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What is International Trade Law for?

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University of Georgia School of Law

Research Paper Series

Paper No. 2018-44

Dean Rusk International Law Center

Research Paper Series

Paper No. 2018-08



Repository Citation

Harlan G. Cohen, *What is International Trade Law for?*, 113 Am. J. Int'l L. 326 (2019),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/1283

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ISSN: 1552-6275
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New York University School of Law
New York, NY 10012
U.S.A.



Version of 6 December 2018

Cite as:
IILJ Working Paper 2018/6
(MegaReg Series)

WHAT IS INTERNATIONAL TRADE LAW FOR?

Harlan Grant Cohen*

Abstract:

Events of the past few years, including the Brexit vote in the United Kingdom and the demise of the Trans-Pacific Partnership and election of Donald Trump as President in the United States, have reignited debates about the global trade regime. In particular, many have begun to question whether the trade regime has done enough for those who feel left behind by globalization. While some have held fast to the view that redistribution of trade's gains is primarily a matter of domestic policy, others have suggested tweaks to the international trade agreements aimed at better spreading the wealth.

But what if the problem isn't policy, but principle? The major international economic institutions of the last few decades have been based on and around a normative principle of "growing the pie" and "raising all boats." Most policy tweaks that have been suggested assume this neoliberal principle, even while trying to soften its harder edges. But it's not clear that those voting against trade agreements agree.

This essay reconsiders the normative basis of international economic law, searching for a new narrative that can reopen and reinvigorate trade politics while justifying and directing the regime going forward. Surveying various normative narratives put forward in the past, it asks what an embedded liberalism might look like in an era of complex transnational supply chains. It suggests that an international economic order built around a state's obligations to provide for the welfare of its people might need to reorient around other policy issues like tax and regulations, shifting trade from the driver to passenger in international negotiations.

* Gabriel M. Wilner/UGA Foundation Professor in International Law, University of Georgia School of Law. Thank you to Gregory Shaffer, M.J. Durkee, Tim Meyer, Reuven Avi-Yonah, Nicolas Lamp, Mona Pinchis-Paulsen, Joshua Barkan, Julian Arato, Ben Heath, Matjaz Nahtigal, Thomas Streinz, and participants in the UC Irvine Reconceiving Trade Agreements for Social Inclusion Workshop, the ESIL International Economic Law Workshop, and the Brooklyn Law International Business Law Roundtable for their insightful thoughts and comments. Thanks also to Lauren Brown, Steven Zavodnick, and Dana Lohrberg for their vital research assistance.

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I. INTRODUCTION

Events of the past few years, including the Brexit vote in the United Kingdom¹ and the demise of the Trans-Pacific Partnership (TPP)² and election of Donald Trump as President in the United States,³ have reignited debates about the global trade regime. With anti-trade populism seemingly on the rise in Europe and the United States, many have begun to question whether the trade regime has done enough for those who feel left behind by globalization.⁴ While some have held fast to the view that redistribution of trade's gains is primarily a matter of domestic policy,⁵ others have suggested tweaks to international trade agreements aimed at better spreading the wealth.⁶

But what if the problem isn't policy, but principle? The major international economic institutions of the last few decades have been based on and around a normative principle of "growing the pie" and "raising all boats."⁷ Free-trade will make every state better off, we explain and are told. Most policy tweaks that have been suggested assume this neoliberal principle, even while trying to soften its harder edges.⁸ But it's not clear that those in the United States and Europe voting against trade agreements agree.

This essay reconsiders the normative narrative underlying international trade law. The prevailing narrative of "growing the pie" and "raising all boats" plays a key role in international trade law. It explains why free trade should be pursued and justifies the existing multilateral trading system. It directs interpretations of existing trade rules and guides negotiations towards deeper liberalization. It justifies why

¹ Anushka Asthana, Ben Quinn, & Rowena Mason, *UK Votes to Leave EU After Dramatic Night Divides Nation*, THE GUARDIAN (Jun 24, 2016).

² See Adam Davidson, *What the Death of the T.P.P. Means for America*, THE NEW YORKER (Jan. 23, 2017), <https://www.newyorker.com/business/adam-davidson/what-the-death-of-the-t-p-p-means-for-america>. Although the United States withdrew its signature from the TPP, the other 11 states were able to reach a new agreement, re-titled the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). See CTR. FOR STRATEGIC & INT'L STUDIES, *From TPP to CPTPP* (Mar. 8, 2018), <https://www.csis.org/analysis/tpp-cptpp>.

³ Matt Flegenheimer & Michael Barbaro, *Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016).

⁴ See, e.g., Dani Rodrik, *Populism and the Economics of Globalization*, J. OF INT'L BUS. POL'Y 12, 13-16 (June 2018) (summarizing the negative effects of trade liberalization on advanced economies' labor markets) [hereinafter Rodrik, *Populism*]; Betsy Cooper et al., *How Immigration and Concerns About Cultural Changes are Shaping the 2016 Election*, PRRI /BROOKINGS INST. 2016 IMMIGRATION SURVEY (Jun. 26, 2016), <https://www.prri.org/research/prri-brookings-poll-immigration-economy-trade-terrorism-presidential-race/> ("A majority (52%) of the public says that free trade agreements with other countries are mostly harmful because they send U.S. jobs overseas and drive down wages.").

⁵ See, e.g., generally, International Monetary Fund, World Bank, & World Trade Organization, *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment*, Apr 10, 2017, https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf.

⁶ See e.g., Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 ILL. L. REV. 1 (2019); Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 1014-20 (2017) (proposing that free trade agreements include an "Economic Development Obligations" chapter to soften the domestic losses from trade liberalization) [hereinafter Meyer, *Saving the Political Consensus*].

⁷ These two formulations are actually a bit different in that the first makes no assumption about how benefits will be distributed, but the second suggests that everyone benefits. In that sense, the latter is more pernicious as it hides the very real distributional questions inherent in liberalizing trade.

⁸ See, e.g., David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, 8 ANNUAL REV. ECON. 205, 235 (2016) (arguing that in order to realize the "ultimate and sizeable net gain" from trade, new ideas must be set forth to hasten "the speed of regional labor-market adjustment.").

some benefit and others may not. Most of all, the prevailing neoliberal narrative structures trade politics, dictating which topics are debated, by which actors, in which fora, and according to what logics. As will be explained, it separates trade policy from questions of fair distribution and domestic social welfare.

But there is nothing inherent about the prevailing normative narrative. Over time, other stories have been told about trade's purpose, producing different policies and encouraging different politics. And with many voters questioning the normative force of simply growing the pie, it is fair to ask whether a different narrative, with a different normative vision might better balance the benefits of trade with the demands of trade law's discontents.

After describing the current neoliberal narrative, the role it plays in structuring the trade regime, and the various critiques it faces, this essay continues on to survey various competing normative narratives put forward in the present and past. Considering demands for a trade law more attuned to questions of distribution, more sensitive to other regulatory concerns, and more responsive to the broader public, the essay reconsiders the narratives of embedded liberalism and economic rights that emerged following World War II and found form in the original Bretton Woods Institutions and human rights treaties, respectively. Distilling from those institutions a narrative structured around a state's obligations to provide for the welfare of its people, the essay imagines a restructured politics and policy of trade that would tie trade policy to domestic policy goals, rather than the other way around. It would re-embed trade policy within domestic political decisions about labor policy, redistribution, consumer protection, the digital economy, and the environment, integrating trade into broader policy debates and yoking trade's benefits to those policy ends.

In its final part, this essay imagines what international negotiations based on such a narrative – negotiations towards what might be called “cooperative capability promotion” – might look like. Among others things, it suggests that in a world of complex transnational supply chains, an international economic order built around a state's obligations to provide for the welfare of its people might need to reorient around other policy issues like tax and regulations, shifting trade from the driver to passenger in international negotiations.⁹ It might also need to focus as much on trading policy flexibilities as on deeper liberalization.¹⁰

Many changes to trade policy are currently on the table, some economically and/or politically sound, some not. What's required is a normative narrative capable of directing and justifying choices between and among them. That's where this essay hopes to intervene.

⁹ See, e.g., Bernard Hoekman and Douglas Nelson, 21st Century Trade Agreements and the Owl of Minerva, European University Institute Robert Schuman Centre for Advanced Studies Global Governance Programme Working Paper RSCAS 2018/04 at 12.

¹⁰ See DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 163-74 (2011).

II. THE MIRAGE OF CONSENSUS

For many who had become complacent in a narrative of ever-increasing trade liberalization through broader agreements and deeper integration, the apparent victory of trade liberalization's opponents came as something of surprise. While the victories of Trump and the Brexit movement were shocking, the death of American support for the TPP was even more telling. In less than a year, the TPP had gone from a key Obama administration objective barreling towards ratification,¹¹ to a political outcast, disavowed by the presidential candidates of both major parties.¹² Few politicians seemed willing to argue for it;¹³ too few Americans seemed interested in traditional justifications for liberalizing trade, like growing the economic pie to everyone's advantage.¹⁴ Somewhat bizarrely, it was left to an imperfect messenger, the Prime Minister of Singapore, to make the traditional arguments about the welfare gains to Americans of lower priced products.¹⁵ The demise of the TPP thus demonstrated the depth to which support for liberalized trade had cratered. The arguments for liberalized trade simply weren't resonating.

And why would they? Certainly there were sectors that were set to benefit, like dairy farmers and finance,¹⁶ but for many, the promised economic benefits were no more than an idea, difficult to translate into pocketbook benefits or increased opportunities.¹⁷ And for those who had already seen jobs and opportunities disappear in the wake of prior trade deals,¹⁸ those abstract ideas were more false promises.

¹¹ See Shawn Donnan, *Negotiators Strike Pacific Trade Deal*, CNBC (Oct. 5, 2015), <https://www.cnbc.com/2015/10/05/tpp-negotiators-strike-pacific-trade-deal.html>; Paul Lewis, *Barack Obama Given "Fast-Track" Authority Over Trade Deal Negotiations*, THE GUARDIAN (Jun. 24, 2015).

¹² See Read Donald Trump's Speech on Trade, TIME (Jun. 28, 2016), <http://time.com/4386335/donald-trump-trade-speech-transcript/> ("The Trans-Pacific Partnership is the greatest danger yet. The TPP, as it is known, would be the death blow for American manufacturing," quoting Donald Trump, Speech on Trade, Monessen, Penn.); Russell Berman, *Hillary Clinton Abandons Obama on Trade*, THE ATLANTIC (Oct. 7, 2015), <https://www.theatlantic.com/politics/archive/2015/10/hillary-clinton-abandons-obama-on-trade/409546/> ("Hillary Clinton is now officially against President Obama's enormous trade agreement with 11 Pacific Rim nations. . .").

¹³ See Daniel W. Drezner, *Will Congress approve the Trans-Pacific Partnership?*, WASH. POST, October 6, 2015, https://www.washingtonpost.com/posteverything/wp/2015/10/06/will-congress-approve-the-trans-pacific-partnership/?utm_term=.c18d5881b3fc ("I tried to find a positive congressional statement about TPP. It wasn't easy."); Jackie Calmes, *T.P.P. Faces Rough Road in Congress*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/business/international/pacific-trade-pact-faces-rough-road-in-congress.html>.

