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Huw Llewellyn

Populism, Globalisation and International Law

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Populism, Globalisation and International Law

Huw Llewellyn ¹

Abstract:

This Working Paper draws on the mounting research produced by economists and political scientists that links support for populism with the economic, social and cultural grievances arising from record levels of economic inequality, driven by globalisation, in particular free trade and the technology revolution. It seeks to identify the sources of the harmful effects of free trade in WTO law and free trade agreements, and suggests possible measures to address these harmful effects. It finds in particular that the limited exceptions to free trade that were available to States during the "embedded liberalism" of the first three decades of international trade under the GATT 1947 have been eroded to the extent that the national "policy space" available to regulate in the public interest to avoid free trade's negative economic, social and cultural consequences are no longer adequate. Ever-deepening neoliberal trade relations since the late 1970s and under the 1994 WTO Agreements have largely removed the ability of States to protect nascent or vulnerable industries and jobs, and to protect national social and cultural values and interests. If international law is to play a role in mitigating economic inequality and reducing its potency in driving populism, ways and means to reopen this policy space for States need to be considered.

¹ Director, Codification Division, Office of Legal Affairs, New York. The views expressed in this paper are personal to the author and do not necessarily reflect the views of the United Nations.

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1. Introduction

Multilateralism, and the international institutions and international law that underpin it, are facing multiple challenges. These include geopolitical rivalries as the relative economic and military strengths and influence of powerful States change, instability caused by regional and bilateral conflicts, and growing nationalism and questioning of the liberal order that, though contested, has largely characterised the multilateral system since 1945.² Particularly relevant to the latter challenge is the rise of populism. Populists invoke sovereignty to cast international law and membership of international organisations as a surrender to an unelected, unaccountable global bureaucracy. The decisions of international organisations, courts and tribunals are portrayed as attempts at control by an external elite, and international instruments are withdrawn from.³ Populism, therefore, is something that international lawyers must be concerned about.

Populist political leaders claim to represent and speak for “the people”, who are portrayed as having a unified interest – “the popular will” – which is pitted against all others, including financial elites, foreigners, and minorities. Populism takes many forms and is not easy to define. Populists embrace different ideologies, including nationalism of the radical left or extreme right, and they often do not accept the label “populist”. Populism is less a coherent political ideology than a variety of reactions to context specific economic, social and cultural tensions. The academic literature has largely converged on a definition of populism that is consciously minimal in order to be applicable across all contexts and across the left – right wing spectrum:

Populism considers society to be separated into two homogenous, antagonistic groups, “the pure people” and “the corrupt elite”. Populism is about “the people’s” moral superiority over the elites and, therefore, “the people’s” moral right to govern. The homogeneity of these two separate and opposed groups leaves no room for pluralism, protection of minorities, or diversity of opinion. The moral superiority of the people and the corruptness of the elite

² During the more than four decades of the Cold War, particularly the period of decolonisation, liberalism was not the dominant ideology for a number of countries. For a more comprehensive overview, see R. Alcaro, “*The Liberal Order and its Contestations. A Conceptual Framework*”, *The International Spectator* (2018) Vol. 53, No.1, pp. 1-10.

³ During President Trump’s term in office, for example, the United States withdrew from two international organisations (UNESCO on 31 December 2018 and the WHO on 6 July 2021); it ceased its participation in the UN Human Rights Council from June 2018; it withdrew from five multilateral treaties (the 2015 Paris Agreement, the 1987 Intermediate Range Nuclear Forces Treaty, the 1992 Treaty on Open Skies, the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations, the 1955 Treaty of Amity, Economic Relations and Consular Rights with Iran, and the 2010 New Strategic Arms Reduction Treaty). Non-binding arrangements that the United States withdrew from include the 2015 Joint Comprehensive Plan of Action (known as the “Iran Nuclear Deal”); the 2018 Global Compact for Safe, Orderly and Regular Migration; and the 2018 Global Compact on Refugees. A further high-profile withdrawal was that of the United Kingdom from the European Union and the European Atomic Energy Community, known as “Brexit”, effective on 31 January 2020. Other notable withdrawals and threatened withdrawals over recent years have included those from the Rome Statute of the International Criminal Court, with the African Union adopting a resolution in February 2017 urging its member States to withdraw, against the background of the perceived over-concentration of the ICC on situations in Africa; the withdrawal of Burundi on 27 October 2017; and statements of intention to withdraw by South Africa, the Gambia, Zambia, Kenya and Uganda, although they have not done so; and the withdrawal of the Philippines on 17 March 2019. Hungary withdrew from the United Nations Global Compact for Safe, Orderly and Regular Migration in July 2018, citing national security concerns; and Poland announced in July 2020 its intention to withdraw from the European (Istanbul) Convention on the Prevention of Violence against Women.

means that those who govern on behalf of the people can bypass or suppress checks and balances on power.⁴

Anti-elitism and anti-pluralism are thus central to all forms of populism. Other definitions of populism tend to be narrower, more specialised versions of the above definition, for example adding references to identity politics or authoritarianism.⁵

The rise in populism is a far-reaching phenomenon. In 2018, a survey found that 46 populist leaders or political parties had held executive office in 33 countries across all of the UN regional groups since 1990. Such leaders and parties increased fivefold from 1990 to 2018.⁶ Whilst the election of President Biden in the United States in 2020 might be seen as a notable reversal in this trend, a survey in the same year highlights that populism remains at an all-time high, with more than 25% of States governed by populists.⁷ In the United States, political commentators point to the 74 million votes for former President Trump (46.8% of the votes cast), a record number for a sitting President, as an indicator that his style of leadership grew in popularity during four years in office and cannot be regarded as at an end.⁸

Identifying the cause(s) of populism is important if we are to take steps to try to mitigate its impact on international law and international institutions. Empirical and analytical research, which has surged since around 2015, identifies economic inequality arising from four decades of globalisation, in combination with underlying social and cultural grievances, as the primary drivers of the rise in

⁴ C. Mudde, *Populist Radical Right Parties in Europe*, Cambridge University Press (2007), as cited in M. Funke, M. Schularik and C. Trebesch, *Populist Leaders and the Economy*, Kiel Institute for the World Economy, Working Paper No. 2169, 23 October 2020, available at <www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/Manuel_Funke/KWP_2169.pdf> accessed 16 May 2022. See also the survey of recent economic and political research on populism by S. Guriev and E. Papaioannou, *The Political Economy of Populism*, Centre for Economic Policy Research, Discussion Paper DP 14433, 24 October 2020, available at <<https://repec.cepr.org/repec/cpr/ceprdp/DP14433.pdf>> accessed 16 May 2022.

⁵ For other definitions, see for example B. Eichengreen, *Populism's Common Denominator*, Project Syndicate, 9 November 2018, available at <www.project-syndicate.org/commentary/populism-common-denominator-political-corruption-by-barry-eichengreen-2018-11?barrier=accesspaylog> accessed 16 May 2022, which adds a reference to authoritarianism; P. Norris and R. Inglehart, *Cultural Backlash: Trump, Brexit and Authoritarian Populism*, Cambridge University Press, (2019), available at <<https://ash.harvard.edu/publications/cultural-backlash-trump-brexit-and-authoritarian-populism>> accessed 16 May 2022, which adds references to popular sovereignty, overriding minority rights and checks and balances, xenophobic nationalism and endorsement of tough security against outsiders; and R. Dornbusch and S. Edwards, *The Macroeconomics of Populism in Latin America*, The University of Chicago Press (1991), which takes an economic approach to the definition, based on growth and income redistribution.

⁶ Tony Blair Institute for Global Change, *Populists in Power around the World*, 7 November 2018, available at <<https://institute.global/policy/populists-power-around-world>> accessed 16 May 2022.

⁷ The survey is based on a sample of 60 States that together represent 95% of global gross domestic product. M. Funke, M. Schularick and C. Trebesch, *Populist Leaders and the Economy*, *supra* note 4.

⁸ See, for example, The New York Times, *Here's why 74 million voted for Trump*, 3 December 2020, available at <<https://www.nytimes.com/2020/12/03/opinion/letters/trump-voters.html>> accessed 22 June 2022, and The Washington Post, *Let's take a closer look at Trump's supposedly intimidating 74 million vote total*, 11 December 2020, available at <<https://www.washingtonpost.com/opinions/2020/12/11/lets-take-closer-look-trumps-supposedly-intimidating-74-million-vote-total/>> accessed 22 June 2022.

support for populism.⁹ Inequality has increased further over the last two decades or so through the impact of the technology revolution on lower-skilled jobs and wages.¹⁰

“Globalisation” is the word used to describe the growing interdependence of the world’s economies, cultures, and populations, brought about by international trade in goods and services, technology, and flows of investment, people, and information.¹¹ This process has been going on for centuries, but the term gained popularity in the 1980s and 1990s with the advent of neoliberal international trade policies and the end of the Cold War. “Neoliberalism” is a term used to describe market-oriented policies, including economic liberalisation through reliance on market forces, privatisation, deregulation, free trade and minimising government spending and influence.¹² Free trade and globalisation were seen as “a rising tide that lifts all boats” and a force that would create peace and prosperity for all.¹³ This narrative lasted until the 2008 global financial crisis, in the aftermath of which, mass protests, bank bailouts and austerity measures put the spotlight firmly on who was winning and who was losing from globalisation. Free market neoliberal international trade and the technology revolution have generated enormous wealth for some, but they have also put downward pressure on jobs and wages for many, increasing economic inequality within and among nations to record levels.¹⁴ Economically disadvantaged individuals, workforces and regions have become marginalised. It is here that populist leaders find their primary base of electoral support, giving voice to the frustration and anger of globalisation’s “losers”.¹⁵

There is an apparent disconnect between international law scholarship and this substantial body of research on the causes of populism,¹⁶ which has been carried out primarily by economists and

⁹ See the various studies cited in section 3 below. See also D. Rodrik, “*Many forms of Populism*”, Vox EU Debate on “Populism”, 29 October 2019, available at <<https://voxeu.org/article/many-forms-populism>> accessed 16 May 2022.

¹⁰ See, for example, UN Department of Economic and Social Affairs, “*World Economic Situation and Prospects as of mid-2021*”, 11 May 2021, available at <www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-as-of-mid-2021/> accessed 16 May 2022.

¹¹ There is no one accepted definition of “globalisation”, and many varied descriptions. This one is taken from the website of the Peterson Institute for International Economics, available at <www.piie.com/microsites/globalization/what-is-globalization> accessed 16 May 2022.

¹² See, for example, S. Springer, K. Birch and J. MacLeavy (eds), “*The Handbook of Neoliberalism*”, Routledge (2016) at p. 2.

¹³ “A rising tide lifts all boats” is a phrase commonly attributed to John F. Kennedy in a speech made on 3 October 1963 at Heber Springs, Arkansas. It was used by President Xi Jinping of China in a speech to the World Economic Forum Davos Agenda on 17 January 2022, speech available at <<https://www.weforum.org/agenda/2022/01/address-chinese-president-xi-jinping-2022-world-economic-forum-virtual-session/>> accessed 09 June 2022. See also A. Roberts and N. Lamp, “*Six Faces of Globalization: Who Wins, Who Loses and Why It Matters*”, Harvard University Press (2021), p. 1.

¹⁴ UN Department of Economic and Social Affairs, “*World Economic Situation and Prospects as of mid-2021*”, *supra* note 10; and “*World Economic Situation and Prospects as of mid-2020*”, 13 May 2020, available at: <www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-as-of-mid-2020/> accessed 09 June 2022. See also, Oxfam Briefing Paper, “*The Inequality Virus*”, January 2021, available at <<https://webassets.oxfamamerica.org/media/documents/the-inequality-virus-report.pdf>> accessed 09 June 2022.

¹⁵ C. Bastasin, “*Democracy and Disorder: Secular Divergence: Explaining Nationalism in Europe*”, Brookings Institution, 16 May 2019, available at <www.brookings.edu/wp-content/uploads/2019/05/FP_20190516_secular_divergence_bastasin.pdf> accessed 09 June 2022.

¹⁶ A notable exception is C. Schwöbel-Patel, “*Populism, International Law, and the End of Keep Calm and Carry on Lawyering*”, University of Warwick, School of Law, 13 December 2018, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300695> accessed 09 June 2022, and also in the Netherlands Yearbook of International Law book series (2018) Vol. 49, pp. 97-121.

political scientists. The growing international law literature on populism concentrates primarily on the “symptoms” of populism, including the nature and extent of the impact of populist policies on international law and international institutions¹⁷ refuting populism’s characterisations of international law¹⁸ and explaining why populists are wrong to reject international law and international institutions.¹⁹ Whilst these various analyses are well-founded, their overall theme might be characterised (unkindly) as populism being a problem to which international lawyers have the solution through multilateralism and liberal internationalism.²⁰ There has been little attempt by international lawyers to take account of the economic, social and cultural causes of populism, nor appetite to entertain the possibility that international law, particularly international economic law, might be playing a part in supporting these causes. This is a more uncomfortable yet necessary reflection.

Posner and Koskenniemi (separately) attribute the rise of populism to a backlash against the “overreach” of international law and international institutions in the years following the end of the Cold War, when there was a sense that historical changes would lead to liberal democracy sweeping the world, and global governance would be conducted through international institutions supporting trade, democracy, peace, and human rights.²¹ Koskenniemi links the rise of populism in particular to “the politics of [human] rights” and overreach by the international human rights system.²² These explanations, which draw on reference points that are more familiar to most international lawyers than trade, are certainly worthy of consideration. Yet they are speculative in nature – they do not draw on research to establish the causal links asserted, nor do they refer to the considerable body of research that links populism with globalisation and international trade.

International trade and globalisation are, inevitably, embedded in international law. International trade lawyers, at least those writing about WTO law, acknowledge that globalisation has harmful social and cultural effects, but have traditionally tended either to refute any connection between these harmful effects and international trade law, or to stay at arms-length from any such connection by emphasising that the content of international trade law is the responsibility of States who negotiate the treaties in question.²³ Weiler, for example, stated in 2009 that: “if you look for serious

¹⁷ See, for example, H. Krieger, “Populist Governments and International Law”, *European Journal of International Law* (2019) Vol. 30, No. 3, pp. 971-996; M. P. Rudolph, “Populist Governments and International Law: A Reply to Heike Krieger”, *European Journal of International Law* (2019) Vol. 30, No. 3, pp. 997-1008; D. Tladi, “Populism’s Attack on Multilateralism and International Law: Much Ado about Nothing”, *Chinese Journal of International Law* (2020) Vol. 19, No. 3, pp. 369-391.

¹⁸ See, for example, V. Bilkova, “Populism and Human Rights”, *Netherlands Yearbook of International Law book series* (2018) Vol. 49, pp. 143-174.

¹⁹ L. Kulamadayil, “Addressing Economic Populism through Law - A Case Study of the World Development Report 2017”, *Netherlands Yearbook of International Law book series* (2018) Vol. 49, pp. 209-220.

²⁰ This point is made by C. Schwöbel-Patel in “Populism, International Law, and the End of Keep Calm and Carry on Lawyering”, *supra* note 16.

²¹ E. Posner, “Liberal Internationalism and the Populist Backlash”, *University of Chicago Public Law & Legal Theory Paper Series*, No. 606 (2017), p. 4.

²² M. Koskenniemi, “Enchanted by the Tools? International Law and Enlightenment”, *American University International Law Review* (2020) Vol. 35, No. 3, pp. 397-426 in particular at pp. 414-417.

²³ For a notable exception, see J. Linarelli, M. E. Salomon and M. Sornarajah, “The Misery of International Law: Confrontations with Injustice in the Global Economy”, *Oxford Scholarship Online*, May 2018, p. 112, available at <<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198753957.001.0001/oso-9780198753957>> accessed 09 June 2022. There is quite a volume of literature on the related question of the injustice of the global international economic order as between developed and developing countries, see, for

analytical literature that actually seeks to explore and document the nexus between WTO/GATT legal disciplines and systemic social and economic injustice resulting from international trade, [...] one finds very little indeed. To my knowledge, the case for that nexus has not been made. [...] I cannot make the case that the WTO legal framework as such [...] is in any direct way linked to the meaningful inequities of globalization, for the simple reason that I do not believe that to be the case”.²⁴ Marceau and Trachtman, also in 2009, commenting on increasing international harmonisation of product standards and mutual recognition agreements among States to reduce technical barriers to trade, stated that these developments “constantly revise the scope of national autonomy - of sovereignty. It is important to recognize that it is not the WTO that decides to do these things, but the Members of the WTO, in the exercise of their sovereignty.”²⁵

Petersmann, by contrast, has been critical since at least the 1990s of the absence from textbooks and scholarship of an assessment of the “justice” of international economic law and its institutions.²⁶ Other notable recent exceptions to the “keep calm and carry on lawyering”²⁷ approach to populism and international law include Roberts *et al.* and Lamp,²⁸ who identify globalisation as the central narrative around which the certainties of the post-Cold War world have given way to increasingly acrimonious uncertainty.²⁹ Koskenniemi is critical of the tendency of lawyers, particularly when acting as experts within international institutions that are the guardians of a particular branch of international law (for example, the WTO), to focus on a technical application of “the tools” of law because they are “enchanted” by them, rather than asking critically what purpose and value they serve.³⁰ Viñuales, writing about the existential threat posed by climate change, underlines that the law’s role cannot be limited to addressing the consequences of harmful human (industrial) activities, but must focus also on how the law organises and enables these activities.³¹

example, C. Carmody, F. J. Garcia and J. Linarelli (eds) “*Global Justice and International Economic Law*”, Cambridge University Press (2012).

²⁴ J. H. H. Weiler, “*Law, Culture and Values in the WTO – Gazing into the Crystal Ball*”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), “*The Oxford Handbook of International Trade Law*”, Oxford University Press (2009), pp. 751-752.

²⁵ G. Marceau and J. Trachtman, “*Responding to National Concerns*”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), “*The Oxford Handbook of International Trade Law*”, Oxford University Press (2009), p. 235.

²⁶ E. U. Petersmann, “*Proposals for Strengthening the UN Dispute Settlement System: Lessons from International Economic Law*”, Max Planck United Nations Yearbook (1999), Vol. 3, p. 105; and more recently, E. U. Petersmann, “*Ten Lessons from ‘Institutional Economics’ for Designing Multilateral Trade and Investment Institutions*”, European University Institute, EUI Working Paper LAW 2020/05, Florence (2020), at p. 26, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617907> accessed 09 June 2022. Petersmann is the former Legal Counsellor in the GATT Division of Legal Affairs (1981-1990) and Consultant Legal Adviser in the GATT / WTO Secretariat (1990-2007).

²⁷ This expression is taken from C. Schwobel-Patel, “*Populism, International Law, and the End of Keep Calm and Carry on Lawyering*”, *supra* note 16.

²⁸ A. Roberts and N. Lamp, “*Six Faces of Globalization: Who Wins, Who Loses and Why It Matters*”, *supra* note 13; A. Roberts, H. Choer Moraes and V. Ferguson, “*The Geoeconomic World Order*”, Lawfare, 19 November 2018, available at <<https://www.lawfareblog.com/geoeconomic-world-order>> accessed 17 June 2022, and A. Roberts, H. Choer Moraes and V. Ferguson, “*Toward a Geoeconomic Order*”, *Journal of International Economic Law* (2019), Vol. 22, No. 4, pp. 655-676.

²⁹ A. Roberts and N. Lamp, “*Six Faces of Globalization: Who Wins, Who Loses and Why It Matters*”, *supra* note 13.

³⁰ M. Koskenniemi, “*Enchanted by the Tools? International Law and Enlightenment*”, *supra* note 22, in particular at pp. 421-422.

³¹ J. Viñuales, “*The Organisation of the Anthropocene: In Our Hands?*”, Brill Research Perspectives (2018), pp. 1-81, at p. 5, available at <www.repository.cam.ac.uk/handle/1810/279461> accessed 09 June 2022.

With the important caveat that the author is neither an economist nor a trade law specialist, this Working Paper aims to bridge at least something of the interdisciplinary disconnect between international lawyers and the mounting evidence that populism is caused by economic, social and cultural grievances arising from globalisation. It does so by: looking more closely at populism and its characteristics (section 2); examining the empirical and analytical research linking the rise of populism and populist political leaders with the economic, social and cultural stresses caused by globalisation (section 3); describing the free trade debate among economists, where there are differing but not entirely divergent views (section 4); reverse engineering economists' critical analyses to identify where the harmful aspects of free trade appear in WTO and free trade agreement legal provisions (section 5); identifying possible measures to address economic inequality, both those limited to remedial policies, and those involving possible systemic changes (section 6); and drawing conclusions (section 7).

