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## ILLINOIS LAW REVIEW ONLINE SYMPOSIUM ON “RETOOLING TRADE AGREEMENTS”: RETOOLING OR REDESIGNING TRADE LAW?

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With any degree of trade openness comes the age-old debate about how to manage the impact of international trade on the domestic social contract. At the Marxist end of the spectrum, trade is understood as one of the main tools that shapes not only the domestic hierarchical capitalist society, but also the international dependency order leading to entrenched socio-economic patterns of inequality.<sup>1</sup> At the liberal opposite end of the spectrum, free trade is heralded as a necessary vector to optimize the allocation of resources in an ideally fluid global economy.<sup>2</sup> Greg Shaffer’s diagnosis and prescription for improving trade policy positions is itself at a mid-way point between these two extremes.<sup>3</sup> He embraces the premise of free trade as a first order policy preference, but he also seeks a more equitable social outcome than the practice of deregulated markets typically achieves.<sup>4</sup> His article *Retooling Trade Agreements for Social Inclusion* bypasses the debate about trade as a cause of social inequalities upstream, and instead aims to redesign trade agreements to mitigate some of the factors of social exclusion downstream.<sup>5</sup>

One important note is that Shaffer’s article is about trade *agreements*. It is not a critique of trade rules, nor does it seek to reconceptualize trade in contrast to other forms of exchange, as others have done.<sup>6</sup> Drawing from the rich set of ideas developed in *Retooling Trade Agreements*, the present essay focuses on two themes that guide much of Shaffer’s analysis and a third latent issue that warrants further attention.

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1. See Christian Porter, *Liberalism, Optimism, and Utopia*, 16 INT’L TRADE & BUS. L. REV. 555 (2013).

2. *Id.*

3. Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1.

4. *Id.*

5. *Id.*

6. See generally FRANK J. GARCIA, JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES 205–72 (2013); FRANK J. GARCIA, CONSENT & TRADE – TRADING FREELY IN A GLOBAL MARKET (2018) (arguing that trade as a consensual exchange fundamentally differs from other forms of exchange such as theft, coercion, and exploitation but that current trade law and practice insufficiently safeguards against infringement upon trade relations by non-consensual forms of exchange).

The first Part of this essay engages with the broader issue of the purpose of trade agreements, questioning whether the content of trade agreements should be determined normatively, strategically, or tactically.

The second Part of this essay points out the apparent paradox that many progressive free traders face: seeking general rules but ones that allow a range of domestic policy experimentation. While Shaffer's approach is strongly imbued by deontological ethics, designing trade law instruments that meet the Kantian universalist challenge is indeed the most ambitious of tasks.

Lastly, *Retooling Trade Agreements* briefly discusses how to implement Shaffer's proposals, either on a multilateral or a unilateral basis. Shaffer's approach largely takes the existing framework for trade negotiations as a given and operates within it. By contrast, a more systemic reading questions whether the normative reframing heralded by Shaffer might not also require some measure of structural and procedural reform as a prerequisite.

### 1. WHAT IS THE PURPOSE OF TRADE AGREEMENTS?

Trade agreements already are about much more than enabling trading across borders of goods and services.<sup>7</sup> Yet, they are also under-inclusive of some aspects of trade. Indeed, there is no fixed or explicit definition of trade that might help ascertain what pertains to a trade agreement, or how the latter might be interpreted. At the Havana Conference, the conception of an international trade organization included labor and economic development aspects.<sup>8</sup> Since the 1990s, trade regulation has come to include intellectual property, subsidies,<sup>9</sup> sanitary and phytosanitary standards, and much more as standard features.<sup>9</sup> Trade does not take place in a human, economic, political, legal, and economic vacuum, but no consensus exists regarding what a legitimate, necessary, or sufficient scope of international trade regulation might comprise.

Shaffer persuasively argues, and a number of other progressive thinkers agree, that in a globally open economic system, trade and taxation policy overlap to an extent such that their legal treatment must be addressed jointly, at least inasmuch as tax regulation conditions and shapes trade patterns.<sup>10</sup> As countless news headlines have widely publicized,<sup>11</sup> multinational corporations

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7. Recent examples such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership incorporating the Trans-Pacific Partnership Agreement disciplines on rules of origin and the procedure for implementing them, customs administration and trade facilitation, sanitary and phytosanitary measures, domestic law on labeling, product standards, commercialization (so called technical barriers to trade), investment, public debt, services, including finance, immigration, telecommunications and the digital economy, government procurement, competition, state-owned enterprises, intellectual property, labor norms, environmental protection, anti-corruption, and corporate governance.