¹⁴ See PEW RESEARCH CTR., CLINTON, TRUMP SUPPORTERS HAVE STARKLY DIFFERENT VIEWS OF A CHANGING NATION 27-30 (Aug. 2016) (summarizing survey respondents' views of TPP and free trade agreements generally).

¹⁵ Remarks by President Obama and Prime Minister Lee of Singapore in Joint Press Conference, The White House, Office of the Press Secretary, August 02, 2016, available at <https://obamawhitehouse.archives.gov/the-press-office/2016/08/02/remarks-president-obama-and-prime-minister-lee-singapore-joint-press> ("Can I say something about the TPP?...").

¹⁶ Matthew Yglesias, *The Real Reason Wall Street Loves the Trans-Pacific Partnership*, VOX (Nov. 11, 2015), <https://www.vox.com/2015/11/11/9706360/tpp-financial-services>; Rajeshni Naidu-Ghelani, *TPP Trade Deal: Who are the Winners and Losers?* BBC NEWS (Oct. 6, 2015), <https://www.bbc.com/news/business-34451423>.

¹⁷ See Nathaniel Popper, *How Much Do We Really Know About Global Trade's Impacts?* N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/11/magazine/how-much-do-we-really-know-about-global-trades-impacts.html> ("For all the talk about winners and losers in the global trading game, an actual accounting of what's happening on the winning side overseas is surprisingly elusive.").

¹⁸ See Autor, Dorn & Hanson, *supra* note 8 at 228 ("Estimates of the net impact of aggregate demand and reallocation effects imply that import growth from China between 1999 and 2011 led to an employment

Previous promises that they would share in the benefits of trade liberalization had not been fulfilled; why should they believe that these new ones would?

In some sense this shouldn't have been surprising. Since the massive protests surrounding the World Trade Organization (WTO) Ministerial Conference of 1999, the "Battle of Seattle,"¹⁹ it had become clear that a wide range of groups—organized labor,²⁰ environmentalists,²¹ etc.—are skeptical of the neoliberal consensus. The neoliberal argument that liberalization raises all boats and grows the global pie falls short in their view.²² The neoliberal agenda is blind to the other interests that were being trampled in the rush towards faster and deeper globalization.

For the past decade and half, the response to these concerns has been "policy space." Trade liberalization's proponents would sand down the harshest edges of trade liberalization, by guaranteeing that, at the very least, trade did not stand in the way of legitimate efforts to achieve those other goals.²³ Policy space took a number of forms. It might mean a loosening of WTO rules to allow space for environmental policies that restricted trade, as in the WTO Appellate Body's decision in *Shrimp-Turtle*.²⁴ It might alternatively take the form of various additional chapters or side agreements to trade agreements on development, labor, or the environment.²⁵

This new, modified consensus, a sort-of neo-liberalism-lite, came though with a couple of serious caveats. First, efforts to achieve those other goals had to be neutral with regard to trade. Trade could be affected by those efforts, but it couldn't be the target of those efforts. Protectionism was unacceptable. This

reduction of 2.4 million workers.").

¹⁹ See John Burgess & Steven Pearlstein, *Protests Delay WTO Opening*, WASH. POST (Dec. 1, 1999), <http://www.washingtonpost.com/wp-srv/WPcap/1999-12/01/089r-120199-idx.html> ("A guerrilla army of anti-trade protesters took control of downtown Seattle today, forcing the delay of the opening of a global meeting of the World Trade Organization.").

²⁰ See, e.g., AFL-CIO, TRADE, <https://aflcio.org/issues/trade> (last visited Aug. 7, 2018) ("International trade is a vital part of the U.S. economy. But, too often, powerful corporate interests have negotiated trade deals in secret; stacking the deck in their favor to increase profits for the biggest and most unscrupulous corporations at the expense of working people.").

²¹ See, e.g., SIERRA CLUB, RESPONSIBLE TRADE, <https://www.sierraclub.org/trade> (last visited Aug. 7, 2018) ("For more than two decades, the Sierra Club's Responsible Trade Program has shed light on the threats that the status quo corporate trade model poses to people and our planet. Most recently, we worked with progressive allies to help defeat the toxic Trans-Pacific Partnership.").

²² See AFL-CIO, JOINT STATEMENT BY THE AFL-CIO AND ETUC ON FAIR TRADE PRACTICES, June 15, 2018, <https://aflcio.org/2018/6/15/afl-cio-and-etuc-support-fair-trade-practices> (criticizing the present global trade framework as "increasingly captured by the interests of global corporations and the failed ideology of neoliberalism.").

²³ See Rodrik, *How to Save Globalization from its Cheerleaders*, John F. Kennedy School of Government Faculty Working Paper Series at *20, available at <https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/how-to-save-globalization-from-cheerleaders.pdf> (asking "how do we create the policy space for nations to handle the problems that openness creates.") (internal quotations omitted).

²⁴ Appellate Body Report, *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Appellate Body Report, *United States--Import Prohibition of Certain Shrimp and Shrimp Products* (Recourse to Article 21.5 of the DSU by Malaysia), paras. 135-38, 153-54, WT/DS58/AB/RW (Oct. 22, 2001).

²⁵ See Meyer, *Saving the Political Consensus*, *supra* note 6, at 1002-08; Kathleen Claussen, *Reimagining Trade+ Enforcement Institutions* (unpublished paper on file with author).

is most visible in Appellate Body jurisprudence on the scope of exceptions to GATT rules. Second, by emphasizing policy space, the new consensus left it to others to enact policies that would forward other goals, including the promised redistribution of trade's gains.

The result of this neo-liberalism-lite consensus has, at best, been a sort of half-hearted pluralism, at worst, a nonchalant disregard. What has become clear though is that there is no guarantee that that domestic redistribution will happen.²⁶ Structural features of current politics, including its treatment of international trade as a topic separate from domestic economic welfare, play a key role.²⁷ This has led to a variety of proposals to shake-up those political structures to put those domestic concerns on more even footing with the advocates of expanding trade.²⁸

Nonetheless, these suggestions always fall back on the existing logic. The argument is about “saving trade”—thus accepting and forwarding the neoliberal normative consensus that growing the pie is a global and local good, one worth pursuing, the goal of international economic policy.

But for those who disagree, or fall outside this supposed consensus, these efforts will always fall short. What's needed is a new consensus, a different normative justification for international trade law that can better capture the demands of those who have felt ignored and left behind.

III. TRADE LAW'S NORMATIVE NARRATIVE

What does it mean to talk about trade law or international economic law's “normative narrative”? Policies and legal regimes depend on normative narratives.²⁹ Shared narratives help justify the legal regime to those who live with and under it, thus embedding the rules within a particular society and its politics.³⁰ They provide principles that guide practitioners in their interpretation of that regime's rules, suggesting answers that better fit the goals or values that rules are meant to achieve.³¹ As such, shared normative narratives also support the coherence of the rules in a particular regime,³² stringing them together as part of a logical whole.³³ By providing coherence and distinguishing rule from arbitrary exercises of sovereign authority, these narratives also contribute to the perceived legitimacy of the regime.³⁴

²⁶ See Stefanie Walter, *Globalization and the Welfare State: Testing the Microfoundations of the Compensation Hypothesis*, 54 INT'L STUDIES QUARTERLY 403, 404 (2010) (summarizing economics and political science research to conclude that “[t]he jury is still out” on whether “higher [global economic] integration coincides with bigger welfare states. . .”).

²⁷ See *infra* notes 50-63 and accompanying text.

²⁸ See Timothy Meyer, *Misaligned Lawmaking in International Trade*, 38-41 (Feb. 2018) (on file with the author) [hereinafter Meyer, *Misaligned Lawmaking*] (setting forth three proposals to better “align trade liberalization with the redistribution that trade liberalization makes necessary.”).

²⁹ See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

³⁰ See Hoekman and Nelson, *supra* note 9, at 14-18.

³¹ See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 254-58 (1986). Cf. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013) (describing how competing narratives structure the rules of investor-state arbitration).

³² See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 712 (1988).

³³ See DWORKIN, *supra* note 31, at 176-224 (on “law as integrity” and the problem of “checkerboard statutes”).

³⁴ See, e.g., LON L. FULLER, *THE MORALITY OF LAW* (1964).

These shared normative narratives exist at the nexus between moral theory and politics.³⁵ While they draw from theories of justice to develop a political justification for a particular set of rules, they may only loosely follow those theories, oftentimes finding common narratives, a type of normative consensus across a number of contested ideas about what just or good policies might require.

To put it another way, normative narratives present a type of political-moral conventional wisdom. These narratives capture the basic, shared understanding of why a policy is worthwhile. In the case of trade, these narratives help explain why in a political-moral sense, trade liberalization is worth pursuing. They provide a political-moral story of what trade law and policy should look like and why. And when effective, these narratives thus help tether or embed the global economy within civil society or politics, resolving the tensions between state, economy, and civil society noted by Jürgen Habermas or between nation state, hyper-globalization, and democratic politics described by Dani Rodrik.³⁶

Over the past few decades, neoliberal ideas have provided the shared normative narrative supporting free trade agreements. The starting point of that story is the accepted wisdom within economics that free trade makes all parties better off. Protectionism, the narrative argues, is usually misguided. It may be aimed at helping domestic workers, but it actually has the opposite effect, raising prices, stifling growth, and shrinking the domestic economy.³⁷ The Great Depression, is, in this narrative, the cautionary tale—the exemplar of what happens when states turn to protectionism.³⁸ Trade liberalization, on the other hand, while perhaps causing transitional pain to domestic industries and workers, encourages growth, and through the magic of comparative advantage, increases the overall welfare of all states, giving each state more wealth to allocate among its population.³⁹ Free-trade grows the global and national pie and can make everyone better off.

This narrative, of course, recognizes that trade liberalization will not in-and-of itself better the lives or fortunes of everyone.⁴⁰ It assumes, however, that questions about the redistribution of the welfare gains of trade are best (from a political legitimacy standpoint) and most efficiently (from an economics standpoint)

³⁵ The value of a normative narrative is its ability to recast popular views in terms of a theory of justice, a theory of justice which can in turn point those views and policies based on them in a particular direction.

³⁶ See Hoekman and Nelson, *supra* note 9.

³⁷ See, e.g., Robert Z. Lawrence & Robert E. Litan, *Why Protectionism Doesn't Pay*, HARV. BUS. REV. 60, 61 (May 1987) (arguing that protectionist policies “seldom save jobs for long or preserve the competitiveness of the industry to be ‘saved.’ Meanwhile . . . the consumer suffers through higher prices.”).

³⁸ See Barry Eichengreen & Douglas Irwin, *The Protectionist Temptation: Lessons from the Great Depression for Today*, VOX (Mar. 17, 2009) <https://voxeu.org/article/protectionist-temptation-lessons-great-depression-today> (While many aspects of the Great Depression continue to be debated, there is all-but-universal agreement that the adoption of restrictive trade policies was destructive and counterproductive. . . .”).

