research division, to give one example, left the WTO for Hong Kong to head a think tank committed to rethinking trade agreements and trade policies in terms of GVCs.

<sup>57</sup> Richard Baldwin, *WTO 2.0: Global governance of supply-chain trade*, (64 CEPR Policy Insight 1-20, 2012).

<sup>58</sup> See, e.g., Kevin Granville, *What Is TPP? Behind the Trade Deal That Died*, N.Y. TIMES: BUSINESS DAY (Jan. 23, 2017), <https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is->

- (i) zero percent tariffs phased in over time (chapter 2),
- (ii) customs administration and trade facilitation (chapter 5),
- (iii) investment protection (chapter 9),
- (iv) services liberalization (chapters 10-13), including temporary entry for business persons (chapter 12),
- (v) intellectual property protection (chapter 18),
- (vi) regulatory cooperation (chapters 6, 7, 25),
- (vii) electronic commerce facilitation (chapter 14),
- (viii) competition law (chapter 16), and
- (ix) transparency and anti-corruption provisions (chapter 25).

The U.S. simultaneously pushed for new norms to address Chinese state practices that concerned it, including some provisions that directly and indirectly implicate U.S. labor concerns. It obtained a chapter placing limits on state-owned enterprises (SOEs) so that they must operate on market terms (chapter 17) and another prohibiting the forced localization of computing facilities and transfers of source code as a condition for import, sale, or use of software (chapter 14). In a joint declaration, the parties also agreed to certain undertakings regarding currency manipulation that had long been a thorn in U.S.-China trade relations.<sup>59</sup> In parallel, the Obama administration also insisted on including somewhat more stringent labor and environmental measures (respectively in chapters 19 and 20), though not nearly enough to gain the support of organized labor.<sup>60</sup>

Overall, transnational companies wanted and obtained legal provisions that supported GVCs, which would enable them to coordinate their global operations

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trans-pacific-partnership.html?\_r=0 (maintaining that the TPP would have covered one-third of global trade and 40 percent of global GDP); and Delegation of the European Union to the United States, *Transatlantic Trade and Investment Partnership (TTIP): Creating Jobs, Boosting Exports, and Investing in the Economy of Tomorrow*, [https://miami.consulfrance.org/IMG/pdf/TTIP\\_Publicatiopn\\_85x11in\\_High\\_res.pdf](https://miami.consulfrance.org/IMG/pdf/TTIP_Publicatiopn_85x11in_High_res.pdf) (last visited Oct. 14, 2017) (maintaining that U.S and E.U. trade accounts for roughly 30 percent of global trade in goods, 40 percent of global trade in services, and nearly half of global GDP).

<sup>59</sup> See Gregory Shaffer and Michael Waibel, *The (Mis)Alignment of the Trade and Monetary Legal Orders*, in *Transnational Legal Orders*, eds. Terrence Halliday and Gregory Shaffer (2015).

<sup>60</sup> With U.S. withdrawal from the TPP, influence over trade governance in Asia has shifted toward China and that country's multiple initiatives, including through its proposed Belt and Road Initiative, Asian Infrastructure and Investment Bank, and Regional Comprehensive Economic Partnership (RCEP). These initiatives will aim to enhance trade for Chinese goods, including those produced by China's SOEs.

and enhance their global competitiveness. In this way, they could more efficiently combine U.S. capital and know-how with developing country labor to maximize profits. Consequently, agreements like the TPP would further facilitate the offshoring of tasks, thereby further favoring capital over labor regarding employment terms, and capital over government regarding state taxation and subsidization.

## V. RETOOLING TRADE AGREEMENTS TO SUPPORT SOCIAL INCLUSION POLICIES

The combination of the aftershocks of the 2007-2008 financial crisis, rising inequality, feelings of inequity and suspicion of the close relationship between finance and government, shifts in global economic power toward China, and new mega-regional trade negotiations facilitating GVCs, created political upheaval in the U.S. and Europe. This upheaval helped catalyze the election of U.S. President Trump, the vote for Brexit, and the rise of neo-nationalist parties across Europe.<sup>61</sup> To preserve international institutions and the core purposes they serve, it is incumbent to retool trade agreements to facilitate domestic policies that serve people and societies more inclusively.

1. Tax, trade, and inequality. There is significant evidence that an important cause of increased inequality in the United States is change in tax policy, starting with the Reagan tax cuts in the 1980s.<sup>62</sup> The two major tax cuts of the Reagan era

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<sup>61</sup> See e.g., WORLD ECONOMIC FORUM, THE GLOBAL RISKS REPORT 2017 (12th ed. 2017); Martin Wolf, *The Economic Origins of the Populist Surge*, FIN. TIMES, June 27, 2017; Martin Wolf, *Martin Wolf: The Long and Painful Journey to World Disorder*, FIN. TIMES, Jan. 5, 2017. Indeed, according to Trump's advisor Peter Navarro, the administration hopes to unravel global supply chains so as to "manufacture those components in a robust domestic supply chain that will spur job and wage growth." Shawn Donnan, 'Trump's Top Trade Advisor Accuses Germany of Currency Exploitation', *Financial Times*, 31 January 2017.

<sup>62</sup> Thomas Piketty, CAPITAL IN THE TWENTY-FIRST CENTURY 495-496, 508-514 (2014) ("the spectacular decrease in the progressivity of the income tax in the United States and Britain since 1980, even though both countries had been among the leaders in progressive taxation after World War II, probably explains much of the increase in the very highest earned incomes. At the same time, the recent rise of tax competition in a world of free-flowing capital has led many governments to exempt capital income from the progressive income tax"). See also Thomas Hungerford, Cong. Res. Serv., R42729, TAXES AND THE ECONOMY: AN ECONOMIC ANALYSIS OF THE TOP TAX RATES SINCE 1945 17 (2012) ("Analysis of such data suggests the reduction in the top tax rates appears to

dropped the top marginal income tax rate for the rich from 70% to 38.5%. These tax cuts helped triple the national debt to 2.6 trillion dollars, leading to severe budget cuts that constrained the ability of the state to provide support for vulnerable citizens.<sup>63</sup> They had significant adverse effects on state support, ranging from public education to health insurance, from child care to job training. In parallel, the Republican party led an assault on the estate tax imposed on the wealthiest 0.1 percent of Americans. In 2017, they increased the exempted amount of wealth to \$20 million (for couples), indexed for inflation, up from \$675,000 in 2000, and they reduced the tax rate on these estates from a high of 77% from 1941-1977 to 40%.<sup>64</sup> As a result, only 1,800 estates will be subject to the tax in 2018, down from around 52,000 estates in 2000.<sup>65</sup> To the extent that these tax policy changes simply reflect national preferences, they are a matter of domestic political choice. They nonetheless have implications for trade policy when trade is subsequently blamed for rising inequality.

Tax policy becomes more directly linked with trade policy when globalization processes constrain governments' fiscal choices. For example, to attract investment, governments have reduced taxes on corporate income earned within their borders.<sup>66</sup> In parallel, investors and other high net worth individuals have taken advantage of tax arbitrage opportunities to allocate income to low-tax jurisdictions through creative lawyering, use of tax havens, and tax secrecy laws that prohibit cooperation with public authorities. The Tax Justice Network estimates that "by 2010 some US\$21 to US\$31 trillion of the world's financial

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be uncorrelated with saving, investment, or productivity growth.... However, the top tax rate reductions appear to be associated with the increasing concentration of income at the top of the income distribution." See also JUDITH STEIN, PIVOTAL DECADE 263-270 (2010) (noting switch in tax policy away from investment credits (to create incentives for production) to straight tax cuts.

<sup>63</sup> U.S. Congressional Budget Office, Historical Budget Data, <https://www.cbo.gov/about/products/budget-economic-data#2> (last visited Oct. 13, 2017).

<sup>64</sup> What's New – Estate and Gift Tax, INTERNAL REVENUE SERVICE, <https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax> (last visited Oct. 13, 2017).

<sup>65</sup> Ashlea Ebeling, *Final Tax Bill Includes Huge Estate Tax Win For The Rich: The \$22.4 Million Exemption*, FORBES (Dec. 21, 2017), <https://www.forbes.com/sites/ashleaebeling/2017/12/21/final-tax-bill-includes-huge-estate-tax-win-for-the-rich-the-22-4-million-exemption/#73be5b1d1d54>. Cf. Ashlea Ebeling, *Trump GOP Tax Reform Framework Calls for Estate Tax Repeal*, FORBES (Sept. 27, 2017), <https://www.forbes.com/sites/ashleaebeling/2017/09/27/trump-gop-tax-framework-calls-for-estate-tax-repeal/#27438e2f1174>.

