COMMENT ON SHAFFER, RETOOLING TRADE AGREEMENTS FOR SOCIAL INCLUSION

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Greg Shaffer has again produced a fascinating paper for the *University of Illinois Law Review*.[1] I basically agree with his thesis that the multilateral trading system is facing an existential crisis, arising in significant part from the failure of the gains of trade to be divided equitably amongst the populations of many nations.[2] Clearly, if nothing is done to address this issue in more meaningful terms than simply noting that the gains *could* be divided equitably in each country given the political will, it will be difficult to maintain even the current level of openness in the trading system, let alone hope for improvements. I fear, however, that those that benefit from the current system will be loath to share their gains. I have serious doubts that trade negotiations can address this problem either at the multilateral or bilateral level.

To begin with, the problem is not one that easily lends itself to solution at the multilateral level. In the past, some members of the World Trade Organization ("WTO") have tried to expand the WTO's remit to consider labor issues, as well as competition and investment issues. As regards the latter two issues, it was agreed in 1996—in Singapore at the WTO's first ministerial meeting—to study those issues as subjects for possible future negotiations,[3] and it was agreed at the WTO's Doha Ministerial in 2001 that there would be negotiations on those issues, subject to agreement on the "modalities of negotiations."[4] Those modalities were never agreed upon, and negotiations on those subjects did not occur.[5] As to labor issues, an attempt to address those issues in any way

1. *See* Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1; Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115. *See also* William J. Davey, *Comment on Shaffer/Gao*, 2018 U. ILL. L. REV. ONLINE 36.

2. The system is also facing a serious threat from the near collapse of its dispute settlement system, an issue discussed in my comment in Shaffer & Gao, *supra* note 1. *See also* Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INTL. L. ONLINE 37 (2019).

3. World Trade Organization, Ministerial Declaration of December 13, 1996, WTO Doc. WT/MIN(96)/DEC ¶ 20 (1996) [hereinafter Singapore Declaration].

4. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC ¶ 20 (2002) [hereinafter Doha Declaration].

5. *See* World Trade Organization, Ministerial Declaration of December 18, 2005, WTO Doc. WT/MIN(05)/DEC (2005) [hereinafter Doha Work Programme Declaration]. The Doha Work Programme Dec-

was rejected from the outset.[6] At the Singapore Ministerial, all that could be agreed upon was very general language in which WTO members reaffirmed their "commitment to the observance of internationally recognized core labour standards."[7] At the same time, they "reject[ed] the use of labour standards for protectionist purposes, and agree[d] that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."[8] A second attempt to include labor issues in the WTO was made at the Seattle Ministerial in 1999, but that fared even worse, contributing to the overall collapse of the meeting without any results.[9]

I think that little will change in attitudes on these subjects in the near-to-medium term. Most developing countries in the WTO enjoy fairly good access to the markets of the major developed countries.[10] Consequently, there would seem to be little incentive for them to agree to terms that would remove in any way their labor cost advantage. But unless they do so, there will continue to be problems with displacement of workers by foreign trade in the advanced economies. Thus, I see virtually insurmountable difficulties in addressing these issues effectively in the WTO.

I regret having such a downbeat attitude toward the likely success of addressing this issue in the trade arena, but I fear that it is a realistic one. Of course, Shaffer recognizes the difficulty of addressing these problems in trade agreements, and he proposes what he sees as a win-win scenario that would help improve prospects for workers in developing countries and benefit developing countries. In particular, he places much hope on the possibility of negotiating a deal that would allow developing countries to benefit from increased opportunities to use industrial policies and allow developed countries to penalize so-called social dumping. I have serious doubts this trade-off is realistic. More specifically, I think that it would be a bad deal for developing countries in that their trade would be significantly restricted through use of social dumping actions, while they would gain little from the enhanced industrial policy space. In short, there will be more protection in developed countries and more policy failures in developing countries.

laration discusses the status of the Doha negotiations and does not mention either investment or competition. An attempt to agree on modalities at the prior ministerial meeting at Cancun had not succeeded and that ministerial was generally viewed as a failure. For the WTO Secretariat's description of the chair's conclusions of the meeting on the failed consultations on investment and competition, see *Summary of 14 September 2003, Day 5: Conference ends without consensus*, WORLD TRADE ORGANIZATION (2003), https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last visited Dec. 18, 2018).

6. *See* Doha Work Programme Declaration, *supra* note 5.

7. Singapore Declaration, *supra* note 3, ¶ 4.

8. *Id.*

9. *Ghosts of Seattle Haunt WTO in Form of Draft Ministerial Text*, INT'L TRADE DAILY: NEWS ARCHIVE (June 13, 2000), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=9997209&vname=itdbulallissues&wsn=597742000&searchid=31960943&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0.

10. *See generally Understanding the WTO: Developing Countries*, WORLD TRADE ORGANIZATION (2019), https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm.

I take this view because I do not think that the WTO significantly constrains developing countries from taking industrial policy measures, a point that Shaffer largely accepts in his paper. As a practical matter, the least-developed countries in the WTO (as defined by the United Nations) have fewer constraints on their behavior in the agreements and essentially are not called to account in dispute settlement for their actions, although they may be advised not to violate WTO rules.[11] In any event, the developing world's experience with import substitution measures (which is often what is meant by increased industrial policy space) suggests that this "concession" to the developing world will not be worth much.[12] Indeed, the suggestion in the paper that it would probably be necessary to time limit any measures allowed (so as to avoid some of the problems that occurred under import substitution policies where inefficient, protected industries sometimes became a long-term drag on the economy as a whole), would complicate efforts to obtain investments in the first place. Moreover, the paper assumes that products produced by beneficiaries of this looser industrial policy space would be subject to countervailing duties in export markets and that would further reduce the attractiveness of this alternative to the extent that subsidies were involved.