The primary findings are that, although international trade law provides States with some limited exceptions to free trade to avoid its negative economic, social and cultural consequences, this national "policy space" to regulate in the public interest has been eroded as the international trade system has moved beyond the "embedded liberalism" or "shallow multilateralism"³² of its first three decades under the 1947 General Agreement on Tariffs and Trade ("GATT 1947") toward ever-deepening neoliberal trade relations from the late 1970s, and under the 1994 World Trade Organization ("WTO") Agreements; and that this national policy space has been further diminished by interpretations of the relevant treaty provisions by the dispute settlement bodies established under the WTO Agreement and numerous free trade and investment agreements. If international law is to play a role in mitigating economic inequality and reducing its potency in driving populism, ways and means to reopen this policy space for States need to be considered. Whether there is a sufficiently enabling political climate among States to embark on the multilateral negotiations that would be necessary to achieve such reopening of national policy space in the global trading system is an open question that is explored in sections 6 and 7.

2. Populism

As the definition of populism is unavoidably minimalist in order to encompass its varying forms, a more descriptive approach may be helpful to identify its characteristics.³³ Central, given the economic drivers of populism, is socio-economic populism, which characterises the people as honest, hard-working members of the working class, who require protection from big business, investors, and others regarded as supporting and benefitting from international trade and the international financial system.³⁴ Cultural populism claims to protect the people of the nation – its native members – from outsiders, who may be immigrants, criminals, ethnic and religious minorities, and cosmopolitan or international elites.³⁵ Anti-establishment populism regards the people as hard-

³² These terms are explained in section 5 a) below.

³³ See generally, Tony Blair Institute for Global Change, *"Populists in Power around the World"*, *supra* note 6.

³⁴ *ibid.*

³⁵ *ibid.*, citing C. Mudde, *"The Populist Radical Right: A Pathological Normalcy"*, *West European Politics* (2010) Vol. 33, No. 6, p. 1173.

working victims of a State run by political and economic vested interests. This form of populism distinguishes the people from establishment elites.³⁶

As populism has many faces, how we understand and comment on it tends to depend on our professional viewpoint. For international lawyers, concerning ourselves with States' international obligations, populism is viewed as paired with nationalism, and particularly the notion of "taking back sovereignty" that has been ceded to international organisations and treaties. From the perspective of international human rights lawyers and defenders, populism may be viewed as xenophobic, misogynistic, anti-LGBTQ rights, and antagonistic to many human rights protections.³⁷ For international trade lawyers, populism is associated with protectionism and viewed as a threat to international trade liberalisation.³⁸ Crawford, referring to withdrawals from international treaties, makes an appeal to "defend the communitarian values of international law" against "nativism and unilateralism".³⁹ McLachlan, writing in this KFG Working Paper series, underlines that international law, which enshrines the right of peoples to determine their political status and their economic and cultural development, does not sit in opposition to the sovereignty of the people.⁴⁰ For Pellet, also writing in this Working Paper series, countering forces carrying beliefs that are incompatible with traditional humanist values requires the reasoned promotion of values internally within States – international law will owe its salvation to improved national policies.⁴¹

Running through the various forms of populism is a common "us" (the people) and "them" (outsiders and elites of various types) theme in which populist political leaders claim to be the only legitimate representatives of the people. Populism is, by its nature, divisive. Polarisation of political interests and views is inherent. Populist political leaders and parties paint as illegitimate the views of those who are excluded from their notion of "the people". By claiming to represent and govern on behalf of the people, populist leaders implicitly disenfranchise those who do not support them – opposition, by definition, comes from those who are regarded as not being part of the people.⁴² As "the people" are in fact a subcategory of the total population, by stating that government is conducted on behalf of the people and delegitimising the views of others, populists in effect question the basis of democratic government. In reaction, those who are regarded as not forming part of the

³⁶ *ibid.*

³⁷ See C. Schwöbel-Patel, *supra* note 16 at p. 6; V. Bilkova, "Populism and Human Rights", *supra* note 18; P. Alston, "The Populist Challenge to Human Rights", *Journal of Human Rights Practice* (2017) Vol. 9, No. 1, pp. 1-15.

³⁸ S. Lester and I. Manak, "The Rise of Populist Nationalism and the Renegotiation of NAFTA", *Journal of International Economic Law* (2018) Vol. 21, No. 1, pp. 151-169.

³⁹ J. Crawford, "The Current Political Discourse Concerning International Law", *The Modern Law Review* (2018) Vol. 81, No. 1, p. 21.

⁴⁰ C. McLachlan, "Populism, the Pandemic and Prospects for International Law", KFG Working Paper Series No. 45, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" (2020), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715745> accessed 09 June 2022.

⁴¹ A. Pellet, "Value and Power Relations – the Disillusionment of International Law?", KFG Working Paper Series No. 34, Berlin Potsdam Research Group, "The International Rule of Law – Rise or Decline?" (2019), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400689> accessed 09 June 2022.

⁴² See the various definitions referred to above, *supra* note 5 and the accompanying text. See also, for example, The Guardian, "Donald Trump has made it clear: the only true Americans are white and christian", 16 July 2019, available at <www.theguardian.com/commentisfree/2019/jul/16/trump-real-americans-white-christian> accessed 09 June 2022; and also The Guardian, "What you need to know about Trump's inauguration speech", 20 January 2017, available at <www.theguardian.com/world/2017/jan/20/donald-trump-inauguration-speech-analysis> accessed 09 June 2022.

people, and whose views are delegitimised, may disavow the legitimacy of elected representatives – “not my President”.⁴³ The common ground for political, social and cultural dialogue diminishes.⁴⁴

3. Populism and Globalisation

There is a considerable body of research linking the rise of populism and populist political leaders with the economic, social and cultural stresses caused by globalisation.⁴⁵ Not surprisingly, economists, political scientists, political economists⁴⁶ and sociologists figure prominently among the researchers.

a) Globalisation and inequality

Globalised international trade policies pursued since the late 1970s have generated great wealth for some, but international competition has caused job and wage losses for many others. The production of labour-intensive manufactured goods, in particular, has moved from developed countries to lower-wage countries. Many industries, businesses and jobs have been relocated to cheaper or less regulated countries and regions.⁴⁷ While under international trade and financial rules it has become increasingly easy for businesses to relocate across regions and borders, it is not generally straightforward for people to do this, for a host of legal, social, cultural, linguistic, financial and personal reasons. For developing countries, international trade has benefitted certain products and businesses that have a competitive advantage, while others fail when faced with international competition, with a consequent loss of jobs, local patterns of economic activity, customs and cultures. Higher unemployment and greater inequality result. A small rich elite has tended to benefit rather than the wider population.⁴⁸ Evidence demonstrates that globalisation has increased inequality in both developed and developing countries.⁴⁹

⁴³ See for example, The New York Times, “Not My President, Not Now, Not Ever”, 20 January 2017, available at <www.nytimes.com/interactive/projects/cp/opinion/presidential-inauguration-2017> accessed 09 June 2022, for an account of how in the United States, the trend of political opponents disavowing the legitimacy of the opposing party’s success in Presidential elections did not begin with the election of President Trump in 2017, but rather can be traced to the Tea Party’s reaction to the election of President Obama in 2009.

⁴⁴ Polarisation has been exacerbated in recent decades through social media which, through the use of powerful algorithms, tailors the information that we receive to our preexisting views and preferences. See, for example, Center for Humane Technology, “Ledger of Harms”, available at <<https://ledger.humanetech.com>> accessed 09 June 2022, and Avaaz, “Facebook’s Algorithm: A Major Threat to Public Health”, 15 April 2020, available at <https://secure.avaaz.org/campaign/en/facebook_coronavirus_misinformation/> accessed 09 June 2022.

⁴⁵ For a recent review of the economic and political research, see S. Guriev and E. Papaioannou, “*The Political Economy of Populism*”, *supra* note 4.

⁴⁶ Political economy is the social science that studies politics and economics and the interrelationship between them as a combined subject.

⁴⁷ For research concerning the United States, see D. H. Autor and D. Dorn, “*The Growth of Low-Skill Service Jobs and the Polarization of the US Labor Market*”, *American Economic Review* (2013) Vol. 103, No. 5, pp. 1553–1597; and for research concerning Europe, see M. Goos, A. Manning and A. Salomons, “*Explaining Job Polarization: Routine-Biased Technological Change and Offshoring*”, *American Economic Review* (2014) Vol. 104, No. 8, pp. 2509–2526.

⁴⁸ For a survey of the body of evidence demonstrating increased inequality in developing countries caused by trade, see N. Pavcnik, “*The Impact of Trade on Inequality in Developing Countries*”, National Bureau of Economic Research, Working Paper 23878, September 2017, available at <<https://www.nber.org/papers/w23878>> accessed 09 June 2022.

⁴⁹ C. Hornok and M. Koren, “*The Case for Free Trade*”, Vox EU CEPR Research Paper, 7 May 2016, available at <<https://voxeu.org/article/case-free-trade>> accessed 09 June 2022; P. K. Goldberg and N. Pavcnik, “*Distributional Effects of Globalisation in Developing Countries*”, *Journal of Economic Literature* (2007) Vol. 45,

Numerous scholars have researched and documented dramatic increases in income and wealth inequality over the last two decades of the twentieth century and the first decade or two of the twenty-first century.⁵⁰ There is a growing consensus among economists that the playing field has tilted away from the poor and middle-income earners in favour of the wealthy and corporations, and that the latter have too much influence on the “rules of the game”.⁵¹ The United States, one of the more extreme examples among developed States, has seen inequality reach its highest point, with the top 1% having more than “...the combined wealth of the entire American middle class.”⁵² Research also suggests that the volatility (rise and fall) of earnings in the United States has increased sharply, nearly doubling from the early 1970s to 2010, and that the “...distance that people slip down the ladder when they lose their financial footing” has increased significantly.⁵³ Further, rising inequality has been accompanied by declining social mobility, with the “have-nots” not only more economically behind the “haves”, but also more likely to remain so than in previous decades, and likely to lead shorter lives, suffer from physical and mental health problems, fall prey to addictions and live in broken communities.⁵⁴

The increase in inequality caused by globalisation has been magnified over the last two decades or so by the accelerating technology revolution, which increases the demand for highly-skilled workers and reduces or replaces the need for low-skilled workers. Exponential advances in automation, artificial intelligence and robotics have great potential for increased productivity and innovation, but have already replaced millions of lower-skilled jobs and threaten millions more.⁵⁵ According to research, around 3% of current jobs could be lost globally to these technologies in the coming two years or so, with this figure rising to around 20% by the late 2020s, and around 30% by the mid-2030s.⁵⁶ Alternative jobs will be created, but these will favour highly-skilled and higher educated

No. 1, pp. 39-82; and A. Ebenstein, A. Harrison, M. McMillan and S. Phillips, “*Estimating the Impact of Trade and Offshoring on American Workers using the Current Population Surveys*”, Review of Economics and Statistics (2014) Vol. 96, No. 4, pp. 581-595; and R. Dix-Carneiro, “*Trade liberalisation and labour market dynamics*”, Econometrica (2014) Vol. 82, No. 3, pp. 825-885. See also N. Pavcnik, “*The Impact of Trade on Inequality in Developing Countries*”, *ibid.*

⁵⁰ Most famously, T. Picketty, “*Capital in the Twenty-First Century*”, Belknap Press (2017), and see also The Washington Post, “*Income inequality in America is the highest it’s been since the Census Bureau started tracking it, data shows*”, 26 September 2019, available at <<https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/>> accessed 09 June 2022.

⁵¹ O. Blanchard and D. Rodrik (eds), “*Combating Inequality*”, Massachusetts Institute of Technology and Peterson Institute for International Economics (2021), Introduction, p. xviii.

⁵² J. Tankersley, “*Warren health plan tightens Democrats’ embrace of tax increases*”, The New York Times, 2 November 2019, available at <<https://www.nytimes.com/2019/11/02/business/elizabeth-warren-health-care-plan.html>> accessed 09 June 2022. See also O. Blanchard and D. Rodrik, *ibid.* at p. xi.

⁵³ J. S. Hacker, “*The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream*”, Oxford University Press (2019), at p.6.

⁵⁴ R. Reeves, “*Dream Hoarders: How the American Upper Middle Class is Leaving Everyone Else in the Dust, Why that is a Problem, and What to do About it*”, Brookings Institute Press (2018), and A. B. Krueger, “*The Rise and Consequences of Inequality in the United States*”, Remarks at the Center for American Progress, 12 January 2012, available at <https://obamawhitehouse.archives.gov/sites/default/files/krueger_cap_speech_final_remarks.pdf> accessed 09 June 2022. See also A. Case and A. Deaton, “*Deaths of Despair and the Future of Capitalism*”, Princeton University Press (2020), and, for a European perspective, E. Louis, “*Qui a tué mon père*”, Seuil (2018).

⁵⁵ S. Guriev and E. Papaioannou, “*The Political Economy of Populism*”, *supra* note 4.

⁵⁶ Pricewaterhouse Coopers, “*Will Robots Really Steal our Jobs? An International Analysis of the Potential Long Term Impact of Automation*” (2018), available at <www.pwc.co.uk/economic-services/assets/international-impact-of-automation-feb-2018.pdf> accessed 09 June 2022. The research relates to 29 countries.

workers.⁵⁷ Increased robotisation of manufacturing systems has in many instances caused developing countries to lose their competitive edge vis-à-vis developed countries.⁵⁸

After forty years or so of globalisation, more than twenty years of the technology revolution, and the recent economic shocks caused by the 2008 financial crisis and the ongoing Covid-19 pandemic, inequality is at record levels.⁵⁹ In the words of the UN Secretary-General, inequality “...defines our time” and “...risks destroying the world’s economies and societies”.⁶⁰ Extreme wealth has increased, with the top 1% of the world’s population controlling around 46% of its wealth. Oxfam reported in 2020 that the world’s 2,153 billionaires have more wealth than the 4.6 billion people who make up the poorest 60 % of the planet’s population.⁶¹ The 22 richest men in the world have more wealth than all of the women in Africa.⁶² Inequality has risen in developed and developing countries alike, putting the social contract under stress and increasing mistrust of political leaders.⁶³ Since the early 1980s, free market neoliberal economic policies have greatly increased wealth for the highest earners, stagnated the wages of middle-income earners, and decreased the income of the lowest paid workers.⁶⁴ This “winner-takes-all” approach to economic management, offering limited benefits or wage stagnation to the middle class, has been described as breeding a democratic malaise.⁶⁵

⁵⁷ *ibid*, and see also World Economic Forum, “*The Future of Jobs Report 2020*”, 20 October 2020, available at <www.weforum.org/reports/the-future-of-jobs-report-2020/digest> accessed 09 June 2022.

⁵⁸ See, for example, D. Rodrik, “*New technologies, Global Value Chains and the Developing Economies*”, Harvard University, Background Paper 1, September 2018, available at <https://scholar.harvard.edu/files/dani-rodrik/files/new_technologies_global_value_chains_developing_economies.pdf> accessed 09 June 2022, and D. Rodrik, “*Poor Countries’ Technology Dilemma*”, Project Syndicate, 8 February 2021, available at <www.project-syndicate.org/commentary/poor-countries-technology-dilemma-by-dani-rodrik-2021-02?barrier=accesspaylog> accessed 09 June 2022. See also World Economic Forum, “*Global Technology Governance Report 2021*”, 2 December 2020, available at <www.weforum.org/reports/global-technology-governance-report-2021> accessed 09 June.

⁵⁹ See *World Economic Situation and Prospects as of mid-2021*, *supra* note 10; and Oxfam Briefing Paper, “*The Inequality Virus*”, *supra* note 14.

⁶⁰ UN Secretary-General, Nelson Mandela Lecture, 18 July 2020, available at <<https://news.un.org/en/story/2020/07/1068611>> accessed 09 June 2022.

⁶¹ Oxfam International, 2020 report, <www.oxfam.org/en/press-releases/worlds-billionaires-have-more-wealth-46-billion-people> accessed 09 June 2022, and see also the World Inequality Report 2018, available at <<https://wir2018.wid.world>> accessed 09 June 2022. See also Oxfam Briefing Paper, “*Time to care*”, January 2020, available at <https://webassets.oxfamamerica.org/media/documents/FINAL_bp-time-to-care-inequality-200120-en.pdf> accessed 09 June 2022.

⁶² Oxfam International, 2020 report, *ibid*.

⁶³ See, for example, World Economic Forum, “*These Charts show the Extreme Concentration of Global Wealth*”, 7 January 2019, available at <www.weforum.org/agenda/2019/01/visualizing-the-extreme-concentration-of-global-wealth/> accessed 13 June 2022; World Economic Forum panel discussion “*The Cost of Inequality*”, 25 January 2019, available at <www.weforum.org/events/world-economic-forum-annual-meeting-2019/sessions/the-price-of-inequality#stream-header> accessed 13 June 2022; and W. Roylance, “*Davos was all about Globalization 4.0, so what does it mean?*”, *Diplomatic courier*, 13 March 2019, available at <www.diplomaticcourier.com/posts/davos-was-all-about-globalization-4-0-so-what-does-it-mean> accessed 13 June 2022.

⁶⁴ L. Mishel, E. Gould and J. Bivens, “*Wage Stagnation in Nine Charts*”, Economic Policy Institute, 6 January 2015, available at <www.epi.org/publication/charting-wage-stagnation/> accessed 13 June 2022. See R.V. Reeves, C. Pulliam and A. Schobert, “*Are Wages Rising, Falling or Stagnating?*”, Brookings Institution, 10 September 2019, available at <www.brookings.edu/blog/up-front/2019/09/10/are-wages-rising-falling-or-stagnating/> accessed 13 June 2022, for a critique of the methodologies for determining whether wages have risen, fallen or stagnated.

⁶⁵ K. Schwab, “*The 4th Industrial Revolution: What it Means, How to Respond*”, *Foreign Affairs*, 12 December 2015, available at <www.foreignaffairs.com/articles/2015-12-12/fourth-industrial-revolution> accessed 13 June 2022.

The UN Sustainable Development Goals, adopted by the UN General Assembly in September 2015, are intended, among other things, to eradicate poverty, reduce inequality and lead to a fairer world.⁶⁶ Nevertheless, the UN Secretary-General has confirmed in 2019 and 2020 reports that income inequality continues to increase and that the numbers of people in extreme poverty is anticipated to rise.⁶⁷ According to the annual UN reports on world economic prospects, inequality has continued to rise in developed and developing countries alike, with 70% of the world's population living in countries where income inequality has increased.⁶⁸

b) Economic inequality as a driver of sociocultural grievances and support for populism

Even among the large number of economists, political scientists and others who agree that economic, social and cultural grievances arising from globalisation are the source of populism's rise, there are differences regarding how this causality should be explained. The involvement of political scientists has generated a useful theoretical framework for thinking about these competing explanations of the causes of populism.⁶⁹

Political scientists structure the debate in terms of bottom-up (or demand-side) and top-down (or supply-side) causes. Bottom-up arguments locate the main cause of populism in the economic, social and cultural grievances of citizens, while top-down arguments locate the main cause in institutional (or systemic) failures – the inability or unwillingness of governments, institutions, policy makers, and mainstream political leaders and parties to supply effective responses to these grievances. These bottom-up and top-down explanations together are known as “structural” causes. A third (non-structural) element in the theoretical framework, which reflects a classical political science debate, concerns “voluntarist” explanations, which focus on the choices and behaviour of populist political leaders and parties in shaping the debate and influencing the views of voters.

aa) Bottom-up economic and sociocultural causes of support for populism

Scholars focusing on economic causes of populism argue that globalisation has created deep divisions within many societies in a number of ways: between rich and poor, between elites and “ordinary” people, between cosmopolitan urban populations and those living in rural areas, and between the highly and the less-skilled and educated.⁷⁰ Further, they argue that in addition to

⁶⁶ Adopted as part of the General Assembly resolution “*Transforming our world: the 2030 Agenda for Sustainable Development*”, UN Doc. A/RES/70/1 of 25 September 2015. See also the Sustainable Development Goals webpage, available at <www.un.org/sustainabledevelopment/secretary-general/> accessed 13 June 2022.