³⁹ See Paul Krugman, *Is Free Trade Passé?* 1 ECON. PERSPECTIVES 131 (Fall 1987) (“For one hundred seventy years, the appreciation that international trade benefits a country whether it is ‘fair’ or not has been one of the touchstones of professionalism in economics.”); JOOST PAUWELYN, ANDREW GUZMAN, & JENNIFER HILLMAN EDS., INTERNATIONAL TRADE LAW 11-19 (3rd ed. 2016).

⁴⁰ See *Making Trade an Engine of Growth for All*, *supra* note 5, at 24.

answered through domestic, rather than international, policymaking.⁴¹ Moreover, suggests this narrative, to the extent that liberalized trade does redistribute domestic wealth in its own right, it often redistributes it to the least well off, who have the most welfare to gain from lower-priced goods.⁴² The shorthand for this narrative is that “trade grows the overall pie” or “trade raises all boats.”

As a political-moral narrative it is neither fully a matter of economics, nor of political philosophy, even as it draws from both. This narrative draws heavily from accepted wisdom with regard to economic efficiency and reflects much of the neoliberal consensus about market governance that emerged in the early 1980’s and which has come to dominate international economic policy over the past few decades.⁴³ But it is neither co-terminus with it, nor entirely dependent on it. The neoliberal consensus involves a suite of ideas about trade, investment, monetary, competition, and regulatory policies.⁴⁴ One need not accept all of those to accept the more rough-and-ready narrative that free-trade grows the pie.

Of course, liberalized trade is often justified to policymakers and the public on other bases. Bringing China into the WTO may encourage rule of law or enmesh that regime in global prosperity in ways that would make future political or military conflict less likely.⁴⁵ TPP would anchor the United States in the Asia-Pacific, guaranteeing that it could continue to compete there against China.⁴⁶ TPP would allow the United States, rather than China, to set the regulatory ground-rules for 21st century trade.⁴⁷ More broadly, the rules and institutions of international trade, the WTO, for example, lower the likelihood of trade wars by ensuring predictability, fostering transparency, promoting cooperation and consultations, and encouraging rule-based dispute settlement.⁴⁸ These narratives though generally play a secondary role in justifying trade liberalization and are much more powerful among policymakers and trade specialists than among the public at large.

Trade law’s normative narrative is not just a matter of political messaging, though it very much is that. The normative narrative directs trade law policy, putting a thumb on the scales in favor of certain types of agreements, covering certain subjects, and using specific rules. The growing-the-overall-pie narrative, for

⁴¹ See, e.g., PAUL KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY & POLICY* 214-17 (7th ed. 2005).

⁴² See, e.g., Pablo D. Fajgelbaum & Amit K. Khandelwal, *Measuring the Unequal Gains from Trade*, 131 *QUARTERLY J. ECON.* 1113 (2016).

⁴³ Miguel A. Centeno & Joseph N. Cohen, *The Arc of Neoliberalism*, 38 *ANNUAL REV. OF SOCIOLOGY* 317, 317 (2012); DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* 163-74 (2011).

⁴⁴ See Centeno & Cohen, *supra* note 43, at 317; Rodrik, *supra* note 43, at 163-74.

⁴⁵ See *No Change: Chinese Politics and the WTO*, *THE ECONOMIST* (Dec. 10, 2011) (quoting President Clinton predicting that China’s admission to the WTO “was likely to have ‘a profound impact on human rights and political liberty.’”).

⁴⁶ See Mireya Solis, *The Case for Trade and the Trans-Pacific Partnership*, *BROOKINGS INST.* (Oct. 4, 2016), <https://www.brookings.edu/research/the-trans-pacific-partnership-the-politics-of-openness-and-leadership-in-the-asia-pacific/>.

⁴⁷ See *id.* (arguing that ratification of the TPP accomplishes U.S. strategic goals in Asia by providing for “a smart strategy vis-à-vis China’s regional and global leadership bid by using trade policy in proactive ways (covering governance gaps) and inclusive ways (contemplating a future Chinese accession).”).

⁴⁸ See generally Andrew T. Guzman, *Global Governance and the WTO*, 45 *HARV. INT’L L.J.* 303 (2004). See also Shaffer, *supra* note 6, at 4-8.

example, explains why major international economic agreements are first and foremost, “trade” agreements, handed primarily to trade bureaucrats to negotiate and draft. Particularly now that such agreements contain provisions on investment, regulation, the environment, and labor, others have a voice, but trade diplomats and trade lawyers hold the pen. The growing-the-pie narrative also defines the *policy* and the *exception*. For all the space that has been opened in more recent trade agreements for development, human rights, and the environment, that space is always designed as exceptional, an acceptable exception from the logic of liberalization. The narrative guarantees that such exceptions are seen with a skeptical eye; every exception might be protectionism in disguise and each exception must be balanced against the cost to the overall pie of throwing up specific barriers. The current normative narrative thus helps explain why many of the exceptions built into the WTO agreements have been construed narrowly.⁴⁹

But the normative narrative also constructs the political space in which trade law policy is made and debated.⁵⁰ It defines who is interested and who has a voice in the development of the rules. It constructs economists and business leaders as policy-insiders; if the goal is economic growth, who would have more expertise?⁵¹ But the closed nature of trade politics is part of the current dilemma. To the extent various policies that have been suggested or proposed over the years to help rebalance trade’s benefits, for example, robust job search assistance and training programs, income support and social insurance,⁵² seem politically infeasible,⁵³ it is because of the structure of trade politics. Making those policies possible cannot just be a function of fear or politically necessary accommodation, i.e., “saving trade”⁵⁴; it will need to be the product of a different type of political debate that rebalances the interests and values in play and with them, the players negotiating the terms of their accommodation. A new politics of the possible requires a new narrative of international economic law’s purpose.

Many describe the current consensus as involving a two-step process.⁵⁵ In step one, overall global welfare is grown through international trade agreements. In step two, the distributional effects of liberalizing trade are dealt with through domestic policymaking. This two-step description recognizes that liberalizing trade redistributes wealth, favoring some in each state over others, perhaps in ways that are normatively unfair.⁵⁶ It assumes, however, that decisions about redistribution are best made domestically, either because

⁴⁹ See, e.g., Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 WORLD TRADE REV. 261 (2003).

⁵⁰ Cf. Roberts, *supra* note 31.

⁵¹ Cf. Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. OF ECON. PERSP. 73, 79 (2018).

⁵² See *Making Trade an Engine of Growth for All*, *supra* note 5, at 27-36.

⁵³ See Meyer, *Misaligned Lawmaking*, *supra* note 27, at *32-37 (citing the allure of pork barrel spending for legislators and the decline of labor unions as two major political impediments to a more balanced approach to trade liberalization).

⁵⁴ See Meyer, *Saving the Political Consensus*, *supra* note 6; *Making Trade an Engine of Growth for All*, *supra* note 5, at 4.

⁵⁵ See Shaffer, *supra* note 6, at 8, 11.

⁵⁶ See Meyer, *Misaligned Lawmaking*, *supra* note 27, at *8 (“Trade policy is inherently distributional.”).

those mechanisms do so more efficiently or because they require trade-offs between groups that are best left to domestic politics.⁵⁷

While many do hold to this two-step view, it misconstrues the actual normative consensus. The current normative narrative treats growth through trade as a truism, while remaining agnostic about redistributive policies. While some may say that the latter are matters for internal policy, others may be skeptical of government intervention. Part of what has made the current consensus so durable is that it could be adopted regardless of one's theory of domestic distributive justice. Social democrats, Rawlsians, and Hayekians could all agree to grow the global and domestic pies, even as they disagreed on logics of domestic redistribution.

This, however, creates a political dynamic in which the two "steps" are debated in different political spaces.⁵⁸ Reflecting a truism, the first step, trade policy, is debated around the edges; debate focuses on the shape of particular deals and specific concessions or commitments. The second step though, facing no real consensus about the role of government or the desirability of different types of redistribution, is subject to full political debate. It is thus unsurprising that trade deals move forward even as promises of redistribution do not.⁵⁹ The most pointed example of this disconnect in the United States has been the fate of Trade Adjustment Assistance (TAA). Since 1962,⁶⁰ Congress has generally packaged new trade deals with TAA, which provides financial aid to workers, farmers, and firms hurt by competition from imports.⁶¹ As Tim Meyer describes, however, TAA has had none of the durability of the trade deals it shadowed.⁶² Seemingly always under threat, TAA's funding has been at times allowed to lapse, consistently scaled back, and has over time become more difficult to access.⁶³

IV. THE BOATS TAKE ON WATER OR "LET THEM EAT PIE"

The triumph of anti-trade politics in various countries over the past few years suggests though that the "grow the pie" or "raise all boats" narrative is no longer as widely shared as it once might have been. States' failure to live up to the promises of redistribution associated with the second step (discussed above)

⁵⁷ See Rodrik, *How to Save Globalization*, *supra* note 23, at *21 (The appropriate locus for their discussion and resolution is most likely the national polity, given the wide variety of standard and norms that prevail across the globe."); 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.").

⁵⁸ Cf. Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. MIAMI L. REV. 727, 734 (2003) ("[T]he result is the separation of social and distributional concerns from the rules governing the economy.").

⁵⁹ See Rodrik, *Populism*, *supra* note 4 at 6 ("As long as reversing trade agreements is costly, governments always have the incentive to promise compensation, but rarely to carry it out. The winners need the losers' assent for the agreement. But once the agreement is passed, there is little reason for the winners to follow through."); Meyer, *supra* note 6 at 8, 14-21 (reviewing the history of U.S. Trade Adjustment Assistance to conclude that the "grand bargain" between trade's winners and losers has been one-sided, favoring free trade's advocates at the expense of its victims.").

⁶⁰ TAA was first enacted as part of the Trade Expansion Act of 1962. 19 U.S.C. § 2272 (2012).

⁶¹ See Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT'L L. 797, 798 (2012).

⁶² See Meyer, *Misaligned Lawmaking*, *supra* note 27.

⁶³ *Id.*

have certainly contributed to this frayed consensus. Although the connection between populist politics and displacement is uncertain, there is evidence that states that “retained the capacity/willingness to respond to labor market adjustment problems have had less problems with anti-globalist populism.”⁶⁴

But there are problems with the first step as well that the consensus has masked. While the basic economic truths of comparative advantage remain uncontested, there are questions about how they map onto the partially liberalized trade we have and which current agreements produce.

For one thing, the narrative underlying the grow-the-pie consensus glosses over the differential speed of liberalization. As has been oft-repeated, the WTO does not call for free trade, but for liberalized trade. Members progressively, through negotiations, lower tariffs and eliminate other barriers to trade. The choice is not and has not been between protectionism and free trade, but over the pace and scope of liberalization. That variably paced liberalization though increases the distributional effects of trade agreements, guaranteeing that certain industries are helped or hurt by further agreements and in patterns not necessarily dictated by pure economics. A particular industry, for example, shoemakers, may see its tariff protection lowered,⁶⁵ while another industry’s, say sugar, remains in place. That first industry may also see its protections removed at a rate or pace that its foreign competitors do not. Whether or not these complaints sounds in macroeconomics – the overall deal still likely benefits both states – it becomes harder to argue that international economic deals need not worry about redistribution. International economic deals are involved in redistribution.

