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# Saving the Political Consensus in Favor of Free Trade

Timothy Meyer

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# ESSAY

## Saving the Political Consensus in Favor of Free Trade

*Timothy Meyer\**

*2016 was the year that the political consensus in favor of liberalized international trade collapsed. Today, across the world, voters' belief that international trade agreements lead to economic inequality threatens to derail ratification of the next generation of trade agreements and undo the substantial gains made under existing arrangements. The United States elected Donald Trump president on a platform of rolling back or renegotiating trade agreements. President Trump has moved to fulfill that promise immediately upon taking office by "unsigning" the Trans-Pacific Partnership ("TPP"), the most recent major effort to liberalize global trading rules, and initiating efforts to renegotiate the North American Free Trade Agreement ("NAFTA"). The United Kingdom voted to pull out of the European Union, one of the world's largest and most important free trade zones. Europe's top trade negotiator declared European trade policy "close to death" after Germany and France held up ratification of a free trade agreement with Canada.*

*In the face of this onslaught, trade's defenders have run out of ideas. They point out that trade makes nations wealthier; that trade plays a minor role in creating economic inequality when compared with technological innovation; and that domestic policies unconnected to trade rules can more efficiently address economic inequality, and can do so without the need for international obligations that might be construed as limiting national sovereignty in matters of social policy. These views are right as a matter of economics. But politicians make trade rules, not economists. Right or wrong, voters' belief that liberalizing trade leads to economic inequality creates a political constraint on trade liberalization.*

*This Essay proposes a way to save the political consensus in favor of free trade. In order to preserve and extend the international trade regime and*

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*the extraordinary gains it has produced since the end of World War II, the next generation of preferential trade agreements should include international obligations binding on developed countries to address domestic economic inequality. In other words, trade agreements must include obligations to redistribute the gains from trade within countries. This approach differs dramatically from that taken in existing trade agreements. Since NAFTA, trade agreements have tried to protect those who stand to lose from free trade—principally labor interests—by including labor provisions in trade agreements. However, these provisions are outward looking. They seek to raise labor and environmental standards in developing countries (e.g., Mexico) in order to limit the loss of jobs in developed countries (e.g., the United States). Critics of trade agreements have bought into this orientation. They argue, for example, for removing investor-state dispute settlement (“ISDS”) from trade agreements. But removing ISDS does little to help those suffering economically in developed countries, and it hurts developed countries’ businesses when they operate overseas. The removal of ISDS thus would be a major concession to critics of trade agreements, and yet not one that advances the core objective of ensuring that trade agreements improve economic equality.*

*To be sure, governments do have domestic programs to help those negatively impacted by liberalized trade rules. Trade adjustment assistance (“TAA”) programs offer financial assistance to those who lose their jobs due to international trade. But recent studies in the United States suggest that TAA is ineffective. Moreover, unlike trade agreements, which are in force indefinitely, TAA expires every few years unless Congress reauthorizes it—a fight each time.*

*To put it bluntly, these approaches have failed. They have failed to staunch the loss of jobs, and they have failed to persuade voters in developed countries that international trade is not a primary cause of economic inequality. An “Economic Development Chapter” in future preferential trade agreements would commit developed countries to addressing their own economic inequality problems at home. An Economic Development Chapter would create international obligations for member states to establish fiscal programs, such as education and infrastructure spending, designed to boost economic opportunity for those left behind by growing inequality. These spending obligations would be indexed, so that they would rise and fall with the economic losses attributable to trade agreements. If such losses do not occur or taper off, nations’ spending commitments would naturally sunset. These obligations would be enforced through reporting and monitoring requirements, similar to human rights treaties, and dispute settlement provisions that could lead to a loss of market access, the norm in trade agreements.*

*Tying measures designed to address economic inequality directly into trade agreements would create political coalitions in favor of continuing efforts to liberalize trade. Those who do not benefit from trade agreements could still support them as a way to obtain greater domestic benefits. President Trump, for*

*instance, has made infrastructure spending a major domestic priority and might be willing to support trade agreements in exchange. And those who benefit most from the liberalized trade rules could support redistribution as the price of further globalization. Trade agreements would create a commitment device allowing those who gain from trade to commit in advance to provide those who do not with a share of the spoils.*

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## INTRODUCTION

*The decadent international but individualistic capitalism, in the hands of which we found ourselves after the War, is not a success. It is not intelligent, it is not beautiful, it is not just, it is not virtuous—and it doesn't deliver the goods. In short, we dislike it and we are beginning to despise it. But when we wonder what to put in its place, we are extremely perplexed.<sup>1</sup>*

—John Maynard Keynes

2016 was the year that the political consensus in favor of liberalized international trade collapsed. Surprisingly, the trade regime's existential crisis has not come from developing countries, who have long worried that liberalized trade rules disproportionately benefit developed countries and sometimes work to the outright detriment of

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1. John Maynard Keynes, *National Self-Sufficiency*, 22 YALE REV. 755, 758 (1933).

developing countries.<sup>2</sup> Instead, the threat has come from within developed countries. During the 2016 presidential election, a substantial number of American voters of both major political parties supported candidates who ran on campaigns of rolling back, renegotiating, or revoking international trade agreements.<sup>3</sup> This support culminated in the election of Donald Trump, who after taking office immediately “unsigned” the Trans-Pacific Partnership (“TPP”) and has initiated efforts to renegotiate the North American Free Trade Agreement (“NAFTA”).<sup>4</sup> British voters recently chose to withdraw from the European Union, in large part because they objected to the free movement of people and the regulatory harmonization that accompanies membership in the EU’s common market.<sup>5</sup> Within Continental Europe, countries such as Germany, France, and Belgium have begun to get cold feet about mega-regional trade agreements, imperiling the prospects for ratification of pending agreements, such as the Comprehensive Economic and Trade Agreement (“CETA”) with Canada, and undermining European support for negotiating future agreements, such as the Trans-Atlantic Trade and Investment Partnership (“TTIP”) with the United States.<sup>6</sup>

Economic inequality is the engine driving this transnational dissent movement forward. From Detroit to Liverpool, large swaths of the population perceive themselves to lose out from globalization. Economic data has started to validate these beliefs. In the United States, ninety-five percent of the economic gains during the recovery from the financial crisis of 2007 have gone to the richest one percent of

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2. See, e.g., JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003) (critiquing the “Washington Consensus” policy of free markets as implemented by international economic institutions as bad for developing countries).

3. See *infra* Part I.B.

4. See Eric Bradner, *Trump to Begin Renegotiating NAFTA with Leaders of Mexico, Canada*, CNN (Jan. 22, 2017, 11:58 PM), <http://www.cnn.com/2017/01/22/politics/trump-renegotiate-nafta/> [<https://perma.cc/TMZ6-8K4M>].

5. Lord Ashcroft, *How the United Kingdom Voted on Thursday . . . and Why*, LORD ASHCROFT POLLS (June 24, 2016), <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/> [<https://perma.cc/3FGL-DBAE>] (finding that the most popular reason voters gave for voting to exit from the EU was because decisions about the UK should be made in the UK).

6. See, e.g., Hans von der Burchard & Alberto Mucci, *EU Trade Policy ‘Close to Death’ if Canada Deal Fails*, POLITICO (Aug. 11, 2016, 6:00 AM), <http://www.politico.eu/article/eu-trade-policy-close-to-death-if-canada-deal-fails/> [<https://perma.cc/USD4-E3VA>] (quoting the EU’s top trade official as saying the EU’s trade policy is “close to death” after France and Germany insisted that the EU-Canadian free trade agreement could not be ratified without the consent of thirty-eight national and regional parliaments); *Growing Protest Against TTIP and CETA Trade Agreements in Germany*, DW (Aug. 23, 2016), <http://www.dw.com/en/growing-protest-against-ttip-and-ceta-trade-agreements-in-germany/a-19496077> [<https://perma.cc/5ZME-TWTW>].

society.<sup>7</sup> More to the point, studies have begun to find that, lo and behold, the loss of large numbers of manufacturing jobs can be attributed directly to the expansion of free trade in the early twenty-first century.<sup>8</sup>

In both legal and policymaking circles, the reaction to the link between globalization and domestic inequality has been a mix of disbelief and bemusement. Over and over again, the trade regime's defenders note that globalization increases the welfare of nations, that technology plays a more important role in economic disruption than trade, and that domestic policies offer the most efficient way to distribute the gains from trade within nations.<sup>9</sup>

As an economic matter, these views are surely correct. The international trade regime has led to extraordinary gains in both economic and more general human welfare terms. I therefore would not describe the international trade regime put in place after the Second World War in the terms in which Keynes described the regime that followed the First World War in the quote that opens this Essay. But as Keynes suggested over eighty years ago, the trade regime's ongoing viability depends on politics, not economics. Voters in the United States and Europe increasingly blame international trade for growing economic inequality. That linkage alone is enough to make economic

7. *Growing Apart*, ECONOMIST (Sept. 21, 2013), <http://www.economist.com/news/leaders/21586578-americas-income-inequality-growing-again-time-cut-subsidies-rich-and-invest> [<https://perma.cc/9PDL-KV5S>].

8. See David H. Autor, David Dorn & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2125 (2013) ("We find that local labor markets that are exposed to rising low-income-country imports due to China's rising competitiveness experience increased unemployment, decreased labor-force participation, and increased use of disability and other transfer benefits, as well as lower wages."); Justin R. Pierce & Peter K. Schott, *The Surprisingly Swift Decline of U.S. Manufacturing Employment*, 106 AM. ECON. REV. 1632 (2016) (linking a drop in U.S. manufacturing jobs after 2000 to limitations on increasing tariffs against Chinese goods, with industries more exposed to the policy change suffering greater declines in employment); see also Peter Gosselin & Mike Dornig, *After Doubts, Economists Find China Kills U.S. Factory Jobs*, BLOOMBERG POL. (June 18, 2015, 6:10 PM), <https://www.bloomberg.com/politics/articles/2015-06-18/after-doubting-economists-find-china-killing-u-s-factory-jobs> [<https://perma.cc/26MH-LPYA>] (discussing several recent studies documenting a direct link between China's accession to the World Trade Organization in 2001 and the loss of millions of manufacturing jobs).

9. See, e.g., PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 221 (7th ed. 2005):

It is always preferable to deal with market failures as directly as possible . . . . Any proposed trade policy should always be compared with a purely domestic policy aimed at correcting the same problem. If the domestic policy appears too costly or has undesirable side effects, the trade policy is almost surely even less desirable . . . .;

Simon Lester, *The Globalization Paradox: Democracy and the Future of the World Economy* by Dani Rodrik, 10 WORLD TRADE REV. 409, 414 (2011) (book review) ("But query whether trade restrictions are really the best approach . . . to protect domestic labor standards[.].").

inequality a major object of concern for proponents of international trade.

This Essay argues that in order to preserve and extend the international trade regime, and the extraordinary gains it has produced since the end of World War II in terms of both economic growth and human welfare, the next generation of trade agreements must include binding international obligations on developed countries to address economic inequality. In other words, trade agreements must include obligations to redistribute the gains from trade *within* countries. Since NAFTA, trade agreements have tried to protect those who stand to lose from international trade—principally labor interests—by including labor (and environmental) provisions. However, these provisions are outward looking. They seek to raise labor and environmental standards in *developing* countries (e.g., Mexico), both as an inherent good and to limit the loss of jobs in *developed* countries (e.g., the United States). Critics of trade agreements have bought into this orientation. They argue for removing investor-state dispute settlement (“ISDS”) from trade agreements. But removing ISDS does little to help those suffering economically in developed countries, and it hurts developed countries’ businesses when they operate overseas. The removal of ISDS thus would be a major concession to critics of trade agreements, and yet not one that advances the core objective of ensuring that trade agreements improve economic equality.

To be sure, governments do have domestic programs to help those negatively impacted by liberalized trade rules. Trade adjustment assistance (“TAA”) programs offer financial assistance to those who lose their jobs due to international trade. But recent studies in the United States suggest that TAA is ineffective. Moreover, unlike trade agreements, which are in force indefinitely, TAA expires every few years unless Congress reauthorizes it—a fight each time.

To put it bluntly, these provisions have failed. They have failed to staunch the loss of jobs, and they have failed to persuade voters in developed countries that international trade is not a primary cause of economic inequality. Saving liberalized trade thus requires new solutions.

