RETHINKING TRADE LAW IN AN ERA OF TRUMP AND BREXIT

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Abstract

International trade and economic globalization are in crisis. In the U.S. and elsewhere, current regimes like NAFTA and the EU, and trade deals like the TTIP and the TPP, have become targets for the political backlash against trade and its larger context, economic globalization. Brexit and the 2016 U.S. election remind us that many feel betrayed by current trade policies, that free trade is being imposed on them at their cost but for others' benefit.

At the heart of this crisis, however, there are as always opportunities. First, we have an opportunity to return to trade's roots in ***consent****. Trade is nothing more or less than the economic bargains we agree to, and the rules we agree on to protect, support and facilitate these bargains. However, by this standard much of what passes today for trade is not really trade at all but something else: coercion, exploitation, or worse. Second, we have an opportunity to look below the surface of contemporary events, where deeper underlying trends point towards the early days of a larger, more inclusive set of socioeconomic relationships we can call global market society.*

These two lines of investigation themselves converge into the present inquiry: what kind of trade regulation does a global market society need in order to flourish? How is that different from conventional, contemporary "trade" agreements? And how do we support the most vulnerable workers and others marginalized by economic globalization in the process of

collectively pursuing these economic and social opportunities? If the heart of trade is consensual economic exchange, then this has ramifications throughout the entire social framework we use to recognize, support, protect and facilitate consensual economic exchanges.

Résumé

Le commerce international et la mondialisation économique sont en crise. Aux États-Unis et ailleurs, les régimes actuels, comme l'ALENA et l'UE, et les accords commerciaux comme le TTIP et le TPP, sont devenus des cibles de la réaction politique contre le commerce et son contexte plus large, la mondialisation économique. Le Brexit et les élections américaines de 2016 nous rappellent que beaucoup se sentent trahis par les politiques commerciales actuelles, que le libre-échange leur est imposé à leurs dépens, mais pour le bénéfice des autres.

Mais au cœur de cette crise, il y a toujours des opportunités. Premièrement, nous avons l'occasion de revenir aux racines du commerce au travers du ***consentement****. Le commerce n'est, en quelque sorte, rien de plus que les opportunités économiques que nous acceptons et les règles sur lesquelles nous nous entendons pour protéger, soutenir et faciliter ces opportunités. Cependant, selon cette norme, une grande partie de ce qui passe aujourd'hui pour du commerce n'est pas vraiment du tout du commerce mais quelque chose d'autre : la coercition, l'exploitation, voire pire. Deuxièmement, nous avons l'occasion de regarder sous la surface des événements contemporains, où des tendances sous-jacentes plus profondes indiquent les premiers jours d'un ensemble plus vaste et plus inclusif de relations socioéconomiques que nous pouvons appeler la société de marché mondiale.*

Ces deux axes d'investigation convergent eux-mêmes vers la présente réflexion : de quel type de réglementation commerciale une société de marché mondiale a-t-elle besoin pour prospérer ? En quoi cela diffère-t-il des accords "commerciaux" conventionnels et contemporains ? Et comment pouvons-nous soutenir les travailleurs les plus vulnérables et les autres personnes marginalisées par la mondialisation économique dans le processus de recherche collective de ces opportunités économiques et sociales ? Si l'échange économique consensuel est au cœur du commerce, cela a des répercussions sur l'ensemble du cadre social que nous utilisons pour reconnaître, soutenir, protéger et faciliter les échanges économiques consensuels. .

ABOUT FRANK GARCIA

Frank J. Garcia, professor at Boston College Law School, is the author of several books including the now famous "Global Justice and International Economic Law: Three Takes" (Cambridge University Press). At Boston College, he teaches and writes in the areas of globalization and the global justice debates, global business law and international legal theory. He also leads various projects in the field of International Investment Law, including the BC Law-PUC Working Group on Trade & Investment Law Reform and a Boston College-based research collaborative on Third-Party Funding in International Investment Arbitration. Since 2015, at the Sorbonne law school, he has been a visiting scholar giving talks and teaching to the Master II students in Anglo-American law directed by Professor Sophie Robin-Olivier and to the Master II cohort specializing in Global business law and Governance - including students from partner institutions City University of Hong Kong, Columbia and Melbourne law schools. He also was an inspiration to the JD/LLM partnership with Boston College offering degree exchange opportunities to postgraduate students on both sides of the Atlantic.

It was a rewarding moment for Sorbonne Law to host Professor Garcia and attend to his 2017 Sorbonne public lecture "Rethinking International Trade Law in an Era of Trump and Brexit". As a trade expert, he explained how the U.S., current regimes like NAFTA and the EU, and future trade deals like the TTIP and the TPP, have become targets for the political backlash against trade and its larger context, economic globalization. He reminded us that Brexit and the 2016 U.S. election suggest that many of us are feeling betrayed by current trade policy, and to respond fully we must address that betrayal. For Professor Garcia, one must take advantage of this opportunity to look below the surface of current events and discern deeper lines of convergence, towards an emerging global market society rather than a return to the economic Dark Ages. He like no other offered to step back and re-examine what trade is really all about : nothing more or less than the economic bargains we agree to, and the rules we agree on to protect and support those bargains.

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Frank J. Garcia, professeur à la Boston College Law School, est l'auteur de plusieurs ouvrages dont le désormais célèbre « Global Justice and International Economic Law : Three Takes » (Cambridge University Press). Au Boston College, il enseigne et écrit dans les domaines de la mondialisation et des débats sur la justice internationale, du droit commercial international et de la théorie du droit international. Il dirige également divers projets dans le domaine du droit de l'investissement international, notamment le BC Law-PUC Working Group on Trade & Investment Law Reform et une collaboration de recherche du Boston College sur le financement par des tiers dans l'arbitrage international en matière d'investissement. Depuis 2015, il est professeur invité de l'École de droit de la Sorbonne où il donne des conférences et enseigne aux étudiants du Master II de droit anglo-américain dirigé par le Professeur Sophie Robin-Olivier ainsi qu'aux étudiants du Master II spécialisé en droit des affaires et gouvernance mondiale. Il a également été une source d'inspiration pour le partenariat JD/LLM avec le Boston College qui offre des possibilités d'échange de diplômes aux étudiants de troisième cycle des deux côtés de l'Atlantique.

Ce fut un moment gratifiant pour l'École de droit de la Sorbonne d'accueillir le Professeur Garcia et d'assister à sa conférence publique de 2017 à la Sorbonne « Rethinking International Trade Law in an Era of Trump and Brexit ». Il a expliqué comment les États-Unis, au travers des régimes actuels comme l'ALENA et l'UE, et les futurs accords commerciaux comme le TTIP et le TPP, sont devenus des cibles pour la réaction politique contre le commerce et son contexte plus large, la mondialisation de l'économie. Il nous a rappelé que Brexit et les élections américaines de 2016 nous laissent pour la plupart d'entre nous le sentiment d'avoir été trahis par la politique commerciale actuelle. Pour le professeur Garcia, il faut profiter de cette occasion pour regarder sous la surface de l'actualité et discerner des lignes de convergence plus profondes, vers une société de marché mondiale émergente plutôt qu'un retour à l'âge des ténèbres économiques. Il a ainsi proposé de prendre du recul et de réexaminer ce qu'est réellement le commerce : rien de plus ou de moins que les opportunités économiques sur lesquelles nous nous entendons, et les règles sur lesquelles nous nous entendons pour protéger et soutenir ces opportunités.

Sa contribution à la Sorbonne Student Law Review - Revue juridique des étudiants de la Sorbonne converge vers une question fondamentale : de quel type de commerce une société de marché mondiale a-t-elle besoin pour s'épanouir ? Et comment soutenons-nous les travailleurs les plus vulnérables et les autres marginalisés par la mondialisation économique ?

Nous aimons penser que le professeur Garcia est un auteur pionnier et ouvert d'esprit, et nous sommes profondément d'accord avec lui qu'il n'y a jamais eu un moment plus important pour réexaminer la nature et la réglementation du commerce international, vers une compréhension plus profonde de ses possibilités progressives.

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INTRODUCTION

As I write this, the effects of the Brexit referendum and the Trump election (also, in its own way, a referendum on a half-century of internationalist and neoliberal US policies at home and abroad) are revealing themselves in a slow-motion drama with many repercussions. Within trade, the economic and political integrity of the EU has been seriously challenged, and US trade policy is falling into deeper and deeper disarray, as current or future agreements like NAFTA, KORUS, the TPP and TTIP become targets for a political backlash against trade and its larger context, economic globalization.

Every crisis, however, brings with it an opportunity. For trade policy, provided we can get below the surface waves of current trade politics, the opportunity may be to re-think what trade law is about. By trade law, I mean not just the law of inter-state trade relations—the GATT-WTO system—but international economic law (IEL) most broadly: trade, investment, finance, banking law—in short, the regulatory structure for the global economy. We have thus far pursued a kind of economic globalization that has not only left many countries behind—that is not new news, that has been going on for decades—but also marginalized and undermined the economic lives of many within our own societies. Through these *referenda* the British Midlands and the US heartland have woken the rest of us up to the fact that, at least in their view (and there is more than a kernel of truth in it), current global economic policies and their domestic effects have impoverished and disenfranchised them as they have in the developing world.

How can we respond to all of this most effectively? In this essay I will offer three recommendations. First, that we seize this chance to re-think trade law by recovering trade law's roots in consensual economic exchange. Second, that we accept that the rising inequality and the distributive effects of IEL *within* societies, not just between societies, are all problems of international economic law, and not "someone else's problem". Finally, that in responding to the crisis politically and legally we look as far ahead as possible and prepare ourselves for the next 50 years, rather than try to restore the status quo of the last 50 years, which would only set us up for the next crisis.

In my view, all of this means understanding that beneath the roiled surface water of today's crisis we may in fact be seeing the emergence of a global market society. The question for international economic law, both at the heart of the crisis and as the way out, is this: what *kind* of global market society do we want to build?

I. TRADE AND CONSENT

If we want to fully understand and address the roots of the current crisis as a kind of reactive economic populism against contemporary global economic structures and their related domestic policies[1], we need to better understand the nature of trade law today as a powerful engine for implementing economic policies throughout a global market regulation framework. In my view, this means returning to trade's roots in consensual exchange.

I.A. Trade as Consensual Exchanges

Trade transactions are all about the expectation of a mutual exchange—they are mutual in nature, involving a *bilateral* exchange of economic value[2]. We can experience this in both a positive and a negative dimension. The simultaneous face-to-face barter transaction is perhaps the paradigmatic experience and image of trade and embodies this bi-laterality in its positive form: I hand you something of value to you, and in return you hand me something of value to me.

In contrast, theft is a type of unilateral transaction, helpful in clarifying the nature of trade. A theft involves an *involuntary* transfer of value. It could be said that a theft is not a trade because it is unilateral, but a simple thought experiment clarifies that this is not the essence of the distinction. A thief in the paradigmatic "your money or your life" scenario could give you a cheap watch in return for your wallet, but it would still be a theft despite its bilateral quality. We would not call this a trade, nor would we call it even a coerced exchange.

Thus trade must also be voluntary, which introduces the key notion of consent—both parties must consent to the transaction or there is some element of theft or violence. Return for a moment to the example of the paradigmatic barter transaction I began this section with, and now imagine a third person, standing behind one of the two exchange parties, holding a gun at her back to drive the exchange forward. Our understanding of the nature of the moment changes entirely—whatever it is, it is not trade.

The voluntariness of bilateral exchange can be understood through the centrality of the idea of bargaining in contract law, an institution "central to our social and legal systems, both as reality and as metaphor"[3] and "long…recognized as one of the most powerful statements of

[1] On the role of economic populism in the Trump election, K. Himes, "The State of our Union*"*, *Theological Studies*, 2017, vol. 78, issue 1, p. 147.
[2] The following account is drawn from F. Garcia, *Consent and Trade: Trading Freely in a Global Market*, Cambridge University Press, forthcoming 2018.
[3] M. Eisenberg, "The Bargain Principle and its Limits", *Harvard Law Review*, 1982, vol. 95, p. 741.

the nature of freedom in our society"[4]. The notion of consensual bargain is foundational to the field of contract law[5]. If we look at the core justifications under which a contract is declared void or voidable—mistake, duress, or fraud—we see that they reflect the absence of or an impingement upon bargained-for consent[6].