⁶⁷ See the 2019 and 2020 reports of the Secretary-General on progress on the Sustainable Development Goals, available at <www.un.org/sustainabledevelopment/progress-report/> accessed 13 June 2022 and <https://sustainabledevelopment.un.org/content/documents/24978Report_of_the_SG_on_SDG_Progress_2019.pdf> accessed 13 June 2022; and the 2019 Sustainable Development Summit document at <www.un.org/en/summits2019/pdf/SDG-Summit.pdf> accessed 13 June 2022.

⁶⁸ UN Department of Economic and Social Affairs, “*World Economic Situation and Prospects as of mid-2021*”, *supra* note 10, and “*World Economic Situation and Prospects as of mid-2020*”, *supra* note 14

⁶⁹ See, in particular, S. Berman, “*The Causes of Populism in the West*”, *Annual Review of Political Science* (2021) Vol. 24, pp. 71-88.

⁷⁰ See J. Judis, “*The Populist Explosion: How the Great Recession Transformed American and European Politics*”, Columbia University Press (2016); J. Judis, “*The Nationalist Revival: Trade, Immigration and the Revolt against Globalization*”, Columbia University Press (2018), T. Iversen and D. Soskice, “*Democracy and Prosperity: Reinventing Capitalism through a Turbulent Century*”, Princeton University Press (2019) and K.J. Cramer, “*The*

creating divisions within societies, globalisation has deepened divisions between countries, contributing to increased geopolitical tensions, because it is not only certain “elites” in the developed world that have benefited from globalisation over the past decades, but also some developing countries, particularly China. Economic “losers” in the developed world thus blame countries such as China as well as the “winners” within their own societies for their and their countries’ problems. Cumulatively, increased economic inequality has made many voters resentful and susceptible to populists, who scapegoat and vilify elites and the establishment in their own countries as well as successful rising foreign countries.⁷¹

Empirical research demonstrates that the causes of increasing support for populism include stagnating incomes, unemployment and personal as well as regional inequalities, which cause fear and uncertainty that have not been adequately addressed or compensated, leading to a loss of faith in the existing political leadership and institutions.⁷² Individuals who lose their jobs or suffer wage reductions through international competition, those living in disadvantaged communities and regions where, for example, old industries such as coal and steel production were dominant, or where infrastructure is poor, feel left behind by globalisation and can develop a sense of irreversible decline.⁷³ A perception of an unfairly privileged “elite” develops in relation to those receiving the advantages of free market economics and the benefits of escalating inequality. Mistrust of the political leadership grows. Those who are benefitting from globalisation sense the stark divergence of interests and act to protect their wealth and well-being. Polarisation of interests and mind-sets occurs and a cultural and human distance develops.⁷⁴ Nationalist and populist leaders and parties across many parts of the world have tapped into the resulting fears, uncertainties and frustrations. They have capitalised on the failure of mainstream political leaders to manage these rapid and fundamental economic, social and cultural changes in a way that maintains fairness, and social and cultural cohesion.⁷⁵ Populist politicians have been successful in appealing to the “losers” in these economic and social developments with protectionist, nationalist and anti-immigration agendas.⁷⁶

Politics of Resentment: Rural Consciousness in Wisconsin and the Rise of Scott Walker, University of Chicago Press (2016).

⁷¹ B. Milanovic, *Global Inequality: A New Approach for the Age of Globalization*, Harvard University Press (2016), and B. Milanovic, *Capitalism, Alone: The Future of the System that Rules the World*, Harvard University Press (2019).

⁷² S. Guriev, “Economic Drivers of Populism”, American Economic Association Papers and Proceedings (2018) Vol. 108, pp. 200-203, available at <www.aeaweb.org/articles?id=10.1257/pandp.20181123> accessed 13 June 2022; C. Mudde and C. R. Kaltwasser, “Studying Populism in Comparative Perspective: Reflections on the Contemporary and Future Research Agenda”, Comparative Political Studies (2018) Vol. 51, No. 13, pp. 1667-1693; F. Fukuyama, *The Rise of Populist Nationalism*, Credit Suisse Research Institute, 23 January 2018, available at <www.credit-suisse.com/about-us/news/en/articles/news-and-expertise/francis-fukuyama-the-rise-of-populist-nationalism-201801.html> accessed 13 June.

⁷³ C. Bastasin, “Democracy and Disorder: Secular Divergence: Explaining Nationalism in Europe”, *supra* note 15.

⁷⁴ C. Bastasin, “Democracy and Disorder: Secular Divergence: Explaining Nationalism in Europe”, *ibid*.

⁷⁵ See, for example, K. Aiginger, “Populism: Roots, Consequences and Counter Strategy”, Vox EU CEPR Research Paper, 20 April 2019, available at <<https://voxeu.org/article/populism-roots-consequences-and-counter-strategy>> accessed 13 June; D. Rodrik, “Populism and the Economics of Globalisation”, Journal of International Business Policy (2018) Vol. 1, No. 1-2, pp. 12-33 and I. Colantone and P. Stanig, “Global competition and Brexit”, American Political Science Review (2018) Vol. 112, No. 2, pp. 201-218. See also “Europe and Right-Wing Nationalism”, BBC, 13 November 2019, available at <<https://bbc.com/news/world-europe-36130006>> accessed 13 June 2022 reporting increased votes for many such parties across a large number of European countries.

⁷⁶ See, for example, R. Gold, “The economic causes of populism”, Global Solutions Journal (2020) Issue 5, p.72.

Economists and political scientists have conducted numerous studies that identify increasing income inequality as a source of stress on social cohesion and a major driver of the rise in support for populism.⁷⁷ Research demonstrates in particular that political support for populist leaders and parties is linked to job losses caused by international competition.⁷⁸ One such study, for example, demonstrates that votes for former President Trump in the 2016 US presidential election were strongly correlated with communities suffering job losses through the rise in imports from China.⁷⁹ From the late 1990s until the financial crisis in 2008, the manufacturing industry in the United States lost six million jobs to foreign competition, a third of its manufacturing workforce. These unemployment levels accelerated in the early 2000s when China joined the World Trade Organization.⁸⁰ Similarly, in Europe, the rise of far-right and nationalist parties has been linked to increased labour market insecurity due to exposure to foreign imports,⁸¹ as has support for Brexit in the United Kingdom.⁸² Using data from electoral districts across all European Union countries in the 2019 elections to the European Parliament, research demonstrates that voting for anti-EU parties, falling confidence in core democratic institutions, and political polarisation, were considerably higher in areas of industrial decline.⁸³

Studies have concluded that financial crises over the past 30 years have been a catalyst for right-wing populist political parties. Many of the now-prominent right-wing parties in Europe that could be considered populist, such as the Lega Nord in Italy, the Alternative for Germany, the Norwegian Progress Party and the Finn's Party are “children of financial crises”, having made their breakthrough in the years following a financial crash. The 2008 financial crisis, in particular, saw a wave of right-wing populists gaining power, often as coalition partners.⁸⁴ The chief economist of the Financial Times has argued that we cannot fail to focus on the “economic origins of the populist surge” and

⁷⁷ See, for example, World Economic Forum, “*These Charts show the Extreme Concentration of Global Wealth*”, 7 January 2019, available at <www.weforum.org/agenda/2019/01/visualizing-the-extreme-concentration-of-global-wealth/> accessed 13 June 2022; World Economic Forum panel discussion “*The Cost of Inequality*”, 25 January 2019, available at <www.weforum.org/events/world-economic-forum-annual-meeting-2019/sessions/the-price-of-inequality#stream-header> accessed 13 June 2022; and W. Roylance, “*Davos was all about Globalization 4.0, so what does it mean?*”, Diplomatic courier, 13 March 2019, available at <www.diplomaticcourier.com/posts/davos-was-all-about-globalization-4-0-so-what-does-it-mean> accessed 13 June 2022.

⁷⁸ For a recent survey of the research, see S. Guriev and E. Papaioannou, “*The Political Economy of Populism*”, *supra* note 4.

⁷⁹ D. Autor, D. Dorn, L. F. Katz, C. Patterson and J. V. Reenen, “*Concentrating on the Fall of the Labor Share*”, American Economic Review: Papers & Proceedings (2017) Vol. 107, No. 5, pp. 180-185, available at <<https://doi.org/10.1257/aer.p20171102>> accessed 13 June 2022.

⁸⁰ These numbers are taken from J. R. Pierce and P. K. Schott, “*The Surprisingly Swift Decline of US Manufacturing Employment*”, American Economic Review (2016) Vol. 106, No. 7, pp. 1632-1662.

⁸¹ See, for example, E. Dal Bo, F. Finan, O. Folke, T. Persson, and J. Rickne, “*Economic Losers and Political Winners: Sweden’s Radical Right*”, August 2018, available at <<http://perseus.iies.su.se/~tpers/papers/Draft180902.pdf>> accessed 13 June 2022.

⁸² I. Colantone and P. Stanig, “*The Trade Origins of Economic Nationalism: Import Competition and Voting Behavior in Western Europe*”, 21 January 2017, available at <www.bancaditalia.it/pubblicazioni/altri-attivi-seminari/2016/14_novembre_Colantone_Stanig.pdf> accessed 13 June 2022.

⁸³ Y. Mounk, “*The People vs. Democracy. Why Our Freedom Is in Danger and How to Save it*”, Harvard University Press (2019), and E. Klein, “*Why We’re Polarized*”, Profile Books (2020).

⁸⁴ B. Eichengreen, “*The Populist Temptation: Economic Grievance and Political Reaction in the Modern Era*”, Oxford University Press (2018); D. Rodrik, “*The Globalization Paradox: Democracy and the Future of the World Economy*”, W. W. Norton (2011); A. Schafer and W. Streeck (eds), “*Politics in the Age of Austerity*”, Polity Press (2013); and S. Sprong, J. Jetten, Z. Wang, K. Peters and F. Mols, “*Our country needs a strong leader right now: economic inequality enhances the wish for a strong leader*”, Psychological Science (2019) Vol. 30, No. 11, pp. 1-13.

that “[i]t is no accident that many studies document a significant rise in vote shares for parties that could be considered populist in the aftermath of the 2008 financial crisis.”⁸⁵

Within the “bottom-up” causes of populism, explanations focusing on sociocultural grievances are the main competitor to economic grievances. These explanations tend to be favoured by political scientists studying advanced industrial countries, and by sociologists.⁸⁶ They argue that social and cultural trends over the decades, notably rising immigration, the decline of traditional values, and the mobilisation of women and minority groups, are the main cause of support for populism. These trends have challenged ethnic and gender hierarchies, generating a counterreaction that has led to support for right-wing populists, particularly among white men, whose interests populist parties are seen as defending.⁸⁷

Immigrant populations have reached historically high levels in the United States and in many European countries. In Europe, the political impact of this has been increased by the refugee crisis of 2015, and by fear generated by terrorist incidents, such as the November 2015 attacks in Paris and the December 2016 attack in Berlin.⁸⁸ It is argued that because recent immigrants in Europe come largely from non-western, non-Christian cultures, fears have been generated about the decline of European culture and identity, leading some voters to support populist politicians and parties that claim to defend these values.⁸⁹ In the United States, high levels of immigration have occurred against a background of an underlying trend toward a majority non-white population in the next twenty to thirty years.⁹⁰ Political scientists argue that this generates group-based identity fears that lead some voters to support politicians and parties that claim to protect their social status and identity.⁹¹ They also argue that the election of President Obama in 2009 led to a sense of empowerment of minority groups, which

“...reinforced a sense of loss and disempowerment by white working-class voters whose economic base was shifting in a globalized economy and whose previously dominant social status was being challenged by the growing diversity of the country in terms of race and ethnicity, gender roles, and sexual orientation.”⁹²

A number of scholars argue further that there is a perception in both the United States and Europe of a longer-term assault on traditional values that has been going on since around the 1960s, leading many to feel that their identities and values are threatened. Taken together with rising immigration

⁸⁵ M. Wolf, “*The economic origins of the populist surge*”, Financial Times, 27 June 2017, available at <<https://www.ft.com/content/5557f806-5a75-11e7-9bc8-8055f264aa8b>> accessed 13 June 2022.

⁸⁶ S. Berman, “*The Causes of Populism in the West*”, *supra* note 69.

⁸⁷ S. Berman, “*The Causes of Populism in the West*”, *ibid*.

⁸⁸ S. Berman, “*The Causes of Populism in the West*”, *ibid*.

⁸⁹ C. Caldwell, “*Reflections on the Revolution in Europe: Immigration, Islam, and the West*”, Anchor Books (2009); and D. Murray, “*The Strange Death of Europe: Immigration, Identity, Islam*”, Bloomsbury Publishing (2017).

⁹⁰ United States Census Bureau, News Release CB18-41, 13 March 2018, Washington D.C., available at <<https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html>> accessed 13 June 2022.

⁹¹ M.A. Craig and J. A. Richeson, “*On the precipice of a ‘majority-minority’ America: perceived status threat from the racial demographic shift affects white Americans’ political ideology*”, Psychological Science (2014) Vol. 25, No. 6, pp. 1189-1197.

⁹² A. Abramowitz and J. McCoy, “*United States: racial resentment, negative partisanship and polarization in Trump’s America*”, The Annals of the American Academy of Political and Social Science (2018) Vol. 681, No. 1, pp. 137-156.

and the increased empowerment of minority groups, it is argued that these trends have generated a nativist, nationalist, populist backlash as increasing numbers of citizens, particularly white males, have come to feel like “strangers in their own land”.⁹³

More complex, but possibly more persuasive, explanations for the “bottom-up” rise of populism may be derived by combining these competing bodies of research supporting either economic or sociocultural explanations.⁹⁴ A major study analysing decades of World Values Survey data, for example, concludes that sociocultural grievances are the more immediate cause of right-wing populist voting, but that the underlying importance attached to such grievances is the consequence of increased economic inequality and insecurity, together with a sense of erosion of traditional values over the past few decades.⁹⁵ A further study has found that globalisation’s downward pressure on jobs and wages has resulted in manual jobs becoming unable to guarantee economic security or a middle-class lifestyle, with the consequence that the social standing of such workers has fallen and their sense of social marginalisation has increased, creating a feeling of collective status-threat. This has rendered these manual workers vulnerable to the politics of resentment toward professional elites and minorities.⁹⁶ Those who feel more socially marginalised, because they lack strong attachment to the normative order, social engagement, or a sense of social respect, are more likely to become alienated from mainstream politics, and to support radical parties.⁹⁷

A study of immigration in Europe finds that where governments do not provide sufficient resources to help local authorities absorb an inflow of immigrants, “native” citizens are more likely to demonstrate racial, ethnic or cultural grievances. In other words, resource scarcity may trigger underlying sociocultural tensions.⁹⁸ Analysis of the United States’ presidential elections in 2008, 2012, and 2016 suggests that economic hardship and uncertainty – job losses and wage reductions caused by imports from overseas – triggered anti-immigration and anti-minority sentiments, which bolstered support for conservative anti-trade politicians.⁹⁹ Economic shocks from international competition have been shown to increase support for nativist politicians by intensifying resentment against “out-groups” and attachment to “in-groups” in the United States.¹⁰⁰ Similarly in Europe, research has demonstrated that those in regions impacted by foreign imports are less supportive of

⁹³ See, for example, M.A. Craig and J.A. Richeson, “More diverse yet less tolerant? How the increasingly diverse racial landscape affects white Americans’ racial attitudes”, *Personality and Social Psychology Bulletin* (2014) Vol. 40, No. 6, (pp. 750-761), and A. Hochschild, “*Strangers in Their Own Land. Anger and Mourning on the American Right*”, New Press (2018).

⁹⁴ See for example N. Gidron and P. A. Hall, “*The Politics of Social Status: Economic and Cultural Roots of the Populist Right*”, *The British Journal of Sociology* (2017) Vol. 68, No. 1, available at <<https://scholar.harvard.edu/files/hall/files/gidronhallbjs2017.pdf>> accessed 13 June 2022.

⁹⁵ R. Inglehart and P. Norris, “*Trump and populist-authoritarian parties: the silent revolution in reverse*”, *Perspectives on Politics* (2017) Vol. 15, No. 2, pp. 443-454, and P. Norris and R. Inglehart, “*Cultural Backlash: Trump, Brexit and Authoritarian Populism*”, Cambridge University Press (2019).

⁹⁶ B. Bonikowski, “*Ethno-nationalist populism and the mobilization of collective resentment*”, *British Journal of Sociology* (2017) Vol. 68, No. 1, pp. 181-213 at p. 202.

⁹⁷ N. Gidron N and P. A. Hall, “*Populism as a problem of social integration*”, *Comparative Political Studies* (2020), Vol. 53, No. 7, pp. 1027-1059, at p. 1029.

⁹⁸ R. M. Dancygier, “*Immigration and Conflict in Europe*”, Princeton University Press (2010).

⁹⁹ A. Cerrato, F. M. Ferrara and F. Ruggieri, “*Why Does Import Competition Favour Republicans?*”, SSRN, 30 September 2018, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3147169> accessed 13 June 2022.

¹⁰⁰ D. Autor, D. Dorn, L. F. Katz, C. Patterson and J. V. Reenen, “*Concentrating on the Fall of the Labor Share*”, *supra* note 79.

democratic institutions, less likely to hold liberal values, favour strong leaders and express concerns about the cultural impact of immigration.¹⁰¹

Overall, therefore, there is broad agreement that economic and sociocultural factors reinforce each other.¹⁰² Economic stresses caused by globalisation and the 2008 financial crisis have triggered dissatisfaction with the *status quo*, which feeds into identity politics and pre-existing cultural tensions.¹⁰³ The current rise of populism began during and shortly after the 2008 global financial crisis and the “austerity” measures that followed it.¹⁰⁴ This was the deepest economic crisis since the Great Depression of the 1930s for developed and developing countries. Unlike the Great Depression, however, the 2008 crisis did not at that time lead to the adoption of progressive New Deal-style policies by governments to protect individuals from market forces, but to bank bailouts financed by taxpayers, who saw their living standards drop as governments imposed austerity measures, which led to public services being cut.¹⁰⁵ The resulting increases in unemployment and economic insecurity boosted the votes of populist parties.¹⁰⁶ Widespread resentment of bank bailouts gave populists the opportunity to assert that banking “elites”, who had caused the crisis, were getting away with, or being rewarded for, their mistakes.¹⁰⁷ Austerity measures implemented by governments were, in a number of cases, required by the International Monetary Fund (“IMF”) or the EU as a condition for loans.¹⁰⁸ Austerity measures aim to reduce a government’s debt by cutting public spending on social security, healthcare and the wages and pensions of government workers, combined with an increase in taxes. The resulting weakening of national social security safety nets for workers in the wake of the financial crisis led to a widespread feeling of unfairness, and has been linked to reduced

¹⁰¹ I. Colantone and P. Stanig, “The Trade Origins of Economic Nationalism: Import Competition and Voting Behavior in Western Europe”, *American Journal of Political Science* (2018) Vol. 62. No. 4, pp. 936-953, available at <<https://onlinelibrary.wiley.com/doi/full/10.1111/ajps.12358>> accessed 13 June 2022.

¹⁰² See S. Guriev and E. Papaioannou, “The Political Economy of Populism”, *supra* note 4, pp. 53-55, and R. Inglehart and P. Norris, “Trump and the Xenophobic Populist Parties: The Silent Revolution in Reverse”, *supra* note 95.

¹⁰³ N. Gidron and P. A. Hall, “The Politics of Social Status: Economic and Cultural Roots of the Populist Right”, *supra* note 94, and K. Aiginger, “Populism: Roots, Consequences and Counter Strategy”, *supra* note 75.

¹⁰⁴ S. Guriev and E. Papaioannou, “The Political Economy of Populism”, *supra* note 4, at section 3.2.

¹⁰⁵ R. Ray, K. P. Gallagher and W. Kring, “Global Financial Crisis: New Data, Same Trend and Similar Determinants”, Boston University Global Development Policy Center, Working Paper November 2020, available at <<http://www.bu.edu/gdp/files/2020/11/IMF-Austerity-Since-the-Global-Financial-Crisis-WP.pdf>> accessed 13 June 2022.

¹⁰⁶ L. Guiso, H. Herrera, M. Morelli and T. Sonno, “Economic Insecurity and the Demand of Populism in Europe”, Einaudi Institute for Economics and Finance, May 2020, available at <www.heliosherrera.com/populism.pdf> accessed 13 June 2022.