International trade agreements should henceforth include an “Economic Development Chapter” that contains three kinds of obligations: (1) member states would be required to report to an Economic Development Committee—a body of experts elected by the member states but serving in their individual capacities—two kinds of data. First, they would be required to measure the gains from trade to the country as a whole and how those gains are distributed across the country. Such data would thus include measures of which communities



or regions benefit from trade and which suffer. Second, member states would be required to report the measures they have taken to redistribute domestically the gains from trade; (2) member states would be required to enact substantive policies to redistribute the gains from trade domestically. Governments require flexibility in the specific kinds of programs on which they spend. Flexibility is necessary because individual nations will have individual needs, and because flexibility enables political bargaining around the design of programs, which can facilitate the building of coalitions in support of both trade agreements and economic development policies. For this reason, the obligation should be expressed as a fiscal obligation to expend a certain amount of money on policies aimed at redistributing the gains from the trade. The amount members would be required to expend would be indexed to losses from liberalized trade that a government identifies and reports to the Economic Development Committee. Trade agreements would therefore commit domestic legislatures like the U.S. Congress to fund policies of their choosing that address the downsides of liberalized trade. The Economic Development Chapter should also push states to spend in areas that boost economic opportunity, such as educational and infrastructure spending; (3) failure to comply with either the monitoring and reporting obligations or trade-adjustment obligations would be subject to inter-state dispute settlement and could lead to the suspension of trade concessions.

A robust Economic Development Chapter is in the interest of both developed and developing countries, as well as free trade supporters and opponents within those countries. In developed countries, concerns about economic inequality have led to the United States' decision not to ratify the TPP, influenced the United Kingdom's decision to leave the EU, and have threatened to derail ratification of CETA in the EU and the negotiation of the TTIP between the EU and the United States. Tying measures designed to address economic inequality directly into trade agreements would create political coalitions in favor of liberalized trade. Those who do not benefit from trade agreements could still support them as a way to obtain greater domestic benefits. President Trump, for instance, has made infrastructure spending a major domestic priority and might be willing to support trade agreements in exchange. And those who benefit most from liberalized trade rules could support redistribution as the price of further globalization. Trade agreements would create a commitment device allowing those who gain from trade to commit in advance to provide those who do not with a share of the spoils.

For developing countries, the inclusion of these provisions would reduce the likelihood that developed countries will seek to renegotiate

trade agreements, either immediately prior to ratification or years down the road. Before the United States could ratify NAFTA in 1993, the United States first had to seek additional concessions on labor and environmental provisions from Mexico and Canada.<sup>10</sup> President Trump intends to renegotiate NAFTA again as part of his strategy to bring jobs back to the United States. Meanwhile, the UK must now renegotiate the terms of its access to the EU common market. These renegotiations inject uncertainty into trade politics, markets, and the lives of ordinary citizens. By reducing renegotiation, Economic Development Chapters would introduce a needed measure of stability into trade policy.

Part I describes the debate about the role of free trade in creating economic inequality. In short, proponents of liberalized trade continue to argue that trade policy and domestic policies to address economic inequality should be kept separate. The political consensus that supports trade agreements is falling through the cracks of that separation. Part II discusses policies that governments have used to address economic inequality: labor and environmental provisions in trade agreements and trade adjustment assistance programs domestically. Part III outlines what an Economic Development Chapter might look like.

## I. THE POLITICAL CONSENSUS IN FAVOR OF LIBERALIZING TRADE

### A. *Debating International Trade*

The traditional view among economists has been that liberalized international trade is a rising tide that lifts all boats. As Gregory Mankiw, a Harvard economist and adviser to President George W. Bush, put it: “Economists have talked for years about trade, free international trade, being a positive for economies around the world, both at home and abroad. This is something that is universally believed by economists.”<sup>11</sup>

The logic of this proposition rests on the notion of comparative advantage. School children learn that specialization of labor drove the evolution of ancient civilizations. In the days of hunter-gatherers, individuals or family groups had to do everything to survive—find food, make tools and clothing, and build shelters. Someone who had to

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10. Although formally the United States sought concessions from both Mexico and Canada, the labor and environmental provisions in the NAFTA Side Agreements were aimed principally at Mexico. The United States already had a free trade agreement in place with Canada. Free Trade Agreement, Can.-U.S., Jan. 2, 1988, 27 I.L.M. 281.

11. N. Gregory Mankiw & Phillip Swagel, *The Politics and Economics of Offshore Outsourcing*, 53 J. MONETARY ECON. 1027, 1031 (2006).

construct a shelter for his family, make a spear to hunt with, hunt, cook, and turn animal skins into clothing probably was not going to do a great job at any of these things. Hunter-gatherers were jacks of all trades but masters of none. Specialization of labor allowed people to concentrate on only one task—farming or weaving or toolmaking. Freed from the need to do everything, a blacksmith could learn to build better tools and trade those tools for food. The farmer could grow more food because he no longer needed to spend time making a plough. He could outsource the job to the blacksmith.

Comparative advantage is the same basic idea applied to international trade. Countries do better when they concentrate on producing those things that they are relatively better at making and trade for everything else.<sup>12</sup> The intuition behind this idea is that countries have finite resources (labor, natural resources) with which to produce goods. They also vary in how efficiently they can produce a particular good. Countries can trade those goods they produce relatively efficiently for those goods they produce relatively inefficiently. The cost of buying the relatively inefficiently produced good from another country is less than the opportunity cost of diverting scarce resources to produce the same good at home.<sup>13</sup> As the leading international trade law casebook puts it, the “general lesson of comparative advantage is that when two countries open up to trade, both are made better off in the sense that the total wealth of the countries is increased.”<sup>14</sup>

The fact that international trade increases the wealth of nations has long been the cornerstone of the defense of liberalized trade. Economists, lawyers, and policymakers have argued that countries should lock in the gains from liberalized trade through international institutions like the World Trade Organization (“WTO”) and leave the division of those gains within countries to domestic policy.<sup>15</sup> In economic terms, international trade creates Kaldor-Hicks gains—it boosts total global welfare, but in a way that may leave some worse off.<sup>16</sup> In

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12. For a basic presentation of the idea of comparative advantage, see JOOST H.B. PAUWELYN, ANDREW T. GUZMAN & JENNIFER A. HILLMAN, *INTERNATIONAL TRADE LAW* 12–16 (3d ed. 2016).

13. For a more advanced presentation of the notion of comparative advantage, see KRUGMAN & OBSTFELD, *supra* note 9.

14. PAUWELYN, GUZMAN & HILLMAN, *supra* note 12, at 16.

15. See e.g., KRUGMAN & OBSTFELD, *supra* note 9, at 214–17; PAUWELYN, GUZMAN & HILLMAN, *supra* note 12, at 25 (“[O]ne might support liberalization if one believes that the trading system is an inappropriate way to redistribute the gains from trade.”).

16. See Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 *GEO. J. INT’L L.* 165, 167 (2007) (arguing that “the Kaldor-Hicks framework provides a conceptual basis that the [WTO] membership could adopt to harmonize its trade and development goals”).

principle, Kaldor-Hicks improvements in welfare can be transformed into Pareto improvements, or improvements that increase total welfare by making at least one party better off without making any party worse off, through transfers. Neither the fact of liberalized trade nor trade law guarantees those transfers will actually take place, however.

Yet the average citizen cares mostly about this second issue: How are the gains from trade distributed? Indeed, economists themselves noted as early as 1941 that international trade can leave some, especially less-skilled workers, worse off.<sup>17</sup> If trade is efficient in the sense that it creates the largest pie for policymakers to divide among their citizens, but it does so in a way that exacerbates inequality, should the average citizen still favor free trade?

In general, economists have argued that the answer is yes. They have had faith, for example, that labor markets would adjust to the effects of international trade, smoothing out some of the short-run costs of liberalized trade. Former Federal Reserve Chairman Ben Bernanke has argued that

some empirical research suggests that, in the 1980s and 1990s, increased international trade reduced the profitability and hence the demand for labor in a number of industries that employed relatively more low-skilled workers. . . . Because labor markets are adaptable, outsourcing abroad does not ultimately affect aggregate employment, but it may affect the distribution of wages.<sup>18</sup>

Other economists were even more optimistic. Jagdish Bhagwati, an economist at Columbia University, argued in 2007 that econometric research showed that international trade did not put downward pressure on wages and indeed might even protect wages from the downward pressures created by technological change.<sup>19</sup> In other words, liberalizing trade did not create the need for domestic redistribution. The invisible hand of the market would adjust.

This is not to say that Bhagwati or Bernanke do not recognize growing inequality. They do.<sup>20</sup> But they finger a different culprit: technological change.<sup>21</sup> Liberalizing trade and technological innovation

17. Paul Krugman, *Trade and Inequality, Revisited*, VOX (June 15, 2007), <http://voxeu.org/article/trade-and-inequality-revisited> [<https://perma.cc/RAB9-MK47>] (“[S]ince the 1941 Stolper-Samuelson paper, we’ve known that growing trade can have large effects on income distribution, and can easily leave broad groups, such as less-skilled workers, worse off.”).

18. Ben S. Bernanke, Chairman, Fed. Reserve, Speech to the Greater Omaha Chamber of Commerce: The Level and Distribution of Economic Well-Being (Feb. 6, 2007), <https://www.federalreserve.gov/newsevents/speech/bernanke20070206a.htm> [<https://perma.cc/3NYQ-BXEC>].

19. Jagdish Bhagwati, *Technology, Not Globalisation, Drives Wages Down*, FIN. TIMES (Jan. 3, 2007), <https://www.ft.com/content/f8738fba-9b53-11db-aa70-0000779e2340> [<https://perma.cc/ZSN6-U5K9>].

20. See Bernanke, *supra* note 18; Bhagwati, *supra* note 19.

21. Bernanke, *supra* note 18.

have, as it turns out, basically the same effects. The rise of email has rendered the U.S. Postal Service increasingly irrelevant. Why do we need to employ people to sort, transport, and deliver mail when we can just send messages through the internet? Self-checkout technology at grocery stores reduces the need to pay clerks to do the same job. And so forth. Just as producing a product overseas creates job losses at home, so too technological innovation eliminates jobs. Indeed, technological innovation displaces more people than trade.<sup>22</sup> As Bernanke said, “I read the available evidence as favoring the view that the influence of globalization on inequality has been moderate and almost surely less important than the effects of skill-biased technological change.”<sup>23</sup>

Yet a growing number of studies have begun to link the loss of hundreds of thousands or millions of manufacturing jobs not to technology, but to competition from imports created by the liberalization of trade rules, especially with China.<sup>24</sup> In light of this data, some scholars have begun swimming against the current of traditional thinking. For the most part, these writers favor liberalized trade and support the international institutions that make such trade possible. They worry, though, that the trade regime may prompt a backlash if it does not offer governments a way to address the most pressing domestic policy issues of the twenty-first century.

Nobel Prize-winning economist Joseph Stiglitz has been at the forefront of those questioning the distributional effects of globalization. He has taken trade’s cheerleaders to task, writing that “one could say [they] lied [by arguing] that all would benefit” from free trade.<sup>25</sup> Instead, he reviews data on wage stagnation in the United States and Europe, concluding that “the big losers [in recent decades]—those who gained little or nothing—were those at the bottom and the middle and the working classes in the advanced countries. Globalization is not the only reason, but it is one of the reasons.”<sup>26</sup>

22. See Michael J. Hicks, *Donald, Hillary, and Bernie Are Lying to Us About Those Lost Manufacturing Jobs*, MARKETWATCH (May 14, 2016, 12:50 PM), <http://www.marketwatch.com/story/donald-hillary-and-bernie-are-lying-to-us-about-those-lost-manufacturing-jobs-2016-05-12> [https://perma.cc/H29R-SCKB] (“Somewhere between 81% and 100% of those 7.5 million manufacturing job losses since the 1970s are due to technology, not trade.”).

23. Bernanke, *supra* note 18; see also Bhagwati, *supra* note 19 (“The culprit is not globalisation but labour-saving technical change that puts pressure on the wages of the unskilled.”).

24. See Autor, Dorn & Hanson, *supra* note 8; Pierce & Schott, *supra* note 8.

25. Joseph E. Stiglitz, *Globalization and Its New Discontents*, PROJECT SYNDICATE (Aug. 5, 2016), <https://www.project-syndicate.org/commentary/globalization-new-discontents-by-joseph-e-stiglitz-2016-08> [https://perma.cc/VAZ7-JQVC].

26. *Id.* (discussing BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* (2016)).