In contrast, there would be little doubt that industries in the developed world would make the fullest possible use of the social dumping rules. While there may be some difficulty establishing violations of labor rules since many developing countries have laws on the books that purport to comply with International Labor Organization core labor rights conventions, there is often an enforcement issue.[13] But given the vagueness of what constitutes a violation of the right to organize or bargain, a domestic industry in a developed country might well be able to persuade a domestic agency like the U.S. Department of Commerce that there has been such a violation. As envisaged by the paper, if a violation is established, the remedy is a duty set sufficiently high to remedy the injury the industry is suffering without needing to prove a causal relation between the labor rights obligation and the injury. Once again, one can imagine that a domestic industry arguing before a domestic agency might often be able to obtain a significant level of protection. A challenge to such duties in the WTO dispute settlement system would take years to resolve (assuming that the WTO dispute settlement system does not implode as it may next year),[14] which means that the protection will be in place for a considerable period of time.

11. For a general discussion of the past and current position of developing countries in the WTO and the GATT multilateral trading system, see JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1269–84 (West 6th ed. 2013).

12. *See, e.g.*, Aregbeshola R. Adewale, *Does Import Substitution Industrialisation Strategy Hurt Growth?: New Evidence from Brazil and South Africa*, 2012 AFRICAN & ASIAN STUD. 288 (2012).

13. *See, e.g.*, Ravi Kanbur & Lucas Ronconi, *Stricter Labor Laws Go Hand-in-Hand with Less Enforcement Effort*, VOX (Mar. 30, 2016), https://voxeu.org/article/labour-laws-strict-rules-are-correlated-weak-enforcement.

14. *See* Shaffer, *supra* note 2.

Thus, while the proposal attempts to address a serious problem, I think that in the end it would favor developed countries over developing countries and engender even more bitterness in trade relations in the WTO.

Outside the WTO, I am not sure the outlook is much better for addressing trade and labor issues. While free trade agreements ("FTAs") often have labor rights provisions, it is not clear that those provisions have had much positive effect. First, the provisions may not be subject to any effective dispute settlement procedure at all, such as is the case with the labor provisions of the North American Free Trade Agreement.[15] By that I mean that even if a violation is found, there is no effective redress.[16] Second, in those agreements where labor-rights provisions are subject to more effective dispute settlement,[17] the labor provisions have seldom been invoked in dispute settlement. This lack of use of dispute settlement procedures under FTAs is true in general and not just in labor cases.[18] Indeed, the Guatemala case cited by Shaffer is noteworthy for having been brought at all, and that the United States ultimately lost the case. While the United States established that Guatemala had failed to enforce its labor laws, it could not show a trade effect.[19] In this regard, it is worth noting that under U.S. law, there are a number of trade preference programs for developing countries (for example, the General System of Preferences ("GSP") program) that may be suspended if a beneficiary country does not respect internationally recognized worker rights.[20] Such claims are brought regularly by U.S. labor unions and processed by the United States Trade Representative.[21] While GSP benefits are occasionally suspended, it has always seemed to me that it usually happens only when the United States has serious political problems with a beneficiary country. Otherwise, the United States accepts beneficiary country commitments to try harder.[22] This history suggests that relying on FTAs, which have only limited geographical coverage and questionable dispute settlement mechanisms, as a way to address the problems Shaffer raises will also not work.

So, is there no hope? While I am somewhat downbeat on the likelihood of major trade liberalization occurring in the near future, I think the way forward

15. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 §531 (1993).

16. JACKSON ET AL., *supra* note 11, at 1187–88.

17. Over time the United States has included stricter provisions on labor rights and dispute settlement in its free trade area agreements. *Id.* at 1188–89.

18. *See generally* William J. Davey, *Dispute Settlement in the WTO and RTAs: A Comment*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 343, 343–357 (Lorand Bartels & Frederico Ortino eds., 2006).

19. *U.S. Labor Dispute Failure Prompts Calls for NAFTA Changes*, INT'L TRADE DAILY: NEWS ARCHIVE, (June 30, 2017), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=115243558&vname=itdbulallissues&wsn=502184000&searchid=31961048&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0.

20. *See* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, U.S. GENERALIZED SYSTEM OF PREFERENCES GUIDEBOOK (Mar. 2017), *available at* https://ustr.gov/sites/default/files/gsp/GSP%20Guidebook%20March%202017.pdf.

21. *Id.*

22. *See generally* JACKSON ET AL., *supra* note 11, at 1189–98.

needs to emphasize much expanded international cooperation in the tax field. Shaffer describes the efforts to date, but much more needs to be done. For historical and bureaucratic reasons, such cooperation will probably not be negotiated in connection with trade issues per se. It is clear, however, that something must be done to reverse the revenue erosion noted by Shaffer, so as to enable governments to spend more to address the problems of un- and underemployment from trade and, more significantly, from automation and technical change. While it will be difficult to enact domestic policies to ensure a fairer distribution of the gains from trade, one may hope that if the alternative to not enacting such policies is a significant decline in such gains, then elites who benefit from the current system may be motivated to act to save it.