I.B. B. What is Not Trade, and Why

Based on this preliminary inquiry, I would now like to turn to an examination of several alternatives to trade (i.e., other economic interactions that we do not consider trade), in order to paint a fuller picture of what trade is and what it is not.

I.B.1. Predation

As Simone Weil writes, one cannot seek consent where there is no power of refusal[7]. At the private-party level, contract law recognizes this difference through the concept of duress, a defense to the finding of a contractual obligation. In other words, where one party's formal consent to a contract was not freely given, but was given under some form of pressure, the law will not recognize this as a meeting of minds and will not find a contract.

Thus through contract law's exploration of this subtle terrain of consent and economic relationships, we have as a society identified a space short of the criminal law of theft, within which the absence of consent nevertheless has important consequences. Within that space, we withhold the conceptual apparatus of contractual obligation and enforcement because we have determined that such apparent agreements are not in fact contracts—deals, bargains, promises—despite the formal appearance of consent.

I.B.2. Coercion

Short of predation, we can recognize a subtler weakening of consent, involving what we call coercion. Coercion occurs when a transaction is mutual, and in some basic way consensual, but something weakens the fullness or freedom of the consent, short of outright theft or duress[8].

[4] T. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction", *Harvard Law Review*, 1983, vol. 96, pp. 1173, 1235.
[5] Eisenberg, *op. cit.*, p. 741.
[6] See *infra* notes 26–30 and accompanying text.
[7] S. Weil, "Justice and Human Society" *in* S. Weil, Eric O. Springsted ed., 1998, p. 123.
[8] See generally Robert Hale's groundbreaking essay, "Coercion and Distribution in a Supposedly Non-Coercive State", *Political Science Quarterly*, 1923, vol. 38, n.3, pp. 470-494 (even voluntary market exchanges can be coercive in the presence of disparities in bargaining power, resources or knowledge). I am indebted to my friend Jeffrey Dunoff for introducing me to Hale's work.

The experience of coercion often involves a restriction on the range of possible bargains that the parties are free, or not free, to propose and consider. To take the paradigmatic case, if I want the flat-screen plasma television from a traditional "big-box" store, I have to surrender my right to judicial resolution of any disputes, accepting the non-negotiable arbitration clause embedded in the form contract[9]. Thus, coercion can presuppose an inequality in bargaining power, where one party works to limit the range of possibilities "on the table," so to speak. The resulting agreement will in an important sense be voluntary, yet in an equally important sense will be motivated less by a desire to do the act in question, than by "a desire to escape a more disagreeable alternative"[10].

As with duress, contract law also wrestles with this issue and reflects this distinction between coerced and voluntary agreements[11]. As Robert Hale points out, since coercion is a market reality independent of the law, the law cannot eliminate coercion – at most, it can change the terms of coercion for better or worse[12]. For this reason, contract law provides particular protections for consumers and those with weaker bargaining power when they deal in what the law calls "adhesion contracts": contracts with commercial parties or manufacturers who possess greater bargaining power, and which are presented in a "take it or leave it" manner[13]. In such cases, courts will look carefully before assuming the consumer consented to the adverse terms of the contract, despite the fact that, in all other material respects, it looks as if a contract was voluntarily entered into.

I.B.3. Exploitation

One dimension common to both theft and coercion is that the party violating our consent, or pressuring us for it, is present within the transaction, so to speak, as is the offending behavior. What about a situation in which the violation or pressure have occurred outside the four corners of the transaction, yet throw a profound shadow over the resulting bargain, the range of choices, and the decision to consent or not? In considering this possibility, we are uncovering the nature of exploitation.

[9] See T. Rakoff, *op. cit.*, pp. 1265–66 (discussing the problem of the enforceability of arbitration clauses in contracts of adhesion).
[10] R. Hale, *op. cit.*, p. 472.
[11] On the difficult, but possible, task of drawing a line between coerced consent and no consent at all, see D. Beyleveld, R. Brownsword, *Consent in the Law*, Hart Publishing, 2007, pp. 345–46.
[12] R. Hale, *op. cit.*, pp. 493–94.
[13] See T. Rakoff, *op. cit.*, (re-conceptualizing the law of adhesion contracts).

To get at the nature of the experience of exploitation, theorists have used a range of approaches, focusing either on the fairness of the transaction or its degrading or abusive quality[14]. What the various accounts share in common is the notion of unfair advantage-taking[15]. This occurs when there is a flaw in the circumstances of the transaction—Risse and Wollner call it a moral defect in a distribution and its history[16]—that, whether due to an injustice in the background conditions, a vulnerability[17], a rights violation, or some other form of disrespect, results in one apparently free party seemingly inexplicably accepting a bargain that is not *fair*, but without evidence of direct coercion[18]. We take the party benefitting from the flaw to be exploiting the situation, and the vulnerable party as the exploited party.

When applied to trade, this suggests that where a party benefits from a defect in the background conditions, say, or a unique economic vulnerability, to the detriment of the other party, the resulting exchanges are not trade, but rather exploitation. The offeree's consent was granted within a restricted range of choices, a restriction that worked in favor of the offeror to permit a bargain that would otherwise be considered unfair. Thus any consent happens in response to an unfair advantage-taking that is essential to the "deal" having been struck at all.

I.C. Trade as Public Transactions: Consensual Flows and Patterns of Exchange

What does this account of consent in trade say about what we call trade between states? We can begin with the notion of trade between states as a transnational pattern of private exchanges, often (but not necessarily) facilitated by state action (here is one place where notions of trade and "free trade" touch). At a purely economic level, we can measure commercial flows of various kinds between states and call those "trade"—certainly, this is at least an element of what we call "trade" between states (i.e., commercial flows seen as patterns of exchange)[19].

[14] See M. Zwolinski, "Structural Exploitation", *Social Philosophy and Policy*, 2012, vol.29, issue 1, pp. 154, 157.
[15] A. Wertheimer, *Exploitation*, Princeton University Press, 1996; M. Risse, G. Wollner, "Three Images of Trade: On the Place of Trade in a Theory of Global Justice", *Moral Philosophy and Politics* 2014, vol. 1, issue 2, pp. 201, 214; M. Zwolinski, *op. cit.*
[16] M. Risse, G. Wollner, *op. cit.*, p. 215.
[17] Vulnerability is a useful term to describe the situation that makes one ripe for exploitation, whether an individual or a state. See R. Goodin, "Exploiting a Situation and Exploiting a Person", *in Modern Theories of Exploitation*, Sage Publishing, 1987, p. 166.
[18] M. Zwolinski, *op. cit.*, pp. 158–61.
[19] It is certainly a key element of economic globalization. See David Held (dir.), *The Global Transformations Reader: An Introduction to the Globalization Debate*, Polity Press, 2nd ed. 2003, p. 67 ("flows facilitated by infrastructure" a key dimension of globalization). This raises an important question: if we conclude that mere economic flows are not enough to count as trade, then much of what is currently constituting economic globalization and justified publicly as "global trade" may not in fact be trade but something else. This ominous

But we can draw on the same thought experiments regarding theft and private exchange above to dig a bit deeper into patterns of exchange between states, as we did for exchanges between individuals.

I.C.1. Theft and Economic Flows Between States

Imagine if we came newly onto the scene and witnessed goods and commodity flows between states – we could be justified in thinking this to be trade, understood as patterns of exchange of economic value. Imagine further, however, that we then discovered that one state had recently conquered the other, and the flows we could see and measure were in actuality the spoils of war. Would we then be as confident that this was trade? I'm not so sure.

What I am exploring here is whether our sense of trade *versus* theft at the private level, is in some way equally characteristic of similar patterns of exchange at the public level between states, when goods are exchanged by force or as the result of the past exercise of force, or perhaps even the ongoing threat of force. We would not be inclined, I think, to consider such wealth extraction to be "trade," though the commercial flows themselves are undeniably essential to the relationship, whatever we may decide to call it.

My sense is that the analogy to theft in private relations holds here. In socioeconomic terms, the aggregate equivalent to theft—transactions which are not mutual and where consent is not present—can be called wealth extraction, plundering or predation; add a political element and we call it imperialism or colonialism[20]. In these cases, there is a pattern of economic benefit flowing from one party to the other, but it is not mutual in a meaningful sense, and most importantly, it is not consensual. Rather, the flow of economic benefit in these cases is achieved through power inequalities as expressed by economic or military force—there is no power of refusal[21].

I.C.2. Coercion and Economic Flows Between States

What if we came upon the same scene and discovered that in addition to the commercial flows we can see and measure, there was a treaty between the two states, calling itself a trade

possibility chimes with elements of the current globalization backlash. I will return to this point in the concluding chapter.

[20] For an interesting account of the wrongs of colonialism with respect to equality, reciprocity, agency and relationship, see generally L. Ypi, "What's Wrong with Colonialism", *Philosophy & Public Affairs*, 2013, vol. 41, issue 2, p. 158.

[21] *Ibid.* There remains the difficult issue of determining the limits of acceptable "influence" or persuasion between states (through forms of soft power, for example), which the discussion of coercion below only partly answers.

agreement, covering these commercial flows. Would this then assure us that what we are indeed in the presence of trade, given that the treaty was duly ratified, indicating at least formal consent? I'm not so sure. Consider if we dug further as before and discovered again that there had been an armed conflict between these states, that one state had won, and the victorious state had used its military advantage to compel the losing state sign an agreement formalizing a process of wealth extraction or "market opening".

The analogy to my earlier account of coercion between private parties seems valid here as well regarding forced agreement at the public level. States can coerce other states just as readily as individuals coerce other individuals. Coerced patterns of exchange between states seem just as much to be something other than trade, as coerced exchanges between individuals.

Private law's reflection on coercion within contracts suggests in the state trade situation that such a pattern of exchange is consensual in some important way, and yet nonconsensual in another important way. It seems too much to conclude that this is a theft, as we did with the examples of predation above. And yet, to say it is simply "trade" and go no further, also seems to miss the mark. Such a move would be akin to concluding under contract law that a coerced exchange is a contract, full stop, and ending our scrutiny of the bargain because there was in fact some degree of voluntary consent.

In the private law context, we have decided we need to go further, and so too between states[22]. Nevertheless, we—and the law—are uncomfortable with this ambiguity.

I.C.3. Exploitation and Economic Flows Between States

What about exploitation? Does the characterization of exploitation between private parties explored above also hold true at the public level? Consider again the same example of coming across a pattern of commercial flows between states that looks like trade and may even be carried out under an agreement calling itself a trade agreement. What if we discover that a few decades earlier the more powerful of the two states had taken active diplomatic and military steps to warn other powerful commercial states away from that hemisphere, declaring it to be uniquely the province of that powerful state, and used the resulting patterns of commercial dependence by the weaker states to negotiate commercial agreements in which the weaker states had little choice but to accept poor terms or even unilateral terms?

[22] See D. Lefkowitz, "The Legitimacy of International Law", *in Global Political Theory*, Polity, 1st ed., pp. 98, 108 (costs of non-agreement on the part of a weaker state may not be so severe as to render the agreement non-voluntary, yet still raise serious consent issues affecting the agreement's legitimacy).

Such a pattern maps in important ways onto the private experience of exploitation I characterized above as being something other than trade, despite the fact that it involves bilateral exchanges, perhaps even some negotiation and even a degree of consent which may even be formalized by a treaty[23]. Exploitation in transnational settings has increasingly become a subject of normative and legal reflection, no doubt due to the salience of such unequal economic relationships in many global contexts, such as capital and labor in foreign investment[24]. In the inter-state context, exploitation or unfair advantage-taking may take the form of a range of policies, structures and institutional behaviors, which for one reason or another result in a situation where a state accepts from another state a poorer bargain than it otherwise could have pursued but for the vulnerability of its circumstances.

Critically for our purposes, the negotiation of trade agreements themselves can be a form of structural exploitation—following Zwolinski's intuition, the trade agreement is not just an element in the background conditions for exploitation, it *is* the exploitation[25]. Moreover, the trade agreement can create the conditions for subsequent private exploitations of the citizens of the weaker state[26].