The current narrative also largely ignores the different effects liberalization has on economies that are already more or less open. As Dani Rodrik observes, the redistributive impact of lowering tariffs is much more dramatic at lower starting tariff rates than higher ones.⁶⁶ Such an effect though is highly unlikely to register in the domestic politics of trade, where the change in policy is likely to look insignificant compared to the pre-existing policy. The effects are difficult to explain without a deep dive into economics and would be counterintuitive to most voters. As public choice theory predicts, the broad range of voters interested in domestic economic welfare and fairness will be at a severe disadvantage in the lobbying and electioneering space compared to the sophisticated financial and corporate backers of liberalized trade. To assert that domestic policy should deal with these effects, particularly when these effects are so difficult to link to trade policies, seems implausible at best. Instead, the effect is likely to go unanswered, leading to resentment and support for anti-trade populism.

Further, as traditional trade barriers come down, trade agreements have moved into new areas like intellectual property and investment protection, where the grow-the-pie narrative is harder to tell.⁶⁷ Business

⁶⁴ Hoekman and Nelson, *supra* note 9, (citing Duane Swank and Hans-Georg Betz, Globalization, *The Welfare State and Right-Wing Populism in Western Europe*, 1 SOCIO-ECONOMIC REV. 215 (2003)).

⁶⁵ See Tran Thu, *U.S. To Lift Most Tariffs On Vietnam Footwear*, SAIGON TIMES, Nov 11, 2015, 20:59 (GMT+7), <http://english.thesaigontimes.vn/44022/US-to-lift-most-tariffs-on-Vietnam-footwear.html>.

⁶⁶ Dani Rodrik, *Populism and Economics of Globalization*, J. of Int’l Bus. Pol’y 4 (2018).

⁶⁷ See, e.g., Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. OF ECON. PERSP. 73, 82-88 (2018).

interests have always been present in the mind of trade negotiators, but in these new areas, they seem dominant.⁶⁸ The resulting agreements look to many more like attempts at rent-seeking by particular companies or industries than the type of shared growth and benefits associated with prior agreements.⁶⁹

And finally, the “policy space” strategy of the past two decades has not fully answered the concerns of those who fought in the Battle of Seattle. Some still question the basic moral positions embedded in the neoliberal narrative, refusing to accept that economic efficiency should take priority over protecting the environment, promoting basic human rights, adopting democratically legitimate health and safety regulations, or achieving greater equity across countries. Their problem isn’t with the economic truth of comparative advantage, but with whether that truth should trump all other priorities.

V. ALTERNATIVE NORMATIVITIES?

But what are the alternatives? The neoliberal “grow-the-pie,” “raise-all-boats” narrative has come over the past few decades to seem almost a truism. (A colleague, responding to the central question of this essay, described the current narrative as “physics.”) But that narrative is not eternal nor has it been uncontested. Various scholars have over the decades attempted to develop theories of justice that might guide international trade agreements, with more or less radical conclusions on how trade law might be reorganized.⁷⁰ And Samuel Moyn has richly described the varied narratives of social welfare and economic rights that vied for acceptance from the French revolution until the ascendancy of neoliberalism.⁷¹ The New International Economic Order (NIEO)—the 1970s campaign by non-aligned movement and developing countries to argue for a more equitable distribution of global wealth across countries⁷²—is only the most remembered of the many normative narratives that have been tried out over time.

The anti-trade campaigns of the past two years might be seen as groping towards their own alternative narratives.⁷³ We might distill a couple of different alternatives from the anti-trade campaigns of the past two years. On one side, idealized, might be a type of neo-mercantilism associated most closely with Donald Trump and the populist right.⁷⁴ In this view, trade is a zero-sum competition for resources between

⁶⁸ See *id.* at 84.

⁶⁹ See generally *id.*

⁷⁰ See, e.g., OISIN SUTTLE, DISTRIBUTIVE JUSTICE AND WORLD TRADE LAW 37-48 (2018) (describing theories).

⁷¹ See generally SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

⁷² For a discussion, see, e.g., ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER 44-52 (2011); Diane A. Desierto, *Postcolonial International Law Discourses On Regional Developments In South And Southeast Asia*, 36 INT’L J. LEGAL INFO. 387, 402-05 (2008).

⁷³ For the best description of the claims being made in current populist anti-trade campaigns and how those claims might translate into policy changes, see Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements*, (November, 26 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290590.

⁷⁴ See Binyamin Appelbaum, *On Trade, Donald Trump Breaks With 200 Years of Economic Orthodoxy*, N.Y. Times (Mar. 10, 2016) <https://www.nytimes.com/2016/03/11/us/politics/-trade-donald-trump-breaks-200-years-economic-orthodoxy-mercantilism.html> (“Mr. Trump’s mercantilism is among his oldest and steadiest public positions. Since at least the 1980s, he has described trade as a zero-sum game in which countries lose by paying for imports.”).

states, in which global, multilateral rules serve only to unfairly shackle entrepreneurial and enterprising states.⁷⁵ States should be free to make the best deals they can (or to act unilaterally if they have to) to maximize their own share of the spoils. One might term this alternative, the “you get what you *take*” theory of trade, a normative belief that the best competitors (not in the market, but in trade warfare) should be rewarded with the greatest share of the spoils.⁷⁶ (Belief in this theory generally goes along with a belief that your state is the one being hurt by the rules and would benefit from a less regulated street-fight.) Nicolas Lamp, in a careful, subtle reading of President Trump’s rhetoric, finds a story of jobs as property, earned by, stolen from, and soon to be recaptured by American workers.⁷⁷ On the populist left, a different theory of fairness emerges, one focused more on the distribution of wealth between labor and capital and worried about regulatory leakage.⁷⁸ On the one hand, “fair trade,” should guarantee benefits not only to corporations and bankers, but workers as well.⁷⁹ On the other hand, it should guarantee against a race-to-the bottom, where progressive regulations with regard to labor and the environment put workers at a competitive disadvantage.⁸⁰ This latter vision might be seen as a more robust version of the neo-liberalism-lite that has been the dominant policy over the past two decades and reflected in the labor, environmental, development, and human rights chapters that have been added to the more recent free trade agreements.⁸¹

The first alternative vision may resonate with many disaffected voters, as evidenced by the victories of Donald Trump in the United States and Brexit in the United Kingdom.⁸² It is unclear that the second alternative vision, while perhaps popular among liberal elites, has popular purchase. It seems to suffer from its inherent vagueness. It’s never entirely clear what the “fair” in “fair trade” means or the metric along which fairness is to be measured.⁸³ Calls for fair trade risk sounding too weak, in which case, it might sound

⁷⁵ See *id.* (“[Mr. Trump] described trade as a zero-sum game in which countries lose by paying for imports.”).

⁷⁶ Cf. Lamp, *supra* note 73, (May 18, 2018) (on file with the author) (concluding that Mr. Trump “attributes [U.S. job losses] to the ‘unfair’ rules of international trade agreements and to the ineptitude of US politicians and trade negotiators who have failed to level the playing field for US producers.”)

⁷⁷ See *id.* at 4-10.

⁷⁸ See, e.g., Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT’L ECON. L. 43, 49 (2000).

⁷⁹ Cf. Antonia Eliason, *Development and Regional Trade Agreements: Entrenching Structural Inequities*, 46 GA. J. INT’L & COMP. L. 636, 646 (2018) (“Using this framing, the division becomes not one between the Global South and the Global North, but one between the transnational capitalist class and those that do not benefit from the financial gains of late capitalism.”).

⁸⁰ See, e.g., Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values*, 45 HARVARD J. ON LEGIS. 377, 394 (2008).

⁸¹ See, e.g., EUROPEAN UNION – SINGAPORE TRADE AND INVESTMENT AGREEMENTS (Apr. 18, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (including a chapter on Trade and Sustainable Development); U.S.-KOREA FREE TRADE AGREEMENT (Mar. 15, 2012) <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (containing sections on labor and the environment); NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (Sept. 1993), <https://www.dol.gov/ilab/trade/agreements/naalcgd.htm> (labor side agreement to NAFTA). See also Kathleen Claussen, *Dispute Settlement Under The Next Generation Of Free Trade Agreements*, 46 GA. J. INT’L & COMP. L. 611, 618 (2018).

⁸² See *supra* notes 1, 2 & accompanying text.

⁸³ See Andrew Walton, *What is Fair Trade?* 31 THIRD WORLD QUARTERLY 431, 431 (2010) (“[T]here is a lack of clarity regarding how we should conceptualise Fair Trade.”).

to many like more of the same empty, unenforceable promises of post-1999 neo-liberalism-lite, or too strong, in which they sound either like a rejection of all future trade agreements or less pugnacious version of the neo-mercantilist vision of the populist right.

Traditional advocates of liberalized trade and free trade agreements have mostly responded by doubling-down on the grow-the-pie narrative, arguing that simmering discontent is a result of step-two domestic political failures⁸⁴ and politicians' failures to properly communicate free trade's benefits.⁸⁵ Some though have grasped for alternative narratives that might support the system, leaning into usually secondary arguments for free trade, like the argument that free trade encourages peace, security, and alliances by enmeshing like-minded states and encouraging rules-based dispute settlement⁸⁶ or that free trade encourages transnational solidarity by creating points of contact and cultural exchange.⁸⁷ The allure of these narratives is that they make now-contested economic arguments besides-the-point. Support trade to protect national security! Support trade to protect the postwar liberal, rules-based order!⁸⁸ Support trade to maintain the European project! At times in the past, when concerns about war and peace dominated concerns about economics, these narratives have had significant appeal. The problem with these narratives is that they make now-contested economics besides-the-point, at a time when contested economics seem more salient to many voters than these other concerns. Politics in the United States, the United Kingdom, and the rest of Europe hardly suggest that these narratives are resonating beyond the foreign policy and intellectual elite.

VI. EMBEDDED LIBERALISM AND HUMAN RIGHTS

Few of the proposed alternative narratives for international trade have garnered the type of consensus enjoyed by that of growing the pie or raising all boats. In recent history though, at least one other has: the narrative John Ruggie described as "embedded liberalism."⁸⁹ Ruggie built off the work of Karl

⁸⁴ See, e.g., N. Gregory Mankiw, *Why Economists Are Worried About International Trade*, N.Y. TIMES, Feb. 16, 2018 ("[E]xpanding trade hurts some people in the short run. That fact may call for a robust safety net and effective retraining. But it does not undermine the conclusion that free trade raises average living standards.").

⁸⁵ See *Making Trade an Engine of Growth for All*, *supra* note 5, at 27-36 ("[G20 leaders] called for action to better communicate the benefits of open trade to a public that may have become more skeptical, especially in advanced economies.").

⁸⁶ Vikram Singh, Dalibor Rohac, and Danielle Pletka, *Partnership in Peril: The Populist Assault on the Transatlantic Community*, CENTER FOR AMERICAN PROGRESS, Posted on July 31, 2018, 7:00 am,

<https://www.americanprogress.org/issues/security/reports/2018/07/31/454248/partnership-in-peril/> ("Arguing over trade and tariffs will deepen those crises and accelerate momentum toward a decisive rift in transatlantic alliances."); Simon Nixon, *What's At Stake as Rules-Based Trade Comes Under Fire*, WALL ST. J., Jan. 10, 2018.