8. U.N. CONF. ON TRADE ON TRADE AND EMP'T, FINAL ACTS AND RELATED DOCUMENTS, U.N. SALES NO. 1948.II.D.4, E/CONF. 2/78 (1948).

9. Thomas Cottier, *International Economic Law in Transition from Trade Liberalization to Trade Regulation*, 17 J. INT'L ECON. L. 671 (2014).

10. Shaffer, *supra* note 3, at 103–04.

11. See, e.g., Jennifer Rankin, *Facebook, Google and Amazon could pay 'fair' tax under EU plans*, THE GUARDIAN (Mar. 21, 2018, 11:33 AM), <https://www.theguardian.com/business/2018/mar/21/facebook-google-and-amazon-to-pay-fair-tax-under-eu-plans>.

have developed deep expertise in structuring their intra-company transactions, as well as transactions with third parties so as to minimize the amount of taxes they pay overall, with the result that the pattern of their “brick and mortar” operations has little to do with the pattern of financial flows derived from these operations.<sup>12</sup> At present, trade agreements intersect with taxation in a much more limited fashion: decreased tariffs on imported products mean less revenue for states, most favored nation clauses prevent discriminatory tariff application amongst foreign producers, and national treatment clauses prohibit discriminatory taxes to the detriment of foreign products vis-à-vis domestic products in the domestic market.<sup>13</sup> Aside from these three main types of trade rules, a myriad of more technical provisions exists on administrative fees relating to cross-border transactions.

Similarly, labor is a critical part of trade, from an economic, social, political, and developmental perspective—a fact recognized by the architects of international economic organizations in the aftermath of World War II. As labor regulation became a victim of Cold War politics, it was dropped from the GATT and instead continued to be regulated separately under the auspices of the International Labor Organization created in 1919.<sup>14</sup> Here again, Shaffer seeks to reintegrate international trade regulation and domestic labor standards in order to promote a more equitable allocation of the gains and losses of globalization.<sup>15</sup>

Connecting trade regulation and what trade lawyers call “non-trade” topics—traditionally including environmental regulation, labor rights, public health, and human rights, but potentially also covering other areas of economic regulation such as taxation—has been on the agenda of trade policy debates for several decades.<sup>16</sup> In the late 1990s, the linkage literature debated whether bringing these issues within the ambit of the World Trade Organization automatically raises standards for “non-trade” issues if the two were made contingent on one another in negotiations—a strategic move. Some debated whether normatively, strategically, or tactically, trade and non-trade topics should be linked.<sup>17</sup> The single undertaking process for negotiations, whereby nothing is

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12. See initiatives such as the OECD/G20/Base Erosion and Profit Shifting Project. *Base Erosion and Profit Shifting*, OECD, <http://www.oecd.org/tax/beps/beps-actions.htm> (last visited Feb. 18, 2019); Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS*, 10 ERASMUS L. REV. 1, 3–11 (2017). See also OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures*, OECD, PARIS (Mar. 9, 2018), <http://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf>.

13. See, e.g., *Principles of the Trading System*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Feb. 18, 2019).

14. Drusilla K. Brown, *International Labor Standards in the World Trade Organization and the International Labor Organization*, FED. RES. BANK OF ST. LOUIS REV. JULY/AUG. 2000.