<sup>66</sup> See AFL-CIO, *Making NAFTA Work for Working People 23* (2017) (a chart on "Corporate Tax Rates in OECD Countries Compared (2000 vs. 2016)," based on OECD data).

wealth was invested by ... virtually tax-free methods through the offshore system,” one “which exploits the legal fiction that corporations are individual and separate legal persons, even if they are owned and centrally controlled within a corporate group.”<sup>67</sup> This tax competition and use of tax havens undermines a main source of revenue for modern welfare states,<sup>68</sup> so that the state is less able to provide social security and job retraining to benefit those adversely affected by economic globalization. This problem is particularly severe for developing countries.<sup>69</sup>

These dynamics regarding tax policies create political pressure for trade protectionism. If political support is to be maintained for a reasonably open trading system supported by an international institution that facilitates economic cooperation, harmful tax competition must be curtailed. Such an effort demands multilateral coordination. If the U.S., E.U., and other major economies work together, they could use trade policy as leverage to constrain harmful tax competition, avoidance, and evasion. They could, for example, condition the conclusion of a trade agreement on a parallel tax agreement. Yet because capital exercises increased political clout within countries, this coordination has become difficult, as capital plays countries off of each other to attract it.

There are signs of progress through the OECD’s and G20’s creation of an action plan and package of measures to prevent base erosion and profit shifting (BEPS) strategies by multinational companies.<sup>70</sup> This project has been expanded to include around 96 countries through an “Inclusive Framework” that requires countries to commit to implement a comprehensive package and pay an annual

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<sup>67</sup> Sol Picciotto, *The Deconstruction of Offshore*, in *THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY* 160, 162 (Heinz Klug and Sally Engle Merry eds., 2016). See also *Tax Havens: Buried Treasure*, *THE ECONOMIST* (Oct. 7, 2017), <https://www.economist.com/news/finance-and-economics/21730046-even-new-data-are-patchy-and-do-not-fully-account-all-wealth-new> (“Accounting for offshore holdings suggests wealth inequality is even greater than was thought. In Britain, France, and Spain, the top 0.01% of households stash 30-40% of their wealth in tax havens”).

<sup>68</sup> Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 *HARV. L. REV.* 1575 (2000).

<sup>69</sup> Alex Cobham & Petr Jansky, *Global distribution of revenue loss from tax avoidance: Re-estimation and country results* (WIDER Working Paper 2017/55, 2017), <https://www.wider.unu.edu/publication/global-distribution-revenue-loss-tax-avoidance>.

<sup>70</sup> OECD, *ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING* (2013).

fee.<sup>71</sup> Yet, the effectiveness of BEPS has been questionable.<sup>72</sup> Moreover, even larger losses of revenue come from tax evasion and avoidance by high net worth individuals.<sup>73</sup> The U.S. and E.U. have taken some independent measures to address these challenges. The E.U. adopted the European Union Savings Directive in 2003 which required E.U. member states to provide each other with information on interest paid to achieve more effective taxation of residents. More recently, the E.U. adopted the Anti-Tax Avoidance Directive in 2016, which aims to create a minimum level of protection against corporate tax avoidance throughout the E.U.<sup>74</sup> The U.S., in parallel, adopted the Foreign Account Tax Compliance Act (FATCA), following which the U.S. Treasury negotiated international agreements to share information and crack down on tax evasion.<sup>75</sup> The 2017 Tax Cuts and Jobs Act contains additional tax avoidance measures.<sup>76</sup> In addition, OECD countries created a Global Forum Working Group on Effective Exchange of Information that, in turn, created model Tax Information Exchange Agreements (“TIEAs”) under which countries agree to cooperate in criminal and civil tax investigations upon request.<sup>77</sup> These agreements were then extended to cover the automatic exchange of

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<sup>71</sup> OECD, *BACKGROUND BRIEF – INCLUSIVE FRAMEWORK ON BEPS* (2017).

<sup>72</sup> Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 BROOK. J. INT’L L. 973 (2016). See also Reuven S. Avi-Yonah and Haiyan Xu, *Evaluating BEPS* (University of Michigan Public Law Research Paper No. 493, 2016).

<sup>73</sup> Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Tax evasion and inequality* (National Bureau of Economic Research No. W23772, 2017), <http://www.nber.org/papers/w23772>.

<sup>74</sup> Directive 2016/1164 of the European Parliament and of the Council of 12 July 2016 *Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market*, 2016 O.J. L 193.

<sup>75</sup> 26 U.S.C. §§ 1471-1474. See also *Foreign Account Tax Compliance Act Resource Center*, U.S. DEPARTMENT OF THE TREASURY, <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last visited Feb. 27, 2018) for the current status of international agreements negotiated under FATCA.

<sup>76</sup> See Latham and Watkins Tax Practice, *US Tax Reform: Key Business Impacts, Illustrated With Charts and Transactional Diagrams* 13-22 (White Paper Number 2266, 2018), <https://m.lw.com/thoughtLeadership/US-tax-reform-key-business-impacts-charts-transactional-diagrams> (noting, for example, the BEAT, or “Base Erosion and Anti-Abuse Tax,” which “will limit tax benefits of transactions between US and non-US affiliates in a multinational group that purportedly result in base erosion,” and the GILTI, or “Global Intangible Low-taxed Income,” determined on a global basis, which will increase adjustable tax income”).

<sup>77</sup> OECD, *MODEL AGREEMENT ON EXCHANGE OF INFORMATION IN TAX MATTERS* (2002). Some member countries have extended the scope of their existing TIEAs to cover the automatic and/or spontaneous exchange of information.

information regardless of a formal investigation.<sup>78</sup> Yet, tax havens continue to flourish, holding trillions of dollars offshore.<sup>79</sup>

One response is to condition trade liberalization on tax policy reform to strengthen governments' ability to provide social welfare.<sup>80</sup> The state is critically important for providing legitimating constraints on capitalism to preserve the social contract.<sup>81</sup> Yet, structurally, states must overcome collective action problems and coordinate if they are to effectively combat harmful tax competition and protect their tax sovereignty. Only then will capitalism be legitimized through embedding it in ways that support social inclusion and individual and social capacity. Enhanced social welfare policies are not rendered impossible by globalization, but the current system supports the free flow of capital, goods, and services that make these policies more difficult to pursue. Social welfare policies will be facilitated if harmful tax competition is constrained and the tax base increased through inter-state coordination.

Trade agreements could be conditioned on separately negotiated international tax agreements, which could be incorporated by reference to them.<sup>82</sup>

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<sup>78</sup> See OECD, *MODEL PROTOCOL TIEA* (2015). See also *Tax Information Exchange Agreements*, OECD, <http://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementsstieas.htm> for a record of TIEAs currently in effect (last visited Feb. 27, 2018).

<sup>79</sup> Gabriel Zucman, *The missing wealth of nations: Are Europe and the US net debtors or net creditors?*, 128 Q. J. ECON. 1321 (2013).

<sup>80</sup> The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains provisions for challenging tax haven schemes tied to the subsidization of exports. Yet, these provisions do not directly, or sufficiently, address the problems of harmful tax competition, avoidance, and evasion. Avi-Yonah differentiates traditional tax havens (seeking to attract investment with little to no income taxes), production tax havens (using specific tax holidays and other benefits to attract investment); and headquarters tax havens (designed to attract multinationals to locate their headquarters), finding that all are subject to potential challenge, but that production tax havens are the most susceptible. Avi-Yonah, *Globalization, Tax Competition*, *supra* n. 46. The current framework is particularly problematic for developing countries that desperately need tax revenues, and otherwise obtain them only through tariffs and consumer taxes, which are regressive in their impact. See Reuven Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, 5 MICH. BUS. AND ENTREPRENEURIAL L. REV. 137 (2016).

<sup>81</sup> Dani Rodrik, *Why Nation-States Are Good*, AEON (Oct. 2, 2017), <https://aeon.co/essays/capitalists-need-the-nation-state-more-than-it-needs-them>; RODRIK, STRAIGHT TALK, *supra* n. 18.

<sup>82</sup> See Yauriv Brauner, *International Trade and Tax Agreements May Be Coordinated, But Not Reconciled*, 25 VA. TAX REV. 251 (2005). These agreements could, for example, curtail wasteful investment subsidies in the form of tax holidays, abatements, and other benefits. See e.g., AFL-CIO, *Making NAFTA Work*, *supra* note...

