
SOCIAL IN/EQUALITY AND INTERNATIONAL TRADE REFORMISMS OF FEAR

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1. DIAGNOSIS: WHY ‘RETOOL’ TRADE AGREEMENTS?

In “Retooling Trade Agreements for Social Inclusion” (‘Retooling’),¹ Prof. Gregory Shaffer has made a compelling case for the adoption of several innovative policy measures at the level of international economic law, primarily in the multilateral World Trade Organization (“WTO”), to promote a more ‘socially inclusive’ international trading system. As can only be expected from one of the most astute and creative contemporary scholars in the field of international trade law, there are some admirable initiatives in Prof. Shaffer’s ‘(re-)tool-box.’ Moreover, and no less importantly, the article itself is an intellectually honest, forward-looking and at times soul-searching prospectus for reform. It reflects much of the genuine *angst* that currently afflicts the trade community of academics and practitioners, who have for several decades followed international trade law tenets, as sophisticated (more often pragmatic than dogmatic) believers in the power of liberal economics,² as the worst form of international economic policy and governance, except for all those other forms that have been tried from time to time. This is of course a paraphrase on Churchill’s quip on democracy,³ and the interactions, positive and negative, between economic liberalization, on one

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

2. Tomer Broude, *At the End of the Yellow Brick Road: International Economic Law Research in Times of Uncertainty*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin B. Picker, Isabella D. Bunn & Douglas W. Arner eds., 2008); Sabine Frerichs, *The Law of Market Society: A Sociology of International Economic Law and Beyond*, in 23 FINNISH YEARBOOK OF INTERNATIONAL LAW (2012–2013).

3. To paraphrase Churchill on democracy: “Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time.” Winston S. Churchill, Speech in the House of Commons (Nov. 11, 1947), in CHURCHILL SPEAKS 1897–1963: COLLECTED SPEECHES IN PEACE AND WAR (Robert R. James ed., 1998).

hand, and democracy, on the other, are very much at the heart of the current state of affairs, characterized by a ‘backlash’ against the former, and a decline in the normative power of the latter.⁴

Indeed, these interactions between liberalization and democracy are the root of the deep concern that underlies ‘Retooling.’ In distributive terms, both global and domestic, low- and mid-skilled workers in the global North, especially in manufacturing, have well felt the pains of globalization through unemployment and relative wage erosion.⁵ Given that apparently these sectors of society represent the median voter in many developed countries, there is now a robust body of evidence that the rise of manufacturing import-competition (notably, but not exclusively from China) has led to (or at least is positively correlated with) the rise of polarizing, nationalist, populist, isolationist, and protectionist policies and legal agendas, in the United States and Western Europe.⁶ As political economists Colantone and Stanig write, “globalization might not be sustainable in the long run in the absence of appropriate redistribution policies aimed at compensating the so-called ‘losers’ of globalization: those segments of society that bear most of the adjustment costs of international trade.”⁷ Law and development scholars Rolland and Trubek observe that “[s]ystems of social protection in the North are proving inadequate to protect the losers from the shocks of market opening, thus undermining the legitimacy of adherence to the multilateral system as it is currently designed and creating domestic backlash against the system.”⁸ Moreover, as international political economist Helen Milner has put it straightforwardly, “[T]he economic-nationalist bargain offers broad protectionism to ‘compensate’ workers threatened by globalisation. *It substitutes protectionism for welfare policy.*”⁹ There would therefore appear to be broad agreement among many observers regarding the diagnosis of the ailing and faltering of the multilateral trading system. There is less agreement on the prognosis, and general puzzlement about the treatment.

4. Freedom House in its 2019 annual report on political rights and civil liberties around the world, accentuates the decline of democracy over the previous 13 years, rolling back the progression of democracy after the end of the Cold War, and more recently increasing attacks on democracy and political and civil rights in established democracies. *Democracy in Retreat: Freedom in the World 2019*, FREEDOM HOUSE, https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf (last visited Sept. 10, 2019).

5. *Id.* at 2.

6. See David Autor et al., *Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure* (Nat’l Bureau of Econ. Research, Working Paper No. 22637, 2016), <https://www.nber.org/papers/w22637.pdf>; Christian Dippel et al., *Globalization and Its (Dis-)Content: Trade Shocks and Voting Behavior* (Nat’l Bureau of Econ. Research, Working Paper No. 21812, 2015), <https://www.nber.org/papers/w21812.pdf>; Italo Colantone & Piero Stanig, *The Trade Origins of Economic Nationalism: Import Competition and Voting Behavior in Western Europe*, 62 AM. J. POL. SCI. 936 (2018).

7. Colantone & Stanig, *supra* note 6, at 936.

8. Sonia E. Rolland & David M. Trubek, *Embedded Neoliberalism and Its Discontents: The Uncertain Future of Trade and Investment Law*, in *WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION* 87, 89 (Alvaro Santos et al., eds., 2019).

