
THE LAW AND POLITICS OF SOCIALLY INCLUSIVE TRADE

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INTRODUCTION

American ambivalence toward international institutions is nothing new. In his farewell address, George Washington famously warned against foreign entanglements.¹ After World War I, the U.S. Senate rejected the Treaty of Versailles, leaving the United States outside the formal post-war order it helped establish and neutering the new League of Nations.² Throughout the late twentieth century, the United States refused to ratify multilateral agreements ranging from the Vienna Convention on the Law of Treaties,³ to the UN Convention on the Law of the Sea,⁴ to a host of human rights agreements.⁵ Nor did the dawn of the twenty-first century change the United States' attitude. In 2001, President George W. Bush began his administration by “unsigned” the Rome Statute of the International Criminal Court and the Kyoto Protocol on the UN Framework Convention on Climate Change.⁶ These agreements run the gamut from treaties on peace and security to the environment, and from human rights to the law of the sea.

But one area—international trade—has fared better than others in insulating itself from the United States' hesitation toward international institutions. Even while he warned against foreign entanglements, Washington also counseled his successors to “establish[,] with powers so disposed, . . . conventional

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1. President George Washington, Farewell Address (Sept. 19, 1796), in AM. DAILY ADVERTISER [hereinafter Washington Farewell Address], available at http://avalon.law.yale.edu/18th_century/washing.asp.

2. *The Treaty of Versailles*, U.S. SENATE (last visited Mar. 9, 2019), https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_TreatyVersailles.htm.

3. *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE (last visited Mar. 9, 2019), <https://www.state.gov/s/l/treaty/faqs/70139.htm>.

4. Roncevert Ganan Almond, *U.S. Ratification of the Law of the Sea Convention*, DIPLOMAT (May 24, 2017), <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>.

5. Sophie McBain, *Why Is the U.S. So Reluctant to Sign Human Rights Treaties?*, NEW STATESMAN AM. (Oct. 7, 2013), <https://www.newstatesman.com/north-america/2013/10/why-us-so-reluctant-sign-human-rights-treaties> (noting that the U.S. has failed to ratify the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, The Convention against Enforced Disappearance, the Mine Ban Treaty, and a number of other international human rights treaties).

6. Edward T. Swaine, *Unsigned*, 55 STAN. L. REV. 2061, 2061–64 (2003).

rules of intercourse, the best that present circumstances and mutual opinion will permit”⁷

This embrace of commerce and the international institutions that support it has been relatively consistent throughout American history. Even in the face of significant domestic political resistance to new trade agreements, such as opposition to NAFTA in the early 1990s and the Seattle riots at the WTO Ministerial in 1998, key government institutions have by and large supported international trade institutions, even when they have been leery of other institutions.⁸

No longer. The 2016 presidential election sent Donald Trump to the White House on a platform of renegotiating trade agreements that he argued had poorly served American interests, especially those of the blue-collar workers so central to politics in the states that delivered the presidency to Trump. Since taking office, the Trump administration has embarked on an aggressive campaign to use trade policy to rebuild American manufacturing capacity. It has imposed tariffs on steel and aluminum imports in an effort to expand productive capacity and jobs in those sectors.⁹ It has renegotiated NAFTA to include provisions it hopes will return more of the automotive supply chain to the United States.¹⁰ And it has taken on China over its industrial policy that has led to the loss of U.S. jobs.¹¹

These actions, unfortunately, have done little so far to meaningfully address the very real underlying concern.¹² Neither U.S. trade policy nor international trade agreements do enough to ensure that trade liberalization supports important social values, such as an equitable distribution of wealth and environmental protection, which market transactions often undervalue. Given the

7. Washington Farewell Address, *supra* note 1.

8. The line is, of course, not unbroken. Congress resisted the GATT’s formation and development, as well as the establishment of an international organization to oversee the GATT, in the mid-twentieth century. Critically, though, this congressional opposition was never strong enough to overcome presidential enthusiasm for the multilateral trading system. See Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. (forthcoming 2019) (manuscript at 21–22).

9. David J. Lynch & Damian Paletta, *Trump Announces Steel and Aluminum Tariffs Thursday over Objections from Advisers and Republicans*, WASH. POST (Mar. 1, 2018), https://www.washingtonpost.com/news/business/wp/2018/03/01/white-house-planning-major-announcement-thursday-on-steel-and-aluminum-imports/?utm_term=.609371fb7aeb.

10. Jen Kirby, *USMCA, Trump’s New NAFTA Deal, Explained in 500 Words*, VOX (Feb. 5, 2019, 10:17 PM), <https://www.vox.com/2018/10/3/17930092/usmca-nafta-trump-trade-deal-explained> (noting that automobiles must have at least 75% of their components manufactured in the U.S., Mexico, or Canada to be tariff-free and that by 2023, 40 to 45% of automobile parts must be manufactured by workers who earn at least \$16 per hour).

11. See David H. Autor et al., *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade* 28–29 (Nat’l Bureau of Econ. Research, Working Paper No. 21906, 2016), <https://www.nber.org/papers/w21906>; Jim Tankersley & Keith Bradsher, *Trump Hits China with Tariffs on \$200 Billion in Goods, Escalating Trade War*, N.Y. TIMES (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/us/politics/trump-china-tariffs-trade.html>.