There is precedent for this approach in WTO agreements, which incorporate by reference export credit subsidy rules negotiated in the OECD (in the WTO Agreement on Subsidies and Countervailing Measures) and regulatory standards developed through international standard-setting organizations (in the WTO Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures). WTO tribunals also reference other international treaty obligations in interpreting and applying WTO rules.<sup>83</sup>

International cooperation as presented above represents a first-best option. Given the track record of its failures to address adequately the problems of harmful tax competition, tax avoidance, and tax avoidance, the fallback option is constructive unilateral action to preserve the tax base where possible.<sup>84</sup> Such unilateral action can, in turn, potentially catalyze international coordination.<sup>85</sup>

## 2. Safeguarding policy space for complementary domestic social policies.

Adjustment policies are needed to offset the risks of economic globalization and rapid technological change. As Devashish Mitra and Priya Ranjan write, social protection helps address market failures from labor-market crowding, promotes distributional equity from the gains of trade and technology, and "makes economic globalization more palatable politically."<sup>86</sup> Without complementary domestic policies, support for neo-nationalist parties could continue to rise, representing a new form of tribalism with racialized dimensions that will undermine the existing international institutional order, as well as domestic ones. Domestic social policies are needed whether trade, technology, or both in combination, cause increased job

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<sup>83</sup> For example, international environmental treaties have shaped the interpretation of GATT Article XX, which provides exceptions to trade obligations on health and safety, environmental, and public moral grounds. *See, e.g.*, Appellate Body Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 170, WT/DS58/AB/R (Oct. 12, 1998). In that decision, “the Appellate Body implicitly accepted the possibility that a subset of Members themselves might define, in its words, the “line of equilibrium” between regulatory restrictions and liberalized trade under the chapeau of Article XX. Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT’L L. 103, 126 (2011).

<sup>84</sup> Reuven Avi-Yonah, *Constructive Unilateralism: U.S. Leadership and International Taxation*, 42 INT’L TAX J. 17 (2016).

<sup>85</sup> Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism, and International Law*, 1 TRANSNATIONAL ENVIRONMENTAL LAW 31 (2012).

<sup>86</sup> Devashish Mitra & Priya Ranjan, *Social Protection in Labour Markets Exposed to External Shocks*, in MAKING GLOBALIZATION SOCIALLY SUSTAINABLE 199 (Marc Bacchetta & Marion Jansen eds., 2011).

insecurity and income inequality. It is beside the point if workers lose their jobs because of trade from China, because of robots, or because of a turn to robots in light of global competition. Since it is politically easier to blame trade involving foreigners than technology, enhanced social policies will help protect the international trade legal order itself. They should be multi-pronged and vary in light of domestic preferences and institutional and social contexts.<sup>87</sup> Yet, at a minimum, they should address issues of social security and labor flexibility in response to economic globalization and technological change.

a. Social security. Industrialized states created social welfare programs after World War II that provided social security to citizens. They varied in what they provided, with European countries being much more generous than the United States, although they all provided significant benefits to the vulnerable. Social security programs, however, have been compromised because of reduced tax receipts due to tax cuts and lower economic growth. They need to be revamped if a relatively open trading system is to be sustained. Countries will vary in their preferences, but they need policy space to provide basic health care, some form of basic guaranteed income (including but not limited to retirement and disability income), housing, child support, public education, and job training.

One option is to condition trade liberalization on the development and retention of such social programs. The anti-government turn of the Tea Party and the Republican Party in the U.S. make this politically difficult at this time, but, in that case, it seems prudent to check further trade liberalization. Otherwise, trade liberal policies will further empower neo-nationalists deploying anti-elite rhetoric, which paradoxically further erodes government's ability to support those vulnerable to economic change, whether the change is catalyzed by technological developments, economic globalization, or both in combination. It is a vicious spiral. The spiral will need to be reversed if states are to retain the policy space to pursue social security programs while maintaining a cooperative trade legal order.

b. Job flexicurity. Meaningful employment is critical for individual self-worth and a sense of belonging in society. The term flexicurity was first developed in Denmark, and then taken up by the European Union, to respond to social policy

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<sup>87</sup> See KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY (2014).

challenges in a globalized world. Flexicurity policies aim to combine labor market flexibility, lifelong learning, active labor market policy, and social security.<sup>88</sup> Flexibility is required to ease economic adjustment and enhance labor accountability. Lifelong learning facilitates job transitions by enhancing individual capacity. Active labor market policies provide the unemployed with rights, complemented by duties. They include job centers, training schemes, and job subsidies. Social security ensures basic income support during employment transitions. Long-term employment is increasingly vulnerable in a globalized world characterized by rapid technological change. The era for lifetime employment with a single employer is largely gone. Given the increased risks of employment shocks for an increasing number of workers, support for trade liberal policies should be conditioned on the development of job flexicurity policies. There is no “best” policy for enhancing social solidarity and inclusion. Rather, policy experimentation is required in light of domestic social and institutional contexts,<sup>89</sup> and trade agreements should be supportive of them.

c. Trade adjustment policies. Traditional trade adjustment mechanisms provide some job retraining and social security that can form part of a broader flexicurity policy package. In themselves, they are radically insufficient, including because of the broader links between trade and technology-induced change, but they nonetheless demonstrate how adjustment policies can be linked to trade agreements. Traditionally, trade adjustment policies have been a matter solely of domestic concern. The United States has had programs since 1962, which have generally been adopted concurrently with the launch of negotiations for new trade

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<sup>88</sup> See Council Secretariat of the European Union, *Implementation of the common principles of flexicurity within the framework of the 2008-2010 round of the Lisbon Strategy* (2008), <http://ec.europa.eu/social/main.jsp?catId=102/>; Ton Wilthagen & F.H. Tros, *The Concept of Flexicurity: A New Approach to Regulation Employment and Labour Markets*, 10 EUR. REV. OF LAB. AND RES. 170 (2004) (defining flexicurity as "... a degree of job, employment, income and combination security that facilitates the labour market careers and biographies of workers with a relatively weak position and allows for enduring and high quality labour market participation and social inclusion, while at the same time providing (2) a degree of numerical [both external an internal], functional and wage flexibility that allows for labour markets' [and individual companies'] timely and adequate adjustment to changing conditions in order to maintain and enhance competitiveness and productivity.").

<sup>89</sup> Thelen, *supra* note...

agreements.<sup>90</sup> The problem with these programs has been two-fold. First, the programs are narrow in their focus, and they have been far from sufficient to address the increased precariousness of work. Second, there is nothing that guarantees that a future legislature will not curtail or eliminate the benefits. As a result, the lack of adequate adjustment policies spur backlash against trade, putting trade agreements in jeopardy.

To ensure ongoing support for an open trading system, a commitment to redistribute the gains from trade could be incorporated into trade agreements themselves. In this way, governments would make commitments more credible not only to workers but to their trading partners as well, which otherwise would be concerned about trade restrictions. There are different ways this commitment could be structured. Tim Meyer proposes that trade agreements include an Economic Development Chapter that provides for three kinds of obligations: (i) a fiscal obligation on countries to enact substantive policies to redistribute the gains from trade domestically; this obligation would be indexed to losses from liberalized trade that the government identifies and reports; (ii) an obligation to report compliance with this obligation to an Economic Development Committee of experts created under the agreement, which would independently gather data on the impacts of trade within the country; and (iii) a dispute settlement mechanism to enforce the commitment, which could lead to the suspension of trade concessions.<sup>91</sup> In complement, they could be accompanied by a small financial transaction tax on the value of currency or securities sales (say less than 0.1 percent) to fund the policies.<sup>92</sup>

As regards state-to-state enforcement, Meyer envisions the potential of tit-for-tat cases where, for example, the U.S. claims Mexico has breached its obligations regarding adjustment assistance, and, in turn, Mexico brings a similar claim against the U.S., a phenomenon current in WTO dispute settlement. Yet, states may not bring claims against each other—those who live in glass houses do not throw stones. As a complement, they could create private enforcement mechanisms, such as through a petition process (as under the Inter-American

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<sup>90</sup> Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1962). *See also* Trade Act of 1974, 19 U.S.C. § 2341 (1974); Trade Preferences Extension Act of 2015, 19 U.S.C. § 2271 (2015). For background, see Edward Alden, *Failure to Adjust: How Americans Got Left Behind in the Global Economy* (Rowman & Littlefield, New York 2016) 110–26.

<sup>91</sup> Tim Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985 (2017).

<sup>92</sup> *See* Frank Garcia & Tim Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE (2017).

Convention of Human Rights) or through private actions before a court (as in the case of the European Court of Human Rights).<sup>93</sup> Yet, private enforcement mechanisms may be politically infeasible at this time. Nonetheless, as Meyer also notes, human rights treaties commonly create committees to which members must report, following which the committee makes recommendations.<sup>94</sup> The mere creation of reporting requirements before a trade adjustment committee still would constitute an improvement because it could spur the preparation of shadow reports by labor organizations and civil society organizations to pressure governments. That pressure could play into domestic politics to keep governments more accountable.

Although this type of obligation can be structured in many ways, the core idea is that trade agreements will only be sustainable if states commit to distribute economic gains broadly. If the benefits from trade are not so distributed, then a country would breach commitments to its citizens (regarding the sharing of the benefits) and to its trading partner (concerned about denial of market access because of protectionist pressures). As a result, such provisions could enhance the credibility of state commitments both internally and externally. Otherwise, by subsequently reducing trade adjustment assistance, a country would undercut both the domestic bargain that led to ratification of the trade agreement and the international bargain itself.