9. Helen V. Milner, *Globalisation, Populism and the Decline of the Welfare State*, 61 SURVIVAL: GLOBAL POLITICS AND STRATEGY 91(2019) (emphasis added).

On this backdrop, Prof. Shaffer argues that the problem and treatment lie at the level of *international* law and institutions, as well as at the level of domestic governance. This is of course a simplification of ‘Retooling,’ which does not seek to absolve governments of their social responsibilities.¹⁰ Prof. Shaffer builds on a critique of the ‘two-step’ model he identifies as the historical practice of international trade law, in which the first step consists of international economic liberalization through legal hand-tying in trade agreements, and the second step consists of dealing with local adjustment costs through domestic measures. The ‘(re-)tool-box’ is a set of reforms to international trade law that might address ‘social inclusion’ as part and parcel of the first step.¹¹

Yet, in my reading, many of Prof. Shaffer’s proposals, e.g., those relating to social security,¹² job ‘flexicurity,’¹³ and trade adjustment policies,¹⁴ are firmly within the ambit of independent national policy-making, and it is uncertain how the introduction of international agreements regarding such measures, even if subscribed to by states, would promote their effective adoption.¹⁵ Not so with his proposals regarding tax competition,¹⁶ with which I wholly agree, given the international collective action problems involved that could be assuaged through international agreements (though not necessarily linked to international trade regulation); and the proposals relating to labor clauses,¹⁷ which are in many respects a continuation of the trade and labor debate that has been a significant feature of international trade law at least since the 1990s, albeit with limited effectiveness as far as either trade flows or labor rights are concerned.¹⁸

Indeed, as this last point (specifically on trade and labor) suggests, Prof. Shaffer may be overstating the claim in his opening statement¹⁹ that international trade law has been ‘oblivious’ to ‘social inclusion.’ As Section I of ‘Retooling’ makes abundantly clear, international trade law has always held as its primary,

10. Shaffer, *supra* note 1, 2–4.

11. *See generally, id.*

12. *Id.* at 23.

13. *Id.* at 23–24.

14. *Id.* at 24–26.

15. *But see* Tim Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985 (2017). With suggestions on international normative requirements and institutional monitoring and enforcement mechanisms linking trade concessions to domestic trade adjustment policies, it is difficult to see why such commitments would be attractive to governments, or how they would make trade adjustment policies more effective.

16. Shaffer, *supra* note 1, at 17–22.

17. *Id.* at 26–29.

18. Labor clauses of some sort appear in a large proportion of trade agreements. *See* Céline Carrère et al., *Labor Clauses in Trade Agreements: Worker Protection or Protectionism?* (Fondation pour les Études et Recherches sur le Développement International, Working Paper No. 200, 2017), http://www.ferdi.fr/sites/www.ferdi.fr/files/publication/fichiers/p200-ferdi-_c.carrere-m.olarreaga-d.raess.pdf (noting 84 percent of trade agreements signed in 2014 included some sort of labor clause). *See also id.* at 15. (concluding that, with some qualifications, “on average the introduction of [labor clauses] does not have a statistically significant impact on bilateral trade.” While this can indicate that labor clauses are not protectionist, it also casts a shadow of doubt on the aspiration that labor clauses will promote social inclusion in the global North and labor rights in the global South.)

19. Shaffer, *supra* note 1, at 1.

indeed explicit goal, the enhancement of global standards of living through international cooperation, and the reduction of welfare-reducing externalities of domestic economic (and other) policies.²⁰ In other words, international trade law as we know it at least since the middle of the previous century, has always and incessantly been concerned not only with aggregate wealth creation but with distribution and redistribution of economic and social resources, often in the framework of ‘embedded liberalism,’²¹ which has enabled welfare-enhancing economic liberalization while retaining domestic policy and regulatory space when states choose to seize it. This has been, and continues to be, a tug-of-war, or rather, a tug-of-peace; the contribution of the multilateral trading system to relative international stability and prosperity over the last decades, inter alia through permitting a broad heterogeneity of domestic economic policies should not be underestimated by reformers or reformists from any corner of the ring.

As I will argue briefly below, to the extent that a lack of ‘social inclusion’ is associated with the ‘dis-embedded’ Neoliberalism of the ‘90s,²² it is not a result of *international* governance structures as such, but rather of an aggregation of domestic policy-choices reflective of non-binding yet pervasive economic dogmas. These have, of course, manifestations in international economic law, which is created and shaped by states, but more importantly, they have permeated Western capitalist domestic policies, regardless of the international economic legal frameworks. To be blunt, and perhaps theoretically conservative yet socially progressive, social policy remains first and foremost the domain of domestic decision—and policy-making—as I believe it is and certainly can be, in fact, and furthermore as it should be, as a normative matter.²³ Despite the crucial importance of international economic agreements and institutions, primarily the

20. *Id.* at 2–4.

21. John Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982), building on KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

22. For one account, see ANDREW T.F. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011); and more recently, contributions in *THE FUTURE OF INTERNATIONAL ECONOMIC INTEGRATION: THE EMBEDDED LIBERALISM COMPROMISE REVISITED* (Gillian Moon and Lisa Toohey eds., 2018).