Dani Rodrik, an economist at Harvard, has gone further, arguing that trade agreements need to create greater “policy space” for governments to pursue domestic policy objectives.<sup>27</sup> He argues that a new consensus has set in in which economists agree that globalization is indeed contributing to inequality, even if commentators disagree about its relative importance.<sup>28</sup> More importantly, Rodrik finds that anti-globalization forces are motivated “only partly by labor market concerns and pocket-book issues.”<sup>29</sup> They are also motivated by notions of fairness.<sup>30</sup> A global economy that delivers benefits to some but not others strikes many people as fundamentally unfair. That unfairness—difficult to quantify economically—is the international trade regime’s Achilles’ Heel.

Despite the emerging doubts about whether liberalizing trade is good, or just good for many but not all, unabashed free trade continues to have its defenders. The critics’ critics have responded by falling back on traditional economic thinking. Joel Trachtman, a respected international lawyer and professor, has recently argued that the suggestion that liberalized trade causes economic stagnation and inequality is “without foundation.”<sup>31</sup> Similarly, Simon Lester has argued that limitations on liberalized trade are not the best, or even an effective, means of dealing with domestic policy issues such as labor standards.<sup>32</sup> Economists David Dollar and Aart Kray have argued that “it simply cannot be said that inequality necessarily rises with more trade, more foreign investment, and lower tariffs.”<sup>33</sup>

Trade’s defenders do not necessarily think that domestic policies aimed at addressing inequality are a bad idea. Like most people, free traders have diverse views on redistributive policies. What they agree on, though, is that those policies should be kept separate from trade

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27. See, e.g., DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2012); Dani Rodrik, *How to Save Globalization from Its Cheerleaders*, 1 J. INT’L TRADE & DIPL. 1 (2007) [hereinafter Rodrik, *How to Save Globalization*].

28. Rodrik, *How to Save Globalization*, *supra* note 27, at 9. Indeed, as Nobel Prize-winning economist Paul Krugman argued as far back as 2007: “It’s no longer safe to assert that trade’s impact on the income distribution in wealthy countries is fairly minor. There’s a good case that it is big, and getting bigger.” Krugman, *supra* note 17.

29. Rodrik, *How to Save Globalization*, *supra* note 27, at 21.

30. *Id.*

31. Joel Trachtman, *The Anti-Globalists*, INT’L ECON. L. & POL’Y BLOG (Aug. 18, 2016), <http://worldtradelaw.typepad.com> [<https://perma.cc/4XRF-HTZD>].

32. Lester, *supra* note 9.

33. David Dollar & Aart Kraay, *Spreading the Wealth*, FOREIGN AFF., Jan.-Feb. 2002, at 120, 128.

rules.<sup>34</sup> Trade makes the pie bigger; domestic policies divide the pie up. Never the twain shall meet.

### *B. The Domestic Political Economy of Trade*

The traditional economic thinking and its response to critics largely miss the point. No one doubts that liberalized trade does in fact create economic losers within countries.<sup>35</sup> The argument is about the magnitude of the effect and its relative importance as compared to other causes of inequality such as technological innovation—an interesting and important question for economic policy.<sup>36</sup> Likewise, no one disputes that domestic policies, such as a more progressive tax system or robust social safety nets, can in principle address economic inequality without limiting the economic integration envisioned by the WTO and, to an even greater extent, mega-regional trade agreements like the TPP and TTIP.<sup>37</sup>

But implementing domestic policies requires a domestic political consensus in their favor. Unlike scholarly consensus, political consensus does not usually rest on nuanced understandings of causal relationships and the magnitude of effects. Put simply, voters in developed countries around the world think that liberalized trade and the institutions that support it significantly contribute to economic inequality. And more and more they are willing to vote accordingly.

In the United States, a recent Bloomberg poll proclaimed that opposition to free trade is the one thing on which the Democratic and Republican parties can agree.<sup>38</sup> The poll asked respondents about their views on a number of protectionist policies. Two-thirds of respondents said that they preferred an American-owned factory in the United

34. For example, Gabrielle Marceau, a counselor in the WTO's Legal Affairs Division and an international law professor, has suggested that the trade regime should pursue greater "inclusiveness," which includes "domestic policies to ensure that the benefits of trade are widely distributed. [But] for most WTO Members, [such policies] would constitute interference in domestic affairs, and we all agree that social choices between cultures are very difficult, if not impossible, to compare!" Gabrielle Marceau, *Towards Inclusive Growth Through Trade and Investment*, 33 SIEL NEWSL. (Soc'y of Int'l Econ. Law), Oct. 2016, at 2, 2, <http://sielnet.org/resources/Pictures/SIEL%2033rd%20Newsletter%20Final.pdf> [<https://perma.cc/89L2-J6JP>].

35. See, e.g., Krugman, *supra* note 17.

36. See, e.g., Bernanke, *supra* note 18.

37. Many do, of course, argue that using a progressive tax system or creating a greater social safety net would be bad policy. But they do not argue that such policies would prevent trade agreements from going forward and having their desired effect.

38. John McCormick & Terrence Dopp, *Free Trade Opposition Unites Political Parties in Bloomberg Poll*, BLOOMBERG POL. (Mar. 24, 2016, 5:00 AM), <http://www.bloomberg.com/politics/articles/2016-03-24/free-trade-opposition-unites-political-parties-in-bloomberg-poll> [<https://perma.cc/F38J-33DQ>].

States that created only one thousand jobs to a Chinese-owned factory that created two thousand jobs.<sup>39</sup> Eighty-two percent of respondents said they would be willing to pay more for American-produced goods<sup>40</sup>—a privilege they would have in a world with less liberalized trading rules. And forty-four percent said that NAFTA had been bad for the U.S. economy, against only twenty-nine percent who said it had been positive.<sup>41</sup> This discontent has driven presidential politics. In the Democratic primary, Senator Bernie Sanders campaigned against trade agreements, forcing his opponent and the eventual Democratic nominee, Hillary Clinton, to come out against the TPP despite her support for it as Secretary of State. Perhaps most strikingly, sixty-seven percent of those who supported the Republican presidential nominee, Donald Trump—and fifty-two percent of Republicans overall—have negative views of free trade.<sup>42</sup> These numbers are striking because Republicans have traditionally been the party of free trade in the United States. Donald Trump's nomination and election represents a rejection of these historic views.

Of course, these sentiments are not limited to the United States. In June 2016, fifty-two percent of British voters elected to leave the European Union, the world's largest customs union.<sup>43</sup> Post-referendum polling revealed that those voting to leave did so in protest of the loss of national control that accompanies governance by international economic institutions. For example, forty-seven percent of respondents said that the United Kingdom would fare better economically if it left the EU.<sup>44</sup> Forty-nine percent of Leave voters said they voted as they did primarily because regulations affecting Britain should be written in

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39. *Id.*

40. *Id.*

41. *Id.* Polls that ask more generally about views on free trade, rather than about specific policies, tend to find greater support for free trade. See Max Ehrenfreund, *What Americans Really Think About Free Trade*, WASH. POST (Mar. 25, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/03/25/what-americans-really-think-about-free-trade/?utm\\_term=.932f867027e3](https://www.washingtonpost.com/news/wonk/wp/2016/03/25/what-americans-really-think-about-free-trade/?utm_term=.932f867027e3) [<https://perma.cc/E6ZC-SXJ9>] (comparing polls and discussing Americans' contradicting opinions on free trade); Justin McCarthy, *Majority in U.S. Still See Opportunity in Foreign Trade*, GALLUP (Mar. 9, 2015), <http://www.gallup.com/poll/181886/majority-opportunity-foreign-trade.aspx> [<https://perma.cc/4F74-BW5F>] (discussing increased optimism of free trade amongst Americans).

42. Bruce Stokes, *Republicans, Especially Trump Supporters, See Free Trade Deals as Bad for U.S.*, PEW RES. CTR.: FACTTANK (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/republicans-especially-trump-supporters-see-free-trade-deals-as-bad-for-u-s/> [<https://perma.cc/7AZ4-D9V3>].

43. Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Dec. 12, 2016), <http://www.bbc.com/news/uk-politics-32810887> [<https://perma.cc/WS2E-4HC4>].

44. Ashcroft, *supra* note 5. However, only six percent of Leave voters said they voted to leave primarily because doing so would make the UK better off economically. *Id.*



Britain rather than Brussels<sup>45</sup>—a vote against the regulatory harmonization at the root of the push toward preferential trade agreements among developed countries.<sup>46</sup> Another thirty-three percent voted as they did to regain control of British borders.<sup>47</sup> Free movement of people and free movement of goods are foundations of the EU. Moreover, free movement of goods implies some efforts at harmonizing regulations, efforts made in virtually every trade agreement.<sup>48</sup> A pro-sovereignty vote might thus be viewed as a soft anti-trade vote. Economic inequality and opportunity also played a significant role. A majority of those employed and with university degrees voted to remain; a majority of those unemployed and of those whose education ended at secondary school or before voted to leave.<sup>49</sup>

Although the precise breakdown may vary, today this skepticism of the value of economic and political integration runs throughout European politics. Philip Cordery, the French Parliament member responsible for European affairs in President Francois Hollande's party, has stated his belief that "what happened in the UK at the referendum could have happened [in] almost every other country in the European Union—except in the other countries no Prime Minister would have been as irresponsible as to ask for a referendum."<sup>50</sup> A 2016 survey from the University of Edinburgh found that a majority of French voters and pluralities of voters in Germany, Spain, and Sweden

45. *Id.*

46. See, e.g., Peter A. Petri & Michael G. Plummer, *The Economic Effects of the Trans-Pacific Partnership: New Estimates* 15 (Peterson Inst. for Int'l Econ., Working Paper No. 16-2, 2016), [https://piie.com/system/files/documents/wp16-2\\_0.pdf](https://piie.com/system/files/documents/wp16-2_0.pdf) [<https://perma.cc/22VQ-T8L2>] (noting that the U.S. gains from the TPP flow primarily from the reduction in nontariff barriers such as regulatory obstacles).

47. Ashcroft, *supra* note 5.

48. See, e.g., Comprehensive Economic and Trade Agreement Between Canada and the European Union and its Member States ch. 21 (Sept. 26, 2014), [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) [<https://perma.cc/E9Z9-NC7S>] [hereinafter CETA]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, , 1867 U.N.T.S. 187, 190 (1994) [hereinafter Results of the Uruguay Round] (creating obligations for states to work toward harmonizing technical regulations); Agreement on the Application of Sanitary and Phytosanitary Measures art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement] (creating a presumption that measures comply with the SPS Agreement if they reflect international standards).

49. Ashcroft, *supra* note 5.

50. 'Almost All EU States Could Follow UK, Leave Union'—French MP, RT NEWS (Sept. 27, 2016, 7:11 AM), <https://www.rt.com/news/360762-french-mp-eu-members-exit/> [<https://perma.cc/W796-TXXR>].

avored a referendum on leaving the EU.<sup>51</sup> Surveys have found similar support for exit, or at least the opportunity to vote on exit, in the Netherlands, Austria, Italy, and Hungary.<sup>52</sup> Beyond a threat to the EU itself, disaffected European constituencies are increasingly agitating for greater concessions in trade agreements. In October 2016, for instance, the regional parliament of Wallonia—the poorest region in Belgium, with unemployment twice as high as elsewhere in the country—temporarily blocked the Belgian government’s (and therefore effectively the entire EU’s) ability to sign the CETA with Canada, relying on features of the Belgian federal structure that give regional parliaments a say in foreign affairs.<sup>53</sup>

These voters may very well be mistaken about the relationship between trade and inequality. At the very least, blowing up trade relationships—the solution their leaders, such as President Trump in the United States and British Foreign Secretary Boris Johnson in the UK, offer—only makes the problem worse, as British voters are learning in the wake of the Brexit vote. And yet ultimately the long-term sustainability of the international trade regime depends on convincing these voters that liberalized trade is in their interest. Economic and legal policy debates are failing in this task. If economic policy cannot create the political consensus necessary to sustain liberalized trade, the trade regime’s proponents must look to political economy. If voters do not want liberalized trade itself, despite its many benefits, what can international trade offer them?

## II. EFFORTS TO COPE WITH TRADE-BASED INEQUALITY

The drafters of the General Agreement on Tariffs and Trade (“GATT”), negotiated in 1947, understood that liberalizing trade was at least as much about politics as economics. The GATT includes a number of rules that economists agree make little sense from an economic

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51. Jan Eichhorn, Christine Hubner & Daniel Kenealy, *The View from the Continent: What People in Other Member States Think About the UK’s EU Referendum*, U. EDINBURG APPLIED QUANTITATIVE METHODS NETWORK (2016), [https://www.aqmen.ac.uk/sites/default/files/TheViewFromTheContinent\\_REPORT.pdf](https://www.aqmen.ac.uk/sites/default/files/TheViewFromTheContinent_REPORT.pdf) [<https://perma.cc/Q5CR-AD87>].