⁸⁷ See, e.g., Giacomo Magistretti and Marco Tabellini, *Economic Integration and Democracy: An Empirical Investigation*, HARVARD BUSINESS SCHOOL WORKING PAPER, August 7, 2018, <https://hbswk.hbs.edu/item/economic-integration-and-democracy-an-empirical-investigation> (testing thesis); Mitchell Lerner, *Trump's Unilateralism And Korea-US Alliance*, KOREA TIMES, July 30, 2018, http://www.koreatimes.co.kr/www/opinion/2018/07/198_253015.html (linking the issues).

⁸⁸ See, e.g., William A. Macdonald, *Canada Must Act Fast On Trade And Competitiveness To Counter Trump*, GLOBE AND MAIL, August 5, 2018.

⁸⁹ See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

Polyani who famously explained how the market, long embedded within society, culture, and politics, had, over the course of the first great wave of globalization of the nineteenth century, become disembedded from them.⁹⁰ The sudden ease with which capital and goods flowed around the world combined with the laissez-faire logic of free markets overwhelmed existing social welfare mechanisms, leading to both massive dislocations of labor and near constant crises.⁹¹ With the onset of the global Great Depression, states felt they had to throw up barriers to trade in order to bring their individual economies and social welfare systems under control.⁹² The result was a contagious spread of beggar-thy-neighbor policies that deepened rather than alleviated the Depression and helped set the stage for World War II.⁹³

The new consensus that emerged from the period, exemplified in the thinking John Maynard Keynes, and reflected in the Bretton Woods international economic institutions of the postwar world, was that the re-opening of global trade (and the growth necessary for rebuilding) would need to be reconciled with the state's ability to develop its social welfare state.⁹⁴ Re-embedding trade within society and politics meant limiting the scope of liberalization, both by allowing capital controls and lots of space for social welfare policies.⁹⁵ It also put trade liberalization in a decidedly secondary policy position compared to domestic economic policies. Rather than judging domestic policies by whether they were impermissibly protectionist, trade policies were judged by whether they allowed for or forwarded domestic social welfare.⁹⁶

This consensus provided the normative foundation for the liberalized trading regime of the General Agreement on Tariffs and Trade. Embedded liberalism began to break down over the course of the 1970's, as global recessions and stagflation convinced many policymakers (and voters) that the postwar accommodation of trade and social welfare policies was no longer workable.⁹⁷ Instead the neo-liberal

⁹⁰ KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

⁹¹ *Id.*

⁹² See Eichengreen & Irwin, *supra* note 38.

⁹³ See *id.*

⁹⁴ See Ruggie, *supra* note 89, at 393 ("This was the essence of the embedded liberalism compromise: unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism.").

⁹⁵ See *id.* at 396 ("[T]he principles of multilateralism and tariff reductions were affirmed, but so were safeguards, exemptions, exceptions, and restrictions—all designed to protect the balance of payments and a variety of domestic social policies.").

⁹⁶ See *id.* at 397 ("The substantial reduction of tariffs and other barriers to trade was called for; but it was not made obligatory and it was coupled with appropriate emergency actions, which were allowed if a domestic producer was threatened with injury from import competition that was due to past tariff concessions."); Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002) ("The postwar trade and financial order was therefore mainly designed to enable states to manage their domestic economies, in a manner consistent with political and social stability and justice, without the risk of setting off a protectionist race to the bottom."); Andrew T.F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, in *EMBEDDING GLOBAL MARKETS: AN ENDURING CHALLENGE* 18-19 (John Gerard Ruggie, ed. 2008) ("[T]he liberalism of Free Trade was embedded within a deeper commitment to an interventionist programme of governmental social action.").

⁹⁷ See Howse, *supra* note 96, at 101 ("The collapse of the gold standard and with it the structure for managed macroeconomic adjustment foreseen by the Bretton Woods system, combined with the recession of the 1970s and the

consensus that still dominates began to take hold, and with it the view that global growth through liberalization should be the primary goal of international economic policy.⁹⁸

Embedded liberalism was a fraternal twin of the human rights embodied in the Four Freedoms,⁹⁹ the Universal Declaration of Human Rights,¹⁰⁰ and the two International Covenants.¹⁰¹ The worldwide Depression and World War II had encouraged a rethinking of the role of government in economic policymaking. Laissez-faire views had fallen out of favor, replaced by beliefs that governments had an obligation to protect the welfare of their citizens.¹⁰² While embedded liberalism sought to create space for those government policies, the human rights movement sought to require it, proclaiming the rights of individuals to employment, social welfare, and health, among others.¹⁰³ The core of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) is the obligation on “Each State... individually and through international assistance and co-operation,”¹⁰⁴ to provide for the welfare of its people. The ICESCR Committee, together with human rights advocates and scholars, have spent the past few decades developing the meaning and substance of those obligations.¹⁰⁵ Many, more recently, have drawn on the work of Amartya Sen and Martha Nussbaum to develop an approach focused on the states’ obligations to help individual realize their “capabilities” – to enable their citizens to live lives they value.¹⁰⁶

mounting intellectual and practical (stagflation) challenges to the Keynesian consensus, led to increasing emphasis on microeconomic interventions of various sorts for adjustment purposes, as well as to new kinds of trade restrictions.”).

⁹⁸ See *id.* at 104 (“they moved from free trade as an economic ideology to free trade as embedded in a broader liberal economic ideology. Trade liberalization became part of a general set of prescriptions for growth and prosperity, at odds to a large extent with the progressive welfare state vision of the embedded liberalism bargain.”).

⁹⁹ See FRANKLIN D. ROOSEVELT, STATE OF THE UNION ADDRESS (Jan. 6, 1941), <https://fdrlibrary.org/four-freedoms> (arguing that the United States should provide wartime aid to Great Britain the protect the four freedoms that all people possess—the freedom of speech, the freedom of worship, the freedom from want, and the freedom from fear).

¹⁰⁰ UNITED NATIONS GENERAL ASSEMBLY, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/>.

¹⁰¹ UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [hereinafter ICESCR].

¹⁰² See *supra* notes 95-96 & accompanying text.

¹⁰³ Though, ironically, the United States, author of the “Four Freedoms,” favored a more liberal international trade regime, part of the reason for its failure to ratify the International Trade Organization.

¹⁰⁴ ICESCR, *supra* note 101, art. 2.1.

¹⁰⁵ See, e.g., UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, AN EVALUATION OF THE OBLIGATION TO TAKE STEPS TO THE “MAXIMUM OF AVAILABLE RESOURCES” UNDER AN OPTIONAL PROTOCOL TO THE COVENANT (May 10, 2007), http://www2.ohchr.org/english/issues/escr/docs/e_c12_2007_1.pdf; David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT’L L. 53 (2006); Michael J. Dennis & David P. Steward, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 AM. J. INT’L L. 462 (2004).

¹⁰⁶ See, e.g., MARTHA NUSSBAUM & AMARTYA SEN, *THE QUALITY OF LIFE* (1993).

But although born together, international human rights law and the Bretton Woods institutions, embedded in their own parallel institutions, quickly diverged.¹⁰⁷ While the international economic law machinery was picking up steam, the economic rights embodied in the Universal Declaration and ICESCR became politicized in East-West and North-South fights and struggled to gain traction.¹⁰⁸ Advocates for economic and social rights did eventually have some success in promoting states' obligations to provide basic minimum rights. By that point though, their strategies of focusing on state level policies and judicial enforcement of constitutional economic rights stood in stark contrast to the inter-state globalism by-then-embraced by international trade. The two models seemed to have become completely inapposite.¹⁰⁹ To the extent to which one was paying attention to developments in both areas of international law, the divergence may actually have reinforced the two-step consensus that free trade would define inter-state policy and human rights would define domestic.

Moreover, attempts during this period to bridge this gap and to bring the human rights vision to bear on international economic law were largely driven by developing states. Associated with efforts to develop a New International Economic Order or a trade and development agenda,¹¹⁰ such calls put the developed states which had built the Bretton Woods institutions and their successors on the defensive.

Now may be the time though to seek reconciliation between these estranged siblings. For one thing, neither calls for a renewed focus on social welfare and the state's obligations to its people nor a skepticism about the benefits of unfettered liberalization are now limited to the developing world. In fact, it is traditionally developing states like China and India who seem to have the most current enthusiasm for global international economic institutions¹¹¹ (even as they bend the rules in their own favor). This geo-political reality reflects the apparent lesson of the now famous "elephant graph" of Branko Milanovic.¹¹² Plotting the global change in real income from 1998-2008 by income percentile, the graph shows how much of the world – the 10th-65th income percentiles along with the very top earners – have experienced massive growth in real income over that period. One group, though, has not – the 75th-85th income percentiles. While the first

¹⁰⁷ See Christiana Ochoa, 23 B.C. THIRD WORLD L.J. 57, 58-59 (2003) (Although they share philosophical roots in liberal ideals, human rights and international economic law stand as polarized communities, as a result of a decades-long creation of separate instruments and institutions.”).

¹⁰⁸ Samuel Moyn also suggests that framing social welfare obligations in terms of rights was more anachronistic at the time of the Universal Declaration than is generally understood. See MOYN, *supra* note 71, at 41-67.

¹⁰⁹ See LANG, *supra* note 72, at 52 (“Still, the legacy of mutual professional isolation remained.”).

¹¹⁰ See *id.*, at 48-52; Harold Hongju Koh, *The New New International Economic Order*, 87 AM. SOC'Y INT'L L. PROC. 459, 459-60 (1993) (“[D]eveloping nations posited a new set of principles based on more explicitly distributive and equitable considerations. They spoke of “economic self determination,” “sovereignty over natural resources,” hostility toward “dependencia” (over-dependence on multinational enterprises), freedom to modify contracts to deal with changing circumstances, and “appropriate compensation under all the circumstances.”

¹¹¹ See, e.g., Rachel Brewster, *Monkey Cage: Trump Is Breaking The WTO. Will China Want To Save It?*, WASH. POST, May 2, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/02/trump-is-breaking-the-wto-will-china-want-to-save-it/?utm_term=.04c861af032b.

¹¹² Branko Milanovic, *The Greatest Reshuffle of Individual Incomes Since the Industrial Revolution*, VOX (July 1 2016), <http://voxeu.org/article/greatest-reshuffle-individual-incomes-industrial-revolution>.

group is disproportionately located in the new economic powerhouses of Asia, the second is disproportionately represented by the middle class of the older developed states.¹¹³ It may be time for the developed world to rediscover the normative vision of international human rights law and make it its own.¹¹⁴

For another, as populist politics gain new force among developed state electorates, the human rights vision may become an attractive way to ground international economic policy within domestic social welfare needs. Tying international trade law to states' human rights obligations to provide for the welfare of their people may be a narrative through which international economic policy can become "re-embedded."