23. See, e.g., Tomer Broude, *From Seattle to Occupy: The Shifting Focus of Social Protest*, in *LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES* 91 (Daniel Drache & Lesley A. Jacobs eds., 2014).

WTO and other transnational governance structures, so long as we exist in a formally state-centric organized world,²⁴ the social policy ‘buck’ stops with national (as well as sub-national)²⁵ governments, even as international law is not entirely innocent in this respect.

This comment will proceed in three parts, thought-stubs really. First, I will re-narrate Prof. Shaffer’s preoccupation with ‘social inclusion’ as a call for social *equality*, building on and juxtaposing the recent work of legal historian Samuel Moyn²⁶ and others, and explain the opportunities and the difficulties in this re-narration in terms of economic and social human rights, in particular the tensions between equality and sufficiency, in ways that distance ‘social inclusion’ from international trade law as such. Second, I will embrace political historian Pierre Rosanvallon’s concept of a “reformism of fear,”²⁷ and argue that both the backlash against international economic law and the suggestions for retooling it constitute such reformisms of fear, although coming from very different directions. Third, I will specifically engage with one of Prof. Shaffer’s policy proposals, the idea of ‘social antidumping’ mechanisms, arguing that such instruments would not be effective in promoting social equality, whether in the global South or the global North, thus constituting the wrong treatment. The conclusions will call for a strengthening of state institutions and domestic networks for reintegrating the not inconsiderable segments of society that feel marginalized by economic change.

2. A SECOND DIAGNOSTIC OPINION: SOCIAL INCLUSION—OR IS IT SOCIAL IN/EQUALITY?

The attentive reader of this comment may have noticed that I have so far mentioned the term ‘social inclusion’ only in inverted commas. This is because it is difficult to define, let alone operationalize (in a qualitative rather than quantitative sense), what ‘social inclusion’ means, and what it means to whom, and in no place in ‘Retooling’ is social inclusion clearly defined. Indeed, ‘inclusive trade’ has been an occasional and fuzzy catchphrase in recent years, in contexts that ‘Retooling’ refers to peripherally,²⁸ but very much in a somewhat stale labor-market oriented mode. The WTO and International Labour Organization

24. This is not to detract from the roles of non-state actors such as multinational corporations, or the importance of transnational governance and legal orders, but to recall the formal and actual fundamental position of states both as international actors and as sovereigns, a position that has been reinforced in recent international politics. See *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer eds., 2016). For an excellent defense of state-centric theory, see David A. Lake, *The State and International Relations*, in *THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS* 41 (Christian Reus-Smit & Duncan Snidal eds., 2008).

25. Cities can play a crucial role in the design and implementation of economic and social policy on a global scale. See, e.g., SASKIA SASSEN, *CITIES IN A WORLD ECONOMY* (4th ed. 2012). With respect to immigration, see also AVNER DE-SHALIT, *CITIES AND IMMIGRATION: POLITICAL AND MORAL DILEMMAS IN THE NEW ERA OF MIGRATION* (2019).

26. SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018).

27. E.g., Pierre Rosanvallon, *How to Create a Society of Equals: Overcoming Today’s Crisis of Inequality*, *FOREIGN AFF.*, Jan.–Feb. 2016.

28. Shaffer, *supra* note 1, at 2 n.3–4.

(“ILO”), for example, have used this term in the context of skills development for inclusion of workers in the economy and reduction of unemployment, primarily in the face of technological innovation,²⁹ which is a classical adjustment policy not as such inconsistent with trade liberalization (actually quite consistent and complementary to it). ‘Inclusive growth’ is another similar term that has been used at the WTO, but is essentially a well-dressed phrase for removing barriers to trade that are characteristic of developing countries (e.g., trade facilitation inefficiencies),³⁰ better including more national economies in the benefits of trade. In other words, these expressions, in the trade context, essentially refer to promoting the efficient use and allocation of resources through policies that supplement liberalization. This is crucially important in itself, of course, but nothing new here, from a conceptual perspective, even if the nuts-and-bolts are to some extent different from, say, post-1990s adaptive Neoliberalism. I am quite sure that ‘inclusive trade’ and ‘inclusive growth’ in these senses are not exactly the same as the ‘social inclusion’ that Prof. Shaffer has in mind in ‘Retooling,’ which seems to have a broader and perhaps deeper meaning still to be divined.

Interestingly, the World Bank at least informally deems ‘social inclusion’ to be “the process of improving the terms on which individuals and groups take part in society—improving the ability, opportunity, and dignity of those disadvantaged *on the basis of their identity*.”³¹ This refers to the truly socially disadvantaged, mainly within their nationally defined societies and perhaps beyond, who are relatively excluded from the economy or at least discriminated against participation in it on a social basis: “among the most common group identities resulting in exclusion are gender, race, caste, ethnicity, religion, and disability status.”³² These are all important issues—but also not the focus of the ‘social inclusion’ that ‘Retooling’ is directly concerned with.