¹⁰⁷ S. Bair, “Bank Bailouts Propped up the Financial System. But we should Never Repeat Them”, *The Washington Post*, 23 May 2019, available at <www.washingtonpost.com/outlook/bank-bailouts-propped-up-the-financial-system-but-we-should-never-repeat-them/2019/05/23/f50e001a-7bee-11e9-8ede-f4abf521ef17_story.html> accessed 13 June 2022.

¹⁰⁸ These countries included Ireland, Portugal, Greece and Cyprus.

confidence in national and European political institutions.¹⁰⁹ This provided populist politicians with conditions in which it was easy to blame government and supranational “elites”.¹¹⁰

bb) “Top-down” institutional (systemic) causes of populism

Top-down explanations of populism do not rely on the notion that economic and social trends directly influence citizens’ political demands and choices. They draw instead on the insights of institutional scholars of political science who argue that economic, social, and other structural trends are filtered through institutions that determine how they are translated into political outcomes.¹¹¹ Originally conceived in the 1960s primarily as a means of understanding developing countries,¹¹² this approach is now applied also to declining political institutions of developed countries. The central idea is that a lag in the development of political institutions behind social and economic change creates political instability and possibly disorder.¹¹³ Top-down explanations thus locate the main cause of populism in the decline of responsiveness and effectiveness of political institutions, leading citizens to vote for politicians and parties with anti-establishment and anti-*status quo* messages.

Such decline can affect both national and international institutions. Scholars of the United States underline how its complex system of election and government, the influence of wealth and powerful lobbies, and the unlikelihood that low-income individuals are able to run for high elected office, “warp” the translation of voter preferences into political outcomes. This raises the appeal of populist political leaders who promise to transfer power to the people.¹¹⁴ In Europe, the most common focus of research is the European Union. In particular, as increasing policy-making areas have fallen within the competence of the European Union during the late twentieth and early twenty-first centuries, there has been no corresponding increase in European citizens’ democratic control over European Union institutions. As European Union competence has expanded, the policy options that national governments have reduced, yet it is these national governments over which electorates have more direct control. The greater the scope of decisions that derive from the European Union, the less

¹⁰⁹ Y. Algan, S. Guriev, E. Papaioannou and E. Passari, “*The European Trust Crisis and the Rise of Populism*”, Brookings Papers on Economic Activity, Conference Drafts 7-8 September 2017, available at <www.brookings.edu/wp-content/uploads/2017/09/4_alganetal.pdf> accessed 13 June 2022; and M. Lechler, “*Employment Shocks and Anti-EU Sentiment*”, *European Journal of Political Economy*, 59, September 2019, pp. 266-295.

¹¹⁰ P. Stephens, “*Populism is the True Legacy of the Global Financial Crisis*”, *Financial Times*, 30 August 2018, available at <www.ft.com/content/687c0184-aaa6-11e8-94bd-cba20d67390c> accessed 22 June 2022; M. Funke, M. Schularick and C. Trebesch, “*The Financial Crisis is still Empowering Far-Right Populists*”, *Foreign Affairs*, 13 September 2018, available at <www.foreignaffairs.com/articles/2018-09-13/financial-crisis-still-empowering-far-right-populists> accessed 13 June 2022.

¹¹¹ P. Hall and R. Taylor, “*Political science and the three new institutionalisms*”, *Political Studies* (1986), Vol. 44, No. 5 pp. 936–957; and S. Steinmo, K. Thelen, F. Longstreth (eds) “*Structuring Politics: Historical Institutionalism in Comparative Analysis*”, Cambridge University Press (1992).

¹¹² S.P. Huntington, “*Political Order in Changing Societies*”, Yale University Press (1968).

¹¹³ S.P. Huntington, “*Political Order in Changing Societies*”, *ibid* at p. 6.

¹¹⁴ See, for example, S. Berman, “*Why are we so dissatisfied with democracy? The reasons are many*”, *The Guardian*, 22 December 2018, available at <<https://www.theguardian.com/commentisfree/2018/dec/22/why-are-we-so-dissatisfied-with-democracy-the-reasons-are-many>> accessed 13 June 2022, and G. Ingram and A. Wills, “*Misrepresentation in the House of Representatives*”, Brookings Institution, FixGov Blog, 22 February 2017, available at <<https://www.brookings.edu/blog/fixgov/2017/02/22/misrepresentation-in-the-house/>> accessed 13 June 2022.

distinct are the policy choices on which national political parties compete and the greater is the “democratic deficit”.¹¹⁵

Another institutional factor often underlined in explanations of the causes of populism in Europe is “technocracy”, which refers to decision-making power being transferred to unelected bureaucrats and international organisations. Studies demonstrate that the policy preferences of technocrats often diverge from those of ordinary citizens, leading to a disconnect between citizens’ demands and the policies offered and implemented. This trend has boosted the appeal of populists, who promise to protect national sovereignty and to take back control from Brussels bureaucrats to restore power to the people.¹¹⁶

As will be apparent, there is an important “top-down” institutional or systemic aspect to the economic inequality and consequent social and cultural tensions that have been driven by globalisation over the last four decades or so. The transformation of the GATT 1947 “shallow” system of embedded liberalism to a neoliberal international trade system leaves States little national policy space in which to regulate in the public interest to protect vulnerable industries, jobs and cultures, labour standards, human rights and the environment. These aspects of sovereignty in economic and industrial policy have been transferred by States to multilateral treaty regimes and international institutions, resulting in an inability on the part of governments to protect national economic, social and cultural priorities.

cc) Political leaders and parties as (voluntarist) causes of populism

An important aspect of the rise of populism has been the decision of right-wing populist politicians to place issues such as immigration, “traditional values” and, in Europe, Euro-scepticism, at the centre of their political platforms, and to present themselves as the only political party able to understand and represent the views of the people on these matters. Mainstream parties are criticised for responding with silence or with alternatives that do not correspond to voters’ preferences.¹¹⁷ Coalition governments have been found to blur the differences between mainstream centre-left and centre-right parties, increasing the scope for populist parties to present themselves as the only real alternative to the *status quo*. Convergence of mainstream political parties generates a “representation gap” that can lead to extremism and “democratic decay”.¹¹⁸ From this perspective, centre-left parties in Europe have weakened their traditional social-policy commitments, and centre-right parties have “...failed to contain xenophobes and nativists”, thus validating populist claims that “the political status quo amounted to rule by a corrupt, self-serving elite cartel and that only radical solutions could ensure real representation of ‘the people’ “. ¹¹⁹

¹¹⁵ See, for example, K. Nanou and H. Dorussen, “*European integration and electoral democracy: how the European Union constrains party competition in the member states*”, *European Journal of Political Research* (2013) Vol. 52, No. 1, pp. 71–93.

¹¹⁶ See, for example, S. Svallfors “*Knowing the game: motivation and skills among policy professionals*”, *Journal of Professional Organizations* (2017) Vol. 4, No. 1, pp. 55–69.

¹¹⁷ C. de Vries and S. Hobolt, “*Political Entrepreneurs: The Rise of Challenger Parties in Europe*”, Cambridge University Press (2020).

¹¹⁸ S. Berman and H. Kundnani, “*Mainstream parties in crisis: the cost of convergence*”, *Journal of Democracy* (2021) Vol. 32, No. 1, pp. 22–36.

¹¹⁹ A. Grzymala-Busse, “*The failure of Europe's mainstream parties*”, *Journal of Democracy* (2019) Vol. 30, No. 4, pp.35–47 at p. 35.

In the author's view, it is not necessary to see these various approaches to explaining the causes of populism as necessarily in competition with each other, nor to choose between them. Each of them is credible and supported by research. The interplay between economic inequality and underlying sociocultural grievances is a potent mix driving the bottom-up support of ordinary people for politicians and parties who promise to break the *status quo* and return them to a time when things were better. The failure or unwillingness of mainstream political parties and national and international institutions of economic governance to blunt the excesses of globalisation and to protect the livelihoods, status and well-being of ordinary people from cheap foreign competition is a top-down institutional failure that is perceived by the people as a value judgement by elites that economic efficiency has more worth than its human costs. Against this background, it is straightforward for populist politicians to focus the national debate on issues of immigration, identity and traditional values, to vilify those who represent the *status quo* and to present themselves as the true representatives of the people and the only plausible alternative.

c) Explanations for the causes of populism advanced by international lawyers

Few international lawyers have undertaken a similar examination of the causes of populism, preferring to concentrate on the symptoms of its impact on international law and institutions. Notable exceptions are Posner and Koskenniemi. Posner describes populism as a backlash against “global legalism”, which he considers an assumption on the part of many international lawyers that “further international legal integration of the world is inevitable and beneficial, and that it enjoys the support of most ordinary people”, which “has been refuted by events”.¹²⁰ At the end of the Cold War, there was a

“brief but powerful sense that the historical trajectory must end with an international confederation of liberal democracies [which] led to enthusiastic support for universal international institutions that supported trade, democracy, peace, and human rights”.¹²¹

In response,

“[m]any ordinary people, left behind by globalization, have united in their opposition to further international legalization. They have lost faith in international institutions [...] and in the national leaders who supported them. They now seek new national leaders who will advance the national interest rather than global ideals”.¹²²

Koskenniemi similarly ascribes the populist backlash to an overreach of international law and institutions as a result of the post-Cold War “global governance ethos”, in which each global “issue area” was to have its own global governance regime. He focuses his view of overreach on “the politics of [human] rights”, which had its origins in the 1960s, but in the 1990s moved beyond the previous limited form that had respected the cultural and political particularities of States to involve itself increasingly with the liberties of individuals within States.¹²³ This human rights overreach, with strong

¹²⁰ E.A. Posner, “*Liberal Internationalism and the Populist Backlash*”, *supra* note 21, at p. 2.

¹²¹ E.A. Posner, “*Liberal Internationalism and the Populist Backlash*”, *ibid* at p. 4.

¹²² E.A. Posner, “*Liberal Internationalism and the Populist Backlash*”, *ibid* at p. 2.

¹²³ M. Koskenniemi, “*Enchanted by the Tools? International Law and Enlightenment*”, *supra* note 22, in particular at pp. 414-417. See also M. Koskenniemi, “*International Law and the Far Right: Reflections on Law and Cynicism*”, Annual T.M.C. Asser M. Koskenniemi Lecture 2018, 29 November 2018, available at <<https://www.asser.nl/annual-lecture/annual-tmc-asser-lecture-2018>> accessed 13 June 2022.

assertions of liberalism and universality, undermined political parties and the political process within States, diluted national cultures and loosened social and religious norms, causing the current backlash in favour of traditional values and nationalist nostalgia.¹²⁴ There is a certain correlation, of course, between this reasoning and the reassertion of “traditional values” identified as a cause of populism by the research cited above.¹²⁵

Whilst both of these (overreach of international law) explanations for the causes of populism have some persuasive value, and have a certain appeal of logic in the historical context of the end of the Cold War when viewed through the prism of international law and international institutions, it is difficult to imagine ordinary people (“the people”) having such matters at the front of their minds when deciding how to vote – populists have come to power on the basis of rising electoral support. Theories based in the post-Cold War push for liberalism, expansion of international law and human rights, and a more “porous” sovereignty of States may be in the minds of international lawyers, and might explain something of the motivations of populist political leaders, but such esoteric (“elite”) thoughts are less likely to be uppermost in the minds of the “real” people who vote for populist politicians, in the author’s view, than job insecurity and wage losses.

No body of research establishing a link between populism and a post-Cold War overreach of international law and its institutions has been cited by Posner or Koskenniemi, except to some extent in relation to the “democratic deficit” in the context of the European Union.¹²⁶ As Posner himself concedes: “[t]he populist revival [...] seems far removed from these obscure legal developments”.¹²⁷ He adds: “What Accounts for the Backlash? The answer to this question is speculative but clues lie about, and they can be put together into a suggestive theory”.¹²⁸ In relation to Koskenniemi’s human rights-based argument, Orford has commented: “nothing in the field of international human rights law [...] comes close to the systems for enforcing investment protection and economic integration...”¹²⁹. In other words, she argues that the international trade system impacts the daily lives of ordinary people much more so than the international human rights system, and is correspondingly more likely to influence their attitudes, perspectives and voting intentions.

4. The Free Trade Debate Among Economists

The debate among economists is essentially one between, on the one hand, those who believe that liberalised free trade generates greater volumes of exports and imports, stimulates investment, and creates an overall net gain in wealth within and among countries; and on the other hand, those who believe that the empirical evidence does not necessarily support this assertion and that it ignores the human costs of a system that creates economic winners and losers. Whereas a decade or so ago, economists may have had a greater divergence of opinions, there is a growing convergence around

¹²⁴ M. Koskenniemi, *“International Law and the Far Right: Reflections on Law and Cynicism”*, *ibid*, and M. Koskenniemi, *“Enchanted by the Tools? International Law and Enlightenment”*, *ibid*. See also A. M. Orford, *“International Law and the Populist Moment: A Comment on Martti Koskenniemi’s Enchanted by the Tools? International Law and Enlightenment”*, *American University International Law Review* (2020) Vol 35, No. 3, pp. 427-443.

¹²⁵ See *supra* notes 93 - 97 and the accompanying text.

¹²⁶ E.A. Posner, *“Liberal Internationalism and the Populist Backlash”*, *supra* note 21 at pp. 8-11.

¹²⁷ E.A. Posner, *“Liberal Internationalism and the Populist Backlash”*, *ibid* at p.8.

¹²⁸ E.A. Posner, *“Liberal Internationalism and the Populist Backlash”*, *ibid* at pp. 13-14.

¹²⁹ A. M. Orford, *“International Law and the Populist Moment: A Comment on Martti Koskenniemi’s Enchanted by the Tools? International Law and Enlightenment”*, *supra* note 124 at p. 436.

the extent of economic inequality, its sources in globalisation and the technology revolution, and the fact that it is a major issue that governments must address.¹³⁰

The case for free trade is that reducing or eliminating tariff and non-tariff barriers to international trade: increases the volume of exports and imports; boosts investor confidence; enables countries to specialise in producing goods and services for which they have a comparative advantage; generates economies of scale for producers because they have access to larger markets; lowers prices and increases choice for consumers; relocates production to places that are more cost efficient, thereby increasing aggregate productivity; and generates technological advance through competition. The economic “cake” (wealth) that all countries have to divide is thereby larger.¹³¹ Although there has traditionally been wide agreement among economists regarding this overall net wealth gain,¹³² it is increasingly argued that in the real world, where perfect market competition is not available, free markets do not necessarily enhance efficiency and produce a larger cake.¹³³ Even where the size of the cake is enlarged, evidence of the size of the aggregate net gain is limited.¹³⁴

The reduction of tariff and non-tariff barriers to trade was certainly successful in reenergising the world economy in the wake of the Great Depression and the devastation of World War II, helping States to recover and to lift living standards for their populations. The case for free trade was largely unchallenged throughout this post-war period. From the late 1970s and early 1980s, policies of market fundamentalism associated with the economic politics of Ronald Reagan and Margaret Thatcher became dominant in international policy circles, the World Bank and the IMF, and in international trade agreements.¹³⁵ Neoliberal economic policies included free trade and globalization, reduction of government and public sector involvement in the economy, reducing taxes, particularly for corporations and the wealthy, reducing government spending, deregulation, privatisation (including of health services, transport and other national infrastructure) to increase the role of the private sector in the economy and in society. These policies were based on a belief that economic growth, poverty reduction and the structural changes needed in developing

¹³⁰ O. Blanchard and D. Rodrik (eds), *Combating Inequality*, *supra* note 51, Introduction, pp. xi – xx. The book is based on a major conference of economists from across the spectrum of political and economic views, held at the Peterson Institute for International Economics in Washington D.C. in October 2019.

¹³¹ For a classic statement of this rationale, see M. Friedman and R.D. Friedman, “*The Case for Free Trade*”, Hoover Digest, 1997 No. 4, 30 October 1997, available at <www.hoover.org/research/case-free-trade> accessed 13 June 2022; and a more modern version in C. Hornok and M. Koren, “*The Case for Free Trade*”, *supra* note 49.

¹³² See C. Hornok and M. Koren, *ibid.*

¹³³ T. Picketty, *Capital and Ideology*, Belknap Press (2019).

¹³⁴ See, for example, J. Feyrer, “*Distance, Trade and Income – the 1967 to 1975 Closing of the Suez Canal as a Natural Experiment*”, National Bureau of Economic Research, Working Paper 15557, December 2009, available at <<https://www.nber.org/papers/w15557>> accessed 13 June 2022; C. Arkolakis, A. Costinot and A. Rodriguez-Clare, “*New Trade Models, Same Old Gains?*”, *American Economic Review* (2012) Vol. 102, No. 1, (1): pp. 94-130; and A. Costinot and A. Rodriguez-Clare, “*Trade Theory with Numbers: Quantifying the Consequences of Globalization*”, in G. Gopinath, E. Helpman and K. Rogoff (eds), *Handbook of International Economics*, Vol. 4, Elsevier (2014), pp. 197-261.

¹³⁵ See, for example, D. Cahill and M. Konings, “*Neoliberalism*”, John Wiley and Sons (2017); and J.L. Campbell and O. K. Pedersen (eds), “*The Rise of Neoliberalism and Institutional Analysis*”, Princeton University Press (2001), p. 288. See also World Bank Policy Research Working Paper 5316, “*The Washington Consensus, Assessing a Damaged Brand*”, May 2010, available at <<https://documents1.worldbank.org/curated/en/848411468156560921/pdf/WPS5316.pdf>> accessed 22 June 2022.

economies would arise through harnessing the power of markets and diminishing government intervention.¹³⁶

Stiglitz (Nobel prize winning economist) has underlined the resistance that economists meet when questioning free trade – belief in its virtues is so great and so long-standing that any economist who expresses scepticism is at risk of losing credibility.¹³⁷ He does not accept that international trade necessarily increases a country's aggregate productivity and wealth, arguing that whether it does so depends on how wealth is distributed and how human and social costs are taken into account.¹³⁸ He describes the common assertion by politicians and international organisations that international trade creates jobs as fallacious – it both creates and destroys jobs, depending on the competitive advantage or disadvantage of the industry concerned. In effect, free trade moves jobs across regions and borders to places where labour and related costs are cheaper.¹³⁹ Rodrik highlights that the WTO system of international trade in its current (post-Bretton Woods) form is designed to maximise free trade – to achieve maximum globalisation. He argues that it is a system that has prioritised the lowering of barriers to international trade to an extent that diminishes States' regulatory "policy space" – it restrains their national authority to protect nascent and vulnerable national industries, businesses, jobs, communities and cultures.¹⁴⁰ He states that free trade tends to be associated with economic, political and social progress, and protectionism with backwardness and decline,¹⁴¹ whereas the case for free trade is, in fact, nuanced, and a full assessment requires an understanding of its impact on inequality, and social and cultural norms, so that a balance can be struck.¹⁴²

Chang, taking a historical approach, argues that today's developed economies attained prosperity through protectionism and government intervention in industry. Many developing countries had higher economic growth in the Bretton Woods (pre-neoliberalism) era, before deregulating their economies, and are now struggling to follow in the footsteps of the developed world.¹⁴³ Rodrik similarly points out that success stories among developing countries, particularly China, India and other East Asian States, were achieved by not opening their economies fully to international competition until nascent industries had achieved stability and a competitive advantage through government support and intervention.¹⁴⁴ This historical perspective has also been traced by the

¹³⁶ See, for example, the World Bank's World Development Reports on International Capital and Economic Development (1985); Trade and Pricing Policies in World Agriculture (1986); and Industrialization and Foreign Trade (1987).

¹³⁷ J. E. Stiglitz, *Globalization and its Discontents*, W. W. Norton (2002); and J. E. Stiglitz, *The Overselling of Globalization*, Paul A. Volcker Prize Lecture, National Association of Business Economists, 6 March 2017, available at <<https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Volcker%20Award%20Speech%20Paper.pdf>> accessed 22 June 2022.

¹³⁸ J. E. Stiglitz and A. Charlton, *Fair Trade for All: How Trade can Promote Development*, Oxford University Press (2005), p. 34.

¹³⁹ Ibid.

¹⁴⁰ D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, W. W. Norton (2011), p. 368.

¹⁴¹ D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, ibid, and see also, for example, M. Friedman and R.D. Friedman, *The Case for Free Trade*, supra note 131.