I.C.4. Theft, Coercion and Exploitation in Contemporary Trade Agreements

Contemporary trade practice furnishes many examples of what from a consent perspective does not appear to be trade at all, but can better be characterized as forms of theft, coercion or exploitation between states. I can only offer two examples here, one involving domestic law reform in the CAFTA agreement between the United States and the Central American States (including the Dominican Republic)[27] and the other market access in the US-Korea FTA or KORUS[28]. These illustrate vividly the non-trade dynamics which have

[23] See M. Risse, G. Wollner, *op. cit.*, pp. 211–12 (noting that exploitation is a powerful concept for the analysis of trade because "[a] core aspect of exploitation is that it may occur even if everybody's fate is improved through the activity in question, and even if everybody participates voluntarily. Trade exhibits these features…").
[24] See generally M. Zwolinski, *op. cit.*
[25] *Ibid.* pp. 175–77. See M. Risse & G. Wollner, *op. cit.*, p. 211 (noting that "States can take unfair advantage of each other. Bigger states can exploit their bargaining power in negotiations, bilaterally or within the WTO").
[26] I am thinking for example of a treaty whose market access provisions open an industry to unsustainable levels of competition, or at an unsustainably fast pace, for reasons that benefit the more powerful state. *See, e.g., ibid.* pp. 219–20 (discussing a Vrousalis' account of exploitation as domination for self-enrichment) ("Some economists argue that trade liberalization may, under certain circumstances, be detrimental to a country's prospects for growth and poverty alleviation (e.g. Rodrik 2007). Some such cases can be understood as exploitative. Powerful actors, states like the US or organizations like the WTO, that require particular institutional set-ups or the pursuit of specific trade and industrial policies detrimental to the prospects of weaker actors, engage in exploitation as domination.").
[27] Dominican Republic-Central America Free Trade Agreement, Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar.-U.S., Aug. 5, 2004 [hereinafter CAFTA].
[28] U.S.-Korea Free Trade Agreement, Kor.-U.S, June 30, 2007 [hereinafter KORUS].

contributed to the widespread popular resentment of trade agreements and their domestic effects that we see today[29].

The CAFTA services chapter requires Costa Rica to undertake significant substantive revisions of its domestic agency and distribution law[30]. That this is even an agenda item for trade agreement negotiations already illustrates the powerful reach of trade policy today, with serious domestic implications. In this case, agency and distribution laws typically offer enhanced, judicially supervised protections for agents and distributors in the event of termination, as they are generally understood to be the weaker parties in such contracts and hence subject to exploitation[31]. The US had identified these rules, a source of frustration to US business, as a key goal for CAFTA reform[32]. The US aim was to weaken these protections for the benefit of foreign—in this case United States—principals.

The treaty requires Costa Rica to weaken its agency and distribution laws in a variety of ways, including mandating that termination with notice—but absent any breach of obligation—is nevertheless to be considered termination for just cause, thus waiving all rights of the agent or distributor to indemnification[33]. Most remarkably, all such contracts, even those in force at the time of ratification, would now be deemed subject to private arbitration unless expressly subject to litigation, even though under the old law access to Costa Rican courts could not be waived by contract even with explicit arbitration clauses[34].

The CAFTA treaty thus requires what is in essence a retroactive modification of any agency and distribution contracts then currently in force to submit the parties to arbitration, by creating the rebuttable presumption that where the contract is silent as to judicial settlement of disputes, such silence indicates an intention to settle any disputes by arbitration[35]. The CAFTA provision thus also retroactively amends the Costa Rican statute by creating a presumption that expressly contradicts the terms of the law then in force, in a way that contradicts what are likely

[29] For more examples, see F. Garcia, *op. cit.*
[30] See CAFTA, *op. cit.*, at annex 11.13, § A, pts. 1–6 (mandating changes to Costa Rica's Law No. 6209, "Law for the Protection of the Representative of Foreign Companies").
[31] P. Perales Viscales, "The Good, the Bad and the Ugly in Distribution Contracts: Limitations of Party Autonomy in Arbitration?", *Penn State Journal of Law & International Affairs*, 2015, vol. 4, issue 1, pp. 213, 219.
[32] *Free Trade with Central America: Summary of the U.S.-Central American Free Trade Agreement*, Office of the U.S. Trade Representative (Dec. 17, 2003), https://ustr.gov/archive/Document_Library/Fact_Sheets/2003/Free_Trade_with_Central_America_Summary_of_the_US-Central_America_Free_Trade_Agreement.html (discussing dismantling distribution barriers that locked US firms into distributor arrangements).
[33] See D. Martinez, "At Termination, Independent Sales Reps are Anything But", *Latin American Law and Business Report*, 1999, vol. 7, issue 5, p. 19.
[34] *Ibid.*
[35] CAFTA, *op. cit.*, at annex 11.13, § A, pt. 3.

to have been the reasonable assumptions of the contracting parties themselves under that regime[36]. Such a modification would under contract law be unenforceable as an example of duress, and which works a kind of theft against the party losing valuable rights without its consent[37].

This imposition of arbitration by the US in an asymmetric trade negotiation seems particularly opportunistic and unprincipled, given that under US domestic law the imposition of arbitration through contracts of adhesion is one ground for their unenforceability[38]. In other words, one of the places where private firms exercise their unequal bargaining power over consumers is by imposing arbitration instead of litigation, and US contract law typically rejects such provisions. It is ironic that the US is using a highly unequal treaty negotiation process to impose such measures on Costa Rican parties *as a class*, acting as an agent of the US manufacturers *as a class*, provisions that US courts themselves would be reluctant to enforce in parallel private law circumstances at home. This kind of coercion at the state level also results in duress or even theft (understood as the non-consensual stripping of a private party's valuable legal rights) with respect to private parties[39].

The prospect of CAFTA sparked huge protests in Costa Rica in 2007 in anticipation of a referendum on the treaty, the only referendum on CAFTA held by any CAFTA country, with protestors violently criticizing the treaty in terms eerily reminiscent of the terms we hear today in US economic populism to criticize US trade agreements[40]. The fact that only a slim majority of the 59% of eligible voters participating in the referendum voted in favor of the treaty, coupled with alleged irregularities in the campaign, meant that in this case the referendum failed to give legitimacy to the treaty or settle the issue of neoliberal integration for Costa Rica or anyone

[36] As one author puts it, the Costa Rican case reveals that even "mandatory" laws aimed at protecting the weaker party in such contracts are not enough, as they are not truly mandatory under the effects of the trade regime. P. Viscales, *op. cit*., pp. 239–41.
[37] See CAFTA, *op. cit*., at annex 11.13, § A, pt. 4.
[38] Although the Federal Arbitration Act favors the enforcement of arbitration agreements, they are still subject to challenges under state law principles of unconscionability. Generally, to be unenforceable a contract of adhesion must be both substantively and procedurally unconscionable. Given that under CAFTA arbitration may be implied by law, those agreements are arguably already procedurally unconscionable. Thus, if these were U.S. contracts, absent the unique imprimatur of federal law, their enforceability would depend solely on the ability of their substantive terms to withstand strict scrutiny. See generally T. Oehmke, J. Brovins, "The Arbitration Contract—Making It and Breaking It », *in American Jurisprudence Proof of Facts, Lawyers Cooperative Publishing*, 3rd ed, 2005, p. 83.
[39] As a further irony, were a state to engage in such a taking with regard to a foreign private party, it would almost certainly amount to a compensable expropriation under international investment law.
[40] J. McPhaul, *Huge Crowds in Costa Rica Protest US Pact*, Reuters (September 30, 2007), https://www.reuters.com/article/us-costarica-usa-protests-idUSN3023528720070930.

else[41]. In the end, all CAFTA states formally ratified the treaty—it was unlikely that Costa Rica or any such small economy would jeopardize the core trade liberalization benefits it urgently needs from a market such as the US, even when such domestic law reforms are imposed on them as a price. In this sense, CAFTA might even be considered an adhesion treaty[42].

In the case of the KORUS and market access, we see a slightly different pattern of outcomes, but the underlying dynamics seem quite similar. In the market access area, gaining better access to Korean agriculture was a top priority for the US, given its comparative advantage in agriculture[43]. However, and equally importantly, maintaining the viability of an admittedly less efficient agriculture sector was key to the Korean government, for reasons of rural unemployment, orderly adjustment, food sufficiency and social stability[44].

In this area the US achieved its objective, securing commitments liberalizing access in virtually all Korean agricultural sectors[45]. The exception was rice, long considered a national security and cultural identity product and therefore a unique product in Korean society[46]. This certainly represents an important success for Korea. However, for our purposes here, the key issue may be not so much that Korea managed to maintain its rice industry protections while CAFTA states could not (although that is noteworthy), but whether Korean producers, even in other sectors, got equivalent benefits in return for the rest of the liberalization commitments. It is always about the balance. Unfortunately, Korea did not achieve that balance. Other than rice, Korea failed to achieve any of its most important goals in agriculture, textiles, services and trade remedies[47].

As in Costa Rica, in Korea the signing of the KORUS and its subsequent introduction into Parliament for ratification provoked huge public protests and much criticism of the

[41] A. Breuer, "Costa Rica's 2007 Referendum on the Dominican Republic - Central American Free Trade Agreement (CAFTA-DR): Citizen Participation or Manipulation?", *Representation*, 2012, vol. 45, issue 4, p. 455.
[42] See A. Corbin, *Corbin on Contracts*, West Publishing Company, rev. ed. 1993, § 1.4 (noting the origin of the term 'adhesion contract' was the international law term for a treaty which states must accept or reject despite having no voice in formulating its provisions).
[43] Key U.S. goals necessary for Congressional consent included agriculture liberalization, addressing the imbalance in Korean auto exports into the United States, and the special treatment of Korea's outward processing zone or OP with North Korea, the Kaesong Industrial Complex. See also Y.-S. Lee, J. Lee, K. Sohn, "The United States-Korea Free Trade Agreement: Path to Common Economic Prosperity or False Promise", *East Asia Law Review*, 2011, vol. 6, issue 1, pp. 111, 115.
[44] *Ibid*. p. 135.
[45] *Ibid*. pp. 135–36.
[46] Multifunctionality refers to the idea that agriculture is more than just food, and can create non-commodity outputs. "*Multifunctionality, or Multifunctional Agriculture"*, OECD (Mar. 10, 2003), https://stats.oecd.org/glossary/detail.asp?ID=1699.
[47] See generally Y.-S. Lee et al. *op. cit*.; see also J. Schott, S. Bradford, T. Moll, « Negotiating the Korea-United States Free Trade Agreement », *Institute for International Economics*, 2006, available at https://piie.com/sites/default/files/publications/pb/pb06-4.pdf (reviewing the parties' negotiating goals).

government, including an opposition MP igniting a tear gas canister on the floor of Parliament to highlight widespread and vociferous opposition to the deal and to delay ratification[48]. Once again, the treaty was approved amidst allegations of surprise votes and procedural irregularities, and widespread public criticism of the domestic economic effects of the treaty were inadequate to stop it[49].

None of this is surprising when viewed as part of power politics between nations (though it may still be disappointing), but when viewed through the lens of consent, it suggests something other than trade is going on. Commentators suggest that in the end, the essential US role in Korean security, and increasing security pressures in the region, meant that Korea was not going to reject any trade bargain, no matter how lopsided[50]. Insofar as the essential US role in Korean security meant that Korea was not going to reject any trade bargain, no matter how lopsided, the US was arguably exploiting the security situation as a background condition.

Moreover, Korea has since discovered that the coercive dilemmas around trade do not end when the agreement is signed. At the time of this writing, the US has just announced that it has "successfully renegotiated" key provisions of KORUS that it felt unfairly burdened US manufacturers[51]. The Administration was able to do so after threatening to group South Korea into the steel and aluminum tariffs the US planned to impose predominantly on China[52]. By doing so, the Administration succeeded in reducing Korean auto exports into the US while securing larger import quotas into Korea for US cars, a US goal in the initial negotiations for KORUS which it had not met in the negotiations themselves[53]. Thus through this most recent

[48] H. Siddique, "South Korean MP Lets Off Tear Gas in Parliament", in *The Guardian* (Nov. 22, 2011, 8:51 AM), https://www.theguardian.com/world/2011/nov/22/south-korean-mp-lets-off-teargas.