The Organisation for Economic Co-operation and Development (“OECD”) has also addressed ‘inclusive growth’ in a recent document on “The Framework for Policy Action on Inclusive Growth,” prepared for the OECD Ministerial Council meeting in Paris in May 2018.³³ This policy framework also refers to underprivileged groups and identities, but makes much bolder and broader statements. Its true focus is not ‘social inclusion,’ but much more explicitly economic and social *inequality* (within OECD states), on “groups left behind” by technology and globalization, and the provision of “equal opportunities”: “[b]y locking

29. Marc Bacchetta et al., *Investing in Skills for Inclusive Trade*, WTO & ILO (2017), https://www.wto.org/english/res_e/booksp_e/investinsskills_e.pdf.

30. WTO, *TRADE COSTS AND INCLUSIVE GROWTH* (Robert Teh et al. eds., 2016), https://www.wto.org/english/res_e/booksp_e/trade-costs-incl-growth_full_e.pdf.

31. See *Social Inclusion*, WORLD BANK, <https://www.worldbank.org/en/topic/social-inclusion#2> (last visited July 11, 2019) (emphasis added).

32. WORLD BANK, *INCLUSION MATTERS: THE FOUNDATION FOR SHARED PROSPERITY 5* (2013), http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1265299949041/6766328-1329943729735/8460924-1381272444276/InclusionMatters_AdvanceEdition.pdf

33. ORG. ECON. COOPERATION & DEV., *THE FRAMEWORK FOR POLICY ACTION ON INCLUSIVE GROWTH* (2018), <https://www.oecd.org/mcm/documents/C-MIN-2018-5-EN.pdf>.

in opportunity, privilege and exclusion, inequalities may undermine intergenerational mobility. Disadvantages in places of origin, early education, health and the labour market often compound each other throughout the life cycle.”³⁴

To be sure, the OECD policy framework is also driven by concerns for slippage in public legitimacy and support for liberalized economic governance: “[b]y undermining trust in government and institutions, high levels of inequality may reduce the political space for reform and may feed a backlash against globalisation and openness, as observed in some OECD countries over recent years with the rise of populist movements.”³⁵ It does not beat around the bush, however, with what may risk becoming managerial euphemisms; the problem is none other than social in/equality.³⁶ Neither (just) the inequality associated with identity-based discrimination, on one hand; nor (just) the inequality associated with sectorial, interest-group based losses. This is social and economic inequality between regions in the same country,³⁷ income inequality among and within age groups,³⁸ inequality perceived as fomented by policy capture in the hands of the wealthy and powerful³⁹ and through corruption.⁴⁰ This is, in many senses, the structural inequality that cuts across broad swathes of domestic societies, that economist Thomas Piketty has explained to be the result of the empirical historical propensity of returns on capital to exceed rates of economic growth⁴¹—with strikingly little reliance or reference to the WTO or trade liberalization writ large as one of its causes, either direct or indirect.⁴²

One could wonder therefore, if the diagnosis of ‘social exclusion’ described in the introduction above, and that ‘Retooling’ closely follows, could not rather be re-narrated as a slightly nuanced second-opinion diagnosis of mainly domestic social and economic *equality*, as a policy goal, with, and despite international economic law. This brings in a host of possibilities only generally sketched here below.

First, a focus on domestic inequality can help reclaim the role of state (and again—sub-state) entities in social and economic governance, without necessarily promoting economic nationalism; what matters most is intra-societal equality, and within the confines of international economic law, governments have sufficient leeway to promote it, if they consider it an important policy goal (something not to be taken for granted). Second, and closely related to the first, a focus on domestic social inequality can provide a benchmark for assessing, in

34. *Id.* at 15.

35. *Id.* at 9.

36. The 2018 OECD policy framework mentions the term ‘inequality’ over 200 times.

37. *Id.* at 56.

38. *Id.* at 57.

39. *Id.* at 174–76.

40. *Id.* at 182.

41. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

42. Indeed, of Prof. Shaffer’s proposed treatments, the issue of tax competition and avoidance would be the closest to addressing this structural capital inequality, but as noted above, this need not implicate the multi-lateral trading system.

terms of international trade law, the legitimacy of national trade measures necessary for reducing domestic inequalities,⁴³ as well as the domestic legitimacy of international economic law. Third, in less than a nutshell, this approach can embrace the social equality-oriented capabilities approaches to human development advocated by Amartya Sen and Martha Nussbaum.⁴⁴ These have arguably manifested themselves in the UN Millennium Development Goals (“MDGs”) and Sustainable Development Goals (“SDGs”) projects, that are most effective as policy goals at domestic levels—in both the global North and global South—possibly more so than the elicitation of international legal rules. Indeed, the SDGs include the reduction of inequalities as an explicit goal,⁴⁵ with very little attention to or faith in international legal economic structures (or to law in general). Fourth, re-narrating the diagnosis of the current crisis as one caused by domestic inequalities may contribute to reducing international geo-economic tension; the issue is not China’s relative position vis-à-vis the US, but rather (to take the SDG’s lead on this), the lower four decile’s relative position vis-à-vis the mean in the US, and in China, and in each jurisdiction, respectively.