¹⁴² D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, ibid, pp. 46-47.

¹⁴³ H-J. Chang, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism*, Bloomsbury Publishing (2009).

¹⁴⁴ D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, supra note 140.

United Nations Conference on Trade and Development (“UNCTAD”).¹⁴⁵ The neoliberal logic of free trade and market forces did not produce the promised gains for most developing countries through the 1980s and into the 1990s. Only the few developing countries in Asia mentioned above saw strong economic growth. These countries had not followed neoliberal policies, but rather national measures to protect nascent industries from the full rigours of international competition in order to broaden and strengthen their industrial base before opening themselves to international free trade.¹⁴⁶ Research by UNCTAD at that time confirmed that active protection measures by these governments had created the conditions for rapid and strong economic growth, and that effective national institutions with a policy space in which to take such measures to support and guide industrial development, and attract investment and technological upgrading, was necessary.¹⁴⁷ Various UNCTAD reports since then have reiterated the need for such a national policy space for States to be successful in achieving development.¹⁴⁸

That free trade produces a “redistribution effect”, i.e. winners and losers, is widely acknowledged among economists, and there is ample evidence demonstrating that it has increased inequality in both developed and developing countries.¹⁴⁹ It is important to understand that this effect is not a consequence of any malfunctioning of the system of trade. It is precisely this redistribution that pro-free market economists argue brings about the aggregate net gain in wealth as resources flow from less productive to more productive locations and activities. UNCTAD annual reports have highlighted since at least 1997 that a narrow focus on economic growth and maximising trade neglects the broader challenge of the associated human and social costs.¹⁵⁰ The 1997 report focused for the first time not only on those in poverty at the bottom of the economic pyramid, but also on those at the top, recognising that widening income gaps had become endemic to globalisation, producing an increasingly disconnected corporate and individual elite. This was having broad economic and social impacts in developed States and leaving many developing countries behind. The Report argued that the rules of international trade favoured the movement of production to cheaper locations and put downward pressure on employment and wages.¹⁵¹ It warned that, if left unchecked, the resulting economic fragilities and political and social tensions would produce a backlash against globalisation.¹⁵² Violent demonstrations took place two years later, in November 1999, at the WTO ministerial conference in Seattle.

An essential difference between those economists advocating free trade policies and those who are more sceptical concerns how to address the redistribution impacts of globalisation. For advocates

¹⁴⁵ See a historical overview in the most recent UNCTAD Trade and Development Report 2021, p. 1 and pp. 6-7, UN Doc. UNCTAD/TDR/2021, available at <https://unctad.org/system/files/official-document/tdr2021_en.pdf> accessed 13 June 2022.

¹⁴⁶ UNCTAD Trade and Development Report 2021, *ibid*, pp. 6-7.

¹⁴⁷ UNCTAD Trade and Development Report 1997, pp. 13-15, UN Doc. UNCTAD/TDR/17, available at <https://unctad.org/system/files/official-document/tdr1997_en.pdf> accessed 13 June 2022.

¹⁴⁸ See the historical overview in UNCTAD Trade and Development Report 2021, *supra* note 145.

¹⁴⁹ See C. Hornok and M. Koren, “*The Case for Free Trade*”, *supra* note 49, and, for example, P. Koujianou Goldberg and N. Pavcnik, “*Distributional Effects of Globalization in Developing Countries*”, *Journal of Economic Literature* (2007) Vol. 45, No.1, pp. 39-82; and A. Ebenstein, A. Harrison, M. McMillan and S. Phillips, “*Estimating the Impact of Trade and Offshoring on American Workers using the Current Population Surveys*”, *The Review of Economics and Statistics* (2014) Vol. 96, No. 4.

¹⁵⁰ See the historical overview in UNCTAD Trade and Development Report 2021, *supra* note 145, p. 1 and pp. 6-7.

¹⁵¹ UNCTAD Trade and Development Report 1997, *supra* note 147, pp. 103-123.

¹⁵² UNCTAD Trade and Development Report 1997, *ibid*.

of free trade, a return to any form of protectionism would jeopardise economic growth in the world economy and may lead to trade wars.¹⁵³ They argue that the gains from redistribution outweigh the losses, and countries who have opened themselves to free trade therefore have the means to ease the burden on globalisation's losers.¹⁵⁴ Policies to ease the burden should include the retraining and education of workers, and provision of moving subsidies to help them relocate away from depressed regions for employment.¹⁵⁵ Economists who are critical of free trade dispute that there is always a net gain to a country experiencing unemployment through international competition, and underline that the reallocation of workers from shrinking industries to expanding ones is far less "frictionless" than had previously been assumed.¹⁵⁶ Workers, if they regain employment at all, can lose several years-worth of wages. These costs fall disproportionately on lower-skilled, female and older workers.¹⁵⁷ These economists argue that assistance to globalisation's losers is necessary but not sufficient because the causes of inequality are systemic to the international trade system. The post-Bretton Woods neoliberal system maximises international trade at the expense of allowing governments a policy space in which to take national measures for the protection of nascent and vulnerable industries, businesses, jobs, communities and cultures.¹⁵⁸ From this perspective, mitigating the adverse impacts of globalisation would require systemic change to reopen this policy space.

Economists critical of free trade and globalisation do not advocate abandoning them. The debate is no longer a polarised one between the extremes of capitalism and communism, or free trade and protectionism, but rather how best to harness or modify international trade to reduce inequality and promote greater fairness. The UN Secretary-General has called for "fair globalization" as a means to curtailing inequality and the rise of mistrust within and among nations.¹⁵⁹ He has stated that "...the only way towards a fair and sustainable future for all ... involves ... a "new global deal" which ensures

¹⁵³ The raising of tariffs during the Trump Presidency did indeed lead to retaliatory tariffs by China and the European Union.

¹⁵⁴ C. Hornok and M. Koren, "The Case for Free Trade", *supra* note 49.

¹⁵⁵ C. Davidson and S. J. Matusz, "Trade Liberalization and Compensation", *International Economic Review* (2006) Vol. 47, No. 3; and A. Kerem Cosar and P. D. Fajgelbaum, "Internal Geography, International Trade and Regional Specialization", National Bureau of Economic Research, Working Paper No. 19697, December 2013, available at <www.ceu.edu/sites/default/files/attachment/event/9181/mar24-kerem-cosar.pdf> accessed June 2022.

¹⁵⁶ These include Summers, Harvard University Professor and former US Treasury Secretary, see G. B. Eggertsson, N. R. Mehrotra and L. H. Summers, "Global Reserve Assets, in a Low Interest Rate World: Secular Stagnation in the Open Economy", *American Economic Review* (2006), Papers and Proceedings 2016, Vol. 106, No. 5, pp. 503-507, available at <www.aeaweb.org/articles?id=10.1257/aer.p20161106> accessed 13 June 2022. See also D. Rodrik, "The Globalisation Paradox", *supra* note 140, J. E. Stiglitz, "Globalization and its Discontents", *supra* note 137, and J. E. Stiglitz, "The Overselling of Globalization", *supra* note 137.

¹⁵⁷ E. Artuc, S. Chaudhuri and J. McLaren, "Trade Shocks and Labor Adjustment: A Structural Empirical Approach", *American Economic Review* (2010) Vol. 100, No. 3, pp. 1008-1045; E. Artuc, F. Docquier, C. Ozden and C. Parsons, "A Global Assessment of Human Capital Mobility: The Role of Non-OECD Destinations", *World Development* (2015) Vol. 65, pp. 6-26; and R. Dix-Carneiro, "Trade Liberalization and Labor Market Dynamics", *Journal of the Econometric Society* (2014) Vol. 82, No. 3, pp. 825-885.

¹⁵⁸ D. Rodrik, "The Globalisation Paradox", *supra* note 140, p. 368, and see also the UNTAD Trade and Development Reports referenced above, *supra* notes 145 to 147.

¹⁵⁹ Sustainable Development Goals Summit, 24-25 September 2019, <<https://news.un.org/en/story/2019/09/1046902>> accessed 15 June 2022. See also W. Bello, "Deglobalization: Ideas for a New World Economy", Zed Books (2005), which, similarly to D. Rodrik, argues that developing countries must be allowed to follow development strategies that are sensitive to their own values and particular mix of constraints and opportunities.

that power, wealth and opportunities are shared more broadly and fairly...”.¹⁶⁰ Lagarde, former Managing Director of the IMF, drew attention to the damaging effects of inequality in 2013, and in 2017 reiterated that the gains of globalisation need to be shared more broadly for it to survive.¹⁶¹

5. Globalisation is Embedded in International Law

To understand how today’s globalised international trade system is embedded in international law, and in particular, how the policy space for States to take national measures for the protection of nascent and vulnerable industries, businesses, jobs, communities and cultures has diminished, it is instructive to begin with a brief historical account.

a) The Bretton Woods system

The Great Depression, which began in the United States in late 1929 but affected the rest of the world and ran until the mid to late 1930s, saw a massive downturn in international trade with tariff and non-tariff barriers being used to protect domestic businesses. Between 1929 and 1937, the volume of world trade halved.¹⁶² In the United States, President Roosevelt initiated an economic relief programme known as the “New Deal” with injections of stimulus spending and other government intervention in the economy to counter the volatility of free markets, to mitigate their negative social consequences and to protect vulnerable industries and jobs. The Great Depression was followed almost immediately by the devastation and destruction of World War II.

The United States emerged from World War II as by far the most powerful State, militarily and economically, albeit the Soviet Union and its allies were a significant check on that power throughout the Cold War years. Unlike the colonial powers of the previous era, the United States exercised its power diffusely, in the sense that it led the negotiation and establishment of a multilateral system of international organisations, the rules of which it was itself also subject to.¹⁶³ Multilateralism served the interests of the United States and its allies, but it also took account of the interests of less powerful States. It carried a high degree of acceptance and legitimacy.¹⁶⁴ The economic and financial aspects of the new multilateral system were negotiated at Bretton Woods in 1944,¹⁶⁵ and were institutionalised in the IMF and the International Bank for Reconstruction and Development (“World Bank”), two of the three institutions intended to constitute the “Bretton Woods system”. Preparatory conferences for the third element, the International Trade Organization (“ITO”), were held in 1946, 1947 (in Geneva), and 1948 (in Havana). The General Agreement on Tariffs and Trade was negotiated

¹⁶⁰ UN Secretary-General, 2020 Annual Nelson Mandela Lecture, 18 July 2020, available at <<https://news.un.org/en/story/2020/07/1068611>> accessed 15 June 2022.

¹⁶¹ World Economic Forum, “The End of Globalization?”, 20 January 2017, available at <www.weforum.org/agenda/2017/01/the-end-of-globalization-davos-disagrees/> accessed 15 June 2022.

¹⁶² J. B. Madsen, “Trade Barriers and the Collapse of World Trade During the Great Depression”, *Southern Economic Journal* (2001) Vol. 67, No. 4, pp. 848-868; and D. Rodrik, “The Globalization Paradox”, *supra* note 140, p. 45.

¹⁶³ Albeit with many privileges, including permanent membership of the Security Council and the veto power, and weighted voting rights within the IMF and the World Bank.

¹⁶⁴ D. Rodrik, “The Globalisation Paradox”, *supra* note 140, p. 70, and J. G. Ruggie, “Multilateralism: The Anatomy of an Institution”, *International Organization* (1992) Vol. 46, No. 3, pp. 561-598, available at <<https://scholar.harvard.edu/files/john-ruggie/files/multilateralism.pdf>> accessed 15 June 2022.

¹⁶⁵ Bretton Woods is the place in New Hampshire where the United States, the United Kingdom and other Allied nations gathered in 1944 to design the post-World War II economic system.

as a multilateral agreement and the text completed at Geneva in 1947 (“GATT 1947”),¹⁶⁶ intended to form part of the ITO arrangements. To enable the GATT 1947 to be effective without waiting for the ITO negotiations to conclude, the Protocol of Provisional Application was adopted to apply GATT 1947 “provisionally on and after 1 January 1948”.¹⁶⁷ Although the ITO draft Charter was completed in March 1948 in Havana, it never entered into force, the United States in particular abandoning its efforts to ratify the Charter in 1951.¹⁶⁸

The purpose of GATT 1947 was to reduce tariffs and other barriers to international trade and to eliminate discriminatory treatment.¹⁶⁹ The central core of these goals is found in the first three articles. The fundamental principle of non-discrimination is “most favoured nation treatment” (MFN), found in article I, which is an obligation to extend any benefit conferred on a contracting party to all contracting parties. The obligation is made explicit in respect of tariffs by article II. Article III embodies the second major pillar of non-discrimination, the national treatment principle. Imported products are not to be subject to discriminatory treatment through taxes, laws or regulations that afford protection to “like domestic products”. Article XI prohibits restrictions on the importation or exportation of products. The GATT 1947 system applied essentially to trade in manufactured goods.

The challenge facing the negotiators of GATT 1947 was to dismantle the system of discriminatory tariffs and restrictions on trade that had been put in place in the inter-war years, while respecting the need of governments to pursue domestic intervention in the economy to protect vulnerable businesses, industries and jobs. Immediately after World War II, most western countries, including the United States, had ‘New Deal’ style social and welfare protections in place, and it was imperative that these could be accommodated in the new system of international trade.¹⁷⁰ The negotiators were successful. The first three decades of the Bretton Woods regime have been characterised as “shallow multilateralism”¹⁷¹ that allowed national governments to focus on domestic social and employment needs while enabling global trade to recover from the depression of the inter-war years and the devastation of World War II. Ruggie used the term “embedded liberalism” to describe the dual GATT 1947 objectives of international trade liberalisation and domestic political autonomy to regulate markets to provide social protections and to stabilise the economy in the event of external economic shocks.¹⁷²

The full rigours of free trade were mitigated through several complementary means to achieve this shallow international trade system. First, the Protocol of Provisional Application contained a provision designed to enable as many countries as possible to begin to apply GATT 1947 without delay, namely that its Part II was to be applied “...to the fullest extent not inconsistent with existing

¹⁶⁶ General Agreement on Tariffs and Trade, 30 October 1947, UNTS Vol. 55, p. 187.

¹⁶⁷ Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS p. 308. See also the WTO website at www.wto.org/english/res_e/booksp_e/gatt_ai_e/prov_appl_gen_agree_e.pdf accessed 15 June 2022.

¹⁶⁸ The concern in the US Congress was that the rules of the ITO would interfere with US domestic economic policy. See D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), “*The Oxford Handbook of International Trade Law*”, *supra* note 24, Introduction.

¹⁶⁹ D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), “*The Oxford Handbook of International Trade Law*”, *ibid*.

¹⁷⁰ D. Rodrik, “*The Globalization Paradox*”, *supra* note 140, pp. 67-69 and p. 586.

¹⁷¹ D. Rodrik, “*The Globalization Paradox*”, *ibid*, p. xvi.

¹⁷² J. Ruggie, “*International Regimes, Transactions and Change: Embedded Liberalism and the Post-War Economic Order*”, International Organization (1982) Vol. 36, No. 2, p. 379.

legislation”.¹⁷³ Part II contained most of the substantive obligations, including those relating to tariffs, quotas, subsidies, customs procedures, and the requirement that national treatment be given to foreign imported products. Although GATT 1947 provided an essential multilateral means for States to reduce tariffs and restrictions on trade, therefore, each State provisionally applying it was entitled to what were known as “grandfather rights” for any provision of its national legislation that existed when it became a party to the Protocol of Provisional Application that was otherwise inconsistent with Part II of GATT 1947. National legislation implementing policies to protect jobs, vulnerable industries, businesses and cultures could therefore remain in place.

Second, GATT 1947 applied essentially only to manufactured goods – its scope of application was much narrower than the later WTO Agreements. Further, its text was unusual for a treaty. It contained not only express obligations but also statements about what the parties “should” (rather than “shall”) do, and statements about what is desirable. This reflects to some extent the fact that it was drafted by economists, but is also an indication of the limits of the international trade obligations that governments at that time were prepared to enter into.¹⁷⁴ The text is also unusual in that it is accompanied by “Notes and Supplementary Provisions” which provide explanations and clarifications of the articles of the agreement, which became important to assist in its interpretation.

Third, GATT 1947 allowed for a number of exceptions to the rigours of international trade that were limited in scope, but the limitations were not strongly enforced in the absence of an international organisation and compulsory dispute settlement to oversee their application. Article XIX allowed contracting parties to take “safeguard” action to suspend their obligations temporarily where an increase in imports caused, or threatened to cause, serious injury to domestic producers of like products. In practice, States also entered into a large number of what were known as “grey area” agreements under which foreign exporters agreed to restrict their exports where domestic competing firms incurred substantial losses. These agreements were entered into outside GATT 1947 and were of doubtful compatibility with it.¹⁷⁵ Article XX of GATT 1947 contained exceptions for measures necessary to protect human, animal or plant life or health, and measures relating to the conservation of exhaustible natural resources.

Support for the Bretton Woods regime was not universal. The multilateral trade system established in the aftermath of World War II through GATT 1947 was based on *de jure* equality, which required trade liberalisation by all participating States on the basis of the lowering of tariffs, the most-favoured-nation principle and national treatment for imported products; yet in doing so, it entrenched *de facto* inequality.¹⁷⁶ Many developing countries at that time could not compete on equal terms in international trade markets with the industrialised nations. Other nations did not emerge from colonialism as newly independent States until the 1960s and 1970s. These latter States in particular considered that political colonisation had been replaced by economic colonisation by western multinational corporations. Thus, although non-discrimination was enshrined as a

¹⁷³ Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *supra* note 167, paragraph 1(b).

¹⁷⁴ D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), *The Oxford Handbook of International Trade Law*, *supra* note 24, Introduction.

¹⁷⁵ M. Beshkar and E. W. Bond, *The Escape Clause in Trade Agreements*, in K. Bagwell, R. W. Staiger (eds), *Handbook of Commercial Policy*, Elsevier(2016), Volume 1, Part B, at p. 74, which reports that close to 300 such agreements were entered into.

¹⁷⁶ J. Viñuales, *The Organisation of the Anthropocene: In Our Hands?*, *supra* note 31 at pp. 50-51.

fundamental principle in the GATT 1947 (and subsequent WTO) trade systems, discrimination was and is, to some extent, inherent in the general application of this principle to all countries, where very different initial industrial development conditions prevailed.¹⁷⁷ These advantages for developed countries were increasingly challenged from the 1960s and 1970s, with developing countries calling for differential application of trade rules. This led to the creation of the United Nations Conference on Trade and Development (UNCTAD) in 1964 to promote development matters in international trade negotiations, and to proposals in 1974 for a New International Economic Order to promote greater fairness for developing countries in a spirit of “trade not aid”.¹⁷⁸ It was not until the 1979 Decision on Preferential and More Favourable Treatment (the “Enabling Clause”) that developed contracting parties to GATT were granted an exemption from the most favoured nation principle in order to provide special or differential treatment to developing countries in their tariff concessions. The Enabling Clause, however, as the name implies, enabled developed countries to grant preferential treatment to developing countries, it did not oblige them to do so.¹⁷⁹

Nevertheless, with the above significant caveats, the world economy was largely successful under the shallow Bretton Woods trade regime. Developed countries recovered from the war and increased their prosperity, and many developing countries experienced unprecedented levels of economic growth.¹⁸⁰ The volume of world trade increased at an annual average rate of 7% between 1948 and 1980, which was greater than anything previously experienced.¹⁸¹

b) Post-Bretton Woods free trade: the narrowing of State sovereignty

The shallow Bretton Woods international trade system that had allowed States policy space to regulate in the public interest to protect nascent and vulnerable industries, businesses, jobs, communities and cultures began to change from the 1970s. The Tokyo Round of GATT trade negotiations (1973–1979) focused on non-tariff barriers to trade, resulting in a major expansion of provisions in a series of stand-alone treaties, often referred to as “codes”, addressing product regulations and standards and other matters previously under national regulation. This was a significant step in the direction of international standardisation and harmonisation of products for the purpose of liberalising trade, and a move away from national regulatory discretion. In addition, as time passed, many of the national legislation grandfather rights under GATT 1947 expired or became obsolete. New legislation did not qualify for this exception contained in the Protocol on Provisional Application.

It was also from the late 1970s and early 1980s that policies of neoliberal market fundamentalism became dominant in international policy circles.¹⁸² The IMF and World Bank introduced neoliberal

¹⁷⁷ J. Viñuales, “*The Organisation of the Anthropocene: In Our Hands?*”, *ibid* at pp. 50–51.