[49] "South Korean Lawmakers Approve Korea-US Trade Deal", *Voice of America* (November 21, 2011), https://www.voanews.com/a/south-korean-lawmakers-approve-korea-us-trade-deal-134315453/148562.html

[50] *Ibid*.; Lee *et al., op. cit*., p.153 (for Korea, an unbalanced agreement may not be sufficient reason not to conclude an FTA with the United States given its essential security role).

[51] White House Fact Sheets, "President Donald J. Trump is Fulfilling His Promise on The U.S.–Korea Free Agreement and on National Security", *The White House* (March 28, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-fulfilling-promise-u-s-korea-free-trade-agreement-national-security/.

[52] A. Rappeport, J. Tankersley, "Trump Gets First Major Trade Deal as South Korea Looks to Avoid Tariffs*"*, *New York Times*, Mar. 27, 2018, at A7. Despite the threat to impose steel and aluminum tariffs on South Korea, there is some indication that South Korea would have been exempt from these tariffs as the United States cited national security concerns as the basis for imposing the tariffs and South Korea had previously been granted exemptions from national security concerns. J. Brinkley, "U.S.-S. Korea trade Pact Revision is Full of Holes", *Forbes* (Mar. 27, 2018, 3:30 PM), https://www.forbes.com/sites/johnbrinkley/2018/03/27/us-korea-fta-revision-is-full-of-holes/#304be1da20a3.

[53] The KORUS revisions extended U.S. tariffs on South Korean pickup trucks for 20 years, increased the quantity of U.S. automobile imports from 25,000 vehicles to 50,000 vehicles, and cut South Korean steel exports by 30 percent. S. Lester, "The First Trump Trade Deal: The KORUS Renegotiation May Be Complete", *International Economic Law and Policy Blog*, (Mar. 26, 2018, 8:23 AM), http://worldtradelaw.typepad.com/ielpblog/2018/03/the-first-trump-trade-deal-the-korus-renegotiation-may-be-complete.html.

coercive action, the US was able to revisit negotiations and secure concessions that Korea had resisted in the first place[54].

I.C.5. Summary

When these negotiation dynamics are considered through a consent analysis, they can be understood to illustrate a broader problem endemic in trade negotiations today[55]. Rather than being simply a (repeated) case of hard bargaining, trade negotiations carried out under conditions of such unequal bargaining power and against troubling background conditions have a built-in potential for coercion and exploitation. When these possibilities are acted on by stronger states, weaker states are compelled to negotiate bilateral and regional trade agreements that are inherently redistributive, further shifting power and resources from weaker states to stronger states[56].

When economic agreements between states work through coercive or exploitative dynamics instead of consensual trade, and are then forced through a referendum or ratification process in undemocratic or illegitimate ways, the social costs are long-term and serious. Over time, it is not surprising that this kind of "trade" results in the public and damaging resentments we see affecting global economic and political relationships today.

However, coercive or exploitative behavior between states and the democratic deficits of "Other" countries are only part of the problem we face today. Developed countries have on the whole grown quite accustomed to watching, from what is presumed a safe distance, these resentments as they play out in developing countries we trade with. Trump and Brexit have woken us up to the necessity of considering the effects of such agreements, coupled with our own political deficits, on key domestic constituencies *within* developed states. Inequality and the distributive effects of trade are not just problems between states, but within states as well, and contemporary trade policies are implicated.

II. ECONOMIC GLOBALIZATION AND DISTRIBUTIVE EFFECTS WITHIN STATES

To the extent that international economic law has focused on the issue of inequality, it has done so in terms of inequality between states. Largely overlooked has been the topic of

[54] In return, the U.S. promised to exempt South Korea from the steel tariffs targeted at China. A. Rappeport, J. Tankersley, *op. cit.*
[55] Joseph Stiglitz also highlights such dynamics as contributing to the problems facing globalization today. J. Stiglitz, *Making Globalization Work*, W.W. Norton & Company, 2007.
[56] T. Hale, D. Held, K. Young, *Gridlock: Why Global Cooperation is Failing When We Need It Most*, Polity, 1st ed., 2013, p. 162.

inequality within states and how international economic law has influenced that reality. From the perspective of international economic law, the inequality issue is closely entwined with the topics of colonialism and post-colonialism, the proper meaning of development, and globalization.

II.A. Inequality and International Economic Law

International economic law has undoubtedly contributed to the rise of inequality. We can see that key elements of the international economic law system favor the intensification of inequality at national and global levels. First, at the level of trade and investment flows, while trade has grown within this framework, and *may* decrease inequality in developing countries, such decreases come in part by *flattening* wages in the middle class; moreover, trade may be *increasing* inequality in developed countries by decreasing wages and shifting jobs at the bottom[57]. Similarly, foreign investment increases inequality in home and host countries, outbound by facilitating transfer of low-skill jobs from developed countries, increasing returns to capital; and inbound in developing countries by increasing the skill premium, a good thing in certain respects, but also un-equalizing, promoting new elites[58]. Thus, while trade openness is generally associated with lower inequality (though at some cost to absolute income levels), greater financial openness is associated with rising income inequality[59].

Technological change also has a well-understood effect on inequality, which is magnified through trade and investment channels. New technologies intensify inequality within countries by increasing skill premiums, substituting automation for human labor, and promoting non-traditional work. The effect of new technologies is particularly acute in developed economies, themselves ironically also the lead innovators, where new technologies have contributed to the destruction or offshoring of old jobs in traditional areas of employment[60]. As older, less-skilled work is destroyed or moved offshore, a premium is attached to higher-skilled labor. Technology thus helps deliver a larger share of income gains

[57] Era Dabla-Norris, K. Kochhar, N. Suphaphiphat, F. Ricka, E. Tsounta, "Causes and Consequences: of Income Inequality: A Global Perspective" *IMF discussion note*, 2015; B. Keeley, "Income Inequality: The Gap between Rich and Poor", *OECD Insight*, 2015, pp. 33–50.
[58]E. Dabla-Norris, K. Kochhar, N. Suphaphiphat, F. Ricka, E. Tsounta, *op. cit.*; *The World Bank, Development Goals in an Era of Demographic Change*, 2016, http://www.worldbank.org/en/publication/global-monitoring-report; B. Keeley, *op. cit.*, p. 42.
[59] E. Dabla-Norris, K. Kochhar, N. Suphaphiphat, F. Ricka, E. Tsounta, *op. cit.*, p. 23
[60] See (B. Keeley 2015, pp. 42, 50). The growing importance of skill-biased technological progress for growth and rising demand for higher skills will lead to continued polarization of the wage distribution.

to the owners of capital, and a smaller share to the people who work for them through a reduction in human labor[61].

Third, social regulation is often both more complex and less effective on a global level, and national regulation is under great pressure. To take just one example, the global structure for income taxation facilitates tax avoidance, which in turn depresses national budgets when states can least afford lost revenues in confronting inequality problems, among others[62]. At the ideological level, the dominant global regulatory ideology, neoliberalism, depresses national social welfare systems in both dominant and client states by labeling them either protectionist or unsustainable and then dismantling them, thereby exacerbating inequality and limiting the range of domestic policy tools through which to ameliorate it[63].

Finally, global inequality is having domestic political effects, intensifying the reactivity of domestic politics and further complicating our policies towards inequality and political reform[64]. One can see this in everything from the Euro crisis to Brexit to the reactionary nationalism of US, French, Hungarian, Polish and Austrian politics, to list only a few examples[65]. Global inequality thus creates unique political problems for domestic societies, when socio-economic resentments and migration pressures stoke nativism, xenophobia and reactive domestic politics.

This question of domestic politics brings us full circle again to the task of re-thinking trade law and economic globalization in the wake of Trump and Brexit. In particular, it connects to a further dimension of consent and trade revealed by the current crisis: the consensual domestic political bargains with vulnerable constituencies—the "country within the country"—

[61] See B. Keeley, *op. cit*., p. 42. The labor share has declined in nearly all OECD countries over the past 30 years and in two-thirds of low-and middle-income countries between 1995 and 2007. OXFAM, An Economy for the 1%: How Privilege and Power in the Economy Drive Extreme Inequality and how this can be Stopped", 2016, p. 12, https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf. A declining labor share reflects the fact that improvements in productivity and growth in output do not translate into a proportional rise in earnings for workers, thereby severing the link between productivity and prosperity.

[62] OECD, OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Statement, 2015; H. Ault, W. Schoen, S. Shay, "Base Erosion and Profit Shifting: A Roadmap for Reform", *Bulletin for International Taxation,* 2014, p. 275.

[63] See D. Kotz, T. McDonough, "Global Neoliberalism and the Contemporary Social Structure of Accumulation", *in Contemporary Capitalism and its Crises: Social Structure of Accumulation Theory for the 21st Century*, Cambridge University Press, 2010 (documenting the hollowing out of the modern welfare state under neoliberalism).

[64] See generally K. Lehman Schlozman, H.. Brady, S. Verba, *Citizen Voice in the New Gilded Age: Megaphones for a Few-Whispers for the Rest*, 2016, (unpublished manuscript) (on file with author).

[65] G. Aisch, A. Pearce, B. Rosseau, "How Far is Europe Swinging to the Right?", *New York Times*, Jul. 5, 2016, http://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html (graphically demonstrating the rise of nationalistic politics across Europe).

that undergird a polity's decision to pursue liberalized trade relations, and how our current domestic and global economic rules have betrayed that consensus.

II.B. The social contract of trade – vulnerable workers

This crisis affords us an important opportunity to consider whether we have allowed ourselves to believe we can pursue trade not only without consent abroad, but without meaningful consent at home as well. The crisis reminds us that our misunderstanding of the consensual nature of trade may have repercussions *within* our domestic societies as well as between trading partners.

Addressing this misunderstanding involves looking at the intersection of economic consent in trade and the political process of reaching consensus—meaning shared consent, not unanimity—on the pursuit of a free trade policy. We can call this intersection the social contract of trade[66].

II.B.1. The Social Contract of Trade

The social contract of trade involves the decisions we make as a society to pursue a free trade policy, and as part of those decisions, the commitments we make to vulnerable groups within our own society who are at risk when we undertake as a society to engage in free trade. It is grounded in what it means to consensually pursue a policy of free trade—transnational consensual exchanges—which for structural reasons having to do with national and global economies might nevertheless work to the temporary or permanent disadvantage of other members of our society. It thus includes the obligation to respect the political commitments made to secure consent to a free trade policy, in particular to compensate those within our polity who are vulnerable to trade's downside risks.

One important element in the social contract of trade, as I am using the term here, consists of the obligations we undertake towards these vulnerable workers to hold them free from harm, or more precisely, to ensure they are no worse off than they would have been had we not embarked on a free trade policy. This obligation has deep roots in liberal theory[67] and

[66] See F. Garcia, T. Meyer, "Restoring Trade's Social Contract", *Michigan Law Review Online*, 2017, vol. 116, pp. 78, 82 http://michiganlawreview.org/restoring-trades-social-contract/.

[67] Aaron James, for example, calls this the Duty of Collective Due Care, one of the three equitable principles he finds inherent in the collective social practice he calls mutual reliance on markets, or mutual market reliance for short. A. James, *Fairness in Practice: A Social Contract for a Global Economy*, Oxford University Press, 2012, pp. 17–18.

in the economic justifications for free trade[68], as well as in the consensual nature of trade itself. It follows from the consensual nature of trade that trade policy decisions should also reflect the consent of those on whose behalf such agreements will, at least formally speaking, be negotiated. Otherwise, a trade policy decision, altering as it must the balance of rights, opportunities and burdens trading parties will face, risks works a kind of theft, or nonconsensual economic extraction, on those subject to it if there has been no consensual process underlying it.

In particular, it is important that any promises made as a necessary part of securing a party's consent towards free trade be honored. In an advanced capitalist welfare society, a key site for investigating this relationship lies in the area of adjustment assistance for displaced workers. Adjustment assistance consists of a package of enhanced benefits that OECD and other governments offer to workers who have lost their jobs as a result of trade. It is designed to support displaced workers as they face unemployment or under-employment, and the re-training and relocation often necessary for them to rebuild their lives and their communities.