To be clear, the idea is not to wholesale import human rights jurisprudence into international economic law (though that might be an option). Attempts to translate between the two fields carry a lot of baggage, and while a renewed interest in international economic rights may be a source of ideas and inspiration for international economic law, the best plan may be to develop parallel, complementary discourses between human rights and international economic law, rather than a single one.¹¹⁵ A new narrative for international trade and economic law should sound in the language and logic of international economic law. Focusing on states' welfare obligations may, for example, recast or re-emphasize economic aspects of the neoliberal narrative that are currently treated as secondary. One part of the neoliberal narrative, for example, has been that free trade helps protect domestic consumers against would-be domestic monopolists, subjecting the latter to foreign competition and diluting their ability to capture domestic regulatory decisions.¹¹⁶ Seen through the lens of the states' obligations to its people, this narrative takes on different weight and priority, moving it ahead of wealth maximization goals. It also suggests different trade policy priorities, promoting liberalized trade that encourages competition and that benefits both consumers and labor rather than (and perhaps at the expense of) big corporatist interests.

The key is to develop a shared normative narrative for international trade and economic law that can justify and guide international trade agreements going forward, while responding the concerns that have led some to abandon the current one. Most importantly, a new shared narrative needs to encourage a more

¹¹³ *Id.* There have been attempts to revisit and refine the data on which Milanovic relies, producing somewhat different, perhaps less dramatic, curves. Those other curves though don't undercut the basic point here though about the shifting benefits of, and relative enthusiasm for, globalization. See, e.g., Homi Kharas and Brina Seidel, *What's Happening to the World Income Distribution? The Elephant Chart Revisited*, GLOBAL ECONOMY & DEVELOPMENT WORKING PAPER 114 (April 2018), available at <https://www.brookings.edu/research/whats-happening-to-the-world-income-distribution-the-elephant-chart-revisited/>.

¹¹⁴ Interestingly, or perhaps anachronistically, this view has been recently voiced by former Treasury Secretary Lawrence Summers: "A new approach has to begin from the idea that the basic responsibility of government is to maximize the welfare of citizens, not to pursue some abstract concept of the global good." See Lawrence Summers, *How to Embrace Nationalism Responsibly*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/opinions/global-opinions/how-to-embrace-nationalism-responsibly/2016/07/10/faf7a100-4507-11e6-8856-f26de2537a9d_story.html?utm_term=.b27b0f3dc1ea.

¹¹⁵ As Samuel Moyn has recounted, the rights-based account was only one of a wide range of ways of states' welfare obligations over time. See generally MOYN, *supra* note 71.

¹¹⁶ See Nicolas Lamp, *Value And Exchange In Multilateral Trade Lawmaking*, 4 LONDON REV. INT'L L. 7, 13-17 (2016). As Lamp explains, this narrative was actually dominant in the United States in the middle part of the twentieth century, but was associated then with ideas of "competitive tariffs" rather than free trade. See *id.*

inclusive politics, one that engages a broader range of policy topics and a broader swathe of the public. A Re-embedded liberalism, built on states' obligations to their people might be just such a narrative.

There is though, it should be noted, a significant cost in refocusing international trade law on states' domestic obligations. What arguably gets lost in this narrative is any concept of and concern for global justice.¹¹⁷ Focusing on states' obligations to their citizens risks brushing aside the obligations each state has towards others. The ICESCR itself reflects this trade-off. Although the treaty does include some obligations of international assistance, they remain decidedly secondary and vague.¹¹⁸ The struggle to reconcile domestic and international obligations in theories of justice is well-known, finding echoes, for example, in John Rawls' liberal account of diminishing obligations to state outsiders.¹¹⁹

From the standpoint of developing states and their advocates, witnesses to the continuing inequality in wealth distribution around the world,¹²⁰ this normative narrative likely looks like no more than a reification of the status quo in favor of whiny developed states. It was just such views that drove third-world attempts to build a New International Economic Order. More importantly, an effective, shared normative narrative for international trade should have the potential to resonate widely—not just among a few developed states.

But a focus on states' obligations to provide for its people also raises serious questions about how much harm the domestic policies of one state can cause to others and what sorts of policy externalities should be internalized by each state. Notions of efficiency, transparency, and even-handedness that undergird and guide trade regulation today do not need to be thrown out. Even as they are pushed aside as primary determinants of state policy, they may remain standards for judging good or bad trade arrangements. As in the era of embedded liberalism, they can serve as secondary principles that help judge the various alternative policies that might be used to achieve the welfarist goals of the state. And they can and should continue to be the focus of the WTO and other international agreements. Guaranteeing that states don't callously or unnecessarily harm each other through their policies has long been one of objects of international trade law, embodied in its rules. Under this new narrative, they become the *primary* object. Rather than means of achieving maximally efficient trade, the rules of the WTO and other international agreements remain as backstops, sources of discipline, protecting each state's ability to make decisions in its people's interests from the encroaching actions of others.

And at the very least, a narrative focused on states' obligations to provide for its people does put all states' domestic policy concerns on equal ground. Under the neoliberal model, principles of economic efficiency reign supreme, and developing states are precluded from adopting certain types of industrial

¹¹⁷ See generally OISIN SUTTLE, *DISTRIBUTIVE JUSTICE AND WORLD TRADE LAW* (2018).

¹¹⁸ See, e.g., MOYN, *supra* note 71, at 110-12.

¹¹⁹ JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

¹²⁰ See, e.g., Jason Hickel, *Global Inequality May Be Much Worse Than We Think*, *GUARDIAN*, April 8, 2016, <https://www.theguardian.com/global-development-professionals-network/2016/apr/08/global-inequality-may-be-much-worse-than-we-think>.

policies, even if they deem them in their citizens' best interests. Focusing on states' obligations to provide for its people, however, provides as much justification for China's interests in raising its people's welfares as the United States' or United Kingdom's and as will be discussed, creates a logic for trades in policy flexibility—as matters of principle rather than exceptions for politics.¹²¹

VII. RE-EMBEDDING LIBERALISM FOR AN ERA OF GLOBAL SUPPLY CHAINS

Revising embedded liberalism and adopting a normative narrative based on states' obligations to provide for their people's welfare does not dictate a particular theory of local or global economic justice. Instead, it shifts the terms of and locations where debates between those theories will take place. International trade law, currently untethered from debates about domestic economic policy and redistribution, becomes subject to (and a subject of) them. By emphasizing trade's embeddedness within a broader welfare-enhancing project, it should help shift the locus of decisionmaking about international economic policy from the interstate negotiating table to the domestic one. It provides a justification for embedding discussions about trade within discussions about domestic economic policy, eliminating the two-step approach in favor of a single step.

The point is not to reject liberalizing trade or to embrace protectionism, but to embed discussions about the pace, scope, and terms of liberalized trade within discussions about domestic economics. Imagining trade liberalization as part of a larger economic welfare policy shifts trade out of the driver's seat of either domestic economic policy or of international cooperation.¹²² Liberalized trade does bring a variety of economic and non-economic welfare benefits, including growing the overall pie, but the question becomes how those tools serve the broader social welfare goal, rather than how those goals might temper the hard-driving logic of trade.¹²³ The pace and shape of liberalization are dictated by domestic welfare goals, not the other way around.

And this shift in policy polarity from the international to the domestic applies seems all the more important as new, complicated policy issues like climate change mitigation and adaptation, regulation of the data economy, and deployment of artificial intelligence (AI) emerge. Under the prevailing neo-liberal model, negotiations to liberalize trade in these areas run apace, led by the interests of domestic industries. The hard policy questions about trade-offs between climate change mitigation and trade liberalization,¹²⁴ over ownership of data, privacy, and consumer protection in the digital economy, and over the future-of-work in

¹²¹ See 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).

¹²² Cf. Shaffer, *supra* note 6, at 6 ("[T]rade officials often lose sight of these goals by narrowing the operational goal of trade agreements to that of trade liberalization.").

¹²³ See *id.* ("the organizing principle of trade agreements should be to enhance social and individual capacity in support of human flourishing. From that principle, trade agreements should not be assessed solely in terms of their impact on aggregate national and global GDP (the gains from trade), but also in terms of their distributional effects and their implications for social inclusion and social stability.").

¹²⁴ Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 1937 (2015).

an AI-driven economy are left in their wake, forced to operate against the rules and economic realities produced by international agreements. While these issues need not be resolved before negotiations over trade can take place, they should at the very least be part of the same conversation.

But it is not just the policy issues that have changed or may be changing. The structure of the entire economy has changed since the Bretton Woods institutions were first imagined. Modern transport and rapidly developing technologies has changed the relationship between trade and national economies. Re-embedding liberalism requires imagining how a narrative built on national welfare would reshape policy in an era of complex global value chains.

The economic world looks very different from the one in which embedded liberalism took hold. Technology and cheap, rapid transit of raw materials, components, goods, and information have made complex global value chains possible.¹²⁵ The process of production can be unbundled and located in a variety of different countries, as corporations look for the most efficient producers of each part of the process. While this can lead to better, cheaper products as producers chase comparative advantage in every direction, it also makes capital incredibly mobile, allowing capitalists to scour the world for opportunities that maximize profits and minimize inputs, allowing capital to increase its gains at the expense of labor. It also disembods capital completely from the state: Not only can capital wriggle free from taxes and regulations by strategically locating production and finances, but it can use its mobility to force states to compete for its presence, starting a regulatory and tax race-to-the bottom. At the same time that economists are increasingly worrying that the gains to capital are significantly outpacing the gains to labor¹²⁶ states are losing the tools they need to rebalance the relationship.

These realities suggest that the most pressing needs of a state looking to provide for the welfare of its own people may not be trade agreements, but agreements to coordinate and collect taxes and to stanch regulatory leakage. In a normative narrative focused on states' domestic obligations, the role of international negotiations shift. As states seek to promote the capabilities of their inhabitants,¹²⁷ negotiations become ways for states to cooperate in achieving those goals. Trade negotiations might be replaced by negotiations over "cooperative capability promotion." Lowering trade barriers to produce greater wealth for each state would undoubtedly remain an aim, but it may now come second to other issues like: (1) tax coordination and collection, (2) regulatory convergence, and (3) trades in policy flexibility.

¹²⁵ David Dollar, *Global Value Chains Shed New Light on Trade*, BROOKINGS INST. (July 10, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/07/10/global-value-chains-shed-new-light-on-trade/>.

¹²⁶ See, e.g., MICHAEL JACOBS & MARIANA MAZZUCATO, *RETHINKING CAPITALISM* 8-10 (2016); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

¹²⁷ See *supra* note 106, and accompanying text (discussing Nussbaum and Sen).

1. Tax Coordination and Collection

Before a state can redistribute the gains of trade, it must capture the gains of trade. Global supply/value chains and the extreme mobility of capital have made that extraordinarily difficult.¹²⁸ The example of Apple—a company that can invest its profits anywhere along its global supply chain or park them in the country offering the lowest taxes, all while it waits for a tax holiday in the United States—has become almost a cliché.¹²⁹ It nonetheless well-captures the problem for many developed states today.