It is captivating to realize that the kind of soul-searching presented by ‘Re-tooling’ regarding international trade law’s failures in addressing social inclusion (or social equality, as I would prefer, as explained above)⁴⁶ is not unique to international economic law. None other than international human rights law has, and is still, facing a ‘backlash’ over the last few years, as respect for civil and political rights is receding in jurisdictions that were previously thought to have robust domestic human rights systems.⁴⁷ This ‘populist challenge’ to human rights⁴⁸ can be explained in ways similar to the diagnosis of the weakening of support for trade liberalization law. Median voters in developed countries whose livelihood and relative positions in society have declined are quick to identify the sources of their (subjective and objective)⁴⁹ predicament in the legally (and

43. *E.g.*, under Article XX(a) GATT and its GATS Article XIV(1) corollary; Prof. Shaffer makes a similar suggestion, but with a broader scope of ‘policy space.’ See Shaffer, *supra* note 1, at 24–26. The point here is that social equality is a legitimate public morals concern.

44. The discussion of the capabilities approach is vast, in philosophy, economics and law. Important and useful entry-points are AMARTYA SEN, *INEQUALITY REEXAMINED* (1992); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011). See also JONATHAN WOLFF & AVNER DE-SHALIT, *DISADVANTAGE* (2013). For applications to international global regimes, see GEORGE F. DEMARTINO, *GLOBAL ECONOMY, GLOBAL JUSTICE: THEORETICAL OBJECTIONS AND POLICY ALTERNATIVES TO NEOLIBERALISM* (2000).

45. *E.g.*, *Goal 10: Reduce Inequality Within and Among Countries*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/inequality/> (last visited Sept. 12, 2019) (“By 2030, progressively achieve and sustain income growth of the bottom 40 percent of the population at a rate higher than the national average”).

46. See *supra* Section II.

47. See, *e.g.*, Andrew Gilmour, UN Assistant Secretary-General for Human Rights, *The Global Backlash Against Human Rights* (Mar. 12–13, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23202&LangID=E>.

48. Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1 (2017) (responses by Ron Duda and the late Vijay K. Nadaraj).

49. Even as the status of certain sectors of Western societies (*e.g.*, working class males) has declined, no less if not more important is their subjective sense of ‘status anxiety’, which is associated with support populist

internationally) imposed protection and promotion of the rights of social groups whose position is underprivileged to begin with on the basis of identity, such as race, ethnicity, gender and disability, and the most threatening of all—immigrants, despite their contribution to society. Samuel Moyn has written a persuasive if not uncontroversial indictment of human rights (both civil and political and economic and social, though more the latter) as having focused so far on providing sufficiency—absolute minimum standards—while neglecting social equality.⁵⁰ Moyn is critical of the human rights movement’s coexistence with neoliberal policies.⁵¹ More importantly, however, it seems that human rights law also needs to be ‘retooled’ to better engage with inequality.

Indeed, it could be that the diagnosis of current afflictions is shared by both international economic law and human rights law—the neglect of domestic social in/equality. To my mind, this points more to deficiencies in national political systems, and to failures of democracy, than to the international level (setting aside national capitulations of convenience to the latter).⁵² As a second diagnostic opinion, the problems lie mainly if not exclusively at the second step—which could indeed be flipped as the first step in the two-step model that Prof. Shaffer critiques: international trade law as a reflection of domestic preferences regarding social in/equality.⁵³

3. PROGNOSIS? TWO INTERNATIONAL TRADE REFORMISMS OF FEAR

To be clear, I wholeheartedly support Prof. Shaffer’s call in ‘Retooling’s’ Introduction, to “directly and indirectly . . . enable domestic policy choices over social policy. Otherwise the multilateral system risks collapse, with dire results.”⁵⁴ I concur, and the prognosis is indeed bleak at this time. I agree, that is, but for the word ‘enable’; the international interacts with the domestic, but there is much to be done in the latter sphere without relying or expecting international enabling. I firmly believe that international economic law, in both areas of trade and investment, leaves open to governments a decidedly broad range of policy choices relating to social policies in general, and to the pursuit of domestic social equality in particular. The breadth of this range may change over time and space, and governments are cognizant of the need to manage their constraints.⁵⁵ I am not aware, however, of any claim that healthcare in the US is problematic and

parties. See Noam Gidron & Peter A. Hall, *The Politics of Social Status: Economic and Cultural Roots of the Populist Right*, 68 BRIT. J. SOC. 57 (2017).

50. Moyn, *supra* note 26, at 5 (“The distinction between sufficiency and equality allows us to see how profoundly the age of human rights, while a good one for some of the worst off, has mainly been a golden age for the rich.”).

51. *Id.* at 192 (“[H]uman rights did not abet neoliberalism [but] could easily accompany it.”).