¹⁷⁸ Declaration for the Establishment of a New International Economic Order, adopted by the UN General Assembly on 1 May 1974, UN Doc. A/RES/3201 (S-VI).

¹⁷⁹ See an account of the WTO Agreement’s special and differential treatment provisions for developing countries at <www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm> accessed 15 June 2022.

¹⁸⁰ D. Rodrik, “*The Globalization Paradox*”, *supra* note 140, pp. xvi–xvii and p. 71.

¹⁸¹ D. Rodrik, “*The Globalization Paradox*”, *ibid*, pp. xvi–xvii and pp. 71–72. Most communist countries remained outside GATT and the Bretton Woods regime during the Cold War.

¹⁸² See, for example, D. Cahill and M. Konings, “*Neoliberalism*”, John Wiley and Sons (2017), and J.L. Campbell and O. K. Pedersen (eds), “*The Rise of Neoliberalism and Institutional Analysis*”, Princeton University Press (2001), p. 288. See also World Bank Policy Research Working Paper 5316, “*The Washington Consensus, Assessing a Damaged*

type “structural adjustment” policies as conditions of their loans and grants. These are market-oriented conditions, including economic liberalisation, privatisation, deregulation, free trade and minimising government spending and influence in the market. This approach became known as the “Washington Consensus”, a term coined at the end of the 1980s to describe the synthesis of market fundamentalist policies that had crystallised during that decade.¹⁸³ Whether such policies assisted the receiving countries is a matter of some controversy, but what is clear is that multinational corporations, generally from the global north, benefitted considerably from the opportunities presented, particularly in developing countries.¹⁸⁴

It was during the height of neoliberalism and the Washington Consensus that the eighth and last round of major trade negotiations under GATT 1947 took place. Launched in 1986, the Uruguay Round concluded at a ministerial level conference in Marrakesh, Morocco, in April 1994. The WTO Agreement¹⁸⁵ entered into force on 1 January 1995, with key developments being the establishment of the World Trade Organization (“WTO”) as an international organisation¹⁸⁶ with a compulsory dispute settlement mechanism.¹⁸⁷ Provisional application of the GATT 1947 was terminated and the “GATT 1994”, unchanged from GATT 1947, was incorporated as Annex 1A to the WTO Agreement. The coverage of the new regime was greatly increased by the inclusion of trade in services (Annex 1B) and trade related aspects of intellectual property (Annex 1C). GATT 1947 had only applied to manufactured goods (“products”). A new system of regularly scheduled institutional reviews of each Member State’s trade policies is compulsory (Annex 3). Building on provisions of the GATT 1947, and as an integral package, the WTO Agreements include the Technical Barriers to Trade Agreement,¹⁸⁸ the Sanitary and Phytosanitary Agreement (“SPS Agreement”)¹⁸⁹ and the Safeguards Agreement.¹⁹⁰

Through these various measures, the Bretton Woods shallow trade system of embedded liberalism was superseded by the WTO system with a vastly greater coverage and depth of impact on national sovereignty in pursuit of trade liberalisation. Bringing trade-related aspects of intellectual property, trade in services, technical barriers to trade (such as rules relating to product labelling), and the

Brand”, May 2010, available at <https://documents1.worldbank.org/curated/en/848411468156560921/pdf/WPS5316.pdf> accessed 15 June 2022.

¹⁸³ For discussion, see for example, M. Spence, “*Some Thoughts on the Washington Consensus and Subsequent Global Development Experience*”, *Journal of Economic Perspectives* (2021) Vol. 35, No. 3, pp. 67–82; and N. Birdsall, A. de la Torre and F. Valencia, “*The Washington Consensus: Assessing a Damaged Brand*”, in J. A. Ocampo, J. Ros (eds), “*The Oxford Handbook of Latin American Economics*”, Oxford University Press (2014).

¹⁸⁴ J. E. Stiglitz and A. Charlton, “*Fair Trade for All: How Trade can Promote Development*”, *supra* note 138; D. Rodrik, “*The Globalization Paradox*”, *supra* note 140. See also H. Stein, “*The World Bank and Neoliberalism: Continuity and Discontinuity in the Making of an Agenda*”, *The World Financial Review*, 28 July 2014, available at <https://worldfinancialreview.com/the-world-bank-and-neoliberalism-continuity-and-discontinuity-in-the-making-of-an-agenda/> accessed 15 June 2022, and The Thistle “*The IMF and the World Bank: Puppets of the Neoliberal Onslaught*”, *The Thistle* (2000) Vol. 13, No. 2.

¹⁸⁵ Agreement Establishing the World Trade Organization, 15 April 1994, UNTS Vols. 1867, 1868, 1869.

¹⁸⁶ Article 1.

¹⁸⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement.

¹⁸⁸ See the text of the Agreement on Technical Barriers to Trade at www.wto.org/english/docs_e/legal_e/17-tbt_e.htm accessed 15 June 2022.

¹⁸⁹ See the text of the Agreement on the Application of Sanitary and Phytosanitary Measures at www.wto.org/english/tratop_e/sps_e/spsagr_e.htm accessed 15 June 2022.

¹⁹⁰ See the text of the Agreement on Safeguards at www.wto.org/english/tratop_e/safeg_e/safeint.htm accessed 15 June 2022.

harmonization of public health and safety regulations within the scope of the WTO Agreements significantly expands the range of activities that are subject to the multilateral trade regime.¹⁹¹ The establishment of the WTO as an international organisation and the introduction of compulsory dispute settlement endowed the organisation with the institutional infrastructure and authority that GATT had lacked, and which it needs to oversee a broader and deeper world trade system. At the time, in the period immediately after the end of the Cold War, the establishment of the WTO, and particularly its dispute settlement system, was seen as a significant contribution to the creation of a liberal international order that would not only change trade, but also push States to reform their political systems and expand human rights.¹⁹² In this sense, the extent of trade integration required of States under WTO law could be seen as part of the “overreach” of international law and its institutions, as described by Koskeniemi and Posner.

The narrowing of States’ policy space to take national measures for the protection of nascent and vulnerable industries, businesses, jobs, communities and cultures can be seen in a number of WTO developments. The WTO Agreement no longer allows “grandfather” type exceptions for national legislation and is a “single undertaking”, meaning that acceding States are required to accept the whole package of its obligations. The WTO Agreement on Technical Barriers to Trade has greatly deepened the level of harmonisation required of national regulations and standards, which have been further deepened by mutual recognition agreements among States that accept each other’s procedures for assessing conformity with such standards.¹⁹³ In a globalised world, these developments greatly assist producers who sell their products in multiple markets, yet they also impact national regulatory authority relating to local health, safety and environmental standards, tastes and cultures.¹⁹⁴ The high measure of conformity required of even non-discriminatory national regulations¹⁹⁵ has provoked concerns that the WTO trade regime requires a deregulatory “neoliberal” model that impairs the ability of States to regulate for national economic, social and cultural priorities.¹⁹⁶ As Stiglitz states, national regulations have a purpose – the protection of workers, consumers, the national economy, the environment, and important national, regional or cultural values.¹⁹⁷

The search for the right balance between trade and the national policy space is played out in particular in the interpretation and application of Articles III (national treatment on internal taxation

¹⁹¹ R. Howse, “From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime”, *American Journal of International Law* (2002) Vol. 96, No. 1, p. 94.

¹⁹² See L. F. Damrosch, “Human Rights, Terrorism and Trade”, *ASIL PROC.* (2002), Vol. 96, at p. 130; and C. D. Creamer, “From the WTO’s Crown Jewel to its Crown of Thorns”, *AJIL Unbound* (2019) Vol. 113, p. 51.

¹⁹³ See an account of the Technical Barriers to Trade Agreement, mutual recognition of conformity assessment, and its impact on harmonization, on the WTO website at <www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm> accessed 15 June 2022.

¹⁹⁴ See G. Marceau and J. Trachtman, “Responding to National Concerns”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), “*The Oxford Handbook of International Trade Law*”, *supra* note 24, p. 235.

¹⁹⁵ For an overview, see S. Charnovitz, “*International Standards and the WTO*”, George Washington Law Faculty Publications and Other Works (2005), p. 394, available at <https://scholarship.law.gwu.edu/faculty_publications/394> accessed 15 June 2022.

¹⁹⁶ P. O’Connell, “*On Recording Irreconcilables: Neoliberal Globalisation and Human Rights*”, *Human Rights Law Review* (2007) Vol. 7, No. 3, pp. 498-501; and L. Bartels, “*Trade and Human Rights*”, in D. Bethlehem et al, “*The Oxford Handbook of International Trade Law*”, *supra* note 24

¹⁹⁷ J. E. Stiglitz, “*The Great Divide: On the Wrong Side of Globalization*”, *The New York Times*, 15 March 2014, available at <<https://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization>> accessed 15 June 2022.

and regulation), XIX (emergency action on imports of particular products) and XX (measures necessary to protect public morals; human, animal or plant life or health; or relating to the conservation of exhaustible natural resources) of GATT 1994, the Technical Barriers to Trade Agreement, the SPS Agreement and the Safeguards Agreement. These provisions variously permit, but also impose constraints on, the ability of governments to regulate matters relating to standards, technical and health regulations, and to seek safeguards - exceptions from WTO rules in emergency circumstances. Inevitably, the treaty texts do not establish a bright line between what is an acceptable government policy to protect domestic interests and what is a measure of discrimination and protectionism. It is the WTO Dispute Settlement Body and the Appellate Body that have made these determinations when a measure is challenged, and their decisions have, in practice, favoured trade and further restricted the policy space available to States.

The details of the WTO case law concerning these provisions and how they interrelate (there are some contradictions among them) are more fully analysed in the literature.¹⁹⁸ The following are brief illustrative examples.

In applying the “necessity” test under Article XX GATT 1994, the Dispute Settlement Body and Appellate Body have limited the health, safety and environmental regulations that States may enact by assessing not only the necessity of the national provision in question, but also applying a balancing test – to weigh necessity against other factors, in particular, the impact on trade.¹⁹⁹ Neither Article XX GATT 1994, nor the SPS Agreement nor the Agreement on Technical Barriers to Trade, provide for such a balancing test. This interpretation has been criticised as representing a significant inroad into member States’ national regulatory authority.²⁰⁰

In the area of national health and safety requirements for products under Article XX and the SPS Agreement, the Dispute Settlement Body and Appellate Body have made their own assessments of what they consider to be the appropriate or “authentic” level of national protection that is necessary.²⁰¹ In particular, if the State applies health and safety requirements that are higher than agreed international standards, it must demonstrate scientifically that this standard is necessary - a precautionary approach has not been permitted. A good illustration of how this touches social and cultural differences and sensitivities is the Appellate Body’s decision in the case concerning the European Union prohibition of imports of beef containing certain growth hormones. The European Union, in 1989, prohibited the import of meat containing any of six growth hormones – hormones that were permitted in the United States and Canada. These countries later commenced WTO dispute settlement proceedings. The Dispute Settlement Body found against the European Union in 1997, as did the Appellate Body in 1998.²⁰² The essence of the finding was that the European Union had not

¹⁹⁸ See, for example, G. Marceau and J. Trachtman, “Responding to National Concerns”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), *The Oxford Handbook of International Trade Law*, supra note 24, and P. van den Bossche and D. Prevost, *Essentials of WTO Law*, Cambridge University Press (2016), pp. 178-230.

¹⁹⁹ See, for example, WTO Appellate Body Report *US – Gasoline*, 1996, at para. 22, and WTO Appellate Body Report *Korea – Various Measures on Beef*, 2000, at para. 164.

²⁰⁰ G. Marceau and J. Trachtman, “Responding to National Concerns”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), *The Oxford Handbook of International Trade Law*, supra note 24, at p. 227-228.

²⁰¹ See Appellate Body Report, *Korea – Various Measures on Beef*, 2000, para 178 and G. Marceau and J. Trachtman, “Responding to National Concerns”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), *The Oxford Handbook of International Trade Law*, supra note 24, at para 221.

²⁰² WTO Appellate Body Report *EC – Hormones*, 1998.

undertaken sufficient scientific studies supporting the necessity of the prohibition.²⁰³ The European Union subsequently conducted further scientific studies and maintained its prohibition, which led to retaliatory tariffs and ongoing consultations. Underlying this protracted dispute are fundamental differences of culture and approach to food safety and quality in Europe and North America, the European Union in particular having a precautionary approach, with high levels of public support.²⁰⁴

Article XIX GATT 1994 allows governments to take “emergency” action where increased imports of particular products cause or threaten to cause serious injury to the importing State’s domestic industry. During the Bretton Woods era, States had developed a widespread and doubtful practice of entering into “grey area” agreements with foreign exporters outside GATT 1947 to limit the import of the products in question.²⁰⁵ The Safeguards Agreement was negotiated as part of the WTO Agreements in order to bring these matters within WTO multilateral discipline.²⁰⁶ In the words of the Safeguards Agreement itself, one of its aims is to encourage “structural adjustment” on the part of industries adversely affected by increased imports, thereby enhancing rather than limiting competition in international markets.²⁰⁷ In other words, the Safeguards Agreement is aimed at limiting reliance on exceptional action against imports and bringing it under multilateral control. Reliance on safeguard measures has declined sharply in recent years, which has been attributed to the decisions of the Dispute Settlement Body and Appellate Body, before which no safeguards measures have prevailed. In the words of one commentator, it is “...virtually impossible to construct a safeguard measure that will survive legal challenge under current interpretations...”.²⁰⁸

One of the visible signs that States feel the need to regain some of their diminished national regulatory policy space is the increase in use in recent years of anti-dumping measures, which have given rise to a very large number of disputes among WTO member States under the Anti-dumping Agreement.²⁰⁹ Dumping is the practice of exporting products to foreign markets at below the market value, and anti-dumping measures are duties or tariffs in the importing country aimed at neutralising that price advantage. It is notable that anti-dumping measures taken by States often correlate exactly to vulnerable industries and products in their domestic market.²¹⁰ States are, in this sense, attempting to use anti-dumping measures as a safety valve for their loss of national policy space, and this practice has become one of the “broken windows” in the functionality of the WTO trade system that has led to it being described as in crisis.²¹¹

²⁰³ Ibid at paras 172 and 208, and see also WTO Appellate Body, *Australia – Salmon*, 1998, at para 121.

²⁰⁴ See Regulation (EC) No. 178/2002 of 28 January 2002. The European Union has an integrated approach to food safety covering all parts of the food and animal feed chain, with traceability and the precautionary principle as fundamental concepts.

²⁰⁵ See *supra* note 175 and the accompanying text.

²⁰⁶ G. Marceau and J. Trachtman, “*Responding to National Concerns*”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), *The Oxford Handbook of International Trade Law*, *supra* note 24 at p. 227-228.

²⁰⁷ Preamble to the Agreement on Safeguards.

²⁰⁸ M. Beshkar and E. W. Bond, “*The Escape Clause in Trade Agreements*”, *supra* note 175, at p. 75.

²⁰⁹ See the text of the Agreement on Implementation of Article VI (Anti-dumping) at <www.wto.org/english/docs_e/legal_e/ursum_e.htm#fAgreement> accessed 15 June 2022, and see J. Baumler, “*The WTO’s Crisis: Between a Rock and a Hard Place*”, KFG Working Paper Series No. 42, Berlin Potsdam Research Group “*The International Rule of Law – Rise or Decline?*”, February 2020, at pp. 10-11.

²¹⁰ J. Baumler, “*The WTO’s Crisis: Between a Rock and a Hard Place*”, *ibid*, p. 11.

²¹¹ J. Baumler, “*The WTO’s Crisis: Between a Rock and a Hard Place*”, *ibid*, p. 11.

The national regulatory policy space that governments have allowed themselves under the WTO Agreements through the various exceptions to free trade and non-discrimination discussed above is thus limited in scope and has been further reduced by interpretations of the WTO Dispute Settlement Body and Appellate Body.²¹² The WTO trade system requires States to open themselves to international competition to an extent that significantly exceeds that of the previous Bretton Woods system, with all of the consequences for “redistribution”, inequality, unemployment, and social and cultural tensions discussed and documented in section 3 above.²¹³ Developing countries, in particular, have come under pressure to open their markets to foreign trade and investment.²¹⁴

c) Free trade and investment agreements

A major development in international trade, particularly as the Doha Round of WTO trade negotiations that began in 2001 are not making rapid progress, is the increase in the number of regional, or non-global, free trade and investment agreements concluded among States outside the WTO system. An increasing number of WTO member States have pursued such agreements to accomplish a degree of trade liberalisation on a sub-global level that is difficult to achieve globally, although there is criticism of this approach as diverting resources and personnel from global negotiations, and disadvantaging the less significant trading nations.²¹⁵ There are now several hundreds of these agreements in existence and almost all WTO member States are party to at least one.²¹⁶ Their content varies, with some more limited, covering, for example, trade in manufactured goods, and a few agricultural products and services, while increasingly, others have fuller coverage, including manufactured and agricultural goods, services, investment protection, and protection of intellectual property rights.

As non-global free trade agreements often include investor protections, dispute settlement procedures under these agreements are (unlike the WTO) not only State to State, but also investor-State. Some of these agreements are customs unions, such as those of the European Union and MERCOSUR.²¹⁷ Prominent examples of free trade agreements include the Regional Comprehensive

²¹² The United States, during both the Obama and Trump administrations, blocked appointments to the Appellate Body in protest at a series of decisions that the United States disagreed with, causing the Appellate Body to cease to be able to function from 10 December 2019. See M. Elsig, M. Pollack and G. Shaffer, “*Trump Is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important*”, Washington Post, 27 September 2017, available at <www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/> accessed 15 June 2022; and G. Shaffer, “*A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*”, Yale Journal of International Law (2019) Vol. 44 p. 1.

²¹³ Petersmann analyses the challenges facing the WTO system of trade in terms of competing value premises underlying the differing concepts of capitalism as between the United States and the United Kingdom, Europe, and China and Russia. See E.U. Petersmann, “*Ten Lessons from ‘Institutional Economics’ for Designing Multilateral Trade and Investment Institutions*”, *supra* note 26, at p. 12.

²¹⁴ D. Rodrik, “*The Globalization Paradox*”, *supra* note 140, p. xvii.

²¹⁵ D. A. Gantz, “*Regional Trade Agreements*”, in D. Bethlehem, I. van Damme, D. McRae and R. Neufeld (eds), “*The Oxford Handbook of International Trade Law*”, *supra* note 24, p. 238.

²¹⁶ 350 such trade agreements have been notified to the WTO as in force as at 30 June 2021. See the WTO website at <www.wto.org/english/tratop_e/region_e/rtfactfig_e.pdf> accessed 15 Juli 2022. See also D. A. Gantz, “*Regional Trade Agreements*”, *ibid* and see the WTO website at <www.wto.org/english/tratop_e/region_e/region_e.htm> accessed 15 June 2022.

²¹⁷ MERCOSUR (the Southern Common Market) is a regional economic integration organisation, initially established in 1991 by Argentina, Brazil, Paraguay and Uruguay, and subsequently joined by Venezuela and Bolivia.

Economic Partnership, said to be the world's largest in terms of volume of trade, which includes Australia, China, India, Japan, New Zealand and the Republic of Korea as well as the ten countries of the Association of Southeast Asian Nations (ASEAN). It entered into force on 1 January 2022;²¹⁸ the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, which entered into force on 30 December 2018;²¹⁹ the African Continental Free Trade Agreement, signed on 21 March 2018 by 44 of the African Union's 55 member States, is the world's largest free trade agreement in terms of the number of countries participating;²²⁰ and the United States, Mexico, Canada Agreement, which replaced the North America Free Trade Agreement and entered into force on 1 July 2020.²²¹

The economic debate surrounding free trade agreements is an extension of that relating to the WTO system of trade. Economists supporting free trade believe that the even deeper trade relations created by these agreements, lowering or eliminating tariffs and other restrictions, increasing international competition in the products and services covered, and strictly limiting the scope for national regulations (technical barriers to trade) by the States parties, will increase productivity and the overall wealth generated, thereby stimulating the economies of the trading partners and creating jobs and prosperity.²²² Economists sceptical of free trade question whether aggregate net wealth gains will be created through participation in such agreements, and raise concerns about the risk that they exacerbate inequality, and deplete even further the policy space – the sovereignty – of States to regulate matters of legitimate concern, including labour standards, human rights and environmental protections.²²³

Stiglitz argues that the purpose and effect of trade agreements is different today to the GATT negotiated in the wake of World War II. The purpose then was the reduction of tariffs so that world trade could flow and expand, and States could take advantage of their comparative advantages in production. Today, tariffs are already low. The most significant non-tariff barriers to trade consist of national regulations. Multinational corporations complain that inconsistent national regulations make business costly, in response to which, Stiglitz argues, governments negotiate free trade

²¹⁸ It was signed on 15 November 2020 and required 9 ratifications to enter into force: 6 of the ASEAN States and 3 of the non-ASEAN States.