12. Indeed, the Trump administration’s policies have expanded the number of communities left out of the rising tide of globalization. While the overall economy and stock market have generally continued to thrive during the Trump administration, the U.S. agricultural sector has suffered enormously as other countries have retaliated against the United States for the Trump’s administration’s trade policies.

Trump administration's failure to make good on the demand for a socially inclusive trade policy, it falls to others to find a way forward. Into that void steps Professor Gregory Shaffer with his innovative and illuminating article, *Retooling Trade Agreements for Social Inclusion*.¹³ Professor Shaffer's article is what scholarship should be—well versed in theory and of immediate practical significance.

Professor Shaffer's article is a rich work on the relationship between the international trading system and issues of broader social policy. In this essay, I want to build upon two points Professor Shaffer makes. In Part I, I discuss the history of U.S. trade policy and how the separation of trade policy into what Professor Shaffer calls a "two-step model"—the first, a foreign policy issue aimed at maximizing the benefits of liberalized trade, and the second, a domestic policy issue aimed at combatting distributional problems resulting therefrom—has proven unsustainable because domestic politicians have failed to address the social inequalities caused by free trade. Part II responds to critics who argue that the crisis he identifies does not exist. In Part III, I discuss the substantial promise, but also peril, of a key component of Professor Shaffer's proposed solution to this crisis: revising trade remedies laws to permit countries to impose social dumping duties.

I. THE CRISIS IN INTERNATIONAL TRADE

An Absence of Social Inclusion

Over the course of U.S. history, trade policy has served a number of different purposes. In the first years of the Republic, trade policy was a critical component of foreign policy as the United States attempted to remain neutral in the Napoleonic wars engulfing Europe.¹⁴ In the first half of the nineteenth century, Henry Clay's "American System" used tariffs—the primary tool of trade policy until at least the mid-twentieth century—to raise revenue for westward expansion, while also protecting infant industries located predominantly in the northeast.¹⁵ In the latter half of the nineteenth century, tariff proponents justified their policy preferences on the grounds of industrial development and labor protection.¹⁶ In the aftermath of World War II and during the Cold War, foreign policy once again played a predominant role in shaping U.S. trade poli-

13. See generally Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1 (2019).

14. President George Washington, The Proclamation of Neutrality (Apr. 22, 1793), available at http://avalon.law.yale.edu/18th_century/neutra93.asp.

15. See DOUGLAS IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY 157–58 (2017) (explaining how the Senate used internal improvements to incentivize tariff votes). See also FRANK WILLIAM TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 1, 23 (7th ed. 1923) (describing "protection to young industries").

16. See James L. Huston, *A Political Response to Industrialism: The Republican Embrace of Protectionist Labor Doctrines*, 70 J. AM. HIST. 35, 36 (1983).

cy.¹⁷ The United States supported multilateral trade liberalization through the General Agreement on Tariffs and Trade (“GATT”), the forerunner of the World Trade Organization (“WTO”), as a means of rebuilding American allies and providing a bulwark against communist expansion.¹⁸

With the end of the Cold War, however, U.S. trade policy lost its moorings. Foreign policy continued to provide a justification for granting for certain trade agreements with American allies, such as agreements with countries like Australia that backed the U.S. invasion of Iraq in 2003.¹⁹ But these agreements were too small to have a meaningful economy-wide effect on the United States and were often simple *quid pro quo* agreements that did not pursue any grand foreign policy vision. The Obama administration tried to justify its mega-regional trade agreement, the Trans-Pacific Partnership (“TPP”), on the grounds that it would allow the United States to “write the rules of the road” against a rising China.²⁰ To many commentators, however, that justification did not seem to match the substance of the TPP, which looked very similar to boilerplate U.S. trade agreements.²¹ Nor did this rationale persuade the U.S. public, which in 2016 endorsed presidential candidates from both major parties that disavowed the TPP. The ultimate winner of the election, President Donald Trump, pulled the United States out of the pact.²²

In retrospect, the need to rely on flimsy foreign policy justifications foretold the collapse of what Professor Shaffer has called the “two-step model.”²³ The two-step model starts where the foreign policy paradigm of U.S. trade policy leaves off, treating international trade policy as primarily an international policy problem rather than a domestic economic one. Economists and commen-

17. See Meyer & Sitaraman, *supra* note 8, at 25–26 (arguing that trade policy was justified primarily on foreign policy grounds during the Cold War).

18. President Eisenhower called on Congress to support creation of an Organization for Trade Cooperation (OTC) to administer the GATT in 1955, saying that the failure to do so would “play directly into the hands of the Communists.” IRWIN, *supra* note 14, at 516. In his 1955 State of the Union address, President Eisenhower declared that “[w]e must expand international trade and investment and assist friendly nations whose own best efforts are still insufficient to provide the strength essential to the security of the free world.” *Id.* at 519. His successor, President Kennedy, called trade agreements “an important new weapon to advance the cause of freedom” against the communists. *Id.* at 527.