52. *Id.* at 218 (“Like neoliberalism, human rights movements depend on the state.”).

53. In other words, applying the still valid concept of the two-level game to national preferences for domestic social equality. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

54. Shaffer, *supra* note 1, at 4.

55. See Alexander Thompson, Tomer Broude & Yoram Z. Haftel, *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty and Change in Treaty Design*, INT’L ORG. (forthcoming 2019).

inegalitarian (or that Obamacare is weakening) because of *international* legal constraints; the causes are more clearly domestic US political economy and raw politics.⁵⁶ The US education system is falling behind internationally despite high spending,⁵⁷ for reasons unfettered by *international* trade law.⁵⁸ No *external* legalities forced pre-Brexit-icidal UK to weaken its trade unions and to erode social protection (or inclusion); as historian Sandrine Kott states critically, “[s]ince the 1980s, British politicians have increasingly dismantled the net of protection and redistribution for their citizens. At the same time, within the [EU Council] they have opposed most of the regulations. . . defining the social sphere and social welfare.”⁵⁹ These are but three superficial examples with respect to the US and the UK, the frontlines of the (primarily Western) anxieties at the basis of this discussion, to bring home the point that despite its prevalence, *international* economic law, as a system of governance, is not the root cause of domestic inequality.⁶⁰

The malignant symptoms in the multilateral trading system cannot be denied, however, despite some beacons of continuity and hope,⁶¹ and so we must seek prognoses—how will the condition develop? The most desirable yet least likely prognosis is that irresponsible actors will come to their senses so that the system’s edifice will remain as it was, perhaps with some cracks and some scaffolding.⁶² At the other end of the spectrum, one can consider total systems’ failure, and hope for a new multilateral trading system rising from the ashes.⁶³ One can more pragmatically consider the technicalities necessary for making the system continue functioning, if differently and on life support,⁶⁴ buying time for an inclusive process of reform.

56. For analysis see Isaac D. Buck, *Affording Obamacare*, 71 HASTINGS L.J. (forthcoming 2020).

57. See OECD, EDUCATION AT A GLANCE 2017: OECD INDICATORS (2017), https://www.oecd-ilibrary.org/education/education-at-a-glance-2017_eag-2017-en.

58. April D. Nauman, *Could It Ever Happen Here? Reflections on Finnish Education and Culture*, 10 I.E.: INQUIRY IN EDUCATION (2018).

59. Sandrine Kott, *Social Europe, Democracy and Brexit*, 28 CONTEMPORARY EUR. HIST. 46 (2019).

60. See *supra* text accompanying notes 56–59.

61. Such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership gradually entering into force since 2018, reflecting the resolve of 11 trans-Pacific trading partners to adopt regulatory liberalization measures despite President Trump’s rejection of the Trans-Pacific Partnership. See Matthew Goodman, *From TPP to CPTPP*, CTR. FOR STRATEGIC & INT’L STUDIES (Mar. 8, 2018), <https://www.csis.org/analysis/tpp-cptpp>; see also European Commission Press Release, EU and Mercosur Reach Agreement on Trade (June 28, 2019), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2039> (announcing the very recent EU-Mercosur trade pact).

62. We see now some elements of this regained international responsibility in, inter alia, the EU-Canada “interim appeal arbitration agreement” regarding the treatment of WTO Panel reports in the shadow of a defunct Appellate Body mechanism in the WTO. European Commission Press Release, Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement (July 25, 2019), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2053>.

63. Weihuan Zhou, *In Defense of the WTO: Why Do We Need a Multilateral Trading System?* (Univ. of New South Wales Law Research Law Paper No. 19-44, June 30, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3412002; Henry Gao & Weihuan Zhou, *The End of the WTO and the Last Case?*, EAST ASIA F. (July 10, 2019), <https://www.eastasiaforum.org/2019/07/10/the-end-of-the-wto-and-the-last-case/>.

64. Joost Pauwelyn, WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make? (July 10, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415964.

At this stage, a modest, unoptimistic (though not dystopian) prognosis is that the most concerned actors (*double entendre* intended), such as the US and other OECD economic powers, will adopt international reformist and often obstructionist steps (indeed, to some extent already have) that do not, and cannot, address the central issue of their own domestic inequalities. These reforms are and will be driven by fear of disruption of a fleeting world economic order, not by a genuine concern with domestic healing. As such, they are bound to fail, unless domestic steps are taken to deal with social inequalities. These measures easily conform to what historian Pierre Rosanvallon has depicted in not entirely dissimilar historical context as a “reformism of fear,”⁶⁵ and that I would here refer to as “trade reformisms of fear,” that is, the espousal of reformism that is first and foremost compelled by distress over the inevitable loss of domestic and international hegemony. There are two such trade reformisms in play.