For many social welfare democracies, particularly in Europe, adjustment assistance is seen as part of the basic social contract of their form of the welfare state[69]. In the United States, trade adjustment assistance or TAA is explicitly linked to securing Congressional support for free trade negotiations[70], making it a kind of a special or specific social contract. In either case, how we deliver (or not) on our commitment to adjustment assistance following a decision to engage in trade is a key site for assessing the consensual nature of our trade agreements and trade policy, and for examining the fractured relationship between contemporary economic globalization and important constituencies within developed countries. I will take the US as my example.

[68] See F. Garcia, T. Meyer, *op. cit*., p. 82 (importance of domestic adjustment policies in fairly distributing gains from liberalized trade). See generally C. Aho, T. Bayard, "Costs and Benefits of Trade Adjustment Assistance", in *The Structure and Evolution of Recent U.S. Trade Policy*, University of Chicago, 1984, pp. 153, 157–60 (reviewing economic justifications for adjustment assistance).

[69] See J. F. Hornbeck, *Congressional. Research Service., CRS 7-7500, TAA and Its Role in U.S. Trade Policy*, 2013, pp. 1–3 (summarizing equity arguments); C. Aho, T. Bayard *op. cit*., pp. 154–57 (reviewing in depth equity-based arguments for TAA in the context of either a general or trade-specific social contract between government and workers).

[70] This dates back to the Kennedy Administration. See F. Garcia, T. Meyer, *op. cit*., p. 85. See generally S. Park, "Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment", *Georgetown Journal of International Law*, 2012, vol. 43, issue 3, p. 797.

II.B.2. Betraying the Social Contract of Trade

The current political crisis in the US has revealed that many view the process of formulating a consensus for trade as broken, and the commitment to deliver meaningful trade adjustment assistance as having been violated[71]. Within the US, we have overlooked, neglected or actively betrayed the consent of the most vulnerable within our own polity, as we have pursued "trade" agreements that have similarly ignored, coerced or violated the consent of our trading partners. We have undermined consent both at home and abroad.

When we look at the current terms of TAA in the US, it is sadly too apparent that we have in fact defaulted on the core promise of effective trade adjustment assistance for those whose jobs are at risk due to our decision to pursue trade. When TAA was first created in 1962, benefits were limited to training programs to promote re-employment, and some income support during the training period. Eligibility under the Act was also much more limited than under contemporary TAA programs, and many of the initial applications were denied[72]. By 1974, when Congress next revisited trade policy, support within organized labor for TAA had collapsed, the unions dismissing TAA as nothing more than "burial insurance"[73]. In the 1980s, the Reagan administration proposed abolishing TAA completely, and the program lapsed briefly[74].

Since then, the renewal of TAA, such as it is, has always been tied to new rounds of trade negotiations. Congress has renewed or extended TAA each time it has granted the president trade promotion authority (TPA) or approved a new round of trade agreements, reinforcing the connection between decisions to trade and decisions to compensate at-risk workers, but underscoring its political vulnerability as well[75]. Once TPA is granted or the agreements ratified, TAA funding has tended to diminish, further reinforcing the many program defects inherent in the way TAA has been designed, and leading to widespread acknowledgment that TAA as currently constituted is a failure[76].

[71] See F. Garcia, T. Meyer, *op. cit.*, pp. 82–84 (citing 2016 Presidential campaign poll data).
[72] The first application accepted for benefits did not take place until November 1969. E. Kapstein, "Trade Liberalization and the Politics of Trade Adjustment Assistance", *International Labour Review*, 1998, vol. 137, issue 4, pp. 501, 508.
[73] *Ibid.* p. 509.
[74] J.-F. Hornbeck, *op. cit.*, p. 9.
[75] J.-F. Hornbeck, *op. cit.*, pp. 10–12.
[76] See F. Garcia, T. Meyer, *op. cit.*, p 87; see also T. Meyer, "Saving the Political Consensus in Favor of Free Trade", *Vanderbilt Law Review*, 2017, vol. 70, p. 985.

II.B.3. Restoring Trade's Social Contract

Fortunately, there are ways to honor the social contract of trade and repair the consensual basis of trade as a domestic policy. This means, however, directly addressing the domestic distributive effects of trade as *part* of trade policy, and not as a political add-on. While I will use the US and its TAA program as an example I suspect that, *mutatis mutandis*, the same basic issues and challenges are present outside the US in many other trading states as well, as the crises in Europe suggest, and that therefore these suggestions may have a wider possible field of application[77].

The core element in any attempt to restore the social contract of trade is to ensure first that any promises made in the process of securing consent for trade are in fact honored. This means, in the US, that we should reform how trade adjustment assistance is designed and delivered in the US[78]. The key to a successful TAA program is worker retraining towards sustainable re-employment. By both increasing investment in worker retraining as a percentage of GDP and offering a more effective training and apprenticeship process that better matches training to market needs, rewards early intervention (sometimes before unemployment even occurs), brings adequate relocation assistance and offers more thorough and effective job counseling, a significant number of trade-displaced workers can find alternative meaningful employment, as Europe has demonstrated[79].

The bottom line is that a well-designed and well-executed TAA program would fulfill the social contract of trade both formally and substantively[80]. However, meeting this obligation would require a deeper and more consistent commitment to funding, and here we find TAA's most spectacular failure. Overall, there has been no effort to link funding levels to data on levels of demand or need for the program[81]. As a result, TAA funding has consistently been set too low for program needs, and has fluctuated due to political trends rather than political

[77] See F. Garcia, T. Meyer, *op. cit.*, pp. 84–85.
[78] These suggestions also have implications for other countries as they consider how best to design effective compensation programs. Tim Meyer has argued that for this reason the commitment to undertake domestic adjustment policies should itself be internationalized in the form of commitments within trade agreements, thus binding all parties to a collective decision to support the social contract of trade throughout the free trade zone they collectively create. T. Meyer, *op. cit.*
[79] These successful cases are being studied widely and are starting to be emulated in other OECD countries. See OECD, *Connecting People with Jobs: The Labour Market, Activation Policies and Disadvantaged Workers in Slovenia*, 2016, pp. 116–118.
[80] J. Nie, E. Struby, "Would Active Labor Market Policies Help Combat High U.S. Unemployment?", *Federal Reserve Bank of Kansas City*, Third Quarter, 2011, pp. 43, 48, 51–54.
[81] S. Park, *op. cit.*, pp. 847–848.

commitments[82]. Moreover, in comparative terms the United States is consistently near the bottom of all OECD countries in terms of adjustment spending[83]. This means that restoring trade's social contract must address funding, and not simply program design and delivery, a subject I will return to at the conclusion of this essay.

But before I do, we must enlarge the frame of our inquiry. Restoring trade's social contract requires fundamental changes to domestic trade and welfare policy, beyond even the terms of labor adjustment assistance. However, these distributive effects and the social policies to address them are not confined within any one state, and in fact are part of the larger story to be understood in the current crisis: that we are in the throes of developing a global market and therefore a global market society.

III. CONVERGENCE, GMS AND CONSENSUAL ECONOMIC RELATIONSHIPS

Towards the end of his passionately argued book *Making Globalization Work*, Joseph Stiglitz urges us to consider a new "global social contract," by which he means "an economic regime in which the well-being of the developed and developing **countries** are better balanced"[84]. However, from a sociological, epistemic and normative perspective I don't think Stiglitz goes far enough, though I agree with his policy prescriptions, globalization has brought us far beyond the inter-state social framework that Stiglitz writes within as a backdrop to his prescriptions. We are in, to quote the much-missed Hans Rosling[85], "an entirely new, converging, world"[86]. This means that any idea of a global social contract can no longer be conceived of simply as the transnational complement to a "domestic" social contract, such as the social contract of trade I outlined in the preceding section[87]. Instead, as I will argue below, we are in the throes of working out what a global social contract might mean for a truly *global*

[82] For example, the most recent TAA reauthorization was in 2015, extending TAA through 2021 and capping the annual funding at $450 million, a *reduction* from the amounts authorized in 2009 and 2011. U.S. Dep't of Labor, Side-by-Side Comparison of TAA Program Benefits under the 2002 Program, 2009 Program, 2011 Program, and 2015 Program 2 (Nov. 9, 2015), available at https://www.doleta.gov/tradeact/pdf/side-by-side.pdf [https://perma.cc/3YA8-MNVA]; T. Meyer, *op. cit.*, pp. 1010–11.

[83] J. Nie, E. Struby, *op. cit.*, (demonstrating both that the United States is third from the bottom of twenty-one OECD countries studied, and that the United States currently ranks second from the bottom among the thirty-five OECD countries in its level of TAA as a percentage of GDP, ahead of only Mexico).

[84] J. Stiglitz, *op. cit.*, p. 285 (emphasis added).

[85] K. McVeigh, "Hans Rosling, Statistician and Development Champion, Dies Aged 68", *The Guardian* (Feb. 8, 2017, 2:34 PM), https://www.theguardian.com/global-development/2017/feb/07/hans-rosling-obituary.

[86] Hans Rosling's 200 Countries, 200 Years, 4 Minutes (BBC television broadcast July 25, 2017).

[87] This discussion of the boundaries between domestic and global, and its relation to the social contract metaphor, echoes longstanding debates over the boundaries of Rawls' liberal project. See, e.g., F. Garcia, *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade*, Brill – Nijhoff, 1st ed, 2003, pp. 124–28 (reviewing what was even then an old debate).

socioeconomic space, a global social contract built around shared participation by *people* as well as countries in a global market.

Such a social contract should not and realistically cannot entirely supplant what we now consider as the domestic social contract. However, its emerging reality fundamentally alters the space within which any society works out its own foundational commitments. In particular, the possible emergence of a global social framework means that the question of consent is not simply a question for states in their "internal" and "external" trade relationships. As economic exchanges become global, the regulation of economic exchanges and the concomitant protection—or weakening—of consent also become global. We thus face the possibility of constructing a consensual—hence dynamic and flourishing—or oppressive *global* socioeconomic framework.

I will first summarize below the socioeconomic and normative convergences within the global space today, about which I have written more fully elsewhere[88]. These convergences fundamentally alter the domain within which any adequate response to the current crisis must find traction, since they point towards the emergence of a global market society, within which our aspirations for opportunity and fairness must now take place.

III.A. Convergences

In my view, there are two principal kinds of convergence at work today, the socioeconomic and the normative, that at their confluence point to one thing: an emerging global market society[89].

III.A.1. Socioeconomic Convergence

III.A.1.a. The Global Economy is Deepening

Perhaps the most salient converging trend is the globalization of the economy. Contemporary data suggests the emergence of a global economy characterized by diminishing geographic segregation, decreasing discrimination according to source, and increasingly integrated global production processes, with both transactional and institutional

[88] See F. Garcia, "Convergences: A Prospectus for Justice in a Global Market Society", *Machester Journal of International Economic Law*, 2016, vol. 13, issue 2, p. 128.
[89] I don't mean to say that this is an inevitably teleological process, and of course the politics of the moment seem to suggest the opposite. However, I do believe that underneath the surface of politics one sees these deeper trends and processes, even as we have serious cause for concern about maintaining and deepening the progressive possibilities inherent in these trends.

manifestations[90]. Trade as a percentage of global gross domestic product rose from 27% in 1970 to 43% by 1995, and then to 59% by 2014[91]. Foreign direct investment has risen from approximately $10 billion in 1970 to $320 billion by 1995, and then to $1.56 trillion by 2014[92]. This surge in FDI has in turn facilitated the development of global value chains, within which nearly half of world trade in goods and services takes place[93].

Therefore, both in absolute and relative terms, and over time and to the present day, outcome-based indicators illustrate the deep connections characteristic of a global economy. Removal of institutional impediments has been a necessary condition for such cross-border integration, and in this respect, institutions (and through them, states) have largely demonstrated a commitment to global economic integration[94].

This presents us squarely with a question: what *kind* of global economy are we creating?