²¹⁹ The Trans-Pacific Partnership was a proposed free trade agreement involving these countries and the United States, which was withdrawn from by President Trump in January 2017. The remaining States negotiated and concluded the Comprehensive and Progressive Agreement for Trans-Pacific Partnership which incorporates most of the provisions of the predecessor Trans-Pacific Partnership.

²²⁰ The African Continental Free Trade Agreement entered into force on 30 May 2019 and applies to trade as of 1 January 2021. As of 5 February 2021, the Agreement has 36 States parties. See the website of the African Continental Free Trade Agreement at <<https://afcfta.au.int/en>> accessed 15 June 2022.

²²¹ For the text and further information, see the Government of Canada website at <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng> accessed 15 June 2022.

²²² See, for example, P. Martin, T. Mayer and M. Thoenig, "The Economics and Politics of Free Trade Agreements", Vox EU CEPR Research Paper, 9 April 2010, available at <<https://voxeu.org/article/free-trade-agreements-do-they-help-keep-peace>> accessed 15 June 2022; and S. L. Baier and J. H. Bergstrand, *Economic Determinants of Free Trade Agreements*, Journal of International Economics (2004) Vol. 64, No. 1, pp. 29-63.

²²³ R. Nader and L. Wallach, "GATT, NAFTA and the Subversion of the Democratic Process" in Mander and E Goldsmith (eds), *The Case Against the Global Economy*, Sierra Club Books(1996), at pp. 93-94 - trade agreements threaten democracy by shifting decision-making power from local and national governments to international regimes.

agreements to reduce these regulations. He points out that such regulations, even if imperfect, are there for a reason: to protect workers, consumers, the national economy and the environment.²²⁴

There is consequently considerable criticism of the lack of policy space allowed to States under free trade agreements. The agreements often base their exceptions provisions on those of GATT 1994.²²⁵ In addition to the limitations placed on national autonomy to regulate contained in the trade provisions of these agreements, their investor protection provisions and investor-State dispute settlement bodies have led to further limitations on the autonomy of States to regulate in the national interest. There is particular criticism of the role of investor-State arbitration panels in this regard. Investment protection treaties have been described as responding to business interests by “privatising” dispute settlement through such arbitration panels and limiting public interest regulation.²²⁶ UNCTAD, for example, has found that the manner in which such arbitration panels apply the “fair and equitable treatment” standard for the protection of investors has increased the likelihood that a wide range of State regulations are found to infringe investors’ rights, including those that have a legitimate public purpose, such as economic, social, environmental and other developmental ends.²²⁷ This poses special challenges for developing countries where the State may be required to intervene in the economy and introduce legislative or regulatory measures more frequently and of a greater magnitude than developed countries in order to promote and protect the country’s development.²²⁸ Similarly, an Independent Expert of the United Nations Human Rights Council has reported that, although free trade and investment are, in principle, good things that promote development, in practice, they have favoured guarantees for investors to an extent that excludes or severely limits labour, human rights and environmental protections.²²⁹

Viñuales and Dupuy argue that in international economic dispute settlement, in particular before investor-State dispute arbitration panels, environmental (and human rights) protections are viewed primarily as a limitation on free trade and investment. Human rights and environmental protections are, in this sense, regarded as secondary to trade and investment law and can be lawfully adopted only to the extent that they are consistent with trade liberalisation.²³⁰ They argue that international trade and investment law should not be “quarantined” from these other considerations for the sake of giving investors certainty.²³¹ Stiglitz considers that investment protection provisions in free trade

²²⁴ J. E. Stiglitz, “*The Great Divide: On the Wrong Side of Globalization*”, The New York Times, 15 March 2014, available at <<https://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization>> accessed 15 June 2022.

²²⁵ See, for example, Article 29.1 of the 2015 Trans-Pacific Partnership Agreement, which incorporates Article XX GATT 1994 *mutatis mutandis*, the text of the 2015 Agreement itself being incorporated into the subsequent 2018 Progressive Agreement for Trans-Pacific Partnership.

²²⁶ E.U. Petersmann, “*Neo-Liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System*”, Chinese (Taiwan) Yearbook of International Law and Affairs (2020) Vol. 38, pp. 1-41 at p. 6.

²²⁷ UNCTAD, “*Fair and Equitable Treatment*”, UNCTAD Series on Issues in International Investment Agreements II, United Nations publication (2012), p. 2.

²²⁸ *Ibid.*

²²⁹ Report of Mr. Alfred-Maurice de Zayas of 14 July 2015, Independent Expert of the United Nations Human Rights Council on the Promotion of a Democratic and Equitable International Order, UN Doc. A/HRC/30/44. The report also questions the legitimacy of arbitral panels before which investors can sue States, but not vice versa.

²³⁰ See P-M. Dupuy and J. E. Viñuales, “*International Environmental Law*”, Cambridge University Press (2015), p. 400.

²³¹ P-M. Dupuy and J. E. Viñuales, “*International Environmental Law*”, *ibid.*; and see also S. Joseph, “*Blame it on the WTO? A Human Rights Critique*”, Oxford University Press (2011), p. 288. See also F. Garcia, “*The global market and*

agreements: “impos[e] fundamental changes to countries’ legal, judicial, and regulatory frameworks [...] Of course, investors have to be protected against the risk that rogue governments will seize their property. But that is not what these provisions are about. There have been very few expropriations in recent decades, [...] The real intent of these provisions is to impede health, environmental, safety, and, [...] financial regulations”.²³² Trade and investment protection agreements fail to recognise that national rules implementing non-market values are not exceptions to market rules but are constitutive of the values and culture of the State concerned.²³³

Investment protection agreements have their origins in the 1960s. Foreign investors at that time saw decolonisation as a potential threat to the security of their investments as newly independent States emerged. Many bilateral investment protection treaties were negotiated by developed countries with the newly emerging States. A key step was the conclusion under the auspices of the World Bank of the 1966 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”), establishing a centre for arbitration and providing that arbitral awards would be recognized and enforceable in the courts of member States.²³⁴ Broad interpretations in these awards of “fair and equitable treatment” and direct or indirect “expropriation” have been criticised as increasingly protecting investors’ profits at the expense of government regulation aimed at protecting public health, the environment, or consumer safety.²³⁵ From the 1990s, investor-State arbitration was consolidated and expanded as the means to protect investors through the conclusion of broad free trade and investment agreements, such as the North America Free Trade Agreement. By the end of 2017, 855 investor-State claims had been brought, the majority against developing countries by developed country investors. The average amount claimed was \$1.3 billion and the average amount awarded was \$504 million.²³⁶

There has been a backlash against these developments that began with withdrawal in 2007 from the ICSID Convention by Bolivia, Ecuador, and Venezuela, since when, numerous States in Latin America, Asia, and Africa have announced their intention to terminate some or all of their bilateral investment treaties, including Bolivia, Ecuador, India, Indonesia, South Africa, and Venezuela.²³⁷ As western

human rights: trading away the human rights principle”, Brooklyn Journal of International Law (1999) Vol. 7, No. 1, pp.51-97 at p. 65; and J. Capaldo, “*The Trans-Atlantic Trade and Investment Partnership: European disintegration, unemployment and instability*”, GDAE Working Paper No. 14-03, Global Development and Environment Institute at Tufts University, available at <http://ase.tufts.edu/gdae/policy_research/ttip_simulations.html> accessed 15 June 2022.

²³² See J. E. Stiglitz, “*The Secret Corporate Takeover*”, Project Syndicate, 13 May 2015, available at <www.project-syndicate.org/commentary/us-secret-corporate-takeover-by-joseph-e--stiglitz-2015-05> accessed 15 June 2022.

²³³ J. Linarelli, M. E. Salomon and M. Sornarajah, “*The Misery of International Law: Confrontations with Injustice in the Global Economy*”, Oxford Scholarship Online, May 2018, p. 112, available at <<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198753957.001.0001/oso-9780198753957-chapter-4>> accessed 15 June 2022.

²³⁴ UNTS Vol. 575, p. 159. The ICSID Convention was concluded at Washington on 18 March 1965 and entered into force on 14 October 1966.

²³⁵ A. R. Parra, “*The History of ICSID*”, Oxford University Press (2017), p. 25 and H. L. Bray, “*Understanding Change: Evolution from International Claims Commissions to Investment Treaty Arbitration*”, in S. W. Schill, C. J. Tams and R. Hoffmann (eds), “*International Investment Law and History*”, E. E. Publishing (2018), pp. 102, 104 and 118.

²³⁶ UNCTAD, World Investment Report 2018, p. 91, available at <https://unctad.org/system/files/official-document/wir2018_en.pdf> accessed 15 June 2022.

²³⁷ See M. Waibel, A. Kaushal, K-H. Chung and C. Balchin (eds), “*The Backlash against Investment Arbitration: Perceptions and Reality*”, Wolters Kluwer (2010); F. Costa Morosini and M. Sanchez Badin, “*Petrobras in Bolivia: Is*

States have increasingly become respondents in investor-State proceedings, a growing political resistance has begun in Canada, Europe and the United States to the inclusion of investor-State dispute settlement provisions in free trade agreements.²³⁸ The United States, in particular, initiated a renegotiation of the North America Free Trade Agreement and “unsigned” the Trans-Pacific Partnership.²³⁹

6. Addressing inequality

Possible remedial measures to address economic inequality fall roughly into two categories: bottom-up policies that are aimed at supporting and assisting globalisation’s “losers”; and top-down measures that address issues arising in the system of international trade and investment (systemic issues).

a) Policies to assist globalisation’s “losers”

There is broad agreement among economists from across a spectrum of views that, although international trade remains essential, pursuing only neoliberal policies of stimulating trade and reducing government intervention cannot reduce economic inequality, and that inequality is in itself an impediment to economic growth because it restricts economic opportunities for lower and middle-income earners.²⁴⁰ There is growing agreement that governments should pursue social and industrial policies to address inequality and that raising greater revenue through taxes is necessary to pay for them.²⁴¹

Possible policies to address inequality range across two dimensions. The first dimension concerns the stage of the economy that the policy addresses, which have been described as “pre-production”, “production” and “post-production”. The second dimension concerns the part of income inequality that the policy seeks to address. Some policies target poverty reduction, others seek to support middle-income earners, and others seek to reduce incomes at the top.²⁴² These are not only economic questions, of course, but involve political choices.

Pre-production policies address the attributes with which workers enter the job market, including education, training, health care and child care. Production-stage policies (broadly, “industrial” policies) affect the composition and organisation of production, for example, minimum wages,

there a Rule of Law in the ‘Primitive World?’, in H. Muir Watt, L. Bíziková, A. Brandão de Oliveira and D. P. Fernández Arroyo, (eds), *Global Private International Law: Adjudication Without Frontiers*, E. E. Publishing (2019), p. 381. Ecuador re-signed the ICSID Convention on 1 June 2021, see ICSID News Release, 21 June 2021, at <<https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention>> accessed 15 June 2022.

²³⁸ In particular, in the context of the negotiation of the Transatlantic Trade and Investment Partnership, see the European Commission, Concept Paper *“Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an investment court”*, May 2015, available at <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 15 June 2022.

²³⁹ S. Puig, *“The United States-Mexico-Canada Agreement: A Glimpse into the Geo-economic World Order”*, AJIL Unbound (2019) Vol. 113, p. 56.

²⁴⁰ O. Blanchard and D. Rodrik (eds), *“Combating Inequality”*, *supra* note 51, Introduction, pp. xi – xx. The book is based on a major conference of economists from across the spectrum of political and economic views, held at the Peterson Institute for International Economics in Washington D.C. in October 2019.

²⁴¹ O. Blanchard and D. Rodrik (eds), *“Combating Inequality”*, *ibid*, Introduction, pp. xi – xx.

²⁴² See this analysis at O. Blanchard and D. Rodrik, *ibid* at p. xvi.

effective trade unions, strong collaborative relations between unions and management, trade agreements, subsidies for investment, research and development, and subsidies or tax incentives for “green” policies and for locating businesses in declining regions. Such policies may also include direct financial subsidies to help workers move from declining regions to regions where jobs are being created,²⁴³ and infrastructure projects in declining regions in order to make them more competitive and, in some cases, to protect their cultural and linguistic heritage.²⁴⁴ Post-production policies affect the distribution of wealth and income, and may include progressive income taxation, wealth taxation, corporate taxation, carbon taxation, income support, and social security payments, for example, child and family support, and unemployment payments.²⁴⁵

Policies are also needed to address rapid technological change, particularly automation and robotisation of production, where the employment practices of businesses and how to influence these are a key consideration that will impact employment and inequality into the future. Strengthening rewards to businesses for the retention of labour including, for example, incentives to retain and retrain existing workers for new types of jobs, has had some success in Germany. That example has demonstrated that good labour relations between management, workers and trade unions are important in this context to ensure good collaboration that works from all perspectives.²⁴⁶ Broader government policies may also be needed for retraining and education so that workers can move from declining industries to growing ones, together with possible reform of national education systems to orient them toward the more high-tech, digital jobs of the future.²⁴⁷

These policies for cushioning the impact of globalisation are generally ones that can be taken by governments nationally, without necessarily requiring multilateral agreement. An exception is corporate taxation, which is a potential source for funding of the above remedial measures, but has been a matter of concern for a number of years, with some countries having very low or zero corporate tax rates to encourage multinational corporations to locate their businesses there. Unilateral action by States to raise corporate taxation would be possible, but of course creates a competitive disadvantage for the State concerned. In a recent breakthrough in this respect, agreement was reached among 136 States in the context of the Organisation for Economic Cooperation and Development in October 2021 for a minimum 15% corporate tax rate for multinational enterprises, which will enter into force in 2023.²⁴⁸ This was endorsed by leaders of the G20 countries later in the same month.²⁴⁹

²⁴³ C. Hornok and M. Koren, “*The Case for Free Trade*”, *supra* note 49, and also World Economic Forum: “*WEF Outlines plan for Fair and Inclusive Economic Recovery*”, 3 June 2021, available at <www.fairplaytalks.com/2021/06/03/wef-outlines-lines-six-recommendations-for-fair-inclusive-economic-recovery/> accessed 15 June 2022.

²⁴⁴ World Economic Forum: “*WEF Outlines plan for Fair and Inclusive Economic Recovery*”, *ibid*.

²⁴⁵ O. Blanchard and D. Rodrik, *supra* note 51 at pp. xiii - xiv. See also C. Hornok and M. Koren, “*The Case for Free Trade*”, *supra* note 49 and also World Economic Forum: “*WEF Outlines plan for Fair and Inclusive Economic Recovery*”, *ibid*.

²⁴⁶ O. Blanchard and D. Rodrik, “*Combating Inequality*”, *ibid* at p. xvii.

²⁴⁷ C. Hornok and M. Koren, “*The Case for Free Trade*”, *supra* note 49 and World Economic Forum: “*WEF Outlines plan for Fair and Inclusive Economic Recovery*”, *supra* note 243.

²⁴⁸ See the OECD announcement at <www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm> accessed 15 June 2022.

²⁴⁹ See Reuters, “*G20 Leaders Endorse Global Minimum Corporate Tax Deal for 2023 Start*”, 30 October 2021, available at <www.reuters.com/business/g20-leaders-endorse-global-minimum-corporate-tax-deal-2023-start-2021-10-30/> accessed 15 June 2022.

Prominent among this category of remedial measures are the 2015 Sustainable Development Goals (“SDGs”). The UN Secretary-General has underlined that they are “...a blueprint for the transition to a healthier planet and a more just world, for present and future generations”.²⁵⁰ He has stated, in particular, that the recovery from the COVID-19 crisis must lead to a different economy: “Everything we do during and after this crisis must be with a strong focus on building more equal, inclusive and sustainable economies and societies...”.²⁵¹ The SDGs were negotiated and adopted by the UN General Assembly in 2015 and set an agenda to be achieved by 2030.²⁵² There are 17 Goals aimed, *inter alia*, at ending poverty and hunger, expanding access to health care, education, justice and jobs, promoting inclusive and sustained economic growth, while protecting the planet from global warming and environmental degradation.

The UN reported in 2019 that, “[a]lthough positive results have been reported, global efforts [to achieve the SDGs] have been hampered by challenges such as conflict, climate change, lack of access to essential health services, growing inequalities and significant financing gaps.”²⁵³ Goal 10 is specifically aimed at reducing economic inequality within and among countries by 2030, but inequality has continued to rise to unprecedented levels, exacerbated by the Covid-19 pandemic.²⁵⁴ Criticism of the SDGs’ approach to poverty reduction and inequality centres on their reliance on the model of economic growth, economists being far from unanimous on the assertion that trade is a driver of growth, development and poverty reduction (as discussed in section 4 above), and such doubts have been expressed also by a Special Rapporteur of the UN Human Rights Council.²⁵⁵ The lack of express mention in the SDGs of difficult political issues, such as redistributive taxation as a direct means of reducing income inequality and poverty has also been criticised.²⁵⁶ On these points, the Secretary-General has himself expressly recognised that the expansion of trade and technological progress have contributed to “offshoring” (the movement of jobs to cheaper locations) and unprecedented income inequality, and that redistributive taxation is needed to increase social protections, including universal health coverage, the possibility of a universal basic income, and

²⁵⁰ Sustainable Development Goals Summit, 24-25 September 2019, <<https://news.un.org/en/story/2019/09/1046902>> accessed 15 June 2022.

²⁵¹ UN Secretary-General, Launch of the Report on the Socioeconomic Impacts of Covid-19, 31 March 2020, available at <www.un.org/en/un-coronavirus-communications-team/launch-report-socio-economic-impacts-covid-19> accessed 15 June 2022.

²⁵² Adopted as General Assembly resolution A/RES/70/1 of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development.

²⁵³ See the 2019 report of the Secretary-General on SDG progress at <https://sustainabledevelopment.un.org/content/documents/24978Report_of_the_SG_on_SDG_Progress_2019.pdf and the 2019 summit document at www.un.org/en/summits2019/pdf/SDG-Summit.pdf> accessed 15 June 2022.

²⁵⁴ UN Department of Economic and Social Affairs, “World Economic Situation and Prospects as of mid-2021”, *supra* note 10, and “World Economic Situation and Prospects as of mid-2020”, *supra* note 14. See also, Oxfam Briefing Paper, “The Inequality Virus”, *supra* note 14.

²⁵⁵ See the Report of the Special Rapporteur of the UN Human Rights Council on Extreme Poverty and Human Rights, “The Parlous State of Poverty Eradication”, 2 July 2020, UN Doc. A/HRC/44/40. See also J. E. Stiglitz, J-P. Fitoussi and M. Durand, “Measuring What Counts: The Global Movement for Well-Being”, The New Press (2019); J. Hickel and G. Kallis, “Is Green Growth Possible?”, New Political Economy (2019) Vol. 25, No. 4, ; K. Raworth, “Doughnut Economics: Seven Ways to Think Like a 21st Century Economist”, Chelsea Green Publishing (2017); and S. McCloskey, “Are the Sustainable Development Goals Sustainable?”, Centre for Global Education, British Educational Research Association, 26 May 2021, available at <www.bera.ac.uk/blog/are-the-sustainable-development-goals-sustainable> accessed 15 June 2022.