The first trade reformism of fear is the Trumpian ‘trade war’ approach, embodying ‘backlash,’ and responding to the justifiable fear of the loss of American hegemony to China as a geopolitical power, that more or less plays by the rules and indeed can be seen now as a power that upholds them.⁶⁶ This is a trade reformism that focuses on the international regulation of trade (arguably, utilizing the first, international ‘step’), using and abusing traditional trade tools such as antidumping duties, safeguards, quantitative restrictions and questionable ‘security’ exceptions to appease domestic political sectorial interests, without any clear contribution to social inclusion or equality. It is entirely unclear how this kind of policy enables domestic steps towards social equality.

Indeed, international political economists have recently argued that the Trumpian strategy of breaking international trade rules will not shift power back to national governments.⁶⁷ Rather, “[b]y stepping away from global governance, states weaken their own bargaining power vis-à-vis powerful domestic groups and curtail the influence of civil society groups. Paradoxically, the Trump administration’s step back from global governance would leave power in the hands of firms that predominantly benefit from the status quo.”⁶⁸ This is perhaps the most poignant demonstration of the futility and misguidedness of this international trade reformism. It will exacerbate domestic pains and contribute naught to the healing of the root causes of the current economic dislocation, not least to adjustment to a new geo-economic and geopolitical reality.

The second trade reformism of fear is the quest for modifications to the international trade regime that consider social inclusion or social in/equality at the international level—very much the approach embodied in ‘Retooling.’

65. PIERRE ROSANVALLON, *THE SOCIETY OF EQUALS* 174 (Arthur Goldhammer trans., 2013) (referring to Bismarck’s social welfare plans); see also Moyn, *supra* note 26, at 219.

66. For analysis that illuminates China’s strategic efforts to succeed in the multilateral trading system, see Gregory Shaffer & Henry Gao, *China’s Rise: How it took on the US at the WTO*, 2018 UNIV. ILL. L. REV. 115.

67. See Leslie Johns, Krzysztof J. Pelc & Rachel L. Wellhausen, *How a Retreat from Global Economic Governance May Empower Business Interests*, 81 J. POL. 731 (2019).

68. *Id.*

Though very different from the first approach, it shares the sense that the international rules are skewed and wrong, that if only they could be changed, in this case re-oriented towards ‘social inclusion’ (or equality), all would be well.

As noted already above, I would subscribe to several of the ideas described in ‘Retooling,’ but I am afraid that they would not solve the underlying problems, which are at heart the inability and unwillingness of governments to address *domestic* social inequality, regardless of the international trade law environment. The path towards international economic law legitimation runs through national policy-making. In the next section I will briefly address one of Prof. Shaffer’s international ‘Retooling’ ideas, that I disagree with, in this context.

4. THE WRONG TREATMENT: WOULD ‘SOCIAL ANTIDUMPING’ PROMOTE SOCIAL EQUALITY?

It is noted above that most of Prof. Shaffer’s ideas in ‘Retooling’ can (and indeed should) be implemented at the domestic level rather than the international one. Here I will briefly dwell on his most international trade law-oriented proposal⁶⁹ regarding ‘protection against social dumping.’⁷⁰ The suggestion, as I understand it, is to seize and elaborate somehow the existing mechanisms of standard antidumping, with all their flaws, to address differences in labor rights between (most prominently, but not exclusively), China and the United States. In other words, the proposal buys into the narrative whereby the losers from globalization in the West have been losing from ‘unfair’ competition through lower labor standards in developing countries and emerging economies. More importantly for this critique, the proposal suggests that the development of international legal action through ‘social antidumping’ could somehow alleviate this problem by economic equalization. Indeed, ‘Retooling’ is probably the most coherent and detailed attempt to develop such an approach.

Most simplified, under WTO law, antidumping (duties) are contingent import measures regarding price-discrimination between national markets. More explicitly, the ‘sin’ of dumping exists when the adjusted sales price of a widget in its country of production (the ‘normal value’) is higher than the price of the same good in an export market (the ‘export price’).⁷¹ Antidumping duties, however calculated, will provide additional protection for domestic production. There is no question that the legality of such antidumping measures and practices has constituted a significant bone of contention in the WTO, perhaps the most significant as far as US-China relations are concerned.⁷² I will not discuss the

69. I set aside the proposal to address tax avoidance and evasion, which is indeed of an international nature, but not clearly linked to international trade law.

70. Shaffer, *supra* note 1, at 29.

71. General Agreement on Tariffs and Trade, art. VI, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

72. See Weihuan Zhou & Henry Gao, ‘Overreaching’ or ‘Overreacting’? Reflections on the Judicial Function and Approaches of WTO Appellate Body, 53 J. WORLD TRADE (2019).

technicalities and politics of antidumping here, but only the idea of ‘social antidumping’ and its potential contribution to social equality at the borderline between the first and second ‘steps’—the international and the domestic.

