

RESTORING TRADE'S SOCIAL CONTRACT

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INTRODUCTION

As we write this, U.S. trade policy is falling into deeper and deeper disarray. The United States, Canada, and Mexico are holding frenzied meetings to renegotiate the North American Free Trade Agreement (NAFTA). As recently as October 11, 2017, President Donald Trump warned that he will withdraw the United States from NAFTA if he does not get a deal that is “fair” to American workers.¹ Indeed, the Trump Administration has already pulled the United States out of the Trans-Pacific Partnership (TPP),² threatened to withdraw from the United States-Korea Free Trade Agreement (KORUS),³ and is holding the World Trade Organization (WTO)’s vaunted dispute resolution process hostage to its demands for change.⁴

Despite their radical departure from conventional U.S. policy, the administration’s actions enjoy strong support in the states that voted for President Trump,⁵ as well as from labor interests that traditionally align with the Democratic Party.⁶ This unprecedented political reconfiguration reminds us

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1. Ken Thomas, *Trump, Trudeau Meet at the White House Amid New NAFTA Talks*, CHI. TRIBUNE (Oct. 12, 2017, 6:30 AM), <http://www.chicagotribune.com/news/nationworld/sns-bc-us--trump-canada-20171011-story.html> [<https://perma.cc/6VLT-CF4W>].

2. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> (on file with the *Michigan Law Review*).

3. Damian Paletta, *Trump Preparing Withdrawal from South Korea Trade Deal, a Move Opposed by Top Aides*, WASH. POST: WONKBLOG (Sept. 2, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/02/trump-plans-withdrawal-from-south-korea-trade-deal/?utm_term=.03a5596661bf [<https://perma.cc/7ZQF-JREU>].

4. See Dispute Settlement Body, *Draft Annual Report* ¶ 2.2, WTO Doc. WT/DSB/W/603 (Oct. 13, 2017) (noting concerns by WTO members with “linking the discussion on the systemic issues raised by the United States to the Appellate Body selection processes”).

5. See *infra* Section I.B.

6. Steven Greenhouse, *The Unions that Like Trump*, N.Y. TIMES (Apr. 8, 2017), <https://www.nytimes.com/2017/04/08/opinion/sunday/the-unions-that-like-trump.html> (on file with the *Michigan Law Review*) (“Donald Trump racked up the support of millions of blue-collar

that today many Americans, regardless of party affiliation, feel betrayed by our current trade policies. They believe that free trade is imposed on them, at their cost and for others' benefit.⁷ In short, "the political consensus in favor of liberalized trade [has] collapsed."⁸ This political discord harms all of us. It poses a serious obstacle to further economic liberalization and growth, without effectively addressing any of the challenges arising from automation and global production chains that underlie the current crisis.

At the heart of this crisis, however, lies an opportunity. Free trade's defenders—including the Canadian and Mexican governments and the U.S. business community—are searching for concrete policy proposals that can rescue agreements like NAFTA and pave the way for 21st century trade policy.⁹ In this Essay, we propose three: (1) reforming domestic trade adjustment assistance (TAA) in the United States (2) incorporating obligations to provide adjustment assistance, broadly construed to include traditional TAA as well as policies, such as infrastructure and education spending, into free trade agreements; and most importantly,¹⁰ (3) funding adjustment assistance policies through a financial transactions tax embedded in free trade agreements like NAFTA and applied throughout a free trade area.

The tax we propose would be no more than 0.1% of the value of securities and currency sales within the free trade area and would be the same throughout the free trade area. Embedding the tax in free trade agreements like NAFTA provides a credible commitment to both raise the revenue and spend it on policies aimed at helping those whose economic lives are disrupted by trade liberalization. Equally important, such a proposal is politically feasible and has precedent. The United States has been debating tax reform at the same time that it is renegotiating NAFTA with Canada and Mexico, creating a window of opportunity.¹¹ Moreover, when modern U.S. trade policy was born in 1962, President Kennedy's new trade-negotiation

white voters in Midwestern swing states In doing so, Mr. Trump has championed many issues straight out of organized labor's wish list").

7. See Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 990 (2017).

8. *Id.* at 987.

9. David Ljunggren, 'Hammer, Hammer, Hammer': Canada Lobbies U.S. Before NAFTA Talks