²⁵⁶ See the Report of the Special Rapporteur of the UN Human Rights Council on Extreme Poverty and Human Rights, “The Parlous State of Poverty Eradication”, *ibid*.

boosted investment in public services. He has stated that fair access to education and healthcare must be ensured to all without discrimination, and has called for a “new global deal” to ensure that power, wealth and opportunities are shared more broadly and fairly.²⁵⁷

There are some signs that States may be beginning to take on board the need for such measures to address the impact of inequality. The last four decades of globalisation created a long-term trend of transferring income and wealth to the top of the economic pyramid and risk of job losses, insecurity and reduced wages to the bottom. The combined effects of the economic shocks of the 2008 financial crisis and the ongoing Covid-19 pandemic are causing unprecedented economic challenges, but have also induced governments to begin to question these entrenched policies and arguably to change the balance of power between market forces and State intervention in managing the economy.²⁵⁸ As referred to above, multilateral agreement has been reached on a minimum 15% corporation tax. Further, large financial stimulus packages and social support policies are being used in some countries to reinvigorate economies and reduce inequality.²⁵⁹ These types of packages are national policy measures, not necessarily touching on international legal considerations, except to the extent that the country in question may be subject to “austerity” measures required by the IMF and/or the World Bank as a condition of emergency or development financing.

b) Possible systemic measures to address inequality

There is increasing recognition among economists that the international trade system in its post-Bretton Woods “deep” form, through the operation of the WTO Agreement and numerous non-global free trade and investment agreements, maximises trade, but has eroded the policy space in which States have autonomy to regulate in the public interest to protect nascent or vulnerable industries, jobs, and national social and cultural priorities.²⁶⁰ The international trade system has moved away from “embedded liberalism”. Economic inequality caused by globalisation is a “bottom-up” driver of the rise in populism, but it arises from “top down” systemic challenges in the agreements, institutional structure and organisation of international trade and investment. This is the case because States have agreed in the WTO Agreements and other free trade treaties to narrow the exceptions to free trade that were permitted under the GATT 1947 and to narrow their own scope for regulation, and because the dispute settlement bodies that States have established in the WTO and under free trade and investment agreements have interpreted the relevant treaty provisions in ways that further limit exceptions and the autonomy of States’ to regulate to protect national interests.

Systemic changes to reverse or mitigate these developments would require multilateral engagement and agreement among States to amend the treaty texts in question, or possibly to arrive at agreed

²⁵⁷ See the Secretary-General’s Nelson Mandela Lecture, “*Tackling the Inequality Pandemic: A New Social Contract for a New Era*”, 18 July 2020, available at <www.un.org/sg/en/content/sg/statement/2020-07-18/secretary-generals-nelson-mandela-lecture-%E2%80%99tackling-the-inequality-pandemic-new-social-contract-for-new-era%E2%80%9D-delivered> accessed 15 June 2022.

²⁵⁸ UNCTAD Trade and Development Report 2021, p. 1 and pp. 6-7, *supra* note 145.

²⁵⁹ See, for example, “*Biden’s Covid stimulus package plan: It costs \$1.9tn but what’s in it?*”, BBC website, 6 March 2021, available at <www.bbc.com/news/business-56019033> accessed 15 June 2022; and see also K. Vaswani, “*Changing China: How Xi’s Common Prosperity May Impact the World*”, BBC website, 7 October 2021, available at <www.bbc.com/news/business-58784315> accessed 15 June 2022, referring to the current policies of the Chinese government to narrow the wealth gap, restructure society and build the middle class.

²⁶⁰ For an account of WTO case law that has protected human rights, environmental and other broader public interests, see E.U. Petersmann, “*Neo-Liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System*”, *supra* note 226 pp. 9-10.

interpretations of the existing treaty texts,²⁶¹ and also agreement on a means to “reorient” (for want of a better word) the dispute settlement bodies toward decisions that are compatible with such reopened national policy space. Any such agreements would require consensus in the WTO,²⁶² and agreement of the treaty parties in the context of free trade and investment agreements. Petersmann argues for such return to “embedded liberalism” and a more “decentralised” approach (reopening States’ policy space) not only to promote social justice, but also to accommodate States’ diverse conceptions of their national sovereignty in today’s geopolitical environment and to better enable them to respond effectively to major global challenges such as the Covid-19 pandemic and climate change.²⁶³ Whether there is yet sufficient political awareness and political will among States to engage with systemic reforms of this nature is an open question.

The notion of “reorienting” dispute settlement bodies is, of course, inherently a difficult one. The establishment by States of independent adjudication bodies to settle international economic law disputes between themselves, and between investors and States, may be regarded as one of the principal rule of law achievements of the twentieth century.²⁶⁴ There have been more than 420 panel, appellate and arbitration findings under the WTO dispute settlement system and there are more than 1,000 publicly-known investor-State arbitration cases and related national court decisions (e.g. to consider applications to annul or to enforce investor-State awards).²⁶⁵ Suggested reforms aimed at redirecting the outcomes of such judicial and arbitral proceedings are, therefore, sensitive, and would need to be handled carefully in a manner compatible with the essential requirement that adjudication take place before an independent and impartial tribunal established by law.²⁶⁶

Possible reform in the context of investor-State dispute settlement is currently being addressed by States within Working Group III of the United Nations Commission on International Trade Law

²⁶¹ There has been a practice within the WTO of arriving at “Understandings” on the interpretation of certain provisions of the WTO Agreements. See, for example, Understandings on the Interpretation of Article XVII on the WTO website at <https://www.wto.org/english/docs_e/legal_e/08-17.doc> accessed 15 June 2022.

²⁶² See Article IX of the WTO Agreement for the practice of decision-making by consensus.

²⁶³ E.U. Petersmann, “Ten Lessons from ‘Institutional Economics’ for Designing Multilateral Trade and Investment Institutions”, European University Institute, EUI Working Paper LAW 2020/05, Florence (2020), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617907> accessed 20 June 2022, pp. 9-10 and 13-15.

²⁶⁴ E.U. Petersmann, “Neo-Liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System”, *supra* note 226, p. 9. The United Nations has defined “rule of law at national and international levels” as “a principle of governance in which all persons, institutions and entities, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with internationally recognized human rights”. See Report of the Secretary-General, “Delivering Justice: programme of action to strengthen the rule-of-law at the national and international levels”, UN Doc. A/66/49 of 16 March 2012, paragraph 2.

²⁶⁵ These numbers are taken from E.U. Petersmann, “Neo-Liberal, State-Capitalist and Ordo-Liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System”, *supra* note 226, p. 9.

²⁶⁶ There is an extensive international legal framework of requirements concerning the independence and impartiality of judicial and other adjudicative bodies. The starting points are Article 10 of the Universal Declaration of Human Rights, adopted by General Assembly resolution 217A(iii) of 10 December 1948, UN Doc. A/RES/3/217 A, and Article 14.1 of the 1966 International Covenant on Civil and Political Rights, which states that everyone is entitled to “...a fair and public hearing by a competent, independent and impartial tribunal established by law”, International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, UNTS vol. 999, p. 171. Further detail as to the content of this right can be found in the jurisprudence of the UN Human Rights Committee, in regional human rights treaties and the accompanying jurisprudence, in the case law of international tribunals, and in relevant non-binding international principles and guidelines.

(“UNCITRAL”).²⁶⁷ This UNCITRAL initiative, which began in 2017, builds on the approach to investor-State arbitration that had been taken in the 2014 Mauritius Convention on Transparency, also negotiated within UNCITRAL.²⁶⁸ It responds to the backlash against the awards of investor-State arbitral panels by Latin American, African, Asian and, increasingly, some western States, discussed in section 5 above, and consequent reform proposals, including by UNCTAD in 2015²⁶⁹ aimed at strengthening States’ policy space to regulate in the national interest, modifying and clarifying “fair and equitable treatment” and “indirect expropriation” provisions in free trade and investment protection agreements, and reforming the ad hoc nature of investor-State dispute settlement. Concerns relating to investor-State dispute settlement include: inconsistent interpretations of trade and investment treaty provisions and relevant principles of international law by investor-State arbitral tribunals; lack of transparency (proceedings are often confidential); lack of coherence in the treatment of the relationship between international trade law and other branches of law, particularly national law, international labour law, human rights law and environmental law; and a perceived lack of independence and impartiality on the part of arbitrators (in favour of investors) in such arbitral tribunals.²⁷⁰

Based on a number of papers submitted by governments and the European Union, the UNCITRAL Secretariat²⁷¹ has prepared an initial draft of an instrument for the possible establishment of a multilateral investment tribunal to function on a permanent basis, for consideration by States members of UNCITRAL.²⁷² The European Union, in particular, is supporting the establishment of a standing dispute settlement arbitral tribunal (including an appeal tribunal) potentially for all free

²⁶⁷ See the UNCITRAL website, Working Group III: Investor-State Dispute Settlement Reform, available at <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 20 June 2022.

²⁶⁸ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York, 10 December 2014, UNTS I-54749. The Mauritius Convention enables States to apply the UNCITRAL Transparency Rules to cases arising under any of the 3,000 or so investment agreements concluded by States before 1 April 2014. This is the first time that a multilateral treaty in this field has been used to supplement and improve the very many pre-existing, mainly bilateral, investment protection agreements, providing potentially unifying improvements to an otherwise *ad hoc* collection of treaties.

²⁶⁹ UNCTAD World Investment Report 2015, Reforming International Investment Governance, available at <https://unctad.org/system/files/official-document/wir2015_en.pdf> accessed 20 June 2022, which presents an action menu for investment regime reform. UNCTAD, IIA Issues Note, May 2015.

²⁷⁰ See G. Kaufmann-Kohler and M. Potesta, “*Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*”, 3 June 2016, Geneva Center for International Dispute Settlement, available at <https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf> accessed 20 June 2022; G. Kaufmann-Kohler and M. Potesta, “*The Composition of a Multilateral Investment Court and of an Appeals mechanism for Investment Awards*”, 15 November 2017, Geneva Center for International Dispute Settlement, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_supplemental_report.pdf> accessed 20 June 2022; and UNCTAD, “*Special Update on Investor-State Dispute Settlement: Facts and Figures*”, International Investment Agreements Issues Note, Issue 3, November 2017, available at <https://unctad.org/system/files/official-document/diaepcb2017d7_en.pdf> accessed 20 June 2022.

²⁷¹ The UNCITRAL Secretariat is the International Trade Law Division of the UN Office of Legal Affairs, based in Vienna. See its website at <https://legal.un.org/ola/div_itld.aspx> accessed 20 June 2022.

²⁷² See “*Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*”, Note by the Secretariat, (undated), available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_selection_and_appointment_of_isds_tribunal_members_and_related_matters_0.pdf> accessed 20 June 2022.

trade and investment treaties outside the WTO system.²⁷³ The standing tribunal would have jurisdiction over both investor-State disputes and State-State disputes. Proceedings would generally be public and would allow third parties, for example, representatives of communities affected by the dispute, to participate in the proceedings. Also within Working Group III, UNCITRAL member States are considering²⁷⁴ proposals for strengthening the involvement of States in the interpretation and application of trade and investment treaties to which they are party through possible interpretative declarations and guidance to arbitral tribunals.²⁷⁵ While it would remain the task of the arbitral tribunal to interpret and apply investment treaties for the purpose of determining the particular disputes before it, the treaty parties would retain the power to clarify the meaning of a treaty through an agreed authoritative interpretation.²⁷⁶ It remains to be seen whether the reforms proposed within UNCITRAL will gain multilateral traction and be concluded as an international instrument.

Predating these developments in UNCITRAL, the European Union had issued a concept paper in 2015 following a public consultation exercise in the context of its then ongoing negotiation of the Transatlantic Trade and Investment Partnership with the United States.²⁷⁷ The results of the consultation reflected in the concept paper emphasised, among other things, the importance of the protection of national autonomy to regulate in the public interest. The most recent European Union free trade agreements with Singapore and Canada have express references to such national autonomy.²⁷⁸ Further, these agreements specify that the parties may adopt interpretations of the treaty provisions that bind not only the parties but also the arbitral tribunals established thereunder. Further improvements in the EU/Singapore and EU/Canada agreements clarify that the investor's right to "fair and equitable treatment" is limited to protection from a closed list of types of conduct by States, such as denial of justice, arbitrary conduct and breach of due process, and that the notion of "indirect expropriation" is limited to a substantial taking away from the investor of the attributes of property (i.e. the right to use, enjoy and dispose of the investment). Arbitrators appointed under these agreements must have expertise not only in trade and investment law but in international law more generally.

These types of reforms, together with the discussions ongoing in UNCITRAL, perhaps signal the beginnings of a willingness by States to consider the rebalancing of the system of international trade and investment to reopen the regulatory space for governments to protect national priorities, at

²⁷³ See "Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States", 24 January 2019, UN Doc. A/CN.9/WG.III/WP.159/Add.1, available at <<https://undocs.org/Home/Mobile?FinalSymbol=A%2FCN.9%2FWG.III%2FWP.159%2FADD.1&Language=E&DeviceType=Desktop&LangRequested=False>> accessed 20 June 2022.

²⁷⁴ See "Possible reform of investor-State dispute settlement (ISDS): Interpretation of investment treaties by treaty parties", Note by the Secretariat, 17 January 2020, UN Doc. A/CN.9/WG.III/WP.191, available at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/004/03/PDF/V2000403.pdf?OpenElement>> accessed 20 June 2022.

²⁷⁵ Ibid, paragraphs 38 and 43.

²⁷⁶ See Articles 31 and 32, Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol. 1155, p. 331, in particular Article 31, paragraph 3(a) and (b), and see also the Draft Conclusions of the International Law Commission on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, adopted at the Commission's 70th session in 2018, contained in the Commission's report of that session UN Doc. A/73/10 at paragraph 51, and in the Yearbook of the International Law Commission(2018) Vol. II, Part Two.

²⁷⁷ European Commission, Concept Paper "Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an investment court", May 2015, available at <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 20 June 2022.

²⁷⁸ See an account in the European Commission Concept Paper, *ibid*.

least in the context of trade and investment treaties. It remains to be seen whether the proposed reforms will gain traction within UNCITRAL and be negotiated into an international instrument that attracts wide ratification. The rebalancing of the system of global trade would require also, of course, that States show a willingness to consider similar steps in relation to the WTO Agreements and dispute settlement bodies. There are no signs of this at present.

The political and geoeconomic situation among States within the WTO is a complex and difficult one. Petersmann assesses the WTO system as having developed into one where, among the membership, there are three quite different concepts of capitalism and its underlying value premises: “Anglo-Saxon neoliberalism” (which he associates with the United States and the United Kingdom); “multi-level economic constitutionalism” (which he associates with Europe); and “authoritarian State capitalism” (which he associates with China and Russia).²⁷⁹ These markedly different concepts and approaches compete with each other and, together with recent protectionism by some States, cause disruption to the WTO’s negotiation processes and consensus decision-making.²⁸⁰ Further, it is unclear whether reforms as described in this Working Paper could proceed separately rather than being considered part of the Doha Development Round of WTO negotiations that began in 2001, but are now stalled.²⁸¹

The WTO regime is inevitably impacted by the post-2008 “geoeconomic order”. Roberts *et al* analyse this period as characterised by increasing geopolitical and economic rivalry. The relationship between economics and security in the regime governing international trade and investment law, in particular between the two most powerful States in this regard, the United States and China, has moved to one of heightened concern over the security risks posed by economic interdependence and digital connectivity. They predict that the prospects for States reaching agreement in multilateral trade fora in this heightened climate of security concerns will narrow, and that States will be less willing to accept third-party adjudication of their rights and obligations.²⁸² If this is correct, discussion and agreement on reform could indeed be a rather remote possibility. On the other hand, if the geoeconomic climate is one where States are moving toward a greater need for national authority and less interdependence, it may be that “Bretton Woods” type reforms would be compatible with this changing dynamic.

It is not clear why progress on investor-State reform may be possible in the context of UNCITRAL but is as yet not foreseen in the WTO. Both bodies are multilateral fora comprising member States, albeit UNCITRAL membership numbers 70 States²⁸³ compared to 153 member States of the WTO. A possible explanation is that UNCITRAL functions as, and is regarded as, a more technical, less political, organ, dealing primarily with private international law.²⁸⁴ Although it is predominantly businesses and individuals who trade internationally, not governments, the WTO and its law regulates the rights and

²⁷⁹ E.U. Petersmann, “Ten Lessons from ‘Institutional Economics’ for Designing Multilateral Trade and Investment Institutions”, *supra* note 263.

²⁸⁰ *Ibid* at p. 6.

²⁸¹ See information concerning the Doha Round and what is under negotiation on the WTO website at <https://www.wto.org/english/tratop_e/dda_e/update_e.htm> accessed 20 June 2022.

²⁸² A. Roberts, H. Choer Moraes and V. Ferguson, “Toward a Geoeconomic Order”, *supra* note 28, at p. 671.

²⁸³ The membership was increased from 60 to 70 States at the end of 2021 by General Assembly resolution 229 of 24 December 2021, UN Doc. A/RES/76/229.

²⁸⁴ For a description of UNCITRAL’s functions, membership and methods of work, see its website at <<https://uncitral.un.org>> accessed 20 June 2022.

obligations of States *inter se*, as a branch of public international law. Ironically, it may be precisely because the technical experts who attend UNCITRAL on behalf of their governments are “enchanted by the tools” of their expertise that they are better placed to make progress, less fettered by the political and geoeconomic challenges that face their colleagues who attend the WTO.

7. Conclusion

The development of the international trade system beyond its original Bretton Woods “embedded liberalism” to a deep form of globalised trade is producing economic winners and losers both within and among States. Coupled with the 2008 financial crisis, the Covid-19 pandemic and the technology revolution, globalisation has driven economic inequality to record levels. The overreach of international economic law that is producing this result involves an erosion of the policy space (sovereignty) in which States were previously able to take measures in the public interest to protect national economic, social and cultural priorities. This top-down systemic imbalance, embedded in international economic law, is fuelling a mix of economic and sociocultural grievances that are driving a bottom-up demand from “the people” for change.²⁸⁵ Populist political leaders have been successful in capitalising on this situation to vilify the “elites” who are responsible and to present themselves as the alternative that will reject the *status quo* and follow the will of the ordinary citizen. It is these economic and related sociocultural aspects of liberal internationalism that provide the most cogent explanation for the rise of populism, as evidenced by a considerable body of economic and political science research.

Although the overreach of international economic law that is driving inequality and fuelling the rise in populist support concerns both WTO law and free trade and investment agreements, multilateral discussions among States to date are addressing possible reforms only under the latter, primarily in respect of investor-State dispute settlement. It remains to be seen whether these proposals will gain sufficient traction among States members of UNCITRAL to result in a new draft international instrument for consideration by the UN General Assembly. There are no signs of a similar initiative within the WTO, including its (stalled) Doha Development Round of trade negotiations. Against the challenging background of differing economic models of capitalism among the WTO’s membership and increased geoeconomic tensions among the most powerful of these members, the prospects for negotiation and agreement on a means to return the balance between international trade and national regulatory authority to something resembling that of the Bretton Woods era of “embedded liberalism” may seem remote. On the other hand, if geoeconomic concerns and rivalries are indeed deterring States from further economic integration and interdependence and leading them to seek greater autonomy, the current political and security climate might prove to be a favourable one in which suggestions for a return to greater national regulatory authority and policy space may have some potential for traction.

With a few exceptions, scholars of international law are yet to focus much attention on the causes of the rise in support for populism over the last decade or more, and to take account of the considerable body of evidence developed by other disciplines linking this rise with the economic, social and cultural tensions arising from globalisation and the related technology revolution. The link between the harmful effects of globalisation and international economic law is little acknowledged in

²⁸⁵ See A. Orford, “A Global Rule of Law”, in M. Loughlin and J. Meierhenrich (eds), in “*The Cambridge Companion to the Rule of Law*”, Cambridge University Press (2019).

international law scholarship. The current Working Paper has attempted to bridge something of this interdisciplinary divide by identifying where the “overreach” of international trade is embedded in international economic law and to suggest solutions. In a world of increasing specialisation among international lawyers as the branches of international law expand and their complexity deepens, the role of the “generalist” international lawyer and of the “big picture” is an important one.²⁸⁶ This is certainly the case when considering populism and international law. Yet the issues touched on in this Paper would also benefit from the insights that the substantive and institutional knowledge that specialists in international trade and WTO law bring. Their engagement could help to clarify not only the role of international law in supporting the conditions that drive populism, but also its potential role in mitigating and managing those conditions.

²⁸⁶ See, for example, J. Viñuales, “*The Forgotten Constitution: The UN Friendly Relations Declaration at 50*”, Lauterpacht Centre for International Law, 5 May 2020, available at <<https://www.lcil.cam.ac.uk/blog/forgotten-constitution-un-friendly-relations-declaration-50-prof-jorge-vinuales>> accessed 20 June 2022.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