This type of provision would not be sufficient since the challenges of job security involve much more than trade. Nonetheless, domestic commitments to trade adjustment are commonly made in connection with trade negotiations, and countries have a broader interest to monitor that these commitments are met so as not to undermine the agreements. In the process, such provisions would provide enhanced leverage to affected groups, such as labor, within the country.

d. Labor clauses. In federal and regional jurisdictions, governments adopt minimum labor standards coupled with protection of workers' freedom of association and right to collective bargaining. They thereby curtail pressure on sub-governmental units to lower standards to attract investment, potentially leading to a race to the bottom within them. Such provisions help preserve (and increase) labor's bargaining power in relation to capital, as well as the broader social contract.

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<sup>93</sup> Meyer, *Saving the Political Consensus*, *supra* n. ..., at 1022.

<sup>94</sup> *Id.*, at 1020-1021.

Labor clauses, however, are controversial in trade agreements because of the vast differences in labor productivity and levels of development among countries. They can be used by protectionist interests in advanced industrial economies to block developing country imports, in turn harming workers in these countries—pitting workers against workers. Mechanisms are thus needed to ensure neutral third-party review of labor commitments, which, in turn, provide leverage to domestic labor.

There is mixed evidence regarding the impact of labor clauses in trade agreements on the protection of workers' rights and labor conditions.<sup>95</sup> The risk is that trade agreements simply contain vague platitudes that serve as symbols to legitimate current policy, as opposed to real action to address underlying structural biases privileging capital. The question is whether trade agreements can be useful as part of a larger effort to address labor rights.

Viewed in isolation, there are serious limits to what a trade agreement can do. The ethos and institutional players in trade regimes are focused on trade policy, not worker rights. Clearly a trade organization should not be viewed as the primary guardian of labor rights, which would be preposterous.

However, labor clauses in trade agreements should not be viewed in isolation. Rather, they can form part of larger efforts of transnational legal ordering to shape domestic legal systems and local practices so that labor rights norms become internalized. Ultimately, workers care most about local practices. Thus, local institutions are needed to ensure that labor rights are addressed in a quick, responsive, and effective manner. From this perspective, labor provisions in trade agreements are best viewed as part of a transnational legal process that includes other efforts, such as private corporate social responsibility provisions addressing global value chains, hybrid mechanisms such as the Bangladesh Accord on Fire and Building Safety, and traditional intergovernmental mechanisms through the International Labour Organization (ILO) with its tripartite governance bringing

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<sup>95</sup> Cf. Sabina Dewan & Lucas Ronconi, *U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America*, 57 *INDUS. REL.* 35, 52–53 (2018) (“trade agreements, particularly those with strong labor provisions and resources devoted to trade capacity building, can promote better enforcement of existing labor laws in developing countries”); and Francesco Giumelli & Gerda van Roozendaal, *Trade Agreements and Labour Standards Clauses: Explaining Labour Standards Developments Through a Qualitative Comparative Analysis of US Free Trade Agreements*, 17 *GLOBAL SOC. POL’Y* 38, 38 (2017) (“FTAs do not play a determinant role in improving labour standards in signatory states”).

together governments, trade unions, and business associations.<sup>96</sup> From this perspective, trade agreements can link with efforts to create broader transnational legal ordering in support of labor rights, with the ultimate aim of enhancing protections affecting the shop floor.

The much maligned TPP went further than previous agreements in creating minimum labor standards. TPP members agreed to protect the four fundamental labor standards in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (protection of freedom of association and collective bargaining; elimination of discrimination; prohibition of forced labor; and elimination of child labor), establish a minimum wage, set caps on working hours, and enforce occupational health and safety standards.<sup>97</sup> The TPP specifically applied these requirements to export processing zones, which are criticized for lax standards. The agreement also incorporated dispute settlement that could give rise to sanctions.

In complement, the U.S. signed side letters with Vietnam, Malaysia, and Brunei that created additional labor obligations, including reforms that would have to be implemented before the U.S. commitments under the TPP went into full effect. In the case of Vietnam, the U.S. could suspend its commitment to cut tariffs if it found that Vietnam did not comply with its labor commitments. The bargaining leverage thus flipped because Vietnam would have to sue the U.S. for unfairly suspending tariff concessions, rather than the U.S. having to sue Vietnam for its lack of enforcement of the labor commitments. Indeed, there is evidence that the

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<sup>96</sup> See e.g., Larry Cata Backer, *Are Supply Chains Transnational Legal Orders?: What We Can Learn from the Rana Plaza Factory Collapse*, UCI Journal of International, Transnational and Comparative Law (2017); TIM BARTLEY, RULES WITHOUT RIGHTS: LAND, LABOR, AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY 273-283 (2018).

. See generally, Gregory Shaffer, *Transnational Legal Process and State Change*, Law and Social Inquiry, Law and Social Inquiry... (2012); and Terence Halliday and Gregory Shaffer, *Transnational Legal Orders* (2015).

<sup>97</sup> See Alvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreements*, in eds. Benedict Kingsbury et al.,... (noting how the TPP built from earlier agreements). These provisions generally reflect those demanded by Democrats in Congress in return for granting trade promotion authority to the Bush administration to negotiate free trade agreements, such as with Colombia, Korea, Panama, and Peru, although the agreements with Colombia, Panama and Korea were finally approved by Congress during the Obama administration. The TPP only requires states to *have* the listed rights; it says nothing about how, or at what level, those rights are set. See Cathleen Cimino-Isaacs, *Labor Standards in the TPP*, in TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT 261 (Cathleen Cimino-Isaacs & Jeffery J. Schott eds., 2016).

TPP pushed both Vietnam and Mexico to initiate processes to recognize independent unions. The U.S. withdrawal from the TPP set back these initiatives.<sup>98</sup>

One can imagine further provisions. For example, the agreement could have required the enforcement of the eight fundamental ILO conventions which go into greater detail, and indeed set international standards concerning the protection of the freedom of association, rights to organize and collective bargaining, abolition of forced labor, child labor, and non-discrimination and equal remuneration.<sup>99</sup> Labor unions demand more detailed commitments, as opposed to vague, open-ended provisions, because they give them more leverage. However, the USTR did not support this requirement because the U.S. is only party to two of them, and Republicans otherwise would have opposed the TPP.<sup>100</sup> Nonetheless, the TPP's provisions did cover these issues and they provide a baseline that can be adapted to protect against social dumping more broadly, to which we turn below.

In addition, one can imagine systems granting direct oversight and enforcement of worker rights against companies, such as before arbitration. In this way, a system could be adopted that differs but has parallels with those protecting capital under investment chapters in trade agreements. Institutional mechanisms, in some form, are needed to assure that labor rights are not paper rights but actually effective. Mark Barenberg, for example, has made a detailed proposal in coordination with U.S. labor organizations for independent commissions,

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<sup>98</sup> See Alvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreements*, supra note..., at 15-21.

<sup>99</sup> See European Trade Union Confederation, *EUTC Resolution for an EU progressive trade and investment policy* (June 16, 2017), <https://www.etuc.org/documents/etuc-resolution-eu-progressive-trade-and-investment-policy-adopted-executive-committee#.WpHrmJPwYxg> (calling for a requirement of ratification and implementation of the eight ILO Core Labour Standards, as well as ILO conventions and instruments such as on work safety). The AFL-CIO responded to the TPP as follows: "While the TPP includes some trivial changes to the Labor Chapter from the 'May 10' standard, none of the changes provide significant new protections for workers, nor do they remedy the completely discretionary nature of labor enforcement." AFL-CIO, *Report on the Impact of the Trans-Pacific Partnership*, available at <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP/Report-on-the-Impacts-of-the-Trans-Pacific-Partnership#collapseFive>.

<sup>100</sup> Part of the problem lies in the U.S. government's limited support for issues of importance to organized labor, illustrating that labor clauses in trade agreements are far from sufficient to address problems of social inclusion. See Kerry Rittich, *Trade Agreements in the 21<sup>st</sup> Century: Rethinking the Trade/Labor Linkage* (Feb. 2018 draft on file) [update re Trubek chapter?].

investigative teams, arbitral tribunals, and sanctions to protect worker rights.<sup>101</sup> The inclusion of such a mechanism in trade agreements appears to be unlikely at this time. However, the pressure to develop transnational legal ordering of labor rights, including through trade agreements, remains.

3. Reconceiving negotiations as over market access and policy space. Trade negotiations traditionally involve reciprocal bargaining to increase market access. In this way, they ratchet up trade liberalization over time. Yet, democratic governments are interested in more than just one-way trade liberalization. They also are concerned about policy space, and thus negotiations also should involve reciprocal bargains over policy space to ensure responsiveness to citizen concerns. Before we address new initiatives, we first briefly review existing trade mechanisms and their limits.

a. Existing mechanisms for ensuring policy space. Although the WTO is often criticized for foreclosing policy space, WTO rules in fact incorporate mechanisms for safeguarding it. First, most developing country members set their tariffs at much lower levels than their bound rates, and many tariff lines remain unbound. In these cases, countries retain the option to increase tariffs on goods in targeted sectors as part of their development policy, including to support “infant industries.”<sup>102</sup> Even where applied tariffs are bound at low levels, GATT Article XXXVIII permits Members to modify their schedules every three years by negotiating with other WTO members who have a “principal supplying interest” in the product.<sup>103</sup> Where agreement fails, a WTO member can unilaterally modify its tariff schedule, and the principal supplier may then withdraw “substantially equivalent concessions” to retain a reciprocal balance.