The recent corporate tax cuts in the United States demonstrate the pathologies of the current situation.¹³⁰ Given the extreme mobility of capital that comes with complex value chains, multinational corporations can force states to bid for their presence. States who want to capture any of the value of the corporation's economic activity, whether through taxes or jobs (or taxes on jobs) are forced to promise lower and lower corporate taxes.¹³¹ As they do so, those same states have no choice but to make up that revenue by taxing less mobile wealth – income taxes, property taxes, and sales taxes.¹³² Together these two forces squeeze the same workers who have grown skeptical of trade's benefits. The AFL-CIO, for example, has highlighted how the loss of state revenues due to trade deals and tax competition has starved states of the funds necessary for national economic projects like investments in infrastructure.¹³³

What then can be done at the international level? A starting point for an international economic policy built around a state's obligation to provide for the welfare of its people might be transnational tax coordination. States would want to negotiate both an end to tax competition and a fair division of tax receipts along the value chain. It would seek to use international cooperation to diminish the distortive

¹²⁸ See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crises of the Welfare State*, 113 HARV. L. REV. 1573, 1575-76 (2000) (The mobility of capital has resulted in international tax competition, in which sovereign countries aim to attract both portfolio and direct investment by lowering their tax rates on income earned by foreigners. Tax competition, in turn, threatens to undermine the individual and corporate income taxes, which traditionally have generated the largest share of revenue for modern welfare states.”).

¹²⁹ See John Gapper, *Apple, Keep Your Cool over Global Tax*, FIN. TIMES (Aug. 31, 2016), <https://www.ft.com/content/de2cbd7c-6f5e-11e6-a0c9-1365ce54b926> (describing how Apple diverting its overseas revenues to the low corporate tax jurisdiction of Ireland); see also Rob Davies, *US Corporations Have \$1.4 Trillion in Tax Havens, Claims Oxfam Report*, THE GUARDIAN (Apr. 14, 2016), <https://www.theguardian.com/world/2016/apr/14/us-corporations-14-trillion-hidden-tax-havens-oxfam> (citing a report that Apple holds \$181 billion offshore in three subsidiaries).

¹³⁰ See Tax Cuts and Jobs Act, Pub. Law No. 115-97, § 13001 (Dec. 22, 2017) (lowering the corporate tax rate to 21%); William G. Gale et al., *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis*, TAX POLICY CTR. 5-6 (June 13, 2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf (discussing the “sweeping changes” the law made to the “treatment of foreign source income and international financial flows”).

¹³¹ See Avi-Yonah, *supra* note 83, at 1575.

¹³² See *id.* at 1624 (“[A]s an economy becomes more open to capital flows, it tends increasingly to shift the tax burden from capital to labor.”); Allison Christians, *How Nations Share*, 87 INDIANA L. J. 1407, 1408 (2012). (“Governments that fare poorly will be forced to look ever more intensely to income that is “trapped” by national physical and institutional boundaries—namely, the kind of income that arises from working and buying goods in domestically controlled and monitored markets, rather than the kind that is earned as it passes through multiple jurisdictions with widely varying levels of regulatory oversight.”).

¹³³ AFL-CIO, *Making NAFTA Work for Working People* 22-25 (2017), available at <https://aflcio.org/statements/written-comments-how-make-nafta-work-working-people>.

influence of big corporatist interests in tax policy.¹³⁴ Negotiations along these lines have occurred through the Organization for Economic Co-operation and Development (OECD), which has sought coordinated action through a list of measures states can take together and individually to prevent “base erosion and profit shifting” (BEPS) by multinational corporations.¹³⁵ Even as states adopt measures along those lines, however, corporations and wealthy individuals continue to find loopholes in the system¹³⁶ that end up shielding their income from taxation.¹³⁷

A commitment to re-embedding trade in a state welfare narrative though might mean moving these goals from the periphery of international economic agreements to the center. Trade liberalization and regulatory convergence might become carrots held out to both states and corporations in order to achieve more effective tax coordination. Lowered tariff and regulatory barriers might be offered to other states in return for tax coordination.¹³⁸ Policies desired by multinational corporations like free data mobility might be offered as part of a negotiating mandate in order to secure their support.

While tax coordination would be a first step, more ambitious tax negotiation policies might be imagined.¹³⁹ Specific new taxes, like a tax on financial transaction suggested by Tim Meyer and Frank Garcia might be negotiated.¹⁴⁰ Tax revenue from the value chain might be partially invested in a development bank that would support jobs-producing projects in member countries. Most radical of all, states could require corporations to pay a fee for access to certain free trade benefits, as suggested by Thomas Streinz.¹⁴¹

It might seem naïve or anachronistic to suggest that states might better coordinate to tax global value chain so soon after the passage of large corporate tax cuts in the United States. Proponents of lower corporate taxes, including corporate interests themselves, seem to be in political ascendancy. But it is for precisely that reason that a new normative vision of trade and economic law is needed. Only a new vision can reorder current politics, creating the space to make arguments linking higher corporate taxes and liberalized trade and granting successful politicians some measure of leverage with corporations. In turn, that

¹³⁴ See *supra* text accompanying note 116.

¹³⁵ OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING (2013).

¹³⁶ ...partly, by shifting income from corporations to individuals.

¹³⁷ See Shaffer, *supra* note 6, at 20-21.

¹³⁸ One concern with reformulating the deals this way is that they risk running afoul of the Most Favored Nation (MFN) obligations under the WTO agreements. One reason why current economic megadeals are styled Free-Trade Agreements, even while covering many other topics, is that only where barriers are “eliminated with respect to substantially all the trade,” GATT Art. XXIV.8, are they exempted from the requirement to offer agreed-upon benefits to all WTO members. For these purposes, that might mean that only free trade deals, rather than specific concessions can be held out as carrots for tax coordination or as described *infra*, regulatory convergence or flexibility. There may be ways to structure the agreement to fit within a different exception to the agreement, though under current Appellate Body jurisprudence, that might be difficult. It may instead be that these priorities suggest aspects of the WTO agreements that need to be revised in order to recognize a revised normative narrative for international trade.

¹³⁹ Cf. Carol C. Gould, *Approaching Global Justice Through Human Rights*, in GLOBAL JUSTICE IN INTERNATIONAL ECONOMIC LAW 41 (CARMODY, GARCIA, & LINARELLI, EDS. 2012).

¹⁴⁰ See Frank J. Garcia & Timothy Meyer, *Restoring Trade’s Social Contract*, 116 MICH. L. REV. ONLINE. 78, 93-100 (2018).

¹⁴¹ Thomas Streinz, *Re-Embedding Liberalism: Introducing “Passporting Fees” for Free Trade* (unpublished manuscript, on file with author).

may make those politicians more credible dealmakers, able to offer corporations trade policies they want in return for a higher tax burden. Corporate acquiescence to tax coordination could be a condition of greater regulatory convergence or digital liberalization.

A focus on tax policy has the advantage too of dovetailing with other current concerns, including the concern that gains to capital are outpacing gains to labor and that automation may be a bigger structural threat to labor than trade. As AI continues to take jobs once reliably performed by human workers – on help-desks, in sales, as drivers – the pressure on states to provide a safety net, whether in the form of a guaranteed basic income or something else will only grow. At the very least, the policy flexibility demanded by these coming changes requires a fiscally flexible state.

2. Regulatory Convergence

An international economic policy built around protecting the welfare of a state's people would have to defend domestic environmental and worker protections from outside threats. Supporters of progressive labor and environmental policies have long worried that liberalized trade can undermine their goals.¹⁴² Higher minimum wages, protections for workers, and environmental protection raise the costs of doing business in a state, putting that state's workers at a comparative disadvantage compared to workers in less regulated states.¹⁴³ At the same time, liberalized trade with less regulated states risks regulatory leakage, diluting policy successes by simply moving undesirable behaviors elsewhere. The rise of complex supply chains only exacerbates the problem, making movement of tasks to cheaper production locales extraordinarily easy.

These concerns have led to labor and environmental side agreements to NAFTA¹⁴⁴ and labor and environmental chapters in later free trade agreements.¹⁴⁵ The TPP took this logic the farthest so far. Not only did the agreement require states to abide by certain specific minimum internationally agreed labor standards,¹⁴⁶ but the United States required Vietnam, Brunei, and Malaysia to sign more stringent side agreements.¹⁴⁷ The side agreement with Vietnam, for example, required specific legislative changes aimed at

¹⁴² See Davies & Vadlamannati, *supra* note 52 (finding a decline in labor standards attributable to trade liberalization); Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993).

¹⁴³ See Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2041 (1993) (arguing that "a nation's imposition of stringent environmental regulation and liability rules may harm its international competitiveness").

¹⁴⁴ North American Agreement on Environmental Cooperation, opened for signature Sept. 8, 1993, 32 I.L.M. 1480; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499.

¹⁴⁵ See Meyer, *Saving the Political Consensus*, *supra* note 6, at 1002-08 (discussing examples).

¹⁴⁶ See Trans-Pacific Partnership, art. 19.3 ("Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration. . .").

¹⁴⁷ See Brunei Darussalam – United States Labour Consistency Plan, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>; Malaysia – United States Labour Consistency Plan, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

guaranteeing an effective right to organize unions.¹⁴⁸ Both the labor standard commitments in TPP and the side agreements would have been subject to the TPP's dispute settlement mechanism.¹⁴⁹

Focusing on the state's obligation to its people and negotiating cooperative capacity promotion would suggest continuing down this path, tying minimum labor and environmental standards to regulatory convergence along the supply chain. Trade liberalization and regulatory convergence should be held out not as the goal, but as carrots offered in return for transnational labor and environmental protection. In other words, labor and environmental agreements should offer up trade incentives, not the other way around. From a structural standpoint, this might mean turning the negotiating lead and the pen over to human rights, labor, or environmental specialists, rather than trade negotiators.

Beyond the protections themselves, a refocused economic policy would grant labor more of a role in enforcing the agreements.¹⁵⁰ One way to do so might be by shifting labor and environmental compliance into trade remedies. While states must normally use the WTO's dispute settlement system to raise complaints about other members' actions,¹⁵¹ the WTO agreements create an exception for complaints regarding improper subsidies, the dumping of imports below normal price, or the sudden, massive influx competing products into the domestic market. In those cases, states are allowed to respond with tariffs or other trade barriers after following domestic processes meeting the standards laid out in the Agreement on Subsidies and Countervailing Measures,¹⁵² Anti-Dumping Agreement,¹⁵³ and the Agreement on Safeguards.¹⁵⁴ Those responses are then subject to complaint and review under the WTO's dispute settlement system. Subjecting unfair competition based on violations of labor and/or environmental rules to this sort of process, by giving states initial control over sanctions, would increase the credibility of enforcement threats. Even more significantly, it might open up the possibility of allowing labor and environmental groups to initiate domestic enforcement hearings, thereby giving them a voice in ongoing trade policy and the enforcement of trade deals. Gregory Shaffer, for example, has developed a mechanism states might use to assess social dumping

United States – Viet Nam Plan for the Enhancement of Trade and Labour Relations, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

¹⁴⁸ “United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations,” available at: <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf>. See Lamp, *supra* note 73, at 29-30, for a fuller description of the agreement.

¹⁴⁹ See Trans-Pacific Partnership, art. 19.15.12.

¹⁵⁰ See Claussen, *supra* note 25 (detailing how these agreements currently work and the role granted to labor and other private parties).

¹⁵¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

¹⁵² Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, arts. 11-23, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

¹⁵³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201.