III.A.1.b. Global Inequality is Worsening

For one thing, we seem to be creating a very unequal one. The problem of inequality is not new, yet economic globalization has intensified the nature of inequality today to astronomical proportions. To summarize some contentious statistics, overall we see today a disturbing reversal of the 20th century trend towards growth with lower inequality[95]. Global inequality (between people, across countries) greatly exceeds national inequality (.70 Gini versus .40s for US, .20s to .30s for Europe)[96]. While it may be that inequality *between* countries is decreasing and a lower percentage of the world's population lives in poverty (thanks largely to the gains in China and India), inequality *within* countries is increasing, at least partially

[90] P. Lloyd, "Global Economic Integration", *Pacific Economic Review*, 2010, pp. 71, 72.
[91] Trade (% of GDP), The World Bank, http://data.worldbank.org/indicator/NE.TRD.GNFS.ZS?start=1970 last visited July 15, 2016).
[92] Foreign Direct Investment, Net Inflows (BoP, Current US$), The World Bank, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2014&start=1970 (last visited July 15, 2016). Between 1970 and 2014, FDI as a percentage of global GDP has risen continuously, from 0.5% in 1970 to 2% in 2014, *ibid.*
[93] World Trade Organisation., *International Trade Statistics 2015*, 2015, available at https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf. Global value chains allow firms to "do" the part of the process they are best at, using intermediate goods and services from elsewhere without having to develop a whole industry. OECD, « Interconnected Economies: Benefitting from Global Value Chains », 2013, *available at* https://www.oecd.org/sti/ind/interconnected-economies-GVCs-synthesis.pdf.
[94] *Ibid*, p. 95.
[95] T. Piketty, *Capital in the Twenty-First Century*, Belknap Press: An Imprint of Harvard University Press, 2013; F. Garcia, "Capital in the Twenty-First Century. By Thomas Piketty", *Journal of International Economic Law*, 2015, vol.18, issue 2, p. 188 (reviewing Thomas Piketty's "Capital in the Twenty-First Century").
[96] F. Bourguignon, "Inequality and Globalization: How the Rich Get Richer as the Poor Catch Up", *Foreign Affairs*, Jan./Feb. 2016, p. 11; see also Department of Economic and Social Affairs (UN), *Inequality Matters: Report on the World Social Situation 2013*, U.N. Doc. ST/ESA/345, 2013 (reviewing recent trends in global inequality).

offsetting reductions in global inequality. Depending how you read the data, it could be that domestic inequality entirely offsets reductions in global inequality—it could even be that overall inequality has increased despite the gains mentioned[97].

As discussed above, major elements of the international economic law system as configured today favor the intensification of inequality at national and global levels. The pattern of allocations generated by the international institutions which today frame and regulate the global economy raises significant distributive concerns, in areas as diverse as taxation, access to capital, control over natural resources, and the social costs of investment, to name a few. These patterns present a host of compelling social, political, legal and normative issues for international economic law since, as the regulatory framework of the global economy, all of these issues land in its lap, so to speak[98]. There is much work to be done to ensure that the global economy works fairly for everyone.

III.A.1.c. Global Social Relations are Thickening

Economic globalization is embedded in a larger framework of social, informational and symbolic globalization with immense consequences for economy, politics and society. Globalization is transforming human relationships in ways that affect our inter-connectedness, the basis for solidarity, and the effective reach of our awareness, understanding and actions with respect to others. I can only summarize here what I discuss at greater length elsewhere[99]; but in essence globalization is contributing to the emergence of elements of global community around a range of institutional practices and common challenges[100].

The intensification of global social and economic interaction—in areas as diverse as global finance, refugee crises, terrorism, climate change—create common interests and can contribute to the subjective awareness of a shared fate[101]. These build on what can be called a

[97] C. Lakner, B. Milanovich, "Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession", *World Bank Policy Research*, Working Paper No. WPS6719, 2013 (correcting for underreporting of high-income levels across national data sets leads to significantly higher levels of global inequality (.76 as measured by national Gini coefficients)); *see also* Bourguignon, *op. cit.* (noting this possibility).

[98] See Department of Economic and Social Affairs (UN), *op. cit.*,(inequality poses serious threats to wellbeing of people at all levels of the income distribution); The World Bank, *Development Goals in an Era of Demographic Change*, 2015, (inequality one of three top challenges to development today). See generally T. Piketty, *op. cit.*; J. Stiglitz, *The Great Divide: Unequal Societies and What We Can Do About Them*, W. W. Norton & Company, 2015; E. Anderson, "What is the Point of Equality?", *Ethics*, 1999, vol. 109 Ethics, p. 287.

[99] See generally See F. Garcia, *Global Justice and International Economic Law: Three Takes*, Cambridge University Press, 2013.

[100] *Ibid.*

[101] Of course, they can also lead to divergence, suspicion, resentment, and resurgence nationalism as well. For a heartfelt and searching examination of how these global dynamics have contributed to the causes and politics of these darker responses in recent times, see K. Himes, *op. cit.*

community of knowledge, created by global social media and the information revolution so characteristic of our everyday experience of globalization. Thanks to these infrastructures, we know so much—more than ever before—about how we collectively experience these and other risks, 24/7, around the globe, instantaneously. Finally, globalization is also building a set of shared understandings and practices around how we respond to such risks and to globalization's opportunities as well[102]. We see this in areas such as the use of markets and the regulation of markets through law and institutions, as well as in new and emerging regimes around challenges as diverse as climate change and global tax avoidance[103].

Together this represents in my view a trend towards a fundamental shift in social organization on the planet[104]. One of the surprising features of this new global social space is how it resembles what we used to call "domestic" space, which also consists of regions of wealth, urbanization and industrialization, and regions of agrarianism, poverty and underdevelopment, all linked by an overarching framework of economic, legal, political and social networks of causality, influence and responsibility. We are in the habit of associating this "domestic" space with an identifiable community structured by a set of shared social norms and governance institutions, and for these reasons also used to contrasting it to the "international" on the basis of the absence of such elements in the latter. However, because of globalization, we can no longer easily oppose this "domestic" space of communities to the "international" space "between" communities and insist that the latter lacks shared understandings and institutions. It is all simultaneously local and global[105].

[102] See, e.g., F. Garcia, "Between Cosmopolis and Community: Globalization and the Emerging Basis for Global Justice", *New York University Journal of International Law and Politics*, 2013, vol. 46, p. 1.
[103] See OECD, *Base Erosion and Profit Shifting (BEPS) Action Plan*, 2013, available at https://www.oecd.org/ctp/BEPSActionPlan.pdf; Fiona Harvey, "Paris Climate Change Agreement: The World's Greatest Diplomatic Success", *The Guardian* (Dec. 14, 2015, 2:51 PM), https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations.
[104] See, e.g., D. Messner, "World Society—Structures and Trends", in *Global Trends and Global Governance*, Pluto Press, 2001, p. 22. Perhaps, if not a world of "us," at least a world of "I and Thou"? See M. Buber, "I and Thou", 1937.
[105] See W. Gabardi, *Negotiating Postmodernism*, University of Minnesota press, 2000, ("globalization is marked by the development of diverse, overlapping fields of global-local linkages . . . [creating] a condition of globalized panlocality . . ."). See generally S. Sassen, Territory, *Authority and Rights: From Medieval to Global Assemblages*, Princeton University Press, 2008.

III.A.2. Normative Convergence

III.A.2.a. International Economic Law is Unifying

As the global economy continues to deepen, formerly distinct areas of international economic law are converging into a single, unified body[106]. The functionalist paradigm of disparate international economic law regimes established by states to address specific issues is breaking down in the face of the deepening interconnections between policy areas and the linkage issues these connections create.

This convergence also reflects the deepening of the global economy, as the global commercial integration of goods, services, labor, intellectual property and capital comes to reflect more and more the way a "domestic" economy operates. Within a well-run domestic economy, regulations covering these disparate aspects of economic activity are harmonized through legislative and administrative action and brought into as close a working relationship as possible, for efficiency reasons. The fact that international economic law is undergoing a similar process is both evidence of the larger convergences I am charting, and an opportunity to ensure in a coordinated fashion that global economic regulation is not only efficient in the narrow economic sense, but also efficient in the broader long-term sense, sustainably supporting a flourishing global society.

III.A.2.b. Global Law is Emerging

The evolutions in international economic law are part of a larger process of law's adaptation to the new global social reality[107]. Through globalization, we see in addition to the usual abundance of "national" and "international" law-making, an increase in the number of bodies producing "softer" norms, often through transnational processes, that influence or guide

[106] There is a small but growing body of literature analyzing the parallels between trade law and investment law and arguing their convergence. See, e.g., R. Alford, "The Convergence of International Trade and Investment Arbitration", *Santa Clara Journal of International Law*, 2013, vol. 12, p. 35; T. Broude, "Investment and Trade: the 'Lottie and Lisa' of International Economic Law?", *TDM Special: Intersections: Dissemblance or Convergence Between International Trade and International Investment Law*, 2011; R. Echandi, M. Newson, "Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch", *Journal of International Economic Law*, 2014, vol. 17, issue 4, p. 847; S. Puig, "The Merging of International Trade and Investment Law", *Berkeley Journal of International Law*, 2015, vol. 33. Not all commentators, however, fully accept the comparison or agree with the convergence thesis, for a variety of reasons. See, e.g., N. Di Mascio, J. Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", *The American Journal of International law*, 2008, vol. 102, pp. 48, 53–55 (contrasting the trade and investment regimes in terms of goals and political economies). However, in my view the similarities outweigh the differences.

[107] Or, as Zumbansen characterizes it, "attempts towards the development of an appropriately designed framework of legal analysis and regulation in light of a radically disembedded regulatory landscape." P. Zumbansen, "Transnational Legal Pluralism", *Transnational Legal Theory*, 2010, vol. 1, issue 2, p. 141.

state or private actor behavior or facilitate coordinated regulation by states[108]. We can see such transnational norm creation in a number of areas spanning the waterfront of global social policy, from crime to tax to food safety and beyond[109].

In response, "traditional 'national' legal responses that draw on architectures of normative hierarchy, separation of powers and unity of law are likely to fall short of grasping the nature of the evolving transnational normative order"[110]. The business of law is becoming both transnational and global[111]. A defining feature of regulation in the new global space is a dynamic pluralism involving the interaction of different types and sources of law, with manifold effects on different actors and in different spaces, and subject to contending ideologies[112].

III.A.2.c. Global Justice and Development Discourses are Transforming

The final convergence I want to trace involves our post-war discourse concerning the issues of fairness raised by complex socioeconomic activity and regulation both "within" and "across" the "national." Conventional development discourse has been trapped in certain contradictions and assumptions that are no longer viable if they ever were. The very idea of development began in an unstable binary structure: "we are the developed nations, you are not". To this it added a specific teleology: you want to be like us and to have what we have, in the way we have it—you exist to become us.

Global justice also investigates the subjects that development concerns itself. As Gilbert Rist reminds us, justice discourse too has been marked by the binary structure, yielding a bifurcated vision for a just society: the democratic social welfare state in the countries of the North, and "development" programs in the South[113]. In political philosophy Rawls typifies this

[108] The Basel Accords and the Basel Committee process are a good example, as is the OECD's BEPS Project, both in collaboration with the G-20. See, e.g., OECD, *op. cit.*; I. Drumond, "Bank Capital Requirements, Business Fluctuation Cycles and the Basel Accords: A Synthesis", in *Issues in Finance: Credit, Crises & Policies*, Wiley-Blackwell, 2010 (tracing the channels through which the Basel Accords influence central banking policy and therefore the domestic business cycle and overall macroeconomic stability). On the soft law phenomenon, see generally G. Shaffer, M. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance", *Minnesota Law Review*, 2010, vol 94. p. 706.

[109] See generally D. Messner, *op. cit.*, pp. 34–40; P. Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism", *Transnational Law and Contemporary Problems*, 2012, vol. 21, issue 2, pp. 305, 312–13 (cataloguing global social challenges calling for transnational approaches).

[110] P. Zumbansen, *op. cit.*, p. 153.

[111] See F. Garcia, "Globalization's Law: Transnational, Global or Both?", in *The Global Community: Yearbook of International Law and Jurisprudence 2015*, Oxford University Press, 2016, p. 31.

[112] See P. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, Cambridge University Press, 2012; P. Zumbansen, *op. cit.*. See generally F. Garcia, *op. cit.*, p. 4 (discussing the necessary role of pluralism in global justice theory).