52. *Auxit, F Brexit, Next? EU Countries May Hold Referendums Following ‘Brexit’ Vote*, RT NEWS (June 23, 2016, 8:52 PM) <https://www.rt.com/viral/348039-brexit-eu-referendum-domino/> [<https://perma.cc/2PED-LRZ6>].

53. Barrie McKenna, *What’s Wallonia’s Deal? A Primer on Its Role in CETA’s Crisis*, GLOBE & MAIL (Oct. 25, 2016, 1:47 PM), <http://www.theglobeandmail.com/report-on-business/international-business/european-business/explainer-ceta-wallonia-europe-and-canada/article32489554/> [<https://perma.cc/62GC-PW9S>] (noting that Wallonia was able to de facto block Belgium’s ability to sign CETA and that the rest of the EU had indicated it would only go forward if its twenty-eight members were unanimous).

perspective, but can be justified by the politics of trade. For example, the GATT contains a number of rules on so-called “trade remedies.”<sup>54</sup> Trade remedies essentially allow governments to use trade policy to protect their own domestic producers by raising the tariffs on imports, thereby increasing the price their own citizens have to pay for goods. If a Chinese producer decides to sell its goods in the United States at less than “normal” value, the United States can impose anti-dumping duties—additional import duties on foreign products that ultimately increase the cost American consumers pay for goods.<sup>55</sup> Similarly, if a sudden increase in imports injures a domestic industry, governments can impose safeguards in the form of increased tariffs or other forms of import restrictions.<sup>56</sup> Safeguards do not require a showing that a foreign producer or foreign country has behaved illegally or unfairly. They are purely designed to protect domestic producers that are struggling to compete in the domestic market with foreign producers.

As a matter of economics, trade remedies (like other forms of protectionism) effect a transfer of wealth from domestic consumers to domestic producers. Consumers pay higher prices so that producers can remain competitive and profitable. Moreover, trade remedies often reduce overall welfare. For instance, the George W. Bush administration imposed safeguards, in the form of increased tariffs, on steel imports in 2002 to protect American steel workers. One study

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54. See General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT] (discussing anti-dumping regulations). The WTO’s creators developed these rules in several of the WTO agreements. See Agreement on the Implementation of Article VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Results of the Uruguay Round 147, [https://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](https://www.wto.org/english/docs_e/legal_e/19-adp.pdf) [<https://perma.cc/M7CZ-98GV>] [hereinafter Anti-Dumping Agreement] (discussing the implementation of the anti-dumping measures); Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Results of the Uruguay Round 231, [https://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](https://www.wto.org/english/docs_e/legal_e/24-scm.pdf) [<https://perma.cc/9Z5K-GQY5>] (discussing prohibited subsidies).

55. See GATT, *supra* note 54, art. VI (explaining that “dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry”); Anti-Dumping Agreement, *supra* note 54 (stating that anti-dumping measures are applied “under the circumstances provided for in Article VI of GATT 1994”).

56. GATT, *supra* note 54, art. XIX.1(a):

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

estimated that these tariffs cost \$400,000 per job saved.<sup>57</sup> Further, while steel workers' jobs were saved, the tariffs actually cost the economy jobs overall because higher steel prices forced layoffs in downstream sectors of the economy.<sup>58</sup>

If trade remedies do not make sense economically, why do they exist? As Alan Sykes has argued in the context of safeguards, trade remedies create a political safety valve.<sup>59</sup> Domestic producers, such as the steel industry, tend to be more politically influential than consumers, in large part because they are better organized. Domestic producers hurt by liberalized trade create pressure on politicians to walk back or avoid trade agreements. As a result, the overall benefits of liberalized trade—which outweigh the costs to injured producers—could be lost. Trade remedies offer a solution to this problem. Governments can protect politically important producers injured by foreign competition within a larger legal framework that requires governments to open up their markets. This compromise is clearly second-best from an economic perspective, but the best available solution once one considers the political constraints.<sup>60</sup> Better some protectionism within the GATT than no GATT at all.

Rules on trade remedies may have been among the first efforts to offer a measure of protectionism as the price of trade liberalization, but they have hardly been the last. Import-competing interests have continued to seek assurances that further trade liberalization will not hurt them. These assurances have taken two forms. First, trade agreements now regularly include provisions on labor standards and environmental protection. Second, as a matter of domestic law, governments offer displaced workers trade adjustment assistance.

### *A. Labor and Environment Chapters*

NAFTA, negotiated in the early 1990s, provided the blueprint for how labor and environmental issues would be addressed in modern trade agreements. President George H.W. Bush had negotiated NAFTA, but the 1992 presidential election, in which then-Arkansas Governor Bill Clinton defeated Bush, threw NAFTA's fate up in the air. In the wake of the election, members of Congress from both parties

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57. Gary Clyde Hufbauer & Ben Goodrich, *Steel Policy: The Good, the Bad, and the Ugly*, in *INTERNATIONAL ECONOMICS AND INTERNATIONAL ECONOMIC POLICY* 24, 25 (Philip King & Sharmila King eds., 4th ed. 2005).

58. *Id.*

59. Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 273 (1991).

60. *Id.* at 259.

responded to pressure from labor and environmental groups hoping to defeat the agreement.<sup>61</sup> NAFTA's "opponents' strategy [was] to portray the NAFTA as leading to a massive loss of jobs, the de-industrialization of the U.S., and a lowering of labor and environmental standards to those of the Third World."<sup>62</sup> In effect, critics argued that NAFTA would force the United States to choose between losing jobs to Mexico and lowering its own labor and environmental standards to those prevailing in Mexico.

To assuage these concerns, President Clinton negotiated what is known as the NAFTA Side Agreements (or more formally, the North American Agreements on Environmental and Labor Cooperation).<sup>63</sup> Essentially, the NAFTA Side Agreements required the NAFTA parties to enforce their existing labor and environmental laws.<sup>64</sup> They also established consultative processes for labor and employment issues and permitted dispute resolution that could result in monetary fines if a country failed "to effectively enforce its occupational safety and health, child labor or minimum wage technical standards."<sup>65</sup> Most labor rights, however, including the freedom of association, the right to strike, and collective bargaining, were limited to consultative review and ministerial oversight.<sup>66</sup> With these agreements in hand, Congress agreed to pass legislation implementing NAFTA.

Following NAFTA, labor and environmental chapters became standard not only in U.S. trade agreements, but trade agreements

61. Douglas Seay & Wesley Smith, *Why the Governors Support the NAFTA (and Washington Doesn't)*, HERITAGE FOUND. (June 15, 1993), <http://www.heritage.org/research/reports/1993/06/bg946nbsp-why-the-governors-support-the-nafta> [<https://perma.cc/U76B-BCGB>].

62. *Id.*

63. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 8, 1993, 32 I.L.M. 1480 [hereinafter NAFTA Environmental Side Agreement]; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAFTA Labor Side Agreement].

64. NAFTA Environmental Side Agreement, *supra* note 63, art. 5 ("[E]ach Party shall effectively enforce its environmental laws and regulations through appropriate governmental action . . ."); NAFTA Labor Side Agreement, *supra* note 62, art. 3 ("Each Party shall promote compliance with and effectively enforce its labor law . . .").

65. NAFTA Labor Side Agreement, *supra* note 63, arts. 39–41. If a losing party failed to pay its fine, other parties could suspend benefits under the agreement up to the amount of the fine. *Id.* art. 41.1.

66. *See id.* art. 27.1 (noting that the dispute resolution provisions can only be triggered "[f]ollowing presentation to the Council under Article 26(1) of an [Evaluation Committee of Experts] final report that addresses the enforcement of a Party's occupational safety and health, child labor or minimum wage technical labor standards"); *see also* Cathleen Cimino-Isaacs, *Labor Standards in the TPP*, in *TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT* 261, 265–66 (Cathleen Cimino-Isaacs & Jeffrey J. Schott eds., 2016) (discussing the evolution of labor provisions in U.S. FTAs).

throughout the world.<sup>67</sup> Labor interests soon became dissatisfied, however. The NAFTA Side Agreements model of regulation did not require governments to adopt any particular labor standards. Indeed, it explicitly recognized “the right of each Party to establish its own domestic labor standards.”<sup>68</sup> Later, when President George W. Bush began pushing for a series of new free trade agreements with Panama, Korea, Colombia, and Peru, advocates and their congressional allies argued that labor and environmental chapters needed to contain more stringent requirements.

The blueprint for these new requirements became known as the “May 10” consensus, after the date on which the George W. Bush administration reached terms with congressional leaders.<sup>69</sup> The agreement contained two key components. First, the labor and environmental chapters of trade agreements would henceforth contain substantive standards with which all parties must comply. Those substantive standards would be drawn from existing international agreements and instruments—standards from the International Labour Organization and multilateral environmental agreements, respectively.<sup>70</sup> Second, both chapters would be enforceable on the same terms as the ordinary trade provisions, meaning that a breaching party could face trade sanctions.<sup>71</sup> Lest anyone think these new obligations would require anything of the United States, the U.S. Trade Representative hastened to clarify that they would not: “We [the United States] have nothing to fear from taking on FTA commitments [based on international labor and environmental standards] as well and subjecting those commitments to the FTA dispute settlement process . . . .”<sup>72</sup> Labor and environmental chapters in free trade agreements were still for others, not for developed countries.

The May 10 consensus still provides the framework for labor and environmental chapters. The TPP’s labor and environmental provisions

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67. For examples of labor and environment chapters in non-U.S. agreements, see CETA, *supra* note 48, chs. 23 (Trade and Labour), 24 (Trade and the Environment); Agreement on Labour Cooperation Between Canada and the Republic of Honduras, Can.-Hond., Nov. 5, 2013, B-EC-2/EN, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/labour-travail.aspx?lang=eng> [<https://perma.cc/MCR7-WHLT>]; Free Trade Agreement ch. 15, EU-Viet., Jan. 20, 2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> [<https://perma.cc/PDC6-QUNX>] (not yet in force) (discussing trade and sustainable development).

68. NAFTA Labor Side Agreement, *supra* note 63, art. 2.

69. See *Bipartisan Trade Deal*, OFF. U.S. TRADE REPRESENTATIVE (May 2007), [https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf) [<https://perma.cc/9EM9-RHDP>].

70. *Id.*

71. *Id.*

72. *Id.*

reflect this approach.<sup>73</sup> So too does CETA, the free trade agreement between the EU and Canada.<sup>74</sup> To be sure, the TPP contains some additional commitments by Vietnam, Brunei, and Malaysia. These commitments come in the form of “consistency plans”—bilateral agreements between the United States and each of these countries that spell out precise steps the countries in question must take to bring themselves into compliance.<sup>75</sup> Since the consistency plans were commitments specifically to the United States, they are unlikely to survive the United States’ decision not to go forward with the TPP.<sup>76</sup> Had they come into force, however, the TPP’s broader dispute settlement provisions would have applied to them; allowing the United States to enforce the agreements’ terms.<sup>77</sup>

These consistency plans, even if they fall by the wayside in the TPP itself, are the state-of-the-art for labor and environmental provisions. They therefore could provide a roadmap in future trade negotiations. Unlike the generally applicable labor and environmental chapters, these consistency plans are not even nominally reciprocal, creating obligations only for the developing country. The TPP thus continues an upward march in the labor standards that trade agreements apply to developing countries without imposing any similar, meaningful burdens on developed countries. The existence of substantive labor and environmental obligations, and in particular the consistency plans, also challenges the notion, advanced in the context

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73. See Trans-Pacific Partnership chs. 19 (Labor) & 20 (Environment), Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/5J88-28Z6>] [hereinafter TPP].

74. CETA, *supra* note 48, chs. 22 (Trade and Sustainable Development), 23 (Trade and Labour), 24 (Trade and Environment).

75. See, e.g., Labour Consistency Plan, Malay.-U.S., Nov. 2015, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labor-Consistency-Plan.pdf> [<https://perma.cc/J7VQ-L2BY>] (detailing obligations concerning labor laws and practices).