Second, GATT Article XIX and the WTO Agreement on Safeguards provide that where an increase in imports causes or threatens to cause “serious

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<sup>101</sup> See e.g., MARK BARENBERG, *SUSTAINING WORKERS’ BARGAINING POWER IN AN AGE OF GLOBALIZATION* (2009). See also, AFL-CIO, *Making NAFTA Work*, *supra* note..., at 34-43 (2017); Alvaro Santos, *The Lessons of TPP and the Future of Labor Chapters*, *supra* note.. .

<sup>102</sup> Infant industry protection is a rationale for protecting new industries for a transitional period, especially in developing countries that wish to diversify their economy. The argument is that they could develop a comparative advantage after becoming more efficient and benefiting from economies of scale, but they need temporary protection from competition from established firms in developed countries.

<sup>103</sup> General Agreement on Tariffs and Trade, Oct. 30 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

injury” to a domestic industry, a WTO Member may impose safeguards through raising tariffs or applying quotas. The WTO Appellate Body has interpreted these provisions in a relatively restrictive manner, which commentators criticize (Sykes 2003).<sup>104</sup> In theory, trade negotiations could clarify or amend these texts to be less restrictive. In practice, although the negotiating system has largely broken down, it still takes three years to litigate a safeguards case, thus providing a long period for a country to facilitate adjustment.

Third, WTO rules (as well as most bilateral and plurilateral trade agreements, including all signed by the U.S. and E.U.) permit countries to increase tariffs to offset “dumping” and to countervail subsidies. In practice, these provisions make little economic sense from the perspective of competition policy and aggregate national welfare. Rather, they are best viewed as political safeguards to address import surges, and thus maintain overall support for trade liberalization.<sup>105</sup> These measures are easier to impose because the injury threshold is lower than for safeguards, and measures can be targeted at imports from particular countries that matter.<sup>106</sup>

Fourth, GATT Article XX creates a general exception permitting countries to restrict exports where “necessary to protect public morals,” so long as their measures do not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction of international trade.”<sup>107</sup> The WTO Appellate Body recognized the application of this defense for an E.U. ban on the importation of seal products in response to and in reflection of public morals regarding animal welfare.<sup>108</sup> Restrictions on imports of

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<sup>104</sup> Alan O. Sykes, *The Safeguards Mess: A Critique of WTO jurisprudence*, 2 WORLD TRADE REVIEW 261 (2003).

<sup>105</sup> Alan O. Sykes & Richard N. Cooper, *Anti-dumping and Antitrust: What Problems Does Each Address*, in BROOKINGS TRADE FORUM 2 (Susan M. Collins & Robert Z. Lawrence eds., 1998) (“[A]nti-dumping law was intended to create a politically popular form of contingent protectionism....”).

<sup>106</sup> Some commentators also contend that the WTO Appellate Body has improperly constrained countries’ policy space in using anti-dumping and countervailing duty measures. *See, e.g.*, Roger P. Alford, *Reflections on US—Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSN’L L. 196 (2006); and John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT’L ECON. L. 113 (2003).

<sup>107</sup> *See* GATT, *supra* n. 77, at art. XX.

<sup>108</sup> *See* Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

goods produced in violation of human rights could also be permitted on “public morals” grounds.

Fifth, the WTO Agreement on Subsidies and Countervailing Measures permits industrial policy so long as subsidies are not contingent on export performance or the use of domestic products over imported ones, or cause “adverse effects” to another WTO member, as defined in the agreement.<sup>109</sup> In practice, most developing countries are not in a position to cause adverse effects by subsidizing an industry. Moreover, it takes time to identify a measure and such adverse effects, and almost three years to fully litigate a WTO case. As a result, countries can and do engage in industrial policy, including to assist “infant industries” so that, potentially, they can generate positive economic spillovers and become more competitive through developing economies of scale.

In short, from the perspective of policy space, it is a mistake to assert that current WTO rules foreclose policy space. Nonetheless, the WTO system can more directly and transparently address social and developmental concerns. Since bilateral and plurilateral trade agreements curtail policy space much more than the WTO, policy space mechanisms should be incorporated into them as well, especially when they are between countries at vastly different levels of development.

b. Negotiating over policy space between the Global North and Global South. One can envisage bargaining between developed and developing countries that involves negotiations over policy space as well as over market access. In particular, reforms in trade law could address (1) imports produced under conditions that violate international labor norms and (2) restrictions the WTO currently imposes on development strategies that deter legitimate experimentation. This section fleshes out two potential reforms: (1) a hybrid antidumping/safeguard regime that would authorize increased tariffs when imported goods are produced under substandard labor conditions; and (2) exceptions to the law on subsidies for legitimate industrial policy for development purposes. While there will be opposition to these reforms since the “North” has an interest in the first and the “South” in the second, it may be possible to negotiate a reform package with appropriate safeguards against abuse if political will can be mustered. Otherwise,

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<sup>109</sup> See SCM Agreement, articles 5-6.

countries may push the interpretation of existing WTO law to accommodate these policies, placing greater pressure on the WTO's judicial bodies.

A major challenge with these proposals is that they can impose significant externalities on outsiders. These externalities, however, can be subject to bargaining, as is the case with any rule. The challenge is to operationalize the concept of negotiating over policy space through new legal provisions while limiting the risks of protectionist abuse. Rodrik has been a leading advocate of the need for these policies to address distributional and development concerns.<sup>110</sup> What we need is complementary legal analysis regarding how they can be designed and operationalized. This section advances a way to do so.

Economic theory notes two primary rationales for international trade agreements. Kyle Bagwell and Robert Staiger have developed a theory contending that trade agreements are necessary to help countries avoid beggar-thy-neighbor policies in which they attempt to extract rents by shifting the terms of trade in their favor. Trade agreements help them reciprocally escape a prisoners' dilemma where they might otherwise both engage in such policies to each other's detriment.<sup>111</sup> In parallel, Giovanni Maggi and Andrés Rodríguez-Clare developed a theory of trade agreements as a way for governments to avoid domestic political failures by tying their own hands. In this way, they can better combat internal protectionist pressures that reduce national welfare, and potentially trigger tit-for-tat retaliation that, again, makes all countries worse off.<sup>112</sup>

Social dumping measures could be abused in ways that undermine both of these goals. First, they could be used to raise tariffs to increase a country's terms of trade at other countries' expense. Second, they could be used as a pretext regarding

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<sup>110</sup> See DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR (1997); DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY (2011); DANI RODRIK, STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY (2017).

<sup>111</sup> According to Bagwell and Staiger, "The purpose of a trade agreement is to offer a means of escape from a terms-of-trade driven Prisoners' Dilemma." Kyle Bagwell and Robert Staiger, *The Economics of the World Trading System* 3 (2002). From a terms-of-trade perspective, if an importing country raises a trade barrier and that country exercises market power so that foreign exporters must lower their prices to sell in its market, then the exporting country's terms of trade are prejudiced. That is, the exporting country will need to sell a greater amount of its products (at the lower price) to obtain the same amount of imports.

<sup>112</sup> See Giovanni Maggi & Andrés Rodríguez-Clare, *A Political-Economy Theory of Trade Agreements*, 97 AM. ECON. REV. 1374 (2007).

labor rights when the real aim is to raise protectionist barriers for an uncompetitive industry. Strict procedural and substantive criteria are thus needed.

In contrast, industrial policy in the form of subsidies advance neither of these aims. On the one hand, countries that subsidize worsen their own terms of trade because they make their products cheaper in export destinations.<sup>113</sup> On the other hand, they enhance consumer welfare in the importing country because of their effects on prices. Economists thus generally maintain that a country's response to subsidized imports under competitive conditions should be a thank you note.<sup>114</sup> The only economic rationale for combatting foreign subsidies is if they are used to gain a monopolistic position or to gain a strategic advantage in an oligopolistic industry.<sup>115</sup>

Regardless of economists' challenges to the rationale for prohibiting subsidies, the SCM Agreement exists and the constraints on subsidization will only be amended through bargaining. This section addresses one bargain that could complement an agreement on social dumping.

(i) *Protection against social dumping.* Claims of unfair trade proliferated following the election of Donald Trump. The underlying problem from a social policy perspective, however, is not "unfair trade" as viewed through the traditional WTO lens of product dumping because antidumping procedures tend to involve accounting ploys to show differences in pricing that may be economically

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<sup>113</sup> KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 173 (2002) ("[T]he increased export subsidy reduces the world price and thereby diminishes [the subsidizing country's] terms of trade.").