[113] G. Rist, *The History of Development: From Western Origins to Global Faith*, The University of Chicago Press, 4th ed., 2014.

split: investigating the justice of institutional frameworks, or what Rawls calls the "basic structure", is a key task for political theory, but conceived of as a *domestic* inquiry[114].

Globalization has rendered such binary structures and assumptions unsustainable for critics and advocates of justice and development alike. "North" and "South", "developed" and "developing", all of these binaries are increasingly blurred, challenged and deconstructed through globalization's alchemical properties[115]. The most visible effects are in the economy, where globalization raises profound questions for justice and development: how is the global economy affecting growth, returns on investment, wealth creation, inequality, production and employment patterns, innovation, and human capital investment within both national *and* transnational economic spaces—in short, all of the social conditions of vital interest to development and justice alike.

Economic globalization also enlarges the set of institutions, actors and relationships which justice must consider. We must now include both domestic institutions, such as public and private law, the political process, and socioeconomic structures such as the market; and their international correlates such as international law and international organizations, together with the global market and its international and domestic regulatory bodies; as well as the range of private and quasi-private actors involved in transnational norm creation[116].

Globalization is thus critically reconstructing the discourse around global justice and development, towards a new global post-development discourse around, simply, justice. If justice is the first virtue of institutions, and institutions are increasingly transnational in scope, then so too must the justice conversation be transnational.

III.B. At the Vanishing Point: A Global Market Society?

From my perspective, these convergences—economic, social, regulatory and normative—point towards a newly emerging global space, with key characteristics that challenge our settled categories and create new opportunities for meaningful economic, social and legal activity. For one thing, the transnational space within which what we used to call

[114] For Rawls, beyond national boundaries, different fairness norms apply. *See* Rawls, *op. cit.*, at 3–10; P. Maffetone, "The Law of Peoples: Beyond Incoherence and Apology", *Journal of International Political Theory*, 2011, vol. 7, issue 2, p. 191.
[115] See generally F. Garcia, *op. cit.*; *see also* F. Garcia, *Transcending a Binary View of Development and Justice: Globalization, Opportunity and Fairness*, 2016, (unpublished manuscript) (on file with author).
[116] In global justice theory these are referred to collectively as the "global basic structure." See F. Garcia, *op. cit.*, p. 174; A. Føllesdal, "When Common Interests Are Not Common: Why the Global Basic Structure Should Be Democratic", *Indiana Journal of Global Legal Studies*, 2008, vol. 16. Issue 2, p. 585.

development is supposed to take place, now resembles more closely what we think of as domestic space, than it does our traditional accounts of the international context of development. Moreover, our ongoing investigation of justice, traditionally limited to national spaces, has found the very notion of national space exploded by and permeated with the global, dramatically expanding the boundaries for the justice conversation. And international economic law has grown from a set of functionally specialized regimes that structure the transnational economic relationships of national economies, into a steadily-integrating framework regulating an emerging global economy through global legal processes.

Globalization is creating this space, but we have not yet fully recognized it or absorbed its implications, nor have we thoroughly examined and recast or rejected old legal and normative tools and invented new ones[117]. If we want to fully respond to the current crisis, which means understanding what economic justice will mean for the 21st century, we need to try to understand this new social space.

III.B.1. Emergence of Global Market Society

One way to characterize the social space that is emerging is as a **global market society**[118]. That it is *global*, can readily be seen from the nature of contemporary globalization and its transnational effects on social connections, in particular on economic transactions and business practices and the increasingly global means by which we regulate them. That it is based on *markets*, understood here as networks constituted by acts of buying and selling facilitated through a medium of exchange[119], is also clear from the kinds of economic interactions and relationships that constitute it, by the institutions and regulatory structures employed to govern it (principally through international economic law), and by the ideology these structures follow[120].

[117] As Rist writes, development is no longer about "the success or failure of this or that 'development project' but a general way of envisaging harmonious and equitable cohabitation of all those living today—and in the future—on this planet. Rist, *op. cit.*; *see also* V. Bornschier, "The Civilizational Project and Its Discontents: Toward a Viable Global Market Society?", *Journal of World-Systems Research*, 1999, vol. 5, pp. 165, 175 (existing international agreements and regimes have not yet grown to reflect the political consequences of globalization).

[118] The debt to Polanyi in what follows is clear. K. Polanyi, *The Great Transformation* , 1944; *see also* Bornschier, *op. cit.* (recognizing the emergence of a global market society and offering a critique of its current structure that points towards its progressive possibilities).

[119] K. Hart, C. Hann, "Introduction: Learning from Polanyi", *in Market and Society: The Great Transformation Today*, Cambridge University Press, 2009.

[120] I use the term ideology here in its classical sense, as a set of ideas and values favoring markets over other forms of socioeconomic organization, recognizing full well the more pejorative uses of the term in connection with neoliberalism and "free market" ideology, a mistake to which I will return below.

That it is a global market *society* is perhaps the most controversial characterization of the three, but in my view this is what the convergences outlined above point to[121]. One simple working definition of society could be "a large group of people sharing decisions and work around a common life"[122]. At the global level, we to see evidence that work is shared through a global market, and that decisions are shared—to the extent they *are* shared—through some blend of national and transnational political and regulatory processes[123].

III.B.2. Economic Regulation in the Global Market Society

To the extent that globalization is understood as extending a particular version of market ideology—under-regulated capitalism or the "Washington Consensus", for example—globalization and the very idea of a global market will naturally be resisted as inimical to the interests of the non-capital classes[124]. While I agree with the substance of this critique, I think the underlying conflation of markets with neoliberalism is a mistake, reflecting an understandable normative judgment about the global spread of under-regulated capitalism as a *particular* form of market society, more than a considered judgment of the idea of a global economy or a market society *per se*[125].

Equating markets and market regulation with a specific—and contested—market ideology masks the power of the market *as an idea* that cuts across social models, ideologies and levels of development[126]. Markets are here to stay, and in my view that is a good thing. As Sen has written, the freedom to participate in both the market for labor and the market for products is a key freedom, intrinsically and instrumentally, and therefore a cornerstone of development for anyone in any country[127].

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[121] See also, e.g., K. Hart, "Money in the Making of World Society", *in Market and Society: The Great Transformation Today*, *op. cit.*, p. 91 (humanity formed a world society—understood as a single interactive social network—in the latter part of the 20th century, massively unequal and imperfect, yet a society nonetheless).
[122] "Society", Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/society (last visited Mar. 15, 2018).
[123] I go deeper into this and the points above in my essay on convergences and IEL. See generally Garcia, *op. cit.*.
[124] See A. G. Hopkins, "Globalization in World History", *Pimlico*, 2002, pp. 42–43 (2002) (dangers posed by weakened regulatory power over capitalist system). Had Polanyi lived and worked during the current era of globalization, he might well agree, given his central concern with the dangerous "fiction" of a self-regulating economy. K. Polanyi, *op. cit.*, pp. 31–32. However, I consider the equation of the two—globalization and neoliberalism—to be a mistake, as I explain above.
[125] In this sense, I read Polanyi not as an indictment of market society understood as a society relying on markets for economic organization, but as an indictment of a society organized by markets—neoliberalism, in other words. The task, which this project seeks to contribute to, is to reassert the primacy of society over economy, even (especially) in a market society. See K. Polanyi, *op. cit.*, p. 259.
[126] D. Slater, F. Tonkiss, *Market Society: Markets and Modern Social Theory*, Polity, 2001.
[127] A. Sen, "Development as Freedom", *Anchor*, 1999, pp. 6–8.

Neoliberalism notwithstanding, market societies have certain structural weaknesses and are prone to certain kinds of oppressive tendencies, such as the tilt towards inequality that Piketty warns us of and which we see playing out globally today[128]. In response, market societies seeking some degree of social stability and sustainability develop social practices or domestic institutions capable of supplementing and mitigating the rigors of capitalism even minimally, for example by compensating the "losers" through some form of wealth transfer[129]. Aaron James calls this the practice of mutual market reliance[130]. By this, James means something beyond the shared practice of relying on a domestic market model: the mutual reliance on the emerging global market itself, as a transnational market that lives in, through and beyond the sum of each state's individual markets. This shared practice is itself generative of a broader set of global social relationships and practices that deeply inform the nature and challenges of regulating a global market and keeping it roughly fair.

III.B.3. Consent and the Global Market Society

The emergence of a global market society has profound consequences for how we approach transnational problems of politics, economics and law, including how we chart a course out of the present crisis. Realizing this opportunity depends entirely on how the global market is regulated and according to what norms, and the recent *referenda* tell us we have so far done this badly. This opens up new opportunities for economic law, which plays an essential role in safeguarding markets through defining and protecting consensual economic agreements[131], to play this role on a global level towards a truly *global* network of consensual exchanges.

The key is recognizing that a flourishing trading system which respects the consent of its private individual and state participants, will incidentally also be a more just system of global economic relations, since individuals and states will have fewer reasons to accept bad bargains, and will instead negotiate and conclude more equitable bargains at the transactional and treaty levels. A truly consensual system of trade will therefore promote similar outcomes to what we have sought to promote through the global justice debate, but through a route that ideally cuts across normative traditions, does not assume a difference between "development" and domestic

[128] See T. Piketty, *op. cit.*; see also D. Slater, F. Tonkiss, *op. cit.*, pp. 34–35 (noting disorder, irrationality and oppressive behavior as endemic to market societies, not "transitional" problems); *supra* notes 100–104 and accompanying text (growing inequality).
[129] D. Slater, F. Tonkiss, *op. cit.*, p. 120.
[130] A. James, *op. cit.*.
[131] D. Slater, F. Tonkiss, *op. cit.*, p. 105.

justice, and seems intuitively plausible to any market participant, thus fitting into the larger social and economic norms of an emerging global market society.

IV. PROTECTING CONSENT AND PURSING FAIRNESS IN A GLOBAL MARKET SOCIETY

Taking full advantage of the current crisis in global trade and politics means opening ourselves to the full range of implications when we set up trade and other economic structures at a global level, structures that deeply impact our own societies and the societies of our economic partners. This means we must work to build consensual trade agreements, agreements that directly address the domestic distributive effects of the global market, within a larger framework of building a balanced and inclusive global market society that offers opportunity and fairness for all participants.

IV.A. Creating Genuine Trade Agreements

Agreements such as CAFTA and KORUS contain provisions that are significantly unbalanced in terms of the rights, interests and goals of the various negotiating parties, and are by no means unique in this respect. Understanding why this is so requires that we recognize the (unsurprising) truth that power inequalities tend to produce unbalanced agreements, and the greater the inequality, the more the unbalance. What is perhaps more surprising is that we have allowed ourselves to believe that this is trade, when in fact it seems to better fit patterns of what in other areas we call predation, coercion and exploitation.

If we want to address these dynamics and thereby begin to undo the damage which these recent *referenda* have both revealed and intensified, the most important first step is to change our expectations of trade agreements. Once we understand the consensual nature of trade, then it follows that the policy goal of international trade law should be more than simply liberalizing commercial flows by eliminating economically distorting domestic legislation. The goal should be to maintain an environment in which *trade* can take place and flourish, much as the goal of economic regulation in a domestic setting is to protect and promote a healthy and thriving market, which means recognizing, protecting and promoting consent at all levels. Put another way, promoting and protecting a healthy and thriving global market requires more than simply reducing or eliminating protectionist regulation: it means building a *trading* system and not a disguised system for predation, coercion, or exploitation.

If we work to change our understanding of trade and therefore what we expect of our leaders when they negotiate trade agreements, and what we are willing to support or protest as

citizens and consumers, we have gone a long way towards altering the political environment in which trade—or oppression—takes place. Going farther requires a look at how we might change trade negotiations, even between highly unequal parties, to take this new understanding into account when we negotiate new agreements.

Negotiations among unequal parties, whether they involve explicit coercion or exploitation, need not always result in bad bargains—it all depends on how the negotiations are managed[132]. Scholars analyzing trade negotiations note a variety of strategies both "away from the table" and "at the table" which weaker parties can in fact pursue to attempt to offset this disadvantage. While these strategies are far from perfect and the success stories are perhaps outnumbered by the failures, they are nevertheless a starting point towards consensual agreements, particularly when they follow from a changed paradigm of trade and are coupled with domestic and transnational policies addressing the distributive effects of trade.