76. Whether the other eleven TPP parties will press forward with the agreement without the United States remains uncertain. Japan ratified the agreement in December 2016, see Mitsuru Obe, *Japan Ratifies Trans-Pacific Partnership, Which Trump Has Promised to Leave*, WALL ST. J. (Dec. 9, 2016), <https://www.wsj.com/articles/japan-ratifies-trans-pacific-partnership-which-trump-has-promised-to-leave-1481273551> [<https://perma.cc/JA2P-C5VH>], but other countries are more skeptical. See Gabrielle Chan, *Malcolm Turnbull Cools on TPP Ratification in Face of Hostile Senate*, GUARDIAN (Jan. 25, 2017), <https://www.theguardian.com/business/2017/jan/26/malcolm-turnbull-cools-on-tpp-ratification-in-face-of-hostile-senate> [<https://perma.cc/8EMX-9LE5>].

77. Third-party participation, normally allowed in trade disputes, is not permitted under the consistency plans. See, e.g., United States-Vietnam Plan for the Enhancement of Trade and Labour Relations art. VII.4, EXECUTIVE OFF. PRESIDENT U.S. TRADE REPRESENTATIVE (Feb. 4, 2016), <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf> [<https://perma.cc/K7VP-68JS>] (“This Plan shall be subject to dispute settlement under Chapter 28 (Dispute Settlement) of the TPP Agreement, except for Article 28.14 (Third Party Participation), which shall not apply.”).

of the WTO, that member states will not agree to international rules that create obligations to redistribute the gains from trade domestically.<sup>78</sup> The obligations contained in the labor and environmental chapters—for example, the obligation to provide an effective right to unionize—require countries to protect labor interests in a way calculated to increase labor interests' share of the gains from trade. The consistency plans do even more, providing for the specific means through which countries will achieve this objective. In so doing, they indicate that at least some nations are willing to agree to domestic rules on redistribution in the context of trade agreements.

At the same time, countries have chosen to focus on ensuring that countries do not reduce the labor standards below a specified minimum in order to attract foreign businesses. Preventing a race to the bottom—in which countries must lower their labor or environmental standards to keep jobs at home—should in theory prevent some jobs in the developed countries from moving overseas to take advantage of lower standards and the associated lower production costs. The May 10 consensus stops short, however, of requiring that countries do anything beyond observe international minimum standards. It does not require them to tackle economic inequality directly.

Labor and environmental chapters in trade agreements have a number of other drawbacks. As Senator Elizabeth Warren has pointed out, the labor and environmental provisions continue to have weaker enforcement provisions than the investment chapters of preferential trade agreements.<sup>79</sup> Foreign investors can directly challenge government action that violates investor rights under the investment chapters of trade agreements like the TPP or NAFTA.<sup>80</sup> By contrast, only governments can enforce the labor and environmental chapters through inter-state dispute resolution. This unequal treatment prompted several hundred law and economics professors to sign a letter urging Congress to reject trade agreements like the TPP that include investor-state dispute settlement provisions.<sup>81</sup>

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78. See Marceau, *supra* note 34 (noting WTO members' resistance to measures on redistribution as an inappropriate invasion of the domestic sphere).

79. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html?utm\\_term=.eb0432f03ff9](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.eb0432f03ff9) [<https://perma.cc/5E62-MX5N>].

80. See TPP, *supra* note 73, ch. 9, section B (Investor-State Dispute Settlement); North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (Settlement of Disputes between a Party and an Investor of Another Party).

81. *220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals That Include Investor-State Dispute Settlement (ISDS)*, PUB. CITIZEN (Sept. 7,



Moreover, governments' resolve to actually bring such cases remains uncertain. No mechanism exists to legally compel a government to bring a labor or environmental case (just as no mechanism exists to compel a government to bring a dispute challenging a failure to comply with the agreement's trade liberalization provisions).<sup>82</sup> To date, the United States has only ever pursued one case under the labor or environmental chapters through to formal dispute settlement.<sup>83</sup> That case, against Guatemala under the Central American Free Trade Agreement ("CAFTA-DR"), alleged violations by Guatemala of a number of labor rights, including the rights to collective bargaining and the freedom of association.<sup>84</sup>

Perhaps more importantly, cynicism about the effectiveness of labor and environmental standards runs high. Writing about the TPP's labor provisions, Human Rights Watch notes that

Human Rights Watch and others have expressed concerns that the agreement's labor chapter and associated bilateral agreements will not adequately safeguard labor rights in TPP countries with poor labor rights records, notably Vietnam, Malaysia, and Brunei. . . . [T]he extent to which [the labor provisions] will be implemented or enforced is unclear, particularly given poor enforcement of labor rights provisions in other trade agreements and under each country's domestic laws.<sup>85</sup>

Furthermore, critics argue that "[c]ountries such as Vietnam would have to completely revolutionize their legal systems to comply with the labor-union requirements, which doesn't seem likely."<sup>86</sup>

2016), <http://www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf> [<https://perma.cc/WT3K-V5GB>] ("ISDS grants foreign corporations and investors a special legal privilege: the right to initiate dispute settlement proceedings against a government for actions that allegedly violate loosely defined investor rights to seek damages from taxpayers for the corporation's lost profits.").

82. Domestic groups such as the AFL-CIO can file complaints with the Department of Labor, which can lead to formal disputes, although the government is not required to initiate a dispute. Under the United States Generalized System of Preferences, recipients of benefits can also be, and have been, penalized for failing to abide by labor standards. See Cimino-Isaacs, *supra* note 66, at 274–76 (discussing the enforcement of the TPP labor commitments).

83. Another potential dispute, against Bahrain, is in consultations. See *Bahrain Submission Under U.S.-Bahrain FTA*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/Bahrain-submission-under-US-Bahrain-FTA> (last visited Jan. 9, 2017) [<https://perma.cc/SX8E-QQ8E>].

84. See *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr> (last visited Jan. 9, 2017) [<https://perma.cc/E6YL-RRBF>] (presenting a list of documents relating to the labor enforcement case against Guatemala).

85. Q&A: *The Trans-Pacific Partnership*, HUM. RTS. WATCH (Jan. 12, 2016, 3:32 PM), <https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership> [<https://perma.cc/E7Q5-6KM5>].

86. Alana Semuels, *The TPP's Uneven Attempt at Labor Protection*, ATLANTIC (Jan. 22, 2016), <http://www.theatlantic.com/business/archive/2016/01/tpp-mexico-labor-rights/426501/>

Other organizations expressed dismay that the TPP did not impose “consistency” plans on major U.S. trading partners with poor labor practices, most notably Mexico.<sup>87</sup> In Mexico, the United States’ third largest trading partner behind China and Canada, only one percent of workers belong to a union, and workers have struggled to get better rights.<sup>88</sup> The lack of a consistency plan with respect to Mexico led the Labor Advisory Committee, a group of U.S. labor-union representatives, to oppose the TPP.<sup>89</sup>

Still others expressed doubts that the U.S. government would hold even those countries with consistency plans accountable. Cathy Feingold, the director of the International Department at the AFL-CIO, noted that Vietnam had a five-year grace period in which to implement changes such as allowing workers to unionize at the factory level.<sup>90</sup> The market access for U.S. companies, however, would have kicked in if and when the TPP entered into force. Feingold argued that “[o]nce the U.S. allows companies to access the benefits of the TPP, it’s very unlikely that the government would withhold those benefits should it come across labor abuses.”<sup>91</sup>

### *B. Trade Adjustment Assistance*

Many governments have also used domestic policy to try to offset the distributional effects of trade agreements.<sup>92</sup> The centerpiece of these efforts has been TAA. First created in the United States in 1962 and revised in 1974, 2002, 2009, 2011, and 2015, TAA exists for workers, firms, and farmers. For workers, for instance, TAA provides health care, wage insurance, funds for occupational retraining, and allowances for job searches and relocation to workers injured by competition with foreign producers.<sup>93</sup> A group of three or more workers employed by the same firm who lose or expect to lose their jobs because of import competition may petition the Secretary of Labor for benefits.<sup>94</sup> The Secretary determines whether the workers are eligible for benefits by

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[<https://perma.cc/HZ9N-E5Z2>] (quoting John Sifton, Human Rights Watch’s Asia advocacy director).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. See Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 *GEO. J. INT’L L.* 797, 798 (2012) (discussing how countries address economic dislocations caused by globalization).

93. *Id.* at 799.

94. 19 U.S.C. § 2271 (2012).

examining a number of statutory factors.<sup>95</sup> The ultimate aim of the inquiry is to establish a causal relationship between an increase in imports and job loss.<sup>96</sup>

As discussed above, both economic efficiency and national sovereignty have been invoked as justifications for distributing the gains from trade through domestic, rather than international, law.<sup>97</sup> TAA thus represents the preferred response to trade-induced economic injuries. Economists have long argued that any negative consequences from liberalizing trade can be sorted out through domestic policies like TAA.<sup>98</sup> The benefits provided by TAA aim to redistribute the gains from trade liberalization to those who suffer from the same. Politically, TAA's origins in the United States reflect a bargain between import competing interests and proponents of trade liberalization. The Trade Expansion Act of 1962 granted President Kennedy authority to negotiate major reductions in tariffs in exchange for TAA for workers injured by the tariff reductions.<sup>99</sup> At first blush, then, TAA appears to satisfy both the political necessity of helping those who might otherwise oppose free trade and the economists' mandate that such help be provided without interfering with international trade itself.

The problems with TAA are twofold. First, TAA as currently implemented, at least in the United States, may not work very well.<sup>100</sup> A 2012 study prepared for the U.S. Department of Labor compared a random sample of TAA participants with similarly situated, but TAA-ineligible, workers who lost their jobs at approximately the same time.<sup>101</sup> Among other things, the study compared the wages of the two

95. 19 U.S.C. § 2272 (2012) (listing the statutory factors).

96. Park, *supra* note 92, at 812.

97. See Marceau, *supra* note 34; *supra* Part I.A.

98. See KRUGMAN & OBSTFELD, *supra* note 9, at 214–17 (critiquing the idea that trade policy is an appropriate way to address domestic market failures such as unemployment).

99. See Ethan Kapstein, *Trade Liberalization and the Politics of Trade Adjustment Assistance*, 137 INT'L LAB. REV. 501, 506 (1998).

100. How one assesses TAA's effectiveness depends in part on what purpose one thinks TAA serves. TAA's purpose would appear to be creating employment opportunities for those who have lost their jobs due to trade, in which case one would ask whether TAA succeeds in getting workers jobs with similar or better incomes than they would otherwise have obtained, or perhaps similar to their previous employment. As explained above, data suggests TAA is not especially effective measured in that way. But Robert Lawrence, a former economic adviser to President Clinton, argued that “[i]f you view it as a compensation program, I would say it’s reasonably effective.” Tom DiChristopher, *Sizing Up the Trade Adjustment Assistance Program*, CNBC (June 26, 2015), <http://www.cnbc.com/2015/06/26/is-aid-to-trade-displaced-workers-worth-the-cost.html> [<https://perma.cc/3KJV-Y864>] (“Between 1996 and 2004, the Bureau of Labor Statistics attributed less than 3 percent of mass layoffs to import competition and relocation overseas.”).

101. See Peter Z. Schochet et al., *Estimated Impacts for Participants in the Trade Adjustment Assistance (TAA) Program Under the 2002 Amendments*, MATHEMATICA POLY RES. (Aug. 30, 2012), <https://www.mathematica-mpr.com/our-publications-and-findings/publications/estimated->

groups over a period of four years following the loss of employment.<sup>102</sup> During the first two years, TAA participants both worked less and earned lower wages than those in the non-TAA group.<sup>103</sup> This difference can be attributed to the fact that, rather than immediately seek alternative employment, many TAA participants chose to avail themselves of the job training opportunities available through TAA but not available to workers laid off for non-trade reasons.<sup>104</sup> But over the last two years of the study when the TAA participants were working, the gap narrowed but didn't vanish. In the last year of the study, TAA participants earned \$3,300 less on average than non-TAA participants and worked only thirty-three weeks per year as compared to thirty-five weeks.<sup>105</sup>

Beyond the possibility that it does not work very well, TAA also arguably discriminates unfairly among workers who have lost their jobs through no fault of their own.<sup>106</sup> In the last quarter of 2015, for example, the Labor Department estimates that U.S. employers eliminated 6.8 million jobs through contraction or closing.<sup>107</sup> Yet the Bureau of Labor Statistics estimates that import competition and relocation overseas caused less than five percent of such layoffs.<sup>108</sup> Thus, while trade-related job losses may be one of the most visible signs of economic dislocation, they are only the tip of the iceberg.

The second problem with TAA is that it is a purely domestic legal program. This creates a credible commitment problem. Even if injured workers are able to extract TAA as the price of supporting liberalized trade, nothing guarantees that a future Congress will not cut back on

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impacts-for-participants-in-the-trade-adjustment-assistance-taa-program-under-the-2002-amendments [https://perma.cc/CSC9-5BP6].

102. *Id.* at xv.

103. *Id.* at xvii.

104. *Id.*

105. *Id.* The result was especially pernicious to older workers. The effect on employment and wages was statistically insignificant for younger workers in the last two years of the study, but significant and negative for older workers through the period of the study. *Id.* Other studies have found similar results. See Kara M. Reynolds & John S. Palatucci, *Does Trade Adjustment Assistance Make a Difference?*, 30 CONTEMP. ECON. POL'Y 43 (2011).

106. See James Sherk, *Congress Should Allow Trade Adjustment Assistance to Expire*, HERITAGE FOUND. (Feb. 4, 2011), <http://www.heritage.org/research/reports/2011/02/congress-should-allow-trade-adjustment-assistance-to-expire#.ftn5> [https://perma.cc/SZK4-XJ5L] (“The government should not discriminate between workers who lose their jobs because of trade and workers who lose their jobs for other reasons.”).

107. The United States had a net employment gain of one million jobs because it gained in gross 7.8 million jobs. See News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Business Employment Dynamics—Fourth Quarter 2015 (July 27, 2016), [https://www.bls.gov/news.release/archives/cewbd\\_07272016.pdf](https://www.bls.gov/news.release/archives/cewbd_07272016.pdf) [https://perma.cc/FJ36-JPG3].

108. DiChristopher, *supra* note 100 (“Between 1996 and 2004, the Bureau of Labor Statistics attributed less than 3 percent of mass layoffs to import competition and relocation overseas.”).

those benefits down the road. Trade liberalization commitments, after all, are enshrined in international agreements and implemented through statutes that have no expiration. By contrast, trade adjustment assistance measures typically have sunset provisions.<sup>109</sup> The TAA program was last set to expire in September 2015 but was extended as part of the Obama administration's bid to build support for the TPP.<sup>110</sup> Yet authorization to fund the program now only extends until June 30, 2021.<sup>111</sup> At that time, workers and firms will once again have to seek congressional approval to continue the program. The trade agreements creating the injuries to which TAA responds will continue indefinitely.

This arrangement works when labor markets adjust in the near term to the shocks created by liberalization (and technological change). But this disparate timing creates a mismatch when labor markets' adjustments are sluggish.<sup>112</sup> Having already agreed to the trade deal, beneficiaries of TAA have little leverage in seeking an extension of benefits. Of course, they can always hope to use the next trade deal as leverage, but they do not control the timing of trade negotiations. Consequently, dividing domestic redistribution programs tied to trade, such as TAA, from trade deals themselves ensures that domestic programs are unlikely to be adjusted if the adverse impacts of trade on individual communities or regions are larger or last longer than expected. After a trade deal is in place, the agreement's proponents may not see much value in pushing to further redistribute the gains it creates.

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109. As discussed in Part I.A, economists have generally predicted that labor markets would adjust to disruptions for trade. See Bernanke, *supra* note 18; Bhagwati, *supra* note 19. Under this assumption, pairing time-limited TAA with an indefinite trade agreement might make sense. The difficulty is that shocks to the employment sector, whether from technology or trade, occur today with such frequency that labor markets may not be able to adjust. See Bhagwati, *supra* note 19 (“Before the workers get on to the rising part of the J-curve, they run into yet more such technical change, so that the working class gets to go from one declining segment of the J-curve to another.”); Alan S. Blinder, *Free Trade's Great, but Offshoring Rattles Me*, WASH. POST (May 6, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402555.html> [<https://perma.cc/M4W6-PHE6>] (“I would argue that there's something new about the coming transition to service offshoring. These two powerful forces mentioned earlier—technological advancement and the rise of China and India—suggest that this particular transition will be large, lengthy and painful.”).

110. Greg Nelson, *On Trade, Here's What the President Signed into Law*, WHITE HOUSE (June 29, 2015), <https://www.whitehouse.gov/blog/2015/06/29/trade-here-s-what-president-signed-law> [<https://perma.cc/T2EN-5NZC>].

111. 19 U.S.C. § 2317(a) (2012).

112. See *supra* note 109; see also Autor, Dorn & Hanson, *supra* note 8; Pierce & Schott, *supra* note 8.

### III. TOWARD AN ECONOMIC DEVELOPMENT CHAPTER IN TRADE AGREEMENTS

TAA and trade agreements' labor and environmental chapters have lost their lustre. Saving liberalized trade requires new solutions. In this Part, I propose a new Economic Development Chapter to be included in all future trade agreements. Economic Development Chapters would have at a minimum three components. In Section A, I argue that the Economic Development Chapter should contain obligations to expend a certain amount of funding per year on programs that redistribute the gains from trade. These fiscal commitments would be indexed so that they rose and fell with the losses created by trade agreements. Although nations require flexibility in the kinds of programs they can choose to satisfy this commitment, the Economic Development Chapter should at a minimum push states to use their economic development programs to invest in public education and infrastructure. These priorities are already identified in a Development chapter within the TPP. The obligations proposed here are thus only an extension and deepening of soft norms already found in the most recent generation of trade agreements. In Section B, I tackle the monitoring and enforcement of the substantive obligations. The Economic Development Chapter would require countries to collect data on the domestic winners and losers of liberalized trade and to report that data, along with measures taken to redistribute the gains from trade domestically, to an Economic Development Committee. This committee, a species of which is also already envisioned by the TPP's Development chapter, would be empowered to issue recommendations based on member states' reports, in the manner of human rights committees. Finally, failure to comply with these obligations would be enforceable through inter-state dispute settlement.

Section C concludes with a brief discussion of the new political economy of trade agreements. Beyond helping those individuals and communities that have been left behind by rising inequality, these proposals would shore up the political consensus in favor of liberalizing trade. They would do so by solving the commitment problem that bedevils efforts to address trade dislocations through domestic policy. By tying domestic policies that help those who suffer or perceive themselves to suffer from international trade to the rules liberalizing trade, trade agreements can offer something for everyone.

This approach flips the presumption that exists in current labor and environment chapters. Traditionally, developed countries, especially the United States, have approached the problem of trade-related inequality within their own countries by trying to raise the level

of labor protection in foreign countries through trade agreements. Labor and environmental chapters, although nominally applicable to all treaty members, are understood to apply chiefly to those countries with poor labor practices. Negotiators in developed countries hope to make their own workers better off, or to be seen as trying to make their own workers better off, without actually having to do anything domestically for their workers.

Critics of trade agreements have bought into this orientation. They focus on improving labor and environmental standards in trade agreements and on removing ISDS provisions. These demands reflect genuine concern for labor and environmental standards in developing countries, as well as the possibility that ISDS will be used by corporations to chill efforts to regulate a host of non-economic issues, such as health, safety, and the environment. In focusing on these reforms, though, critics in the United States and EU miss an opportunity to obtain concessions that more directly impact the welfare of economically struggling communities at home.

In particular, removing ISDS deprives business interests of an important tool in countries that lack independent or well-developed judiciaries. The gains in terms of the right to regulate in developed countries are also relatively small. To be sure, there have been investor-state arbitral decisions that many view as striking the wrong balance between the rights of foreign corporations and host governments.<sup>113</sup> More recent decisions, however, have recognized the government's right to regulate so long as it does so in a generally applicable fashion.<sup>114</sup> Indeed, to date the United States has never lost an investor-state dispute. While that record is unlikely to remain intact in perpetuity, it testifies to the fairly limited marginal impact ISDS provisions have in countries with robust domestic legal systems.<sup>115</sup>

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113. See, e.g., *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, ¶¶ 74–112 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002) (holding that Mexico violated NAFTA chapter 11's fair and equitable treatment and expropriation provisions through its subnational governments' denial of permits for a landfill).

114. See *Glamis Gold Ltd. v. United States*, Award (NAFTA Ch. 11 Arb. Tri. June 8, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf> [<https://perma.cc/A6LA-HD3L>]; *Methanex Corp. v. United States*, Award (NAFTA Ch. 11 Arb. Tri. Aug. 3, 2005), <http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> [<https://perma.cc/J22M-9LAX>].

115. Indeed, ISDS often poses less of a constraint on domestic regulatory efforts than does the interstate dispute process central to trade law. For example, in *Mesa Power v. Canada*, a NAFTA tribunal refused to find a violation of NAFTA's investment chapter on the same facts on which a WTO panel found a violation in *Canada-Renewable Energy*, a case brought by Japan and the EU. Compare *Mesa Power Grp., LLC v. Gov't of Can.*, Case No. 2012-17. Award (Mar. 24, 2016) (finding no violation), with Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 5.85, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013) (finding

The approach proposed here turns the tables by creating international obligations that developed countries will have to take affirmative steps to implement. In effect, developed countries will commit themselves to domestic programs that will help those adversely affected by liberalized trade. In so doing, these programs will shore up the political consensus in favor of liberalized trade in the developed world.

### *A. Economic Development Obligations*

The centerpiece of a new Economic Development Chapter should be fiscal commitments to spend “new money” on economic development programs. These fiscal requirements should have two components. First, they should specify a threshold level of spending below which economic development spending may not fall for the first ten or fifteen years that the trade agreement in question is in force. Countries can establish that threshold level through negotiations, both among parties and within domestic legislatures, prior to ratification. Current levels of TAA spending might provide a useful benchmark. As Economic Development Chapters spread, the thresholds used in earlier agreements may provide a starting point for establishing the threshold in later agreements. This threshold would ensure that domestic legislatures cannot renege on economic development commitments shortly after an agreement comes into force without violating the terms of the agreement. Having the threshold sunset after a certain period of time also ensures that countries are not tied to an antiquated number.

Second, governments’ spending obligations should be indexed in such a way that they rise with the effects of dislocation and fall as those adversely affected by trade recover (subject to the threshold described above). Indexing governments’ spending requirements ensures that assistance over the life of an agreement remains appropriate to the needs created by the agreement. Although a number of possible indexing techniques might be used, the most appropriate index might be a measure of unemployment and wage depression or stagnation caused by international trade within subnational political units, such as U.S. states. The government’s obligation to spend could be subject to a cap. For example, the cap might provide that the United States cannot be obligated to spend more nationally than fifty percent of the gains it attributes to liberalized trade.

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violation), and Appellate Body Report, *Canada—Measures Relating to the Feed-in Tariff Program*, ¶ 5.85, WTO Doc. WT/DS426/AB/R (adopted May 24, 2013) (same). Moreover, while the United States has never lost an ISDS case, it regularly loses WTO cases.



To give a concrete example, the government might calculate that the United States gained \$135 billion in 2018 from membership in NAFTA. A new Economic Development Chapter, negotiated by the Trump administration as part of NAFTA's renegotiation, might cap a country's economic development obligations at fifty percent of the annual gains from trade. The U.S. cap (presumably for the following fiscal year to allow for data collection and program implementation) would thus be \$67.5 billion. An increase in lost employment and wages attributable to trade above benchmark levels (e.g., the levels during the year the agreement entered into force) could lead to an increase in the United States' spending obligation above the threshold discussed above. After the initial period described above lapses, declines in employment losses and wage depression attributable to trade would lead to declining economic development obligations. In other words, if trade does not create economic harms, the economic development obligations will naturally sunset.

Given membership in multiple trade agreements, attribution of gains or losses to specific agreements might be, or might become, difficult. For this reason, it might make sense to express the gains as an estimate of the total gains from liberalized trade. The Economic Development obligations would thus be a common obligation across trade agreements. The threshold requirement would be individually negotiated and its duration specific to each agreement, but subsequent agreements would not change the indexing rules. For example, an Economic Development Chapter in a renegotiated NAFTA might impose a \$50 billion per year minimum spending requirement for ten years, indexed as described above. TTIP might enter into force five years into NAFTA's ten year period and include a \$60 billion spending requirement for ten years, as well as the indexing requirement. The effect of TTIP's entry into force would be to raise the United States' spending floor to \$60 billion and extend it for an additional five years. The indexing procedure would not change, although now both NAFTA members and TTIP members would be able to enforce the economic development obligations, as described below.

The spending requirements provide the backbone of the economic development obligations that states would undertake. States' commitments could only be fulfilled by "new money." In other words, states would not be permitted to count existing expenditures to fulfill their economic development objectives (except perhaps expenditures to satisfy economic development objectives in other trade agreements, as described above).

Beyond that, states would have a great deal of latitude to choose the kinds of programs on which they spend. The Economic Development

Chapter should not commit governments to specific forms of assistance. This discretion would reflect the different contexts in which social programs occur and the traditional view that trade agreements should interfere as little as possible with behind-the-border policies. Requiring specific programs, such as unemployment insurance or relocation allowances, would tie governments' hands and prevent experimentation. Studies of TAA, for example, indicate mixed results as to what kinds of programs actually deliver the most effective assistance.<sup>116</sup> Allowing experimentation by governments thus offers the possibility of learning. At the same time, some programs may be effective and feasible in Country A but not in Country B. Countries have different needs and different capabilities, and Economic Development Chapters should be sensitive to this fact.

This discretion may also make economic development obligations more palatable by allowing politicians to craft programs that achieve objectives beyond just addressing the adverse effects of trade. In this sense, the international obligation could become a site for logrolling—"the combining of multiple measures, none of which would pass on its own, into an omnibus proposition that receives majority support."<sup>117</sup> Constituencies that support economic development programs could join forces with those who may not have an interest in economic development per se, but who will agree to support the inclusion of those obligations in international agreements so long as the economic development programs actually implemented address their priorities.<sup>118</sup>

Although states would have discretion in the kinds of programs they choose, an Economic Development Chapter might still push member states toward particular categories of spending. Traditional trade adjustment assistance focuses on the individuals affected by the impacts of trade. Research into social mobility and economic inequality, however, has shown that the effects of economic dislocation can be widespread and multigenerational.<sup>119</sup> The National Bureau of Economic Research has found that, not surprisingly, parents' income

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116. See *supra* Part II.B.

117. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 689 (2010).

118. See, e.g., Anthony M. Bertelli & Christian R. Grose, *Secretaries of Pork? A New Theory of Distributive Public Policy*, 71 J. POL. 926, 934 (2009) (arguing that TAA provides bureaucratic discretion that introduces an element of pork-barrel politics to the program).

119. See, e.g., Patrick Wightman & Sheldon Danziger, *Multi-Generational Income Disadvantage and the Educational Attainment of Young Adults*, 35 RES. SOC. STRATIFICATION & MOBILITY 53, 54 (2012) (reviewing the literature linking socioeconomic status during childhood to later life educational and employment outcomes).

strongly predicts children's income.<sup>120</sup> Globalization has also been linked to the decline of local communities and associated social support networks.<sup>121</sup> By pushing investments toward two areas specifically—public education and infrastructure<sup>122</sup>—Economic Development Chapters can address two problems linked, at least in the popular imagination, to globalization. They can better ensure that governments take care of those least able to adapt to the globalized economy. At the same time, they can also provide an impetus to restore local communities, both in economic and social terms.

To unpack these two categories somewhat, Economic Development Chapters should direct countries to significantly increase their spending on public education in adversely affected communities. For instance, those communities most negatively impacted by liberalized trade might receive  $x$  percentage of the economic growth attributed to liberalized trade in the form of investment in public education and infrastructure. Communities less severely affected would receive a smaller percentage, and so forth. Again, the treaty need not put restrictions on precisely what kinds of education the government must fund. The government might, for instance, offer vocational training beyond that required as part of TAA to workers seeking new jobs. Alternatively, the government might choose simply to put the money into primary and secondary schools in the adversely affected communities.

Increased investment in public education can be especially useful in providing opportunities for the children of displaced workers to find their way in the new economic landscape. Because educational achievement predicts future income, disparities in educational

120. Alison Griswold, *Here's the Startling Degree to Which Your Parents Determine Your Success*, BUS. INSIDER (Jan. 24, 2014), <http://www.businessinsider.com/parents-determine-child-success-income-inequality-2014-1> [<https://perma.cc/CX75-NS8K>]. Other studies have found that parental income predicts educational achievement. See Greg J. Duncan, Pamela A. Morris & Chris Rodrigues, *Does Money Really Matter? Estimating Impacts of Family Income on Young Children's Achievement with Data from Random-Assignment Experiments*, 47 DEVELOPMENTAL PSYCHOL. 1263 (2011).

121. Manfred B. Steger, *Robert Putnam, Social Capital, and a Suspect Named Globalization*, in SOCIAL CAPITAL: CRITICAL PERSPECTIVES ON COMMUNITY AND "BOWLING ALONE" 260, 263 (Scott L. McLean, David A. Schultz & Manfred B. Steger eds., 2002) ("I posit a direct relationship between the waning stocks of social capital and the politics of neoliberal globalization . . .").

122. Cf. Lawrence Summers, *The Next President Should Make Infrastructure Spending a Priority*, WASH. POST (Sept. 11, 2016), [https://www.washingtonpost.com/opinions/whoever-wins-the-presidential-election-must-make-infrastructure-spending-a-priority/2016/09/11/406ef0ee-76c2-11e6-b786-19d0cb1ed06c\\_story.html?utm\\_term=.2ba6335d3da5](https://www.washingtonpost.com/opinions/whoever-wins-the-presidential-election-must-make-infrastructure-spending-a-priority/2016/09/11/406ef0ee-76c2-11e6-b786-19d0cb1ed06c_story.html?utm_term=.2ba6335d3da5) [<https://perma.cc/M5TE-NTY3>] ("Economists and politicians of all persuasions are increasingly concluding that higher infrastructure investment can create quality jobs and provide economic stimulus without posing the risks of easy-money monetary policies in the short run.").

opportunities are a major driver of economic inequality.<sup>123</sup> Wealthier communities can afford to spend more on education, while poorer communities cannot. Communities that suffer job losses from liberalized trade will be less able to invest in public education, pushing the losses from trade liberalization and the costs of economic inequality onto the next generation. Public education can offset these costs.

A requirement that nations invest in infrastructure relies on the same rationale of boosting both economic opportunity and political support for trade agreements. Studies have repeatedly confirmed that infrastructure investments can drive economic growth by creating employment and creating the platform for further investment in businesses.<sup>124</sup> Infrastructure investments are also very visible, illustrating that liberalized trade can work for all communities. The definition of infrastructure should, once again, be broad in order to allow countries flexibility in implementation. The definition might take the form of a non-exhaustive list of measures, including the construction of roads, bridges, railways, and high-speed internet connections. Moreover, unlike education, infrastructure spending need not necessarily target the geographic areas adversely affected by trade liberalization. If people are moving out of economically depressed regions, governments might boost economic opportunity more effectively by investing in infrastructure in high growth areas. On the other hand, if labor mobility remains limited even in the face of slow economic growth,<sup>125</sup> infrastructure projects in adversely affected areas may make more sense.

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123. Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 91 (Greg J. Duncan & Richard J. Murnane eds., 2011) ("As the income gap between high- and low-income families has widened, has the achievement gap between children in high- and low-income families also widened? The answer, in brief, is yes.").

124. ALEXANDER J. FIELD, *A GREAT LEAP FORWARD: 1930S DEPRESSION AND U.S. ECONOMIC GROWTH* 2 (2011) (arguing that the conditions for economic growth in the latter half of the twentieth century were laid in large part by "the organizational and technological transformation of transportation and distribution (wholesale and retail trade) made possible by street, highway, bridge, and tunnel construction"); BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* (2013); Josh Bivens, *The Short- and Long-Term Impact of Infrastructure Investments on Employment and Economic Activity in the U.S. Economy*, *ECON. POL'Y INST.* (July 1, 2014), <http://www.epi.org/files/2014/impact-of-infrastructure-investments.pdf> [<https://perma.cc/E922-VRQR>] (finding that "infrastructure investments provide the potential to boost economy-wide productivity growth").

125. See Olivier Jean Blanchard & Lawrence F. Katz, *Regional Evolutions*, 1 *BROOKINGS PAPERS ON ECON. ACTIVITY* 1 (1992); Edward L. Glaeser & Joseph Gyourko, *Urban Decline and Durable Housing*, 113 *J. POL. ECON.* 345 (2005); Richard H. Topel, *Local Labor Markets*, 94 *J. POL. ECON.* S111 (1986) (all arguing that labor can be slow to relocate in response to shifts in labor markets).

Linking trade agreements to efforts to address broader economic inequality can help rebuild the political consensus in favor of liberalizing trade. Educational and infrastructure spending provide a visible symbol that trade agreements are returning benefits to those communities that might otherwise oppose them. This visible sign is important because psychological research into voting demonstrates that voters usually do not vote in their own personal self-interest.<sup>126</sup> Rather, they identify with their communities and vote in what they perceive as the community's interest.<sup>127</sup> This fact has been used to explain why so many American voters who have not been adversely affected by international trade nevertheless support the protectionist rhetoric of politicians like Donald Trump. As psychologist David Sears suggests, these voters identify with those they believe to have been adversely affected by trade even if they themselves are not.<sup>128</sup> Delivering visible community benefits can thus go a long way toward rebuilding the fraying consensus in favor of political liberalization. If many of the voters in countries like the United States and the UK oppose liberalized trade regimes because of their perceived effects on others in the community, delivering highly visible benefits to those same individuals can change political attitudes.

Finally, beyond the obligations contained in an Economic Development Chapter, we should ask how feasible such commitments are. The answer: not as far-fetched as they sound. Indeed, the TPP already contains a Development chapter.<sup>129</sup> The Development chapter represents the continuation of a trend toward recognizing the importance of domestic regulatory and policy objectives in trade and investment agreements.<sup>130</sup> Moreover, the TPP's Development chapter

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126. See David Sears & Carolyn Funk, *The Role of Self-Interest in Social and Political Attitudes*, 24 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 1, 76 (1991) ("The conclusion is quite clear: self-interest ordinarily does not have much effect upon the ordinary citizen's sociopolitical attitudes.").

127. See Jeff Guo, *Stop Blaming Racism for Donald Trump's Rise*, *WASH. POST* (Aug. 19, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/08/19/stop-blaming-racism-for-donald-trumps-rise/?utm\\_term=.9fb3aba3cba8](https://www.washingtonpost.com/news/wonk/wp/2016/08/19/stop-blaming-racism-for-donald-trumps-rise/?utm_term=.9fb3aba3cba8) [<https://perma.cc/P65L-2VM9>]:

I don't know that voters are connecting that to an improvement in their own economic situations, so much as they believe that a lot of people are harmed by these trade agreements, that a lot of industries moved overseas, and that those jobs may never come back. . . . They think it's bad for people like them, or it's bad for the working class in general.

(quoting psychologist David Sears).

128. *Id.*

129. See TPP, *supra* note 73, ch. 23.

130. See, e.g., Federica Cristani, *Book Review: The Right to Regulate in International Investment Law by Aikaterini Titi Baden-Baden*, 6 *EURO. J. RISK REG.* 329, 329 (2015) ("The concept of the right to regulate has become a critical element in the development of international investment law and policy.").

references some of the priorities mentioned above. For example, Article 23.1(2) provides:

The Parties acknowledge the importance of development in promoting inclusive economic growth, as well as the instrumental role that trade and investment can play in contributing to economic development and prosperity. Inclusive economic growth includes a more broad-based distribution of the benefits of economic growth through the expansion of business and industry, the creation of jobs, and the alleviation of poverty.<sup>131</sup>

Article 23.3(3) goes further, linking broad-based economic growth to “sustained high-level commitment by . . . governments to effectively and efficiently administer public institutions, invest in public infrastructure, welfare, health and education systems, and foster entrepreneurship and access to economic opportunity.”<sup>132</sup>

Despite these positive references to broad-based economic growth and its connection to investment in education and infrastructure, the TPP’s Development chapter lacks any binding obligations. While the parties “acknowledge” and “recognize” the importance of these values, they do not undertake any binding commitments with respect to these traditionally domestic policy areas. Moreover, the TPP’s dispute settlement provisions do not apply to the Development chapter.<sup>133</sup> The existing Development chapter thus lacks the teeth it would need to credibly address the economic inequality at the heart of liberalized trade’s current crisis. It does, though, provide a starting point from which countries could negotiate future Economic Development Chapters and indicates that developed countries are open to including development goals, including infrastructure and education spending, in their agreements.

### *B. Monitoring and Enforcement*

Monitoring and enforcement of the Economic Development Chapter would build directly on existing institutions. First, the TPP’s Development chapter already includes the creation of a Committee on Development.<sup>134</sup> The new Economic Development Chapter should charge a similar committee with gathering data on those communities, regions, and sectors of the economy adversely impacted by trade liberalization and reporting that data to the Committee.<sup>135</sup> Member

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131. TPP, *supra* note 73, art. 23.1(2).

132. *Id.* art. 23.3(3).

133. *Id.* art. 23.9.

134. *Id.* art. 23.7.

135. In many countries these commitments would not significantly increase the information-gathering burden on members above what they already do. Many countries already keep statistics similar to these and maintain government offices, such as the Department of Labor’s Bureau of

states would also report to the Committee on measures taken to comply with the substantive obligations described in Section A. This monitoring effort would resemble the monitoring mechanisms employed by human rights treaty bodies such as the Committee on Human Rights under the International Covenant on Civil and Political Rights and the Committee on Racial Discrimination under the Convention on the Elimination of Racial Discrimination.<sup>136</sup> The Committee would be empowered to comment on nations' submissions and offer recommendations to improve compliance, again in the manner of human rights bodies.<sup>137</sup>

Second, the Economic Development Chapter would be subject to dispute settlement, just as the labor and environmental chapters have come to be subject to dispute settlement. If, for instance, the United States or Canada failed to expend the required amount, another country would be entitled to bring a dispute before an international tribunal. If the tribunal finds a violation, the complaining government would be entitled to retaliate against the violating state by raising trade barriers.<sup>138</sup> The trade barriers the complaining state could impose would be high enough to offset the foregone expenditures.<sup>139</sup> For

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Labor Statistics or Bureau of International Labor Affairs, that can adjust their data collection and analysis. Indeed, the U.S. implementation package for the TPP proposes the creation of a new office to assist in implementing the TPP, demonstrating that the creation of such offices does not pose a significant difficulty. See *The Trans-Pacific Partnership Agreement Implementation Act Draft Statement of Administrative Action*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/DRAFT-Statement-of-Administrative-Action.pdf> (last visited Jan. 11, 2017) [<https://perma.cc/VA53-SH39>] (“Section 105(a) of the [implementing legislation] authorizes the President to establish within the Department of Commerce an office responsible for providing administrative assistance to dispute settlement panels established under Chapter 28 (Dispute Settlement) of the TPP . . .”).

136. International Covenant on Civil and Political Rights art. 28, Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination art. 8, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

137. ICCPR, *supra* note 136, art. 40.4 (“The Committee shall study the reports submitted by the States Parties to the present Convention. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.”); CERD, *supra* note 136, art. 9 (“The Committee . . . may make suggestions and general recommendations based on the examination of the reports and information received from States Parties.”); *id.* art. 11 (“If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee.”).

138. This kind of retaliation, known as the suspension of concessions, is the mechanism through which trade obligations are enforced. See TPP, *supra* note 73, art. 28.20 (entitled “Non-implementation—Compensation and Suspension of Benefits”); Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU] (same).

139. See, e.g., DSU, *supra* note 138, art. 22.4 (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”); TPP, *supra* note 73, art. 28.3.3 (“A complaining Party may, [after, *inter alia*,

example, if Vietnam prevailed in a case against Canada alleging that Canada failed to spend \$50 million a year that it was required to spend, Vietnam could raise tariffs on products in a way calculated to raise \$50 million a year.

One might object that the rules contained in Economic Development Chapters are unlikely to ever be enforced against developed countries like the United States or the EU. Would Vietnam really bring a case challenging the United States' failure to assist American workers? Surely, Vietnam would not bring such a case for the purpose of aiding American workers. That does not mean, however, that Vietnam would never bring such a case. Trade disputes often have a tit-for-tat aspect to them. If the United States brings a claim challenging Indian policies as violating trade rules, India may very well turn around and file a claim against the United States in retaliation.<sup>140</sup> The reciprocal nature of the decision to bring a trade dispute means that disputes about the Economic Development Chapters are possible because bringing such a case could be in the complaining party's interest, even though the ultimate remedy does not benefit the complaining party. At a minimum, the mere possibility of a claim creates pressure for developed countries to comply with the chapter's terms.

Moreover, in some instances enforcing the chapter's obligation could indirectly benefit the complaining party. Imagine two trading partners, such as Mexico and the United States, that border each other and face an immigration problem. The United States might consider bringing a claim challenging Mexico's implementation of the Economic Development Chapter as a benign and human method of addressing illegal immigration from Mexico to the United States. By the same token, Mexico might bring a claim against the United States in order to protect Mexicans or Mexican-Americans working in the United States.<sup>141</sup>

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prevailing in a dispute], provide written notice to the responding Party that it intends to suspend benefits of equivalent effect.”).

140. For example, India indicated that it would file a trade case challenging the lawfulness of government support for the renewable energy sector in the United States after the U.S. filed and won a similar case against India. Ian Clover, *India Confirms it Will File 16 Solar Cases Against US Under WTO Dispute*, PV MAG. (May 13, 2016), [https://www.pv-magazine.com/2016/05/13/india-confirms-it-will-file-16-solar-cases-against-us-under-wto-dispute\\_100024597/](https://www.pv-magazine.com/2016/05/13/india-confirms-it-will-file-16-solar-cases-against-us-under-wto-dispute_100024597/) [<https://perma.cc/JT79-P2LQ>]. The WTO's Appellate Body ruled in the U.S.'s favor on Friday, September 16, and India filed its case on Monday, September 19.

141. Indeed, protecting Mexicans in Mexico provided the impetus for the famous *Avena* decision in which the International Court of Justice ruled, in a case brought by Mexico, that the United States violated the Vienna Convention on Consular Relations (“VCCR”) when it did not notify Mexican nationals arrested in the United States of their rights under the VCCR. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12 (Mar. 31).



One might also argue that private parties such as the AFL-CIO should be able to directly enforce the terms of the labor and environmental chapters. The fact that the labor and environmental chapters are not privately enforceable, while the investment chapters are, has been a bone of contention.<sup>142</sup> Private enforceability of economic development obligations differs from private enforcement of investment commitments, however, because the private party most likely to seek enforcement of the economic development obligations would do so against his own country (i.e., the AFL-CIO seeking to have the United States satisfy its economic development obligations).

Such private enforcement could come in three forms. First, private parties could be authorized to file private complaints with the Development Committee, which would then evaluate the complaint and, if warranted, issue recommendations on how the member state in question could address the complaint. Such private mechanisms are common in human rights treaties. Typically, member states can join an additional protocol that gives the Committee jurisdiction to entertain complaints from members' citizens. Because it is optional, some countries can permit private claims while others may choose not to. Second, a binding dispute resolution system could hear private claims, along the lines of the European Court of Human Rights. Unlike the Committee, a tribunal would issue legally binding rulings. Third, since countries will typically pass implementing legislation, they could create a domestic private right of action.

The first option is the most politically feasible. Developed countries are unlikely to permit their citizens to bring domestic lawsuits challenging appropriation decisions, and they almost certainly would not permit their citizens to bring such a claim before an international tribunal. Since one of the primary purposes of an Economic Development Chapter is to rebuild a broad coalition in favor of international trade agreements, Economic Development Chapters themselves should not directly include a private right of action that can lead to binding penalties.

### *C. The New Political Economy of Trade Agreements*

Linking economic development objectives to liberalized trade in a single instrument solves a political economy problem threatening to derail the trade regime. The benefits of trade agreements to consumers are real and very significant but also diffuse and not necessarily obvious to the average citizen. The costs of trade agreements, on the other hand,

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142. See *supra* Part II.A.

are concentrated, visible, and—because trade and technology have similar effects—prone to overestimation. In light of these factors, the traditional economic and sovereignty arguments for leaving questions about the distribution of the gains from trade to domestic policy are no longer tenable. The perception that trade fuels inequality has to be dealt with within trade agreements.

Most importantly, Economic Development Chapters will tie the hands of domestic legislatures by linking trade liberalization with domestic policies that share the gains from trade. This commitment will reduce the flexibility the legislature has. Should the legislature choose not to fund its development commitments under trade agreements, the country will be in violation of the agreement and risk the possibility of a dispute and retaliation by other parties. This loss of flexibility may be suboptimal both from an efficiency perspective (because governments may not have the same degree of freedom to adapt to changed circumstances) and from a sovereignty perspective (because trade agreements will establish further disciplines on behind-the-border policies). But it may be the best available given contemporary political constraints.

In exchange for this loss of flexibility, trade negotiators and the business interests that favor liberalized trade will receive additional support from labor unions and domestic constituencies that stand to benefit from the Economic Development Chapter. The construction and education sectors, for instance, should become backers of free trade. Those communities hardest hit by technological change might expect to do better by supporting trade agreements than by opposing them. After all, individual communities are powerless to stop the technological innovation that, on any account, plays a critical role in driving job loss and economic inequality. Just as opposing trade agreements is their chance to give voice to their discontent, so supporting trade is a chance to leverage their political clout.

Countries, and individual constituencies within developed countries in particular, should also favor a robust Economic Development Chapter, making agreement and implementation politically feasible. Developing countries should favor an enhanced Economic Development Chapter because it would bring stability to the process of ratifying and implementing trade agreements. Trade negotiators frequently must return to the negotiating table to address demands from disaffected constituencies within developed countries. This was true with the NAFTA Side Agreements, negotiated by President Clinton as the price of NAFTA ratification. It was also true after the George W. Bush administration and congressional leaders reached an agreement on the May 10 Consensus. Only after Peru,

Korea, Panama, and Colombia made changes to their domestic law to bring themselves into compliance with this new norm did Congress take up legislation to implement trade agreements with those countries.<sup>143</sup> Nor is this phenomenon limited to the United States. Europe has recently gone back to the negotiating table to seek further concessions from Canada in the EU-Canada Comprehensive Economic Trade Agreement.<sup>144</sup> These provisions address concerns in Europe about the ability of corporations to use investor-state dispute settlement to challenge domestic health and safety rules.<sup>145</sup>

Using treaties to commit to certain domestic policies is a well-known tactic.<sup>146</sup> Domestic governments that hope to secure the long-term stability of policies that they fear may be reversed by subsequent governments often look to enshrine those commitments in international agreements. The classic example, described by Andrew Moravcsik, involves new democracies in Eastern Europe entrenching democratic norms by signing up to human rights treaties.<sup>147</sup> These newly democratic countries hoped that human rights obligations and institutions like the European Court of Human Rights would pressure future governments to maintain democratic policies in the face of incentives to revert to oppressive forms of government.<sup>148</sup>

Incorporating domestic development policies into trade agreements offers a similar prospect: entrenching both liberalized trade and development policies in international agreements and associated domestic implementing legislation. In an era in which austerity policies and the retrenchment of the public sector have swept the developed world, the benefit to trade's losers should be clear. But the benefit is equally real for international trade's supporters. The political consensus in favor of free trade is eroding. Rebuilding that consensus requires tying free trade's fate to the fate of those who do not hold the

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143. See *Bipartisan Trade Deal*, *supra* note 69.

144. *Commission Attempts to Reopen CETA Negotiations with Canada to Revisit ISDS*, INV. TREATY NEWS (Feb. 29, 2016), <https://www.iisd.org/itn/2016/02/29/commission-attempts-to-reopen-ceta-negotiations-with-canada-to-revisit-isds/> [<https://perma.cc/8X7Y-XP44>].

145. *Id.* (“The CETA provides for a more traditional-style ISDS [investor-state dispute settlement] mechanism, which is not in line with the European Union’s new approach . . . . As it currently stands, the text is seen as unlikely to be approved by the European Parliament.”).

146. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2000) (arguing that if constitution drafters “foresee themselves losing in postconstitutional elections, they may seek to entrench judicial review as a form of political insurance”); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217 (2000).

147. Moravcsik, *supra* note 146, at 220 (“[C]reating a quasi-independent judicial body is a tactic used by governments to ‘lock in’ and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis nondemocratic political threats.”).

148. *Id.*

view that, in Keynes' words, free trade is "almost . . . a part of the moral law."<sup>149</sup>

#### CONCLUSION

A robust Economic Development Chapter is ambitious. Although labor and environmental chapters have made great strides from NAFTA to the TPP, they have not evolved fast enough to save free trade from itself. As voters in the U.S. presidential election, the UK's referendum on Brexit, and the growing support in Europe for right wing and anti-globalization parties illustrate, desperate times call for ambitious measures. Yet one might wonder if Economic Development Chapters are politically feasible. After all, part of what has driven the backlash against liberalized trade has been the retrenchment of the public sector. Social safety nets across the developed world have gotten smaller, and spending on education and infrastructure has dwindled. If governments generally oppose these things, should we really expect them to be willing to include them in trade agreements? As I have suggested here, tying public investment in economic development to trade liberalization would give even fiscal conservatives who favor free markets an incentive to support certain forms of public spending. If politicians continue to argue in favor of greater trade liberalization without supporting efforts to distribute the gains from such provisions, then perhaps globalization's critics are correct.

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149. Keynes, *supra* note 1, at 755.