First, as Prof. Shaffer and virtually all commentators well acknowledge, antidumping law in international trade is notoriously susceptible to political capture and raw protectionism.⁷³ In its innovative proposal, ‘Retooling’ is acutely aware of this risk, and suggests several elements intended to constrain it (such as an injury requirement, that closely echoes standard antidumping law).⁷⁴ Nevertheless, it is unclear that a labor-rights based antidumping regime would be different than the price-based original. This is especially the case in the absence of a reliable quantitative benchmark for labor rights differentials, the potential injury and above all a veritable absence of a standard for causality between labor rights violations and economic advantages or disadvantages. In other words, with all due respect to technical adjustments *mutatis mutandis*, labor rights-based ‘social antidumping’ risks becoming carte blanche for protectionism, that would surely harm some workers (who are, after all, also consumers) and would not do much for social inclusion, let alone equality.

Second, it is far from self-evident that the US, as the major economy that ‘Retooling’ is concerned with, would not itself be at the receiving end of social antidumping measures, in ways that could exacerbate domestic political pressures and international divisions. For example, in its most recent report (2019), the International Trade Union Confederation (“ITUC”), for what it is worth, ranked the US as a state complicit with ‘systematic violations of rights’ regarding labor.⁷⁵ The US is not a party to the International Covenant on Economic, Social and Cultural Rights.⁷⁶ Indeed, labor rights are not respected in the US in a variety of areas, not least in services, a crucially significant field that ‘social antidumping,’ entirely focused on trade in goods, wouldn’t even scratch—recent allegations of abuse by Amazon are a case in point.⁷⁷ And again—it is not clear to me how such measures would promote domestic social equality. Would US manufacturers faced with social antidumping measures in export markets raise their social welfare and labor standards at home in response?

Third, as I have discussed in detail elsewhere, antidumping measures, however elaborately redesigned, would be mistaken approaches to social concerns, as by practical definition they rely on accounting calculations rather than public

73. Shaffer, *supra* note 1, at 18 n.112.

74. *Id.* at 34.

75. See INT’L TRADE UNION CONFEDERATION, *2019 Global Rights Index: The World’s Worst Countries for Workers*, <https://www.ituc-csi.org/IMG/pdf/2019-06-ituc-global-rights-index-2019-report-en-2.pdf>.

76. Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future*, 24 *FORDHAM INT’L L.J.* 607, 633 (2000) (Prof. Shaffer has noted in the past that the United States “has among the least protective labor and employment laws of any developed country”).

77. See, e.g., *Amazon Workers Strike Over Working Conditions & Collective Bargaining Rights Urging Customers to Boycott Prime Day Sales*, BUS. & HUMAN RIGHTS RES. CTR., <https://www.business-human-rights.org/en/amazon-workers-strike-over-working-conditions-collective-bargaining-rights-urging-customers-to-boycott-prime-day-sales> (last visited Sept. 8, 2019).

policy.⁷⁸ Exceptions⁷⁹ and carve-outs as well as labor rights-based border tax adjustments⁸⁰ are of course also malleable, but would be more transparent and explicit in their policy-orientation than social antidumping measures.

In short, if social and economic inequality is a major part of the problem, it is difficult to see how ‘social antidumping’ could be part of the solution. Here too, the issues that undermine international economic law are domestic, not international.

5. CONCLUSION: IN TRADE LAW, TOO, THINK GLOBALLY, ACT LOCALLY

‘Retooling’ is full to the brim with ideas on how to redefine international trade law in ways that could reestablish its social legitimacy (if not establish it in ways that were absent). But more clearly, it presents us with cautionary tales on normative and policy limits. International trade law has provided us with workable heuristics for over fifty years: gradual, embedded liberalism in trade, mostly in trade in goods, perhaps less so in trade in services, whose economic role has grown tremendously and continues to do so. But is international law now at the level of resolve and resolution that can provide the international trade policies advocated in ‘Retooling’ with the support that is needed in the face of populism and economic nationalism? This is doubtful; indeed, the concern is that in the current climate some of the ideas proposed in ‘Retooling,’ such as social anti-dumping, might do the opposite, and support such economic nationalism without providing benefits to either the reduction of domestic inequality or to the legitimacy of the multilateral trading system.

Much more important at this time, as in other areas of legality and freedoms, is to act locally, to promote social equality and solidarity at the domestic and national levels, in order to enable them internationally. International trade law has, as a normative constraint, not prevented or precluded domestic equality-oriented policies. These are ultimately the role of national governance. To be sure, ‘Retooling’ admirably seeks out ways to utilize international trade law in these directions. It is, however, ultimately up to state institutions and domestic policy networks—in conjunction with the transnational—to reintegrate the not inconsiderable segments of society that feel marginalized by economic change.

78. See Tomer Broude, *A Crafty Madness Kept Aloof: Anti-Dumping as Faulted Global Governance*, in *GREY ZONES IN INTERNATIONAL ECONOMIC LAW AND GLOBAL GOVERNANCE* (Daniel Drache & Lesley A. Jacobs eds., 2019).

79. GATT, *supra* note 71, at art. XX(a).

80. See Micah Globerson, *Using Border Trade Adjustments to Address Labor Rights Concerns under the WTO*, 3 *LAB. & EMP. L.F.* 48 (2013).