<sup>114</sup> *Id.* at 163 ("It is sometimes argued that export subsidies warrant encouragement, since they expand the volume of trade and enhance consumer welfare. According to this perspective, an importing country should send a 'note of thanks' when a trading partner offers an export subsidy."); PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 112 (6th ed. 2003) ("The standard model tells us that when foreign governments subsidize exports to the United States, the appropriate response from a national point of view should be to send them a note of thanks!"); Gene Grossman, "The Purpose of Trade Agreements." Chap. 7 of *Handbook of Commercial Policy*, edited by Kyle Bagwell and Robert Staiger (2016).

<sup>115</sup> See generally Paul R. Krugman, *Introduction: New Thinking About Trade Policy*, in *STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS* 1 (Paul R. Krugman, ed., 1986); Paul Krugman, *Introduction*, in *EMPIRICAL STUDIES OF STRATEGIC TRADE POLICY* 1 (Paul Krugman & Alasdair Smith, eds., 1994); Paul R. Krugman, *Is Free Trade Passé?*, 1 *J. ECON. PERSP.* 131 (1987); Avinash Dixit, *International Trade Policy for Oligopolistic Industries*, 94 *ECON. J.* 1 (1984).

justifiable and thus not “unfair.”<sup>116</sup> The real underlying concern should be social dumping of products—that is, products produced under exploitative labor conditions—that sell for less than domestically produced products, and that thus lead to concerns over wage suppression and reductions of labor protections in the “North.” These policies can undermine the domestic social contract and trigger political contestation against trade. A number of bilateral and plurilateral agreements include labor clauses pursuant to which countries agree not to obtain a trade advantage by failing to uphold national labor laws or (in some cases) minimum labor standards. These provisions, however, have proved insufficient in ways that this proposal aims to remedy.<sup>117</sup>

If provisions to safeguard against social dumping are incorporated into trade agreements, they should be subject to strict procedural, substantive, and injury requirements to combat abuse. Many of the provisions could take from the current WTO antidumping regime. The procedural criteria could mirror or build on Articles 5 (Initiation and Subsequent Investigation), 6 (Evidence), 11 (Duration), 12 (Public Notice and Explanation of Determinations), and 13 (Judicial Review) of the WTO Antidumping Agreement. Most importantly, due process rights would be provided to affected parties, including exporters, importers, organized labor, and other social

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<sup>116</sup> Under the current antidumping system, the investigator works more like a cartel enforcer who gathers pricing information from foreign traders, and then, under a threat of sanctions, presses them to raise prices and reduce output. If they do so, then the foreign traders capture “quota rents” in the form of oligopolistic pricing to the detriment of consumers. Under the current system, there is no guarantee, that the price increases will be captured by workers, as opposed to capital, and indeed there is evidence that capital primarily benefits. See Tim Lloyd, Oliver Morrissey & Geoffrey Reed, *Estimating the Impact of Anti-Dumping and Anti-Cartel Actions Using Intervention Analysis*, 108 *ECONOMIC JOURNAL* 458, 473 (1998). The one exception to such unfairness analysis is the case of predatory pricing, which is generally considered to be much rarer. See, e.g., Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in *THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE* (Robert M. Stern ed., 1993).

The issue of subsidies, such as from China, is more complicated. On the one hand, traditional economic analysis contends that foreign subsidies of traded goods benefit importing countries and their consumers. In particular, they increase a country’s terms of trade because foreign governments make their subsidized exports cheaper for an importing country’s consumers while that country’s exports sell at the same price, bringing in the same amount of revenue. Nonetheless, there is significant evidence that subsidized Chinese products have harmed some U.S. workers and communities. Existing WTO rules permit governments to countervail and directly challenge these subsidies. However, the WTO Appellate Body has been criticized for placing undue constraints on governments’ ability to countervail and challenge them.

<sup>117</sup> See Kerry Rittich, [...], in *Rethinking Trade and Investment Law*, eds. David Trubek, David Kennedy, Alvaro Santos, Chantal Thomas (2018).

groups, including consumer organizations. Similarly, injury criteria could reflect those set forth in Articles 3 and 4 of the WTO Antidumping Agreement, which require the showing of a “material injury,” or threat thereof, to a “domestic industry.” WTO jurisprudence provides significant guidance regarding these provisions’ application.

The first challenge with implementing this proposal is to specify when violations of labor rights occur so that a country may impose increased tariffs. The criteria chosen would build from experience with existing labor chapters in trade agreements, including the original TPP. The norms would address labor rights violations, and thus not undercut developing countries’ comparative advantage in producing goods with lower skilled labor in reflection of differences in productivity. The list of labor norms would include rights against forced labor, child labor, hazardous work, and discrimination, establishment of maximum working hours and a minimum wage, and most fundamentally, rights to freedom of association and collective bargaining.<sup>118</sup> A country deciding to impose duties would need to show sustained violations.

A second challenge is obtaining evidence establishing labor rights violations. This can and has been done.<sup>119</sup> Indeed, the U.S. prevailed on this issue in its challenge of Guatemala’s labor practices under the U.S.-Central America Free Trade Agreement (CAFTA).<sup>120</sup> To gather evidence of labor rights violations,

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<sup>118</sup> See e.g. MARK BARENBERG, *SUSTAINING WORKERS’ BARGAINING POWER IN AN AGE OF GLOBALIZATION* (2009). The minimum wage would have to be set near the market clearing rate, which will vary not only by country, but also within countries. Countries should thus have discretion in setting a minimum wage, which may vary within them in light of differing labor market conditions.

<sup>119</sup> Discussion with former official at USTR who worked on the case where the U.S. challenged Guatemala under the U.S.-Central America Free Trade Agreement (CAFTA), March 1, 2018.

<sup>120</sup> See *In the Matter of Guatemala – Issues Relating to Obligations under Article 16.2.1(a) of CAFTA-DR* (Final Panel Report, 2017), [https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%202014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%202014%202017.pdf). The U.S. lost the case because of the standards set forth in CAFTA, which are different than those set forth in this proposal. The CAFTA panel found that the U.S. failed to show that such non-enforcement was both (i) “a sustained or recurring course of action” and (ii) done in “a manner affecting trade. *Id.*, at para. 505 (“When Guatemala’s law enforcement failures are looked at collectively, they show (on an arguendo basis) a sustained or recurring course of action or inaction, but not conduct in a manner affecting trade. When the one law enforcement failure that we found to be in a manner affecting trade is looked at by itself, there is no sustained or recurring course of action or inaction”). See *In the Matter of Guatemala – Issues Relating to Obligations under Article 16.2.1(a) of CAFTA-DR* (Final Panel Report, 2017).

governments can work with labor and civil society organizations, and recognize and incorporate evidence from reports of the International Labour Organization (ILO) on country practices, as the U.S. did in the Guatemala case.<sup>121</sup>

A third challenge is to determine the amount of tariffs that may be imposed on the imports in response to the labor rights violations. The WTO Antidumping Agreement provides detailed provisions for the calculation of antidumping duties based on a comparison of product prices in the country of production and the importing country to determine dumping margins. The result is high transaction costs for all sides, including for the administrative authority. Accounting for the price differential caused by social dumping, in contrast, would not be necessary. In the case of social dumping, duties could be limited to the amount that would offset the injury that the increased imports from the country in question cause or threaten to cause to the domestic industry. Calculating such amount would be more transparent and not involve the manipulation of pricing data, thus reducing administrative costs for firms and administrative agencies. It would be analogous to the calculations made in safeguard procedures conducted under the WTO Agreement on Safeguards.

There are two key differences between this proposal and trade agreements such as CAFTA. First, under this proposal, a country can take direct action against imports produced under non-conforming labor standards. This proposal would shift leverage to the importing state to protect its social contract. No longer would it have to bring an international claim against the party violating the agreement. Rather, subject to procedural, substantive, and injury requirements, the importing country

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<sup>121</sup> *See, e.g.*, In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-D (Rebuttal Submission of the United States, para. 159, Mar. 16, 2015), [https://ustr.gov/sites/default/files/files/Issue\\_Areas/Labor/US%20Rebuttal%20Submission.pdf](https://ustr.gov/sites/default/files/files/Issue_Areas/Labor/US%20Rebuttal%20Submission.pdf) (“Guatemala’s claim that the “labor laws are strictly enforced” also rings hollow when compared to reports by the International Labor Organization and United Nations officials indicating that companies in the Guatemalan agricultural sector have consistently violated Guatemala’s labor laws subsequent to 2008. The reports often attribute these ongoing violations to the conduct of the Guatemalan Ministry of Labor. In 2009, the United Nations Special Rapporteur on the Right to Food concluded that “50.1 per cent of [Guatemalan agricultural] workers currently receive a salary that is below the legally established minimum wage.” In 2011, in reviewing the adequacy of labor inspections in Guatemala, an ILO committee noted “persistent widespread violations of the minimum wage legislation in rural areas.” Similar trends were observed in 2012. That year, the United Nations High Commissioner for Human Rights found “a tendency by the agro-industry to condition workers’ salaries to their productive outputs, with targets in place that are usually excessive, and without guarantees of earning the minimum wage”) (footnotes in text excluded).

could impose a social dumping duty, just as it currently can apply a traditional antidumping duty under existing antidumping law.