IV.B. Wealth Transfers and Economic Inequality

If we hope to fully respond to the current crisis, we must accept that it is unsustainable to inflict neoliberalism abroad while maintaining social welfare state at home when we are living in a global economy and an emerging global market society. But what should be done instead? This depends on very complex causality issues, but at heart it is about working comprehensively to ensure opportunity and fairness for all in a global market society.

For international economic law this means first ensuring that the global economy itself promotes opportunity and fairness. We need to reform international economic rules and institutions where they exacerbate inequality in areas such as trade and investment[133], tax law[134], IMF and World Bank lending[135], global finance[136], resource and borrowing

[132] J. Odell, "Negotiating from Weakness in International Trade Relations", *Journal of World Trade*, 2010, vol. 44, issue 3, pp. 545, 545.
[133] See, e.g., F. Garcia, L. Ciko, A. Gaurav, K. Hough, "Reforming the International Investment Regime: Lessons from International Trade Law", *Journal of International Economic Law*, 2015, vol. 18, issue 4, p. 861 (discussing reform of investment treaty framework).
[134] I. Benshalom, "The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law", *NYU Law Review*, 2009, vol. 85, issue 1; J. Repetti, "Democracy and Opportunity: A New Paradigm in Tax Equity", *Vanderbilt Law Review*, 2008, vol. 61, p. 1129.
[135] F. Garcia, "Global Justice and the Bretton Woods Institutions", *in The Future of International Economic Law*, Oxford University Press, 2008.
[136] R. Buckley, E. Avgouleas, D. Arner, *Reconceptualising Global Finance and Its Regulation*, Cambridge University Press, 2016.

privileges[137], and policies favoring multinational corporate immunity[138]. We also need to reform the rules by which global institutions operate through unequal governance structures, to enhance the voice of the members most burdened by development and inequality challenges and most affected by institutional policies[139].

Going beyond this, we also need to ensure that IEL is reformed to support efforts to realize opportunity and fairness through our domestic institutions and policies. In IEL terms, this means protecting policy space for local measures aimed at ameliorating inequality. IEL institutions should incorporate as a policy something like the principle of subsidiarity pioneered at the institutional level by the EU: if there are successful local policies, how can we protect their policy space, support similar policies and policy experimentation in other "locales", and scale them up for transnational or global application as appropriate? Some countries *have* been able to buck the trend of rising inequality, suggesting that domestic social and economic policies can play a crucial role in determining inequality trends[140]. IEL institutions must ensure, at a minimum, that their policies support such successful local efforts, so the multilateral level can work as partner, not overseer[141].

Both strands—the fairness of the international economic law system itself, and its impact on the fairness of domestic societies—come together around the need to protect and fulfill the social contract of trade as outlined above. A properly designed and implemented adjustment assistance program is key to honoring trade's social contract. Going a step farther, *how* we fund such programs is also key. In my view, it would be most consistent with the social contract of trade, understood as a promise from all of us to those most at risk from free trade, that the funding to support those most vulnerable to trade come from trade itself. While this could in principle be done through traditional legislative redistribution of the gains from trade,

[137] T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Polity, 2nd ed, 2008; L. Wenar, "Property Rights and the Resource Curse", *Philosophy & Public Affairs*, 2008, vol. 36, issue 1.
[138] See, e.g., S. Waddock, "Building a New Institutional Infrastructure for Corporate Responsibility", *Academy of Management Perspective*, 2008, vol. 22, issue 3, p. 87 (surveying the emerging institutional infrastructure for ensuring responsible corporate activity in the face of formal regulatory gaps).
[139] See, e.g., H. Torres, "Reforming the International Monetary Fund—Why its Legitimacy is at Stake", *Journal of International Economic Law*, 2010, vol. 10, issue 3, p. 443.
[140] UN Department of Economic and Social Affairs, *Inequality Matters: Report on the World Social Situation*, 2013, p. 99, http://www.un.org/esa/socdev/documents/reports/InequalityMatters.pdf (last accessed 15 April 2017).
[141] For example, the IMF has recently begun recommending that client governments implement policies to facilitate better access to education, improved health outcomes, stronger labor laws and redistributive social welfare policies to help raise the income share of the poor and the middle class irrespective of the economic development of a country. See Department of Economic and. Social Affairs, *op. cit*., at 103–05; E. Dabla-Norris et al., *op. cit.*, p.27. However, it is important for the IMF to avoid past mistakes and recognize that such policies should be implemented in a manner cognizant of local needs and conditions, not as one-size-fits-all programming. See E. Dabla-Norris *et al*., *op. cit.*, p. 28.

the history of trade politics at least in the US shows that we cannot rely on this for anything as constitutive as the basic bargain underlying trade's social contract.

Instead, we should consider incorporating a financial transaction tax (FTT) into all new or renegotiated trade agreements. This would represent a paradigm shift in how we think of trade and its distributive effects, but the current crisis asks for nothing less than this kind of radical change in our thinking. An FTT linked to trade agreements offers a direct way of harnessing the wealth creation of free trade agreements themselves towards supporting domestic adjustment assistance programs. An FTT with revenue earmarked for adjustment assistance would place entities that benefit tremendously from trade liberalization—major financial institutions—in the role of assisting those who suffer most from the same.

FTT proposals are not new, and a number of these mechanisms have been adopted or proposed around the globe[142]. While a comprehensive review of the extensive literature on FTTs, and a detailed exposition of the features of an FTT such as I am proposing, are beyond the scope of this essay[143], the essence of the arrangement is that parties to a free trade agreement would agree that each party shall impose an incremental tax on specified financial transactions (such as securities, derivatives and currency trades) of anywhere from 0.01% to 0.1% (the rate to be the same in each member state). This is not enough to discourage productive investment transactions, yet it is enough to generate hundreds of millions for adjustment assistance for workers sharing the risks but not getting the benefits of trade's joint venture.

A social contract FTT would need to be carefully designed in terms of scope[144] and jurisdiction[145]. Even with such jurisdictional and scope limitations, such a tax could generate considerable revenue towards funding adjustment assistance obligations. The EU Commission calculated that its earlier 2011 FTT proposal could generate as much as €57 billion with a tax

[142] See F. Garcia, T. Meyer, *op. cit.*, pp. 94–95.
[143] *Ibid*. pp. 95–98.
[144] It should be designed to tax wholesale capital market transactions (stocks, bonds, derivatives and currency trades) between major financial institutions such as banks, investment firms, insurance companies, pension funds, and hedge funds; and not "retail" transactions such as home mortgages and business loans. See generally *Proposal for a Council Directive: Implementing Enhanced Cooperation in the Area of Financial Transaction Tax***,** at 17, 36, COM (2013) 71 final (Feb. 14, 2013) [hereinafter *Proposal for a Council Directive*] (weighing the costs and benefits of taxing various transactions and institutions, and concluding that certain institutions, including refinancing institutions, should not be taxed with an FTT). It is important for political as well as normative reasons that the tax not apply to ordinary consumers at the retail level. See L. Burman, W. Gale, *The Pros and Cons of a Consumption Tax*, Brookings (Mar. 3, 2005), https://www.brookings.edu/on-the-record/the-pros-and-cons-of-a-consumption-tax/ [https://perma.cc/WA73-KXJJ].
[145] Jurisdictionally, taxable transactions could be defined as those between counterparties when at least one counterparty is resident within the free trade area, as the EU does, although in the context of free trade agreements thought should be given to whether the proposal should require both counterparties to be resident. *Proposal for a Council Directive, op. cit.*, p. 18.

rate of 0.1% on all wholesale stock and bond transfers and 0.01% on all derivatives trades, with all twenty-seven Member States participating[146]. An FTT with the same tax rate and jurisdictional structure, if applied in the NAFTA zone today, could yield as much as $64 billion towards adjustment costs in the NAFTA area[147].

However, implemented and allocated, creating a trade-related FTT would be a breakthrough in trade adjustment financing and, more broadly, in mechanisms to address the social costs and inequality effects of trade. Linking such a tax to transactions within the economic zones that free trade agreements create would directly harness their wealth-creating potential and tie the funding for adjustment assistance to financial parties that benefit tremendously from the agreements themselves. Implementing such a reform would fulfill the social contract of trade and render it self-sustaining, rather than subject to the vicissitudes of budgetary politics, and help protect not only vulnerable workers but the trade liberalization process itself and all who stand to benefit from it. Any economic structure as powerful and invasive as the global economy requires no less, and as we are learning, we neglect this at our peril.

CONCLUSION - CONSENT AND FAIRNESS IN A GLOBAL MARKET SOCIETY

Referenda are not of course always a clear indicator of true public sentiment, as they can be manipulated by a variety of actors towards private ends that do not serve the public interest, as we saw in Costa Rica and, of course, Brexit. Nevertheless, *referenda*, especially in a time of resurgent economic populism, can be an accurate signal of where the fault lines lie, and in particular how the electorate is constructing—or can be manipulated to construct—the key narrative of "Us" and "Them"[148].

[146] *Commission Proposal for a Council Directive on a Common System of Financial Transaction Tax and Amending Directive*, SEC (2011) 1102–03 final (Sept. 28, 2011). This would calculate to a tax yield of 0.3% of total EU nominal GDP for 2011 (€18.3 trillion), using GDP as a proxy for the tax base, although other measures such as total EU volume of wholesale capital market transactions could be more accurate. *See, e.g.*, *European Union GDP*, TRADING ECON., https://tradingeconomics.com/european-union/gdp (last visited May 9, 2018) [https://perma.cc/3UQW-8FBV].

[147] Assuming the same 0.3% calculation on a 2016 combined NAFTA GDP of $21.4 trillion. *See Report for Selected Countries and Subjects*, International Monetary Fund (Apr. 2017), http://www.imf.org/external/pubs/ft/weo/2017/01/weodata/weorept.aspx?sy=2016&ey=2016&scsm=1&ssd=1&sort=subject&ds=.&br=1&c=273,156,111&s=NGDPD,PPPGDP,LP&grp=0&a=&pr.x=53&pr.y=13 [https://perma.cc/R94U-J2S8]. To put this in perspective, the combined annual budget for all active labor market policies, TAA included, among the United States, Canada, and Mexico totaled $25 billion in 2015.

[148] On the destructive tendency of populism to construct and reinforce alienating binary oppositions, see *Twenty-First Century Populism: The Spectre of Western European Democracy*, Palgrave Macmillan, 2008; C. Mudde, "The Populist Zeitgeist", *Government and Opposition*, 2004, vol. 39, issue 4, p. 541.

Rather than simply bemoan the manipulations and distortions which fear works, or which fear leaves us vulnerable to, in the political process, we would be wise to look more closely at the issues and concerns underlying the volatility of the moment. In our case, insofar as globalization has collapsed the boundaries between the local and the global, then reimagining both trade and fairness in a global environment means reconstructing our paradigm so that artificial distinctions between opportunity and fairness for "Us", and what passes as "opportunity" and "fairness" for "Them," are eliminated.

In particular, the Trump and Brexit *referenda* have brought it painfully home to all of us that we can no longer afford to assume that "Us" and "Them" are easily distinguishable by national boundaries (hence ignorable by the Global North). In reality, the comparison is a between those favored by economic globalization in its current form, and those who feel themselves to be left out, and these are transnational and even post-national categories that may include our closest neighbors.

Successfully implementing a new trade agenda requires first that we understand that a post-Trump and Brexit trade policy, which is to say the economic policy for a new economic globalization, must be designed to operate in the new global socioeconomic reality. Trade and its pathologies outlined thus far are taking place on a global scale, with implications in all regions and economies of the world, as the global "backlash" against trade and globalization today vividly illustrates. If we are truly living in a global market and emerging global market society, as I believe we are, then we should regulate it appropriately, and seriously examine what kinds of social and other goods we expect a market society to deliver.

Even more urgently, the emergence of global market society means that the grave shortcomings in the global regulatory structure today cannot be adequately addressed by even the most virulent populist national backlash, as Act Two of the Trump and Brexit dramas is making clear. Against this backdrop, a consensual basis for a fairer economic system has an intuitive market-based appeal that can make it useful for structuring a global market system. Insofar as markets thrive on consensual exchanges, so a global market society will thrive on a shared global understanding of the role of consent in exchange.