¹⁵⁴ Agreement on Safeguards, arts. 2-8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154.

duties that combines elements of existing anti-dumping and safeguards procedures.¹⁵⁵ His carefully designed mechanism would protect workers from competition violating internationally recognized labor rights without becoming a mere mask for protectionism.¹⁵⁶

Labor and environmental advocates might also be given access to regulatory decisions in states parties. TPP included a regulatory chapter that encouraged convergence by specifying regulatory tools like cost-benefit analysis,¹⁵⁷ encouraging regulatory coordination between states parties,¹⁵⁸ and guaranteeing corporations access to state regulatory processes.¹⁵⁹ New agreements could offer stronger guarantees of access for all stakeholders.

The offer of regulatory convergence might be made to multinational corporations as well. Multinational corporations want regulatory convergence; it allows them to move tasks along their supply chains more easily and efficiently.¹⁶⁰ States could offer multinational corporations streamlined regulatory access, perhaps through safe harbors, in return for guarantees with regard to labor and environmental standards along the supply chain. Such guarantees would risk WTO challenge, but might be constructed to fit within various exceptions. At the very least, pushing for such a reading would seem a priority of a state obligation focused economic policy.

3. Trading Flexibility

Dani Rodrik has suggested shifting from trading barrier reductions to trading policy space.¹⁶¹ An assumption built into the current grow-the-pie narrative is that liberalization is unidirectional. Liberalizing trade produces welfare gains for all states; protectionism leaves everyone with less. Accordingly, states should always be seeking further liberalization.

The consensus obscures many of the questions that remain about liberalizing trade. While few disagree with the abstract logic of comparative advantage, questions can be raised about the pace and trajectory of liberalization. States don't enter trade negotiations at the same point in their economic development. Specific forms of liberalization, undertaken at particular times, will affect states differently, fixing certain advantages and disadvantages in places. As Dani Rodrik notes, for example, eliminating export

¹⁵⁵ Shaffer, *supra* note 6, at 34-43.

¹⁵⁶ *Id.*

¹⁵⁷ Trans-Pacific Partnership, art. 25.5.2 (b).

¹⁵⁸ *See id.*, art. 25.4.1 (“[E]ach Party shall endeavour to ensure that it has processes or mechanisms to facilitate the effective interagency coordination and review of proposed covered regulatory measures.”).

¹⁵⁹ *See id.*, art. 25.8 (“The Committee shall establish appropriate mechanisms to provide continuing opportunities for interested persons of the Parties to provide input on matters relevant to enhancing regulatory coherence.”).

¹⁶⁰ *See* Hoekman & Nelson, *supra* note 9, at 9-10.

¹⁶¹ *See* RODRIK, *supra* note 43.

subsidies may freeze developing states' advantages where they are, granting access to their raw materials, but making the development of higher-tech, value-added industries unlikely.¹⁶²

Moreover, the lesson of disembedded and embedded liberalism is that untamed liberalization can make other economic policy goals more difficult, undermining the state's ability to make effective policies.¹⁶³ Even if liberalization is a generally desirable goal, flexibility may be necessary to marry overall growth with specific socio-economic policies.

Perhaps states should be negotiating divergences from the liberalization norm rather than further liberalization. Developing states might negotiate for space to enact export subsidies (now banned under the Agreement on Subsidies and Countervailing Measures¹⁶⁴) to help build up domestic industries; developed states might demand in return the ability enact labor or environmental safeguards. Such negotiated divergences would have to be limited lest they unravel the rules of international trade entirely. Gregory Shaffer has done the most advanced work translating Rodrik's suggestion into legal rules compatible with the WTO's obligations and goals, suggesting substantive and procedural limits that could be applied both to the subsidies and safeguards available in such deals, and which could be reviewed through WTO (or alternative) procedures. A different or further limitation might be to limit the number or value of flexibilities that could be bargained for or the length of time for using them. States could be forced to choose one (or some other number) strategic program to subsidize or industry to protect. The goal would be to force states to justify the need for flexibility, not only to their negotiating partner, but their domestic populaces as well. Flexibilities might be time-limited as well. Subsidies or safeguards might have time-limits attached and/or the agreements allowing them might be sun-setted altogether.¹⁶⁵ Both would help to guarantee that such trades reflect each state's current policy needs and help limit their use as vehicles to entrench benefits for particular interests.

One complaint about safeguards is that they tend to hurt a state's consumers more than they help specific industries. Many pointed out, for example, that the recently approved safeguards on solar panels in the United States, by raising the price of solar panels beyond what many homeowners can afford would cost far more American panel installer jobs than the panel manufacturing jobs it might save.¹⁶⁶ But in a certain sense, that may be exactly the point. Safeguards have rarely been used, at least in part, because they pit one group within a state against another, with uncertain consequences for both. One of the core concerns with the current normative narrative is that it establishes a stale politics, which excludes many voices from active

¹⁶² To be fair, the poorest developing countries do retain considerable flexibility in this regard under the Agreement on Subsidies and Countervailing Measures.

¹⁶³ See RODRIK, *supra* note 43.

¹⁶⁴ See Agreement on Subsidies and Countervailing Measures, art 3.1 (a)

https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm (prohibiting "subsidies contingent, in law or in fact(4), whether solely or as one of several other conditions, upon export performance. . .").

¹⁶⁵ See Meyer, *Misaligned Lawmaking*, *supra* note 27, at *40-41.

¹⁶⁶ See, e.g., Nichola Groom, *Billions In U.S. Solar Projects Shelved After Trump Panel Tariff*, REUTERS, June 7, 2018, 1:08 AM, <https://www.reuters.com/article/us-trump-effect-solar-insight/billions-in-u-s-solar-projects-shelved-after-trump-panel-tariff-idUSKCN1J30CT>.

involvement in trade policies. The option of labor or environmental safeguards might provide a means to a more open, more robust trade politics, both at the negotiation and applications stages.

A different form of flexibility might be negotiated into interpretations of current trade agreements' policy exceptions. Current doctrine leaves little room for domestic political realities.¹⁶⁷ Politics rarely allow policies to be adopted in pristine, idealized forms. Instead, the need to build coalitions and assemble votes often requires policies to be watered down or exceptions granted for particular interests/interest groups. For the policies' proponents, the hope is that even with exceptions, meaningful progress on policy goals can be made. Under current WTO doctrine, however, those exceptions undercut arguments for the policies' necessity, suggest that a policy's application is unacceptably arbitrary or unjustifiably discriminatory, or that the enacted measure is not the least trade restrictive means of achieving the policy goals.¹⁶⁸ Political feasibility is not an acceptable justification. A trade policy built upon a state's obligation to provide for its people's welfare would need to protect genuine domestic political settlements.¹⁶⁹ At the international level, administering a political policy exception would be very difficult, but it might reflect the sort of flexibility a re-centered economic policy might demand. One possibility would be to adopt a more deferential stance to legislative bargains that aim towards acceptable policy goals. Deference could be contingent on compliance with various procedural rules including time-lines, transparency, and due process. Another option might be to require only proof that a less-than-ideal policy would be marginally more effective in achieving those goals.

VIII. SHIFTING NARRATIVES

The normative consensus around the “grow the pie,” “raise all boats” narrative is fraying, and with it norms about acceptable and unacceptable trade policies. The United States has raised tariffs on a variety of goods from a variety of trading partners in an effort to protect certain industries and gain leverage to negotiate “better” deals.¹⁷⁰ To justify these moves, the United States has questionably invoked the GATT's national security exception,¹⁷¹ violating a longstanding taboo that may encourage aggressive trade actions by

¹⁶⁷ Cf. Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 1937 (2015).

¹⁶⁸ See, e.g., *Shrimp-Turtle* (rejecting different phase-in periods as unjustifiably discriminatory); Appellate Body Report, *European Communities--Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (Adopted June 18, 2014) (seeing exceptions as undercutting argument for seal fur ban); Panel Report, *United States--Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011) (rejecting market realities as justification for clove cigarette exclusion).

¹⁶⁹ In this sense, the current two-step consensus undercuts itself. Redistribution is left to domestic policymaking, in part, to allow democratic decisionmaking to take place. That policymaking though isn't judged on its own terms, but instead subjected to international standards.

¹⁷⁰ See, e.g., Kellie Ell, *Former Office Depot CEO: Using tariffs to bolster trade leverage is working for Trump*, CNBC, May 31, 2018, 3:38 PM ET, <https://www.cnbc.com/2018/05/31/trump-uses-tariffs-to-bolster-trade-leverage-and-its-working-ceo.html>.

¹⁷¹ See, e.g., Krzysztof J. Pelc, *Monkey Cage: The U.S. broke a huge global trade taboo. Here's why Trump's move might be legal*, WASHINGTON POST, June 7, https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/07/the-u-s-broke-a-huge-global-trade-taboo-heres-why-trumps-move-might-be-legal/?noredirect=on&utm_term=.cd95c5062647.

others.¹⁷² In the trade skirmishes that have resulted, its partners have responded either with questionably legal Voluntary Export Restraints (VERs)¹⁷³ or questionably legal retaliatory tariffs of their own.¹⁷⁴ These partners have also used the mechanisms available through the WTO to challenge U.S. actions. Those challenges fall under the shadow though of the United States' continued assault on the WTO Appellate Body.¹⁷⁵ There is a serious risk that without a new shared narrative to direct trade policy going forward the system could unravel.¹⁷⁶

A re-embedded liberalism based around a state's obligation to provide for its own people is a normative narrative that might be able to capture current discontent with international trade and direct trade negotiations going forward. It is not an attempt to "save" the current system, but to justify a modified system going forward. Many of the policies floated here are likely infeasible in the near political future. Some of these proposals may be hard to square with current WTO obligations (particularly MFN obligations to offer all members any benefit offered to any other state). The goal here though is not to prescribe articles for current negotiations but to imagine what alternative negotiations might look when directed by a different normative narrative. To the extent that such a narrative is possible, it will require an active effort to re-center the discourse within international economic law, in international organizations, and/or domestic politics.

¹⁷² See, e.g., Ahmed Al-Omran, *Saudi Arabia Freezes Trade with Canada and Expels Ambassador*, FINANCIAL TIMES, August 6, 2018.

¹⁷³ See, e.g., Ryohei Yasoshima, *US-South Korea Steel Deal Tests WTO Rules*, NIKKEI ASIAN REV., March 27, 2018 07:46 JST, <https://asia.nikkei.com/Economy/US-South-Korea-steel-deal-tests-WTO-rules>.

¹⁷⁴ See generally Joseph H. H. Weiler, *Editorial: Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System*, 29 EUR. J. INT'L L. 339 (2018).

¹⁷⁵ See, e.g., Brewster, *supra* note 111; Manfred Elsig, Mark Pollack, & Gregory Shaffer, *Monkey Cage: Trump Is Fighting An Open War On Trade. His Stealth War On Trade May Be Even More Important*, WASH. POST, September 27, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?utm_term=.c558006b5721.

¹⁷⁶ See Hoekman & Douglas, *supra* note 9, at 21 ("If the organic link between civil society and the market cannot be restabilized, there is a very real prospect that the 21st Century story of trade agreements will be a story of reversal.")