Second, the petitioner bringing the domestic social dumping action need not prove a causal link between the labor rights violations and increased imports. Rather, a petitioner would only need to show a correlation between (a) the violation of the specified labor rights, and (b) an increase of imports of the products from the country in question that causes or threatens to cause material injury to a domestic industry. The analysis would be simplified. The focus would be on the existence of sustained labor rights violations, in combination with a percentage rise in imports relative to domestic production that causes or threatens to cause material injury to a domestic industry.

This proposal is a hybrid that combines antidumping procedures with a safeguard remedy—that is, it combines a substantive law trigger based on labor rights violations and a safeguard remedy based on increased imports of products causing or threatening to cause material injury to a domestic industry. The rationale for this hybrid is at least two- (and for many) three-fold. First, it is notoriously difficult to prove causation and such difficulty should not work to the advantage of a producer that violates labor rights in a sustained manner. Second, a country should be able to safeguard its social contract by providing a remedy against products produced in such a manner. Third, for many people, sustained violations of international labor rights raise moral concerns and a country should not be forced to open its market to products produced in violation of them.

In practice, as under the current antidumping regime, the initiation of the investigation would trigger negotiations with the party subject to the investigation. As under Article 15 of the Antidumping Agreement, “constructive remedies” could be explored. In this case, however, negotiations triggered by a threat of tariffs would focus on measures to enhance compliance with labor rights. Labor and civil society organizations would be granted access to the process. This proposal would thus more directly benefit the exporting country’s workers.

Such a social dumping agreement can be subject to abuse and thus must be subject to legal discipline. One can envisage different mechanisms to counter abuse. First, the procedure could be subject to a complementary mechanism of international review. For example, an analogue to NAFTA Chapter 19 could be incorporated so that an exporter could request the establishment of a binational

panel to review the final determination issued by the relevant authority.<sup>122</sup> Under NAFTA, the binational panel, composed of five members from the two countries involved, can affirm, overrule, or remand agency determinations. These decisions are binding within the domestic jurisdiction and cannot be appealed to domestic courts. The process is complemented by an extraordinary challenge procedure where a NAFTA party can challenge a binational panel ruling on limited grounds, such as for manifestly exceeding its powers.<sup>123</sup> Second, or alternatively, the targeted country could trigger conventional WTO dispute settlement procedures and bring a claim of non-compliance before the WTO dispute settlement system, just as under the existing WTO antidumping regime. Third, as with all WTO agreements, compliance would be overseen by a WTO committee. In this case, however, representatives of the ILO could be granted official or observer status within it, leading to greater coordination of international labor rights policies.<sup>124</sup>

If current antidumping law remains a parallel procedure (which would likely be the case given the political economy of trade negotiations and the need for a political safety valve), then there would be rules against “double counting,” just as there are when antidumping and countervailing duty investigations are conducted. Alternatively, provisions on social dumping could be integrated into the current antidumping regime. The E.U. has made the first gesture in this respect by

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<sup>122</sup> North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, at art. 1904.5. *See also* David A. Gantz, *Resolution of Trade Disputes Under NAFTA 's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL'Y INT'L BUS. 297, 298 (1998).

<sup>123</sup> NAFTA, *supra* note 226, at art. 1904.13. The challenge is before a committee of three members from the three countries chosen from a 15-person roster. *See* NAFTA Annex 1904.13. *Id.* at art. 1902.2 (providing amendments to domestic law must comply with the GATT and antidumping and subsidy codes and any “successor agreement”).

<sup>124</sup> For example, the ILO has official status regarding the implementation and supervision of the Bangladesh accord that followed in the wake of the Rana Factory fire. *See* Larry Catá Backer, *Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 UC IRVINE JOURNAL OF INTERNATIONAL, TRANSNATIONAL, AND COMPARATIVE LAW 11, 13 (2016). In the WTO context, the International Monetary Fund (IMF) is granted official status within the WTO Committee on Balance of Payments Restrictions. *See* Gregory Shaffer & Michael Waibel, *The (Mis)alignment of the Trade and Monetary Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, 187, 195, 198-201 (Terence Halliday & Gregory Shaffer eds., 2015) (formal analysis required from IMF before the WTO committee). In contrast, WIPO is granted observer status in the WTO Council for Trade-related Aspects of Intellectual Property Rights and the United Nations Environmental Programme holds such status in the WTO Committee on Trade and Environment. *See* World Trade Organization, *International intergovernmental organizations granted observer status to WTO bodies*, [https://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](https://www.wto.org/english/thewto_e/igo_obs_e.htm) (last visited Feb. 26, 2018).

amending its antidumping law to take account of international labor and environmental standards.<sup>125</sup>

If countries fail to agree to such provisions, countries could attempt to apply them under existing WTO law by claiming a general exception under GATT Article XX(a), which permits countries to restrict imports where “necessary to protect public morals.”<sup>126</sup> Article XX(a), however, lacks this proposal’s procedural, substantive, and injury criteria and thus would be more subject to abuse. Moreover, the rationale for its use would have to be on moral grounds over the treatment of *foreign* workers, rather than economic and distributional grounds regarding the protection of *domestic* workers and the domestic social contract. Thus, it should be much more difficult for a neo-nationalist government—such as that currently in power in the United States—to prevail compared to one whose policies are expressly outward-looking.

(ii) *Industrial policy space for developing countries.* Considerable policy experimentation is needed to catalyze economic development since no one knows in advance what works. This is particularly the case given the vastly differing contexts that countries face. Rodrik and others critique WTO rules for taking industrial policy options off the table for developing countries.<sup>127</sup> Industrial policy experimentation for development could be expressly authorized by amending existing WTO agreements, which already provide a framework. Developing countries could demand enhanced policy space for their development initiatives in return for provisions authorizing social dumping measures, again subject to legal discipline.

Since industrial policy of one country will have externalities on others, criteria need to be specified as part of a bargain. In the case of industrial policy, rules could be set forth in a separate agreement or in a revision of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). They would include general principles, substantive criteria, time limits, and reporting and transparency obligations. The general principle would be that the plans must aim to increase

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<sup>125</sup> European Commission Fact Sheet: The EU is changing its anti-dumping anti-subsidy legislation to address state induced market distortions, EUROPEAN COMMISSION (Oct. 4, 2017), [http://europa.eu/rapid/press-release MEMO-17-3703\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-3703_en.htm).

<sup>126</sup> See *supra* note...

<sup>127</sup> See RODRIK, THE GLOBALIZATION PARADOX, *supra* note...; RODRIK, STRAIGHT TALK ON TRADE, *supra* n. 18; CHANG, KICKING AWAY, *supra* n. 18. note...

productivity and set forth clear criteria for success so that they can be evaluated.<sup>128</sup> The substantive criteria would aim to constrain potential abuse.

The WTO SCM Agreement initially provided exceptions pursuant to which three types of subsidies would not be actionable: subsidies for research; subsidies providing assistance to disadvantaged regions; and subsidies for adaptation of facilities to meet environmental requirements, provided in each case they met specified criteria.<sup>129</sup> Those provisions lapsed, but they could be revamped and updated to include development-related industrial policies. For example, they could cover experimentalist policies to develop infant industries, which were initially permitted under GATT Article XVI (on Subsidies) and Article XVIII (on Governmental Assistance to Economic Development), but which are now subject to challenge under the SCM Agreement.

Under a revamped SCM Agreement, special authorization for industrial policy experimentation for development could be made available under agreed terms. For example, it could be limited to developing countries that meet defined World Bank criteria in terms of per capita income, and it could be further subject to industry competitiveness criteria. The criteria could build from national programs under the existing “Generalized System of Preferences” (GSP) that provide for preferential tariff treatment of developing country imports, subject to the denial of benefits once an industry becomes competitive.<sup>130</sup> Under the E.U.’s GSP program, for example, once countries become listed as high- or upper-middle-income economies (using World Bank criteria based on per capita income) for three

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<sup>128</sup> Ricardo Hausman, Dani Rodrik, & Charles Sabel, *Reconfiguring Industrial Policy: A Framework with an Application to South Africa* (HKS Working Paper No. RWP08-031, 2008); Dani Rodrik, *Industrial Policy for the Twenty-First Century*, UNIDO (2004), [http://www.vedegylet.hu/fejkrit/szvggyujt/rodrik\\_industrial\\_policy.pdf](http://www.vedegylet.hu/fejkrit/szvggyujt/rodrik_industrial_policy.pdf).