15. Shaffer, *supra* note 3, at 126–29.

16. See generally Symposium, *Linkage as Phenomenon: An interdisciplinary Approach*, 19 PENN. J. INT'L L. 201 (1998).

17. E.g., José E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001); Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28 (2002); Jeffrey L. Dunoff, “Trade and”: *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1997).

agreed upon until everything is agreed upon, enabled this linkage tactically. For some trade economists, issue linkage was simply a device to increase the potential for trade-offs between parties with differing interests.<sup>18</sup> While advocates for human rights and environmental regulation were of two minds as to the normative wisdom of joining the trade bandwagon, the World Trade Organization's ("WTO") successful dispute settlement mechanism offered the promise of more robust enforcement in areas of international law that had largely lacked it.<sup>19</sup>

The limited success of multilateral negotiations since the Uruguay Round, the vocal rejection of the so-called "Singapore issues" by many developing countries preferring to limit the expansion of the WTO agenda, and the stalled Doha Round have largely spelled the demise of trade linkage as leverage to advance a progressive environmental and human rights agenda. One side effect of these negotiation collapses has been a move away from the single undertaking, with WTO members negotiating and concluding some standalone plurilateral agreements instead.<sup>20</sup> Most recently, the crisis of the Appellate Body is diminishing the WTO's appeal as a strong enforcement forum where "non-trade" issues could find stronger legal support in practice.<sup>21</sup> For all these reasons, it is therefore paradoxical to revive, albeit in an updated form, the idea of conditioning trade negotiations upon negotiations in other areas where international governance is weaker, as Shaffer and others<sup>22</sup> propose to do. Moreover, the proliferation of regional and preferential trade agreements outside of the multilateral system would seem to make linkage even harder to achieve in practice.

Another lens through which to consider the issue of conditioning trade regulation and social equity policies is the international-domestic linkage. The idea is to use the more tractable forum to advance policymaking in another, less tractable, sphere. For instance, trade agreements have been portrayed as a useful device for domestic lawmakers to tie their hands behind their backs in order to advance politically less popular agendas domestically and achieve domestic reform that may otherwise have been stalled by well-organized domestic con-

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18. See generally Bernard M. Hoekman, *Determining the Need for Issue Linkages in Multilateral Trade Negotiations*, 43 INTL ORG. 693 (1989).

19. Keisuke Iida, *Is WTO Dispute Settlement Effective?*, 10 GLOBAL GOVERNANCE 207 (2004).

20. The Agreement on Trade Facilitation is the only multilateral agreement successfully concluded at the WTO since 1995 but it is only in force for those members which have ratified it, making it in practice a plurilateral agreement until the time when all WTO members have ratified it. The Trade Facilitation Agreement is not linked to other aspects of the WTO negotiations. General Council, *Protocol Amending the Marrakesh Agreement, Establishing the World Trade Organization*, WTO Doc. WT/L/940 (Nov. 27, 2014) [hereinafter Agreement on Trade Facilitation]. See also, *Environmental Goods Agreement*, WTO, [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm) (last visited Feb. 18, 2019).

21. Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Aug. 27, 2018, 7:54 AM), <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC190>.

22. See, e.g., Kevin Kolben, *A New Model for Trade and Labor? The Trans-Pacific Partnership's Labor Chapter and Beyond*, 49 N.Y.U. J. INT'L L. & POL. 1063, 1094–1101 (2017); Zack Lenox & Andrew Arshat, *Towards Enforceable Labor Rights in U.S. Free Trade Agreements*, 31 HARV. HUM. RTS. J. 171 (2018); Radu Mares, *Decentering Human Rights from the International Order of States: The Alignment and Interaction of Transnational Policy Channels*, 23 IND. J. GLOBAL LEGAL STUD. 171, 182–90 (2016); Mitsuo Matsushita, *Sharing the Responsibility in Combating Protectionism in Trade*, 11 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 49 (2016).

stituencies.<sup>23</sup> Like the linkage literature, domestic-international plays have a long and illustrious theoretical grounding in law, political science, and international relations.<sup>24</sup> The revolution in communication that accompanied globalization has, to some extent, realigned some of the terms of this debate, inasmuch as it is enabling transnational groups to organize more easily and publicize international or foreign issues to domestic groups. Economic globalization has also reconfigured the very definition of domestic and foreign interests, compared to how they were determined in the 1970s, with transnational corporations having gone full circle from conglomerates to vertically integrated consortia back to diversified conglomerates, but with global supply chains they control. Here again, then, the theoretical frames as well as the practice of domestic-international policy conditioning may have shifted considerably. *Retooling Trade Agreements* acknowledges these factors, but contemporary international relations and political science thinkers might have further valuable insights for our community of progressive trade lawyers regarding their implications.

In sum, there are many reasons to doubt whether linking trade negotiations to other issues that would foster social inclusion is a viable proposition. Yet, the specific solutions offered by Shaffer remain appealing. In a world where trade and investment agreements are increasingly becoming the norm, why not envision trade (investment) and tax agreements? Trade expertise and tax expertise typically reside in different governmental offices, but so do trade and investment. The three topics are intimately related from a subject matter perspective and, together with financial regulation, they are key pillars of international economic law. Addressing one separately from the others is tentative to playing a global whack-a-mole game where mobile private actors, which generally means capital, will always win. As for Shaffer's proposal of incorporating labor standards from the ILO Conventions, the treatment of intellectual property in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") (and, by extension, in the myriad regional trade agreements that do the same or incorporate TRIPS standards by reference) provides a precedent for incorporating rules from other pre-existing treaties.<sup>25</sup> Lastly, Shaffer's proposed hybrid trade remedy to allow states to impose tariffs in response to social dumping deploys legal tools that economists have much vilified but that states avidly use, in the service of a potentially powerful domestic-international linkage on labor conditions.<sup>26</sup>

In other words, legal rules and devices already exist in other areas to do what Shaffer suggests. Successfully replicating these models in the service of social inclusion is a political problem rather than a legal one. A core issue is that the states or groups that advocate for social policies (such as the European

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23. See generally DOUBLE-EDGED DIPLOMACY – INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993).

24. *Id.*

25. See Shaffer, *supra* note 3, at 128–29.

26. See *id.* at 136–38.

Union) or at least decry other countries' low standards (the United States) are also the ones that enable their home-grown multinational companies to avoid contributing to social inclusion through tax avoidance and labor localization strategies.<sup>27</sup> In this context, it is unclear where the political leadership might originate from to implement the proposed reforms. While middle-income countries might have been candidates to carry such ideas forward, the turn to hard-line right-wing policies in Brazil, for instance, dampens such hopes.

## 2. UNIVERSALIST ASPIRATIONS FOR INDIVIDUAL EXPERIMENTATION

There is no question that international economic governance must at the very least accommodate, but better yet protect and promote, a diversity of socio-political development choices. The justification for this proposition lies in realist sovereignty concerns as well as pragmatism, considering the ongoing backlash against a type of globalization that is perceived as single-minded. The push towards a unified set of rules at the WTO appears to have reached a plateau. Special and differential treatment has long proved inadequate to modulate such rules to individual members' economic, social, financial, and developmental needs.<sup>28</sup> Such dynamics leave trade lawyers in a conundrum: continue to strive for universalism by devising rules that are inherently gradual or progressive in their nature, such that they result in varying levels of commitments applicable to all, or abandon multilateralism altogether in favor of eclecticism in the treaties, the rules, and the institutions governing international trade. The WTO's Agreement on Trade Facilitation is an example of the former while the different approaches to trade rules in the Trans Pacific Partnership, the North American Free Trade Agreement's successor, and the Regional Comprehensive Economic Partnership negotiations illustrate the latter approach.<sup>29</sup>

In practice, states are engaging in a variety of strategies to modulate their commitments in the service of their domestic needs and priorities.<sup>30</sup> Some use derogations available to particular categories of members. For instance, Least Developed Countries use exemptions from commitments at the WTO and in regional trade agreements where they are available to them.<sup>31</sup> To some extent, they avail themselves of trade flexibilities available to all, such as trade reme-

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27. See Jack Ewing, *The Netherlands, a Tax Avoidance Center, Tries to Mend Its Ways*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/business/netherlands-tax-avoidance.html>; Floyd Norris, *Made in the U.S.A., but Banked Overseas*, N.Y. TIMES (Sept. 25, 2014), <https://www.nytimes.com/2014/09/26/business/made-in-the-usa-but-banked-overseas.html>.

28. SONIA E. ROLLAND, DEVELOPMENT AT THE WTO 139–85 (2012). Special and differential treatment has been used more effectively by Least Developed Countries.

29. See generally Agreement on Trade Facilitation, *supra* note 20; Kolben, *supra* note 22, at 1079–93; Takashi Terada, *RCEP Negotiations and the Implications for the United States*, NAT'L BUREAU ASIAN RES. (Dec. 20, 2018), <https://www.nbr.org/publication/rcep-negotiations-and-the-implications-for-the-united-states/>.

30. Sonia E. Rolland & David M. Trubek, *Embedded Neo-Liberalism and its Discontents: The Uncertain Future of Trade and Investment Law*, in GLOBALIZATION REIMAGINED: TOWARDS A PROGRESSIVE AGENDA FOR WORLD TRADE AND INVESTMENT LAW (Alvaro Santos et al. eds.), (forthcoming 2019).

31. See, e.g., *Special and Differential Treatment Provisions*, WTO, [https://www.wto.org/english/tratop\\_e/dev\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/dev_e/dev_special_differential_provisions_e.htm) (last visited Feb. 17, 2019).

dies. This is particularly true of Organisation for Economic Co-operation and Development countries and middle-income countries such as Brazil, India, China, and many others. Tiered commitments such as those modeled by the Agreement on Trade Facilitation seem to be particularly appealing,<sup>32</sup> if the speed of ratification of the agreement is any indication of its success so far. Some regional trade agreements include asymmetric clauses meant to foster the equitable distribution of gains within the zone.<sup>33</sup> Breaching their commitments is also a way in which states have created some flexibility for themselves. The timeline for dispute resolution at the WTO, combined with the fact that remedies are strictly prospective enables *de facto* flexibility at little cost for up to several years.<sup>34</sup> The Jawaharlal Nehru National Solar Mission implemented by the Indian government since 2010 illustrates the point.<sup>35</sup> The program was designed to come to a close in 2022.<sup>36</sup> Local content requirements in subsidies and other aspects of the program were predictably in breach of WTO obligations, yet, it took five years for the dispute launched by the United States against India to reach the stage of a request for retaliatory rights.<sup>37</sup> Ongoing proceedings<sup>38</sup> are in a somewhat awkward race with the program's original sunset clause.<sup>38</sup>

*Retooling Trade Agreements* argues that trade agreements already offer many options for “policy space.”<sup>39</sup> It then seeks to design additional universalist legal tools, which could be implemented in multilateral or regional trade agreements. To some extent, it codifies *de facto* practices, which would have the benefit of creating a more level playing field in the modalities for recourse to flexibilities, and more accountability with respect to their use. This is a laudable goal in principle, but such attempts at policing states' industrial policy experimentation have not been entirely successful in the past. In particular, Article XVIII of the General Agreement on Tariffs and Trade (“GATT”) provides various mechanisms for industrial policy, with some measure of multilateral

32. Agreement on Trade Facilitation, *supra* note 20, § II.

33. The Common Market for Eastern and Southern Africa creates a special regime to address “economically depressed areas: within the region. Agreement Establishing a Common Market for Eastern and Southern Africa (COMESA) arts. 6(c), 99–100, 144, Nov. 5, 1993, 2314 U.N.T.S. 265; Agreement on South Asian Trade Area (SAFTA) art. 7, Jan. 6, 2004, [http://saarc-sec.org/digital\\_library/detail\\_menu/agreement-on-south-asian-free-trade-area-safta](http://saarc-sec.org/digital_library/detail_menu/agreement-on-south-asian-free-trade-area-safta); Southern African Customs Union Agreement (SACU) arts. 32, 34.5(b), Oct. 21, 2002, [https://www.wipo.int/edocs/lexdocs/treaties/en/sacu/trt\\_sacu.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/sacu/trt_sacu.pdf) (creating a customs revenue sharing scheme weighted in favor of the weakest members of the group).

34. Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* 16 (Nov. 2017) (working paper) (on file with the European University Institute Department of Law), [http://cadmus.eui.eu/bitstream/handle/1814/47045/LAW\\_2017\\_11.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1).

35. GOV'T INDIA MINISTRY NEW AND RENEWABLE ENERGY, *JAWAHARLAL NEHRU NATIONAL SOLAR MISSION TOWARDS BUILDING SOLAR INDIA* (2010).

36. *Id.* at 3, 7.

37. Recourse to Article 22.2 of the DSU by the United States, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/18 (Dec. 19, 2017); Request for Consultations by the United States, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/1 (Feb. 6, 2013).

38. Request for the Establishment of a Panel, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/20 (Jan. 29, 2018).

39. Shaffer, *supra* note 3, at 131.

checks and balances.<sup>40</sup> The practice regarding Article XVIII shows that GATT Contracting Parties were reluctant to offer their industrial policy for review and controlled phase-out by other GATT parties. Certainly, some existing flexibility tools are heavily used, particularly trade remedies. For others, including most special and differential treatment clauses, the practice shows that such provisions have largely failed to offer sufficient accommodations to developing countries.<sup>41</sup>

Perhaps more crucially, in seeking to formalize more avenues for derogations and exceptions within traditional trade agreements, *Retooling Trade Agreements* upholds the fundamental premise that countries may and should continue on the same trade liberalization path that they have been engaged on for the past several decades, albeit with more and better-designed tools for flexibility. Whether that is the socially optimal course of action will be for history to determine, but the shorter-term political question is whether it will be sufficient to rally dissenters from developed and developing countries alike towards a common ethos of trade agreements.

### 3. THE FORGOTTEN TOOL: A STRUCTURALIST CRITIQUE OF TRADE AGREEMENTS

Going beyond “*Retooling Trade Agreements*,” I would argue that trade rules must deal with normative and stakeholder diversity not just downstream, by offering flexibilities and exceptions, but in the rulemaking process itself. So long as the process for trade negotiations remains mostly unchanged, then the same interests will continue to prevail, leading to largely similar types of regulatory output. This includes infra-national, state-level, regional, or global trade law-making. The state as a filter of infra and supra-national interests plays an important role but fails to exhaust the need for standing of various constituencies, a point that Shaffer also embraces in theory. More socially inclusive trade agreements will perhaps have a better chance of emerging if the various affected communities and constituencies have a redefined role in the rule-making and institution building process.

Providing avenues for multiple types of entities to participate both in substantive rulemaking and in dispute resolution is far from unprecedented in multi-level and multi-jurisdictional legal orders. Where it has been used, it has proven a powerful integrative tool. It has also played a significant role in bolstering the rule of law. European law and international criminal law offer two illustrations. In the EU, a variety of entities, including the EU Commission, the EU Parliament, and the EU Council, member states, individuals, and companies have some standing to bring disputes before the Court of Justice of the Europe-

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40. General Agreement on Tariffs and Trade art. XVIII, Oct. 30, 1947, 2 U.S.T. 1583.

41. ROLLAND, *supra* note 28, at 130–38.

an Union.<sup>42</sup> The Court has played a critical role in pushing forward the European integration project and expanding the ambit of EU law.

With respect to international criminal law, the three procedures for bringing cases to the International Criminal Court (“ICC”) include referral by a state party, referral by the United Nations Security Council, and self-initiation by the Prosecutor.<sup>43</sup> The creators of the ICC envisioned that state referrals would aim at situations occurring in states other than the referring state. Many were skeptical that any of these procedures would be successful for various political reasons. Yet nobody foresaw what turned out to be a frequently used procedure and the one that brought the first series of cases to the Court: self-referral by the state where the atrocities occurred, often in the immediate aftermath of the events, or even as the events are still unfolding.<sup>44</sup> The broad drafting of the member state referral procedure resulted in an unforeseen use that added yet another layer of diversity to recourses to the Court.<sup>45</sup> To a lesser extent, human rights systems also offer a mix of state, supra-national, and individual avenues for airing disputes, which has breathed life into both regional and international legal orders.

Second, with respect to substantive rules on trade, moving beyond the existing content and form of trade agreements would require a radical displacement of economic theory as a driver of the rules. Instead, trade rules should be shaped by what traditionally has been dubbed “non-trade” issues, including social and environmental considerations. In this perspective, the purpose of trade and investment rules would not be to reduce externalities, or implement a particular economic model, but rather to generate positive incentives for the use and management of global commons. For instance, subsidies disciplines resulting in overfishing and in promoting the use of hydrocarbons without internalizing the environmental and social costs of these policies are antithetical to what trade and investment regulation should be concerned with. With the protection of global commons at its core, economic regulation, no matter where it takes

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42. *A Brief Guide to the European Union and its Legislative Processes*, FIN. CONDUCT AUTHORITY 17 (June 2011), <https://www.fca.org.uk/publication/archive/european-union-legislative-process.pdf>.

43. Rome Statute of the International Criminal Court, art. 13, July 17, 1998, 2187 U.N.T.S. 3.

44. *Situation in the Central African Republic ICC-01/05*, INT’L CRIM. CT., <https://www.icc-cpi.int/car> (last visited Feb. 17, 2019) (noting war crimes and crimes against humanity in the context of the armed conflict in the CAR since 2002 were referred by the CAR Government in 2004); *Situation in the Central African Republic II ICC-01/14*, INT’L CRIM. CT., <https://www.icc-cpi.int/carII> (last visited Feb. 17, 2019) (noting war crimes and crimes against humanity in the context of the renewed violence conflict in the CAR starting in 2012 were referred by the CAR Government in 2014); *Situation in the Democratic Republic of the Congo ICC-01/04*, INT’L CRIM. CT., <https://www.icc-cpi.int/drc> (last visited Feb. 17, 2019) (noting alleged war crimes and crimes against humanity in the context of the armed conflict in the DRC since 2002 were referred to the ICC by the DRC Government in April 2004); *Situation in the Republic of Mali ICC-01/12*, INT’L CRIM. CT., <https://www.icc-cpi.int/mali> (last visited Feb. 17, 2019) (noting war crimes committed in Mali since 2012 were referred by the Government of Mali in 2012); *Situation in Uganda ICC-02/04*, INT’L CRIM. CT., <https://www.icc-cpi.int/uganda> (last visited Feb. 17, 2019) (noting alleged war crimes and crimes against humanity, committed since 2002 by the Lord’s Resistance Army were referred by the Government of Uganda in January 2004).

45. Catherine R. Blanchet, Note, *Some Troubling Elements in the Treaty Language of the Rome Statute of the International Criminal Court*, 24 MICH. J. INT’L L. 647, 650–52 (2003).

place, would have the interconnectedness and globalizing effect that many authors support.<sup>46</sup> An alternative driver of rules could be to support diverse social policy choices whilst “doing no harm” externally to other socio-political systems. Suspected harms could be addressed through the systemic features suggested above for dealing with multi-jurisdictional and multi-stakeholder conflicts. This includes standing by a diversity of stakeholders in trade and investment dispute fora, as well as socially inclusive participation in the making of the rules.<sup>47</sup> One cannot exist without the other: we cannot envision a system where diversity is protected without creating venues for stakeholders at the supra and infra-national levels to voice their support or concerns for particular legal or policy measures.

So, what is left of the role of economics, economists and social scientists in the design of trade and investment law and policy? Economic models purport to indicate which actors might be winners and losers, and by how much; international economic law then decides which of these outcomes are desirable by enshrining them into rules that define harm, injury, and entitlement to compensatory tools such as countervailing duties, safeguard duties, and antidumping duties. This approach is in crisis. Instead, economists, social scientists, and legal experts should go beyond thinking in terms of compensating losers, and design instruments that prevent or minimize losses upstream to those most at risk of becoming losers. We also need to fundamentally challenge the way we account for and value net and relative gains and losses. This in turn calls for recasting the role of economists and social scientists in relation to trade lawyers. Social scientists and lawyers should focus on forecasting, evaluating, and explaining the potential and actual impacts and incentives generated by different types of legal instruments and systems. This will enable stakeholders to be in a better position to choose amongst these instruments or to request the creation of new ones.

*Retooling Trade Agreements* offers a rich ecosystem for thinking of avenues out of the current crisis of international trade governance. For some, it will represent a reasonable way to salvage the trade law system. For others, “retooling” falls short of the more fundamental reshaping that is needed. For yet others, it may be too bold socially. Politically, some tacticians might suggest that the only linkage that holds purchase today is one to military and geopolitical agendas. Whatever one’s view, Shaffer’s contribution will help sustain a much-needed discussion on the future of trade regulation.

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46. See, e.g., U.N. System Task Team, U.N. System Task Team on the Post-2015 U.N. Development Agenda: Global Governance and Governance of the Global Commons in the Global Partnership for Development Beyond 2015 6–8 (Jan. 2013), [http://www.un.org/en/development/desa/policy/untaskteam\\_undf/thinkpieces/24\\_thinkpiece\\_global\\_governance.pdf](http://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf).

47. With respect to investment, see e.g., Emmanuel T. Laryea, *Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration*, 59 B.C. L. REV. 2845, 2848 (2018).