19. *United States and Australia Sign Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (May 18, 2004), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2004/may/united-states-and-australia-sign-free-trade-a>.

20. See, e.g., Barack Obama, *The TPP Would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?noredirect=on&utm_term=.4340d1028fa7 (“As a Pacific power, the United States has pushed to develop a high-standard Trans-Pacific Partnership, a trade deal that puts American workers first and makes sure we write the rules of the road for trade in the 21st century.”).

21. See Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT’L L. 315, 316–17 (2018) (noting that U.S. trade agreements, including TPP, are largely boilerplate).

22. *Trump Executive Order Pulls Out of TPP Trade Deal*, BBC (Jan. 24, 2017), <https://www.bbc.com/news/world-us-canada-38721056>.

23. Shaffer, *supra* note 13, at 2–3.

tators of different stripes subscribed to this view.²⁴ They agreed that reducing trade barriers creates wealth, and that such wealth creation was a normatively desirable goal. On this view, the pesky question of who would possess this wealth was not a proper question for international economic policy. That question, rather, was one for domestic economic policy.²⁵

As a political matter, this two-step process allowed policymakers that disagreed on economic policy writ-large to agree on international trade policy.²⁶ Distributional questions are, after all, the most contentious part of any economic policy. By simply removing distributional questions from international trade policy, policymakers on both sides of the political aisle could agree to support a program of trade liberalization that would increase the aggregate wealth of the United States.

As Professor Shaffer rightly notes, the two-step model also allowed the government to yield to pressure from capital.²⁷ A combination of technology improvements, prior international trade liberalization, and the absence of international tax harmonization allowed corporations to move or threaten to move jobs and productive resources like capital itself to countries with more favorable economic policies. Corporations used this leverage to push governments to negotiate international agreements that were increasingly favorable to capital, at the expense of a host of other social concerns. These concerns include labor protection (both in terms of overall employment as well as the kinds of jobs available), environmental protection, and government revenues that pay for educational opportunities, infrastructure, and a social safety net for displaced workers.²⁸

In principle, this two-step model need not have been problematic. Many commentators argued that, while liberalizing trade might cause some economic hardship for certain individuals, the overall economic growth created would ultimately lead to better opportunities for those same individuals. And if, for some reason, the invisible hand of the market did not take care of those who lost out from trade liberalization, the government could step in to provide assistance.

As we now know, this theory of “trickle down trade liberalization” did not bear fruit. The liberalized international trading system persistently punished certain individuals and communities,²⁹ and the government never stepped in with assistance adequate to the challenge.³⁰ Instead, domestic economic policies in many developed countries, including the United States, failed to deal with economic inequality. In response, voters in developed countries world-

24. See, e.g., Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 993–34 (2017) [hereinafter *Saving the Political Consensus*].

25. See *id.* at 996–97.

26. *Id.*

27. Shaffer, *supra* note 13, at 3.

28. *Id.*; Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 81–82 (2017).

29. See Autor et al., *supra* note 11, at 33.

30. Garcia & Meyer, *supra* note 28, at 8.

wide began to take international trade liberalization and the institutions that support it hostage: negotiate trade agreements that create a more equitable, sustainable international economic system or we will vote to tear the entire house down. The Trump trade wars and Britain's hurtle toward an immediate and likely highly damaging exit from the European Union are the most visible examples of this crisis, but the strength of far-right parties across Europe testify to the breadth of the sentiment. Professor Shaffer is thus quite right that now is the time for solutions.

II. A RESPONSE TO THE SKEPTICS

Before turning to Professor Shaffer's solutions, I first want to pause to respond to those that believe that the crisis Professor Shaffer and others identify is no crisis at all.³¹ This skeptical view rests on two basic arguments. First, technological innovation, not trade, is the primary cause of economic inequality. Second, the anti-trade elections in recent years are an historical blip that will pass as voters' views of trade liberalization become more favorable again. Both of these views are, in my opinion, mistaken.

Technology and Trade, not Technology or Trade

For many years, the conventional wisdom has been that technological innovation is primarily responsible for economic inequality and dislocation.³² But as Professor Shaffer notes, new empirical evidence suggests that the conventional wisdom has understated trade liberalization's role.³³ American manufacturing has declined by more than has been previously understood, owing in large degree to China's accession to the WTO.³⁴ Equally importantly, the conventional wisdom imagines trade and technology as distinct spheres. In reality, however, they are "intricately linked."³⁵ Both technological innovation and trade allow companies to produce goods at lower cost. In this sense, trade and technology are substitutes. As some companies lower their production costs (or increase their efficiency) through technological innovation, other companies may lobby for trade liberalization as a strategy to remain competitive. The reverse is also true—trade liberalization may spur companies to invest in technological innovation that leads to automation and the loss of jobs. Competitive pressures created by one strategy—technological innovation or trade—can spur greater use of the other strategy.

31. See Shaffer, *supra* note 13, at 10–11 (citing authors that believe the two-step model remains viable).

32. *Id.* at 14.

33. *Id.*; see generally Autor et al., *supra* note 11.

34. See Gwynn Guilford, *The Epic Mistake About Manufacturing That's Cost Americans Millions of Jobs*, QUARTZ (May 3, 2018), <https://qz.com/1269172/the-epic-mistake-about-manufacturing-thats-cost-americans-millions-of-jobs/>.

35. Shaffer, *supra* note 12, at 14.

Trade and technology are also complements. As Shaffer notes, the unbundling of supply chains depends on both technology and trade.³⁶ Both make global value chains, in which components of a finished product are produced and assembled in a variety of different countries, a cheaper method of producing complex products. Technology reduces costs not only through efficiency gains and automation, but also by reducing transportation costs and allowing final products to be assembled from intermediate goods produced in different places by different actors. Trade liberalization reduces the costs associated with global supply chains by eliminating tariffs—just taxes—and other barriers to moving intermediate goods (or any goods) around the globe.

And that is only talking about trade in goods. Services, however, dwarf goods in terms of their importance to the modern U.S. economy.³⁷ As the twenty-first century moves on, the combination of trade and technology is likely to put the same pressure on services jobs as it did on manufacturing jobs in the twentieth century.³⁸ The explosion of overseas call centers and informational technology service centers are, in this sense, the canary in the coalmine. They foretell of a potential disruption to the U.S. economy of at least the magnitude of that which has already occurred.

As an argument against rethinking how we pursue trade liberalization, the trade versus technology dichotomy is mistaken for another reason. Apart from the empirical claim that technology is more important than trade, commentators have sometimes objected that precisely because trade liberalization and technological innovation are substitutes in certain respects, one should feel the same way about both phenomena.³⁹ The implicit suggestion is that no one except Luddites opposes technological innovation, and therefore no one except a Luddite should oppose trade liberalization.

If this comparison between trade and technology is right, though, it is an argument for expanding the regulation of trade. After all, governments do, in fact, tightly restrict innovation and trade in certain technologies for a wide variety of non-economic reasons. Weapons technology may be restricted for national security reasons; nuclear energy is highly regulated for environmental and security reasons; governments may restrict human cloning for moral and religious reasons; and so on. Moreover, the equivalence between trade and technology, in terms of their social effects, may be overstated. Trade liberalization, for instance, may repeatedly hurt the same groups over time, while technological innovation hurts different groups at different times. Technological innovation may also more reliably produce gains that offset its costs, while the

36. *Id.*

37. Kimberly Amadeo, *How Does the U.S. Economy Work?*, BALANCE (Apr. 24, 2018), <https://www.thebalance.com/us-economy-4073968> (noting that 50% of US GDP comes from services, while only 20% comes from goods).

38. RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* 149–50 (2016).

39. JOOST H.B. PAUWELYN ET AL., *INTERNATIONAL TRADE LAW* 13 (3d ed. 2016) (“The point . . . [is] to persuade you that whatever you like or dislike about liberalized trade, you should like or dislike about technological change.”).

ratio of costs to benefits from trade liberalization rise with increased liberalization.⁴⁰

The Roots of the Political Demand for a Socially Inclusive Trade Policy

If the argument about trade versus technology misunderstands the relationship between the two, the argument about the long-term popularity of trade liberalization policies misunderstands the relationship between voters' policy preferences and the political systems that translate those preferences into policy. Scott Lincicome, for instance, has recently argued that “[c]ontrary to conventional wisdom, the United States is not experiencing a ‘protectionist moment.’”⁴¹ Citing polling data that shows support for trade liberalization, Lincicome argues that “[m]ost Americans generally support freer trade, globalization, and even oft-maligned trade agreements.”⁴² As the title of his piece, *The “Protectionist Moment” That Wasn’t*, suggests, Lincicome therefore infers that the current disruption in trade liberalization is not a result of a demand for policy change from the electorate.

This polling data, however, tells us little about how electoral politics will influence U.S. trade policy. Voters do not cast votes directly over policy issues. They vote for candidates who represent a number of different policy positions. Consequently, voters who feel intensely about a particular issue are more likely to influence policy than voters who don’t feel strongly, even if the latter express a view when asked.⁴³ As Lincicome acknowledges, most voters do not care much about trade policy, and their views are sensitive to how questions are framed.⁴⁴ Such weakly held pro-trade liberalization views are unlikely to influence policy. Moreover, studies find that voters tend to view economic shocks from trade liberalization as different and more serious than other kinds of economic shocks.⁴⁵ Given this disparate stake in policy outcomes, the backlash against trade liberalization is not surprising and is likely to last longer than the critics suggest it will.

40. Shaffer, *supra* note 13, at 13–14.

41. Scott Lincicome, *The “Protectionist Moment” That Wasn’t: American Views on Trade and Globalization*, CATO INST. FREE TRADE BULL., Nov. 2, 2018, at 1, 1.

42. *Id.* at 9.

43. See Michael D. Cobb & Mark T. Nance, *The Consequences of Measuring Non-Attitudes about Foreign Trade Preferences*, SURV. PRACTICE, Nov. 30, 2011, at 1, 1 (“As we demonstrate, the failure to screen for non-attitudes greatly exaggerates the percentage of people who have meaningful preferences about trade. In addition, we show how varying core measurement strategies can easily turn pluralities into majorities with different preference distributions . . .”).

44. *Id.* at 2; see also Alan S. Blinder, *The Free-Trade Paradox: The Bad Politics of a Good Idea*, FOREIGN AFF., Jan.–Feb. 2019, at 119, 121 (“Trump was able to push so many Americans into sixteenth-century thinking because most Americans’ belief in free trade is a mile wide but an inch deep. Polls show that the level of support depends on what is meant by “free trade,” how the question is posed, and when it is asked.”).

45. DANI RODRIK & RAFAEL DI TELLA, LABOR MARKET SHOCKS AND THE DEMAND FOR TRADE PROTECTION: EVIDENCE FROM ONLINE SURVEYS (2019), <http://j.mp/2FrXwYC>. Indeed, Rodrik and Di Tella find that voter demand for protectionism rises most significantly not only in response to trade shocks, but in particular when the shock arises from outsourcing to a developing country (as opposed to a developed country).

Apart from intensity, voter preferences are also funneled through election procedures that accord different weight to different voters' views. For instance, given the importance of seniority in Congress, a vote cast for a new member of Congress is worth less than a vote cast for a member of Congressional leadership or a committee chair. Political geography can thus accord certain policy views outsized importance. If a leader is beholden to voters who hold a particular view, that view may prevail even though it does not represent the majority position nationally. Reopening the government during the recent shutdown, for instance, enjoyed clear majority support in the United States, yet the Republican leadership in the Senate refused for weeks to allow a vote on the issue due to its importance to Republican primary voters.⁴⁶

Where trade policy is concerned, the most important actor, as a practical matter, is the president.⁴⁷ Despite misleading coverage of nation-wide election polls every four years, U.S. presidents are elected through a series of state elections in which almost every state awards its electoral votes on a winner-takes-all basis. Moreover, most states vote reliably for whichever candidate is nominated by a particular party. As a consequence, presidential elections are decided in a small handful of swing states. Because those states decide the outcome of the election, their voters' views are likely to have outsized influence over presidential policy. Policy preferences about trade in states that vote reliably for one party or the other are considerably less influential. Everyone in New York and California could staunchly support trade liberalization, but since those states are reliable Democratic states, those views would be unlikely to impress President Trump.

In our current political geography, those swing states are disproportionately states—for instance, Pennsylvania, Ohio, Michigan, and Wisconsin—that have lost manufacturing jobs that were central to the economic and social identity of many communities.⁴⁸ While political realignments can, of course, scramble this political geography, these states have been important battlegrounds in recent elections and seemed poised to be in upcoming elections as well. As a consequence, we should expect negative feelings about trade liberal-

46. Despite polls showing that 71% of Americans support Congress passing a bill to reopen the government, the Senate will not allow such a vote because of the importance of the border wall to their political base. See Kimberley Gross & John Sides, *No Wonder There's a Shutdown: New Poll Shows How Much Republicans and Democrats Really Disagree on Immigration*, WASH. POST (Jan. 15, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/15/no-wonder-theres-a-shutdown-new-poll-shows-republicans-and-democrats-disagree-profoundly-on-immigration/?utm_term=.f54677e24201. Gun control legislation is perhaps the best-known example of a policy in which the majority view appears to have little effect on policy. See Michelle Cottle, *Baby Steps for Gun Reform*, ATLANTIC (Mar. 3, 2018), <https://www.theatlantic.com/politics/archive/2018/03/gun-reform-congress/554603/>.

47. As a matter of constitutional law, the most important actor is Congress. See Meyer & Sitaraman, *supra* note 8, at 39.

48. See 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* (Nov. 26, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290590 (describing the attachment communities feel to certain jobs as akin to an attachment to property).

ization, which are more prevalent in these states, to continue to receive outsized attention from successful presidential candidates.

III. SUPERVISED UNILATERALISM

The durability of the crisis tells us that we need policy solutions. In this Part, I focus on one solution that Professor Shaffer proposes: revising trade remedies laws to permit countries to impose social dumping duties. As I explain below, this idea has great promise, but some peril as well.

The Peril

First, the peril. In short, expanding trade remedies to permit social dumping duties raises the risk of expanding unilateralism. The WTO's Dispute Settlement Understanding prohibits nations from taking retaliatory action until the Dispute Settlement Body has adjudicated the dispute and granted authorization to retaliate.⁴⁹ Trade remedies—antidumping duties, countervailing duties, and safeguards—are exceptions to this rule.⁵⁰ A proposal to expand trade remedies to combat social dumping thus necessarily involves expanding the role of unilateralism in the trading system.

In principle, of course, this expansion of trade remedies would be accompanied by new international rules governing the permissible use of social dumping duties.⁵¹ Such rules could, again in theory, limit the risk of unilateralism by subjecting unilateral trade remedies to ex post review by the WTO. In this way, a social dumping regime offers the possibility of reconciling a greater role for states to unilaterally pursue their vision of a socially inclusive trade policy *within* the larger multilateral trading system.

To see the risks posed by a social dumping regime, consider why the states that would be the initial targets of social dumping duties (e.g., China and India) would agree to new rules permitting the unilateral imposition of duties on their products by countries like the United States and Europe. Professor Shaffer's answer is to swap an agreement on social dumping duties for new rules permitting the legitimate use of industrial policy.⁵² By agreeing to a social dumping regime, developing countries would gain greater freedom to subsidize infant industries and provide other forms of economic development support.

As Professor Shaffer recognizes, the problem with this proposed swap is that developing countries do not currently feel excessively constrained by WTO rules, most notably the Agreement on Subsidies and Countervailing

49. General Agreement on Tariffs and Trade 1994 art. XXIII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

50. GATT arts. VI & XIX.

51. Shaffer, *supra* note 13, at 34.

52. *Id.* at 33–41.

Measures.⁵³ China, in particular, seems perfectly happy with the current WTO rules on industrial policy as practiced, which have not really prevented it from engaging in massive government intervention in the market. Smaller developing countries, for their part, may lack the capability to engage in large-scale industrial policy. Even if they have the capacity, the effects from industrial policy in smaller developing countries may not justify bringing cases against those countries, leaving them free to do as they please. On its own terms, then, the swap would appear to offer little for developing countries, while promising the imposition of even greater costs.

As current events and Professor Shaffer's article both attest, developed countries, not developing countries, are the ones clamoring for policy space in today's trading system. Developed countries like the United States are also relatively more constrained than countries like China in how they pursue their development objectives. China can feel free to make use of its extensive influence over its banking sector to provide development assistance, for instance.⁵⁴ If the United States wishes to provide similar subsidies, they must be approved by a U.S. Congress that is slow to pass legislation of any kind, let alone significant social programs that might easily become political liabilities.⁵⁵ Consequently, the United States is more likely to provide financial support through means other than direct subsidies, such as tariffs on imported goods or local content requirements. Such means of support are less transparent and often easier to build political coalitions around, and therefore relatively easier to provide in democratic systems sensitive to the perceptions of rent-seeking.⁵⁶ Unfortunately, these means of support run afoul of WTO rules in ways that are clearer and easier to demonstrate than many of China's means of support. In this way, WTO rules actually constrain industrial policy in developed countries more than developing countries.

Professor Shaffer also proposes modeling the predicate for social dumping duties on existing labor and environmental chapters (which themselves draw on existing multilateral labor and environmental rules).⁵⁷ I fully support this proposal, but I am again uncertain why developing countries would agree

53. *Id.* at 42 ("Similarly, to the extent that many developing countries do not feel that constrained by the SCM Agreement in practice, they may find that they have less to gain from these negotiations than developed countries.").

54. Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261, 303 (2016).

55. See, e.g., Stephen Dinan, *Obama Clean Energy Loans Leave Taxpayers in \$2.2 Billion Hole*, WASH. TIMES (Apr. 27, 2015), <https://www.washingtontimes.com/news/2015/apr/27/obama-backed-green-energy-failures-leave-taxpayers/> (discussing how the Obama administration's energy loan guarantee program resulted in the loss of over \$2 billion dollars of taxpayer money); Matthew Mosk, *Obama White House Warned Solyndra Bad for Reelection*, ABC NEWS (Sept. 16, 2011, 8:18 AM), <https://abcnews.go.com/Blotter/obama-white-house-warned-solyndra-bad-reelection/story?id=14534542> (discussing that White House officials knew loans given to Solyndra could result in political repercussions).

56. Arthur Dunkel & Frieder Roessler, *The Ranking of Trade Policy Instruments Under the GATT Legal System*, in PAUWELYN ET AL., *supra* note 39, at 224; Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 937 (2015) [hereinafter *Local Discrimination*].

57. Shaffer, *supra* note 13, at 38.

to import these norms into the WTO. Although both the United States and the European Union have labor and environmental provisions in their FTAs, neither has an FTA with China or India, meaning that they have not agreed that those norms should be attached to enforceable trade rules. As a consequence, countries like China and India might well feel that a negotiation about the predicate for social dumping duties need not be limited to those issues important to developed countries. Instead, just as GATT article XX's exception for public morals incorporates a degree of relativity,⁵⁸ these countries might push for rules permitting the imposition of social dumping duties in response to concerns of their own. China might, for instance, conceive of social dumping duties as a means of censoring certain kinds of imported material deemed socially immoral or politically dangerous.

Beyond the difficulties in negotiating multilateral rules governing the use of social dumping duties, the way in which such duties are used poses its own risks of unilateralism. Most obviously, if negotiations broke down and developed countries adopted social dumping measures without first having come to a multilateral agreement, the adoption of expansive measures of a similar kind by developing countries seems assured. After all, other countries have imposed their own trade barriers in response to the Trump administration's unilateral imposition of tariffs under Section 232 of the Trade Expansion Act of 1962 and, in China's case, Section 301 of the Trade Act of 1974.⁵⁹ There is every reason to think the same would occur if countries proceeded with a social dumping regime unilaterally.

Even with multilateral oversight, however, abuse of the new rules could still lead to spiraling unilateralism. Professor Shaffer again recognizes the need for new rules to limit abuse, proposing, for instance, the possibility of damages for a successful claimant.⁶⁰ But I fear the possibility of abuse is considerably greater. For instance, countries notoriously underchallenge trade remedies imposed on their products.⁶¹ Instead, countries tend to employ "vigilante justice," imposing retaliatory trade remedies and bypassing the WTO system entirely.⁶² Moreover, the aggressive use of trade remedies is common to both developed and developing countries. Although countries regularly complain about U.S. and E.U. trade remedy measures,⁶³ China and India are among the most active

58. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 326, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005); Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009).

59. *China Hits Back at Trump with Tariffs on \$60bn of US Goods*, BBC (Sept. 18, 2018), <https://www.bbc.com/news/business-45555749>.

60. Shaffer, *supra* note 13, at 36.

61. See Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 J. LEGAL STUD. 515, 551–52 (2005).

62. See *id.* at 524, 544–46.

63. As of January 2019, the United States and European Union have been the respondents in 164 and 96 WTO disputes, respectively. These numbers dwarf those of China, which has been a respondent in 43 disputes, the third highest number for WTO members. See *Disputes by Respondent*, WTO (last visited Mar. 9, 2019), https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#respondent.

users of trade remedies.⁶⁴ Expanding trade remedies to include social dumping duties may therefore lead to an expansion in the tit-for-tat use of trade remedies. One might not view such a result as problematic. Tit-for-tat trade disputes have, after all, always been a part of the multilateral trading system. But the ramifications of increasing the role for such disputes are certainly worth considering.

The Promise

Ultimately, the promise of a social dumping regime makes these risks worth it.⁶⁵ For all of the reasons Professor Shaffer identifies, the trading system needs to find better ways to allow governments to promote social inclusion and economic justice. Professor Shaffer has offered a detailed way to build such a system, and he has thoughtfully conceived of the system as an extension of existing rules, a move designed to make a social dumping regime less of a diplomatic lift than it might otherwise be (although, to be sure, it remains a significant one).

Indeed, the peril of social dumping—increased unilateralism—is also one of its great assets. The WTO has many virtues, but its ability to respond to issues of social inclusion has not been one of them. Firmly situated within the first step of Professor Shaffer’s two-step model, WTO institutions have been relatively unresponsive to issues of economic distribution or environmental justice.⁶⁶ Policy space for greater unilateralism in pursuit of those values can introduce into the trading regime what the process of multilateral negotiations has so far failed to. The perfect also should not be the enemy of the good. Proposals to address social inclusion within the trading system are not elegant mathematical proofs; they are legal and diplomatic solutions the implementation of which will require substantial effort and compromise.

The perils identified above, however, do point to what I think might be a more productive negotiating strategy to achieve a social dumping regime: trading a reinvigorated and substantially revised dispute settlement system for a social dumping regime. The United States has refused to permit the election of new members of the WTO’s Appellate Body, and has invoked GATT article XXI’s national security exception, it hopes, to make its national security tariffs

64. See Willemien Viljoen, *Trade Remedies and Safeguards in BRICS Countries* 1–2 (Trade Law Centre, Working Paper, Feb. 2013), <https://www.namc.co.za/wp-content/uploads/2017/10/Anti-dumping-and-trade-remedies-in-BRICS-20130222.pdf> (stating that between 1995 and 2012, India, Argentina and China accounted for 32% of all anti-dumping duties implemented).

65. See TIMOTHY MEYER & GANESH SITARAMAN, GREAT DEMOCRACY INITIATIVE, A BLUEPRINT FOR A NEW AMERICAN TRADE POLICY 29–31 (Dec. 2018), <https://greatdemocracyinitiative.org/wp-content/uploads/2018/12/New-American-Trade-Policy-Final.pdf>.

66. Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 556–64 (2018) (proposing that trade rules be enforced more aggressively to ensure that selective enforcement of trade rules does not undermine environmental and labor objectives); *Local Discrimination*, *supra* note 56, at 939–40 (arguing that subnational programs that discriminate in order to promote global public goods like green energy should be permissible under WTO rules).

on steel and aluminum unreviewable.⁶⁷ The United States' position on the Appellate Body has to a large extent been influenced by adverse rulings on trade remedies measures, rulings it views as judicial activism.⁶⁸

In the face of these actions, China in particular has positioned itself as a defender of the multilateral system.⁶⁹ And no wonder—the WTO's dispute settlement system offers China the best protection available to it against the United States' unilateral action. However fast China's economy has grown in recent years, the United States remains the world's largest economy. Moreover, important Chinese companies like tech giant Huawei remain dependent on U.S. technology, creating additional points of leverage for the United States. Other developing countries, although of less concern to the United States at this time, enjoy similar benefits from the WTO's dispute settlement system.⁷⁰ Put simply, these countries fare better against powerful countries in a world with a functioning multilateral dispute system than in a world without one.

Developing countries thus have a major interest in seeing the WTO dispute system functional again. They also have an interest in seeing developed countries adopt social inclusion policies that tamp down on anti-trade politics.⁷¹ Indeed, as Professors Shaffer and Nicolas Lamp note, developing countries pushed for the inclusion of provisions on developed countries adjustment policies in the original GATT in the hopes that such provisions would reduce the domestic pressure on developed countries to maintain or erect trade barriers.⁷² The current turmoil in the trading system, created most prominently by the United States and the possibility of Brexit, underscores the wisdom of this position. Developing countries have an interest in giving developed countries more tools to address issues of social inclusion.

67. Tom Miles, *World Trade's Top Court Close to Breakdown as U.S. Blocks Another Judge*, REUTERS (Sept. 26, 2018, 9:53 AM), <https://www.reuters.com/article/us-usa-trade-wto-judge/world-trades-top-court-close-to-breakdown-as-us-blocks-another-judge-idUSKCN1M621Y>; Krzysztof J. Pelc, *The U.S. Broke a Huge Global Trade Taboo. Here's Why Trump's Move Might Be Legal.*, WASH. POST (June 7, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/07/the-u-s-broke-a-huge-global-trade-taboo-heres-why-trumps-move-might-be-legal/?utm_term=.3f5cdcdcefe6.

68. These accusations of judicial activism are not just a recent development. The Obama Administration also blocked the reappointment of South Korean Judge Seung Hwa Chang, accusing him of judicial activism. See Manfred Elsig, Mark Pollack & Gregory Shaffer, *The U.S. Is Causing a Major Controversy in the World Trade Organization. Here's What's Happening.*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/?utm_term=.57ccf180ce52; *2018 USTR Trade Agenda Highlights WTO Reform, FTA Talks*, ICTSD (Mar. 8, 2018), <https://www.ictsd.org/bridges-news/bridges/news/2018-ustr-trade-agenda-highlights-wto-reform-fta-talks> (reporting that the Trump Administration has blocked the selection process for new Appellate Body judges due to concerns of "judicial overreach").

69. See Chao Deng, *China Defends WTO Record as Trade Fight Looms*, WALL ST. J. (June 28, 2018, 8:50 AM), <https://www.wsj.com/articles/china-defends-wto-record-as-trade-fight-looms-1530190248?ns=prod/accounts-wsj>.

70. See, e.g., Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS 267/AB/R (Mar. 3, 2005) (finding that U.S. subsidies for its cotton industry were trade distorting and violated its WTO commitments).

71. *Saving the Political Consensus*, *supra* note 24, at 1023–25.

72. Shaffer, *supra* note 13, at 25 n.161.

Developing countries thus might be persuaded to agree to a social dumping regime if they thought that doing so would buy them stability and judicial oversight within the multilateral system. Such a deal would involve substantial changes to the way WTO dispute settlement functions. Proposals for such changes have been widely discussed elsewhere and a detailed discussion of them is beyond the scope of this short essay.⁷³ But Professor Shaffer's suggestion that countries be able to obtain damages for wrongful trade remedies measures is a good one. A separate dispute settlement system for trade remedies disputes is another good proposal.⁷⁴

Along with a social dumping regime, these proposals would increase *both* the unilateral power of states to respond to issues of social inclusion and strengthen the multilateral system's ability to oversee the unilateral exercise of power. In this way, pairing a social dumping regime with a revised and repaired dispute settlement system would shift the WTO toward a system that favors *ex post* review, instead of *ex ante* review, of what would look very much like retaliatory measures. As Professor Shaffer suggests, such a move would need to be paired with stronger remedies for successful challengers, such as compensatory damages. But the combination of these measures could appeal to developed and developing countries alike.

Perhaps most importantly, in trade remedies cases, the party on whom trade remedies have been imposed is the challenger and thus bears the burden of demonstrating that the imposition of trade remedies is unlawful.⁷⁵ As a result, permitting social dumping duties would create a presumption that state action in support of policies of social inclusion is lawful. At this moment in time, such a presumption might have a salutary effect for the trading system well beyond its significance in legal disputes.

CONCLUSION

The distributional effects of trade liberalization threaten to tear apart the multilateral trading system, and the threat is not leaving us anytime soon. The twenty-first century challenge for those wishing to preserve the trading system is to safeguard the great good that comes from an open trading system while preserving room for governments to respond to issues of social inclusion. Professor Shaffer has diagnosed the problem and set out a path to a solution. Although amending international trade law to allow social dumping is likely to face resistance from developing countries and could ultimately lead to an increase in unilateral retaliation, its potential benefits—allowing nations to re-

73. See, e.g., Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WT/GC/W752 (Nov. 26, 2018) (proposing amendments to the WTO's Dispute Settlement Understanding and the appointment of a full bloc of WTO Appellate Body members).

74. See JENNIFER HILLMAN, INST. OR INT'L ECON. LAW, THREE APPROACHES TO FIXING THE WORLD TRADE ORGANIZATION'S APPELLATE BODY: THE GOOD, THE BAD, AND THE UGLY? 6 (2018), <https://georgetown.app.box.com/s/966hfV0smran4m31biblfszj42za40b>.

75. Bown, *supra* note 61, at 530.

spond quickly to issues of social inclusion and strengthening the multilateral system—make it an idea worth pursuing.