<sup>129</sup> Agreement on Subsidies and Countervailing Measures, art. 8.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

<sup>130</sup> These programs were authorized by the GATT Enabling Clause in 1979. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (“Enabling Clause”) L/4904, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203 (1979).

The provisions also could build on provisions of the SCM Agreement, such as the concept of “export competitiveness” under Article 27.6 of the SCM Agreement (3.25% share of world trade for a product for two consecutive years) and the carve-out for export subsidies provided under Annex VII of the SCM Agreement (for least-developed countries and a list of developing countries until they reach a per capita GNP of \$1,000). I thank Nicolas Lamp for this point.

consecutive years, they cease to benefit from the program.<sup>131</sup> Similarly, countries lose GSP preferences for their highly competitive export sectors. Analogous criteria could define beneficiary countries and sectors entitled to benefit from preferential treatment for industrial policy experimentation for development. In this way, countries like China would graduate from the system. Under the proposed system, the criteria for graduation would be agreed multilaterally, and thus not left to countries' discretion.

Time limits would be agreed so that ineffective programs are abandoned. The WTO Agreement on Safeguards provides an example of imposing time limits. Under it, a safeguard measure may be maintained without being subject to a withdrawal of concessions for three years.<sup>132</sup> Similarly, an industrial policy measure could be limited to a set number of years without being subject to retaliation, provided it met the agreed criteria and the country complied with the other obligations relating to it.

The country adopting such a measure would have to report its program. The SCM Agreement already requires that members notify their subsidies each year to the WTO Committee on Subsidies and Countervailing Measures.<sup>133</sup> However, the record of industrial subsidies notification is poor, with over half of WTO members not notifying them.<sup>134</sup> China's failures have particularly irked the United States, which has proposed sanctions against countries that fail to notify, such as a suspension of certain WTO benefits.<sup>135</sup> Under this proposal, a country's failure to

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<sup>131</sup> They remain eligible, but they cease to be beneficiaries so long as they maintain that economic status. For an overview of the E.U. program, see GSP Handbook on the Scheme of the European Union. UNCTAD/ITCD/TSB/MISC.25/Rev.4 (2016), <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1470>. For the analogous U.S. program, see GSP Handbook on the Scheme of the United States of America, UNCTAD/ITCD/TSB/MISC.58/Rev.3 (2016), <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1563>.

<sup>132</sup> Agreement on Safeguards, art. 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154.

<sup>133</sup> Agreement on Subsidies and Countervailing Measures, art. 24-26, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

<sup>134</sup> Gregory Shaffer, Robert Wolfe & Vinhcent Le, *Can Informal Law Discipline Subsidies*, 18 J. INT. ECON. L. 711 (2015).

<sup>135</sup> Communication from the United States, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, World Trade Organization JOB/GC/148, 30 Oct. 2017 (the proposed suspension of benefits includes the right to receive WTO documentation, have access to the WTO website, and have personnel preside over WTO bodies; if non-reporting

report its obligations could trigger a suspension of the ability to use the policy until compliance occurs. Such a sanction would incentivize reporting in ways that the current SCM Agreement does not.

Transparency and reporting are public goods. They are important not only for trade relations, but also for domestic governance to limit rent-seeking. They reduce information asymmetries, enabling firms, citizens, and trading partners alike to know what governments are doing. Even if an industrial policy measure is legitimate, the public has a right to know, and other governments must be assured that it is not abused.<sup>136</sup> In particular, domestic stakeholders must be able to monitor and hold experimental industrial policy programs accountable. Otherwise the results of experiments would not be known, and the risks of cronyism would increase. In the process, governments can learn from each other's experiences.

This proposal too would be subject to risk of abuse. To counter abuse, just as under WTO agreements generally, policies that fail to meet the criteria would be subject to traditional trade dispute settlement. In addition, to the extent that such policies cause material injury to a domestic industry in an importing country, that country could still impose countervailing duties, as under the current SCM Agreement. The ability to bring countervailing duties against such policies would, of course, limit the impact of industrial policies. Yet, such provisions would be required to address potential externalities on producers in third countries. This proposal would represent a return to the trade policies under the GATT where developing countries could subsidize infant industries, but their products could be countervailed when imported into a developed country where the subsidies caused or threatened to cause significant injury to a domestic industry.

Once again, if no agreement is reached, developing countries could initiate them and claim that they are not prohibited "specific subsidies" under the SCM Agreement and are thus permissible. This proposal, however, provides criteria that would help combat abuse in ways that are important both for trading partners and for domestic stakeholders.

(iii) *Feasibility.* Negotiation of these provisions would not be easy. Developing countries are wary of granting authorization to developed countries to block imports on social dumping grounds and developed countries are suspicious

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continues, then it also includes receipt of any WTO training and technical assistance, among other matters).2017.

<sup>136</sup> Shaffer et al., *Can Informal Law Discipline Subsidies*, *supra* n. 101.

of emerging economy industrial policies. Emerging economies would demand some benefit from the negotiations to the extent that they could be excluded from the industrial policy exceptions and be a target of social dumping measures. Similarly, to the extent that many developing countries do not feel constrained by the SCM Agreement, they may find that they have less to gain from these negotiations than developed countries.

Here is where bargaining and politics come in. First, countries would have to prioritize these issues, particularly regarding labor rights since the WTO rules already provide some room for industrial policy. Second, subject to bargaining, provisions can be structured to combat abuse so that they would be subject to no more (and arguably much less) abuse than current WTO rules on “unfair” trade, such as antidumping and countervailing duty rules. For example, developing countries could be granted compensation when prevailing in a WTO challenge against a social dumping measure, which then could be passed onto the affected companies. Third, bargaining could incorporate other issues of interest to countries, whether involving market access or other forms of policy space.<sup>137</sup> Finally, the difficulties faced should be compared with the real-life alternative of existing challenges to the trading system. These issues should be frontally discussed so that the underlying social and development issues are addressed transparently. A multilateral institution such as the WTO provides an important forum for doing so. Negotiations can advance in parallel in plurilateral and bilateral fora. The conceptualization of trade negotiations in all fora should explicitly address policy space concerns.

## CONCLUSION

The GATT was based on a model of embedded liberalism where countries retained considerable policy space to address social inclusion.<sup>138</sup> Over time, in helping to facilitate economic globalization, international trade law contributed to constraining state policy space. Under the WTO, trade law left social policy to domestic politics while supporting structural conditions that empowered capital in

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<sup>137</sup> See e.g. CHRISTIAN BARRY AND SANJAY REDDY, INTERNATIONAL TRADE & LABOR STANDARDS: A PROPOSAL FOR LINKAGE 56-57, 62 (2010) (noting that in return for raising labor standards, a developing county can be granted increased market access and receive financial and technical assistance). See also Kyle Bagwell & Robert Staiger, Domestic Policies, National Sovereignty and International Economic Institutions.

<sup>138</sup> Ruggie, *supra* note...

relation to governments and labor. As a result, it has rendered state policies to protect social inclusion more difficult. Although international trade law is not primarily to blame for rising inequality, job insecurity, and stagnant wages, it is not wholly innocent either.

These are politically challenging times. They present severe risks as well as opportunities. The impacts of trade and rapid technological change on income inequality and the security of work have become politically salient issues in the U.S. and Europe. They have led to the rise of nativist political parties that threaten to upset the institutional framework for international relations. The outcome could be dire. It is time to put forward proposals that reconceive and retool trade agreements so that they directly address adverse impacts on the working and middle classes. This Article addresses why international trade law needs to be structured in ways that support social inclusion if society is to turn the tide against rising neo-nationalism, racism, and authoritarianism. It sets forth concrete options for ensuring that the benefits from trade are more broadly spread and that those harmed are adequately supported so that they may live meaningful, secure, working lives.

Some may dismiss these ideas as impractical since, for example, the problem of social dumping has been debated before. Yet, it is the old, ensconced idea to leave social and development policy solely to the domestic level while liberalizing trade and constraining states' policy space through trade agreements which threatens to undermine domestic social solidarity and, as a result, the international trading system itself. If the trade legal order constrains the ability of governments to develop policies in support of broad-based social inclusion and individual and social flourishing, then it risks collapsing from its very success in promoting liberalized trade. At a minimum, we need concrete proposals that address alternatives to counter the rise of nativism and go beyond the *status quo*. If this Article helps spur such thinking, then it has been a success. Lawyers and economists provided the intellectual constructs and designs for the existing trade legal order.<sup>139</sup> John Maynard Keynes, for example, called lawyers the “poets” at Bretton Woods for their help in crafting the agreement.<sup>140</sup> Will they do the same for the system's redesign so as to save it from itself?

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<sup>139</sup> Rodrik stressed the role of economists in his book *Straight Talk on Trade*, but the imagination of lawyers is also needed.

<sup>140</sup> 26 JOHN MAYNARD KEYNES, *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES* 102 (Donald Moggridge ed., 1980) (“they have turned our jargon into prose and our prose into poetry. And only too often have they had to do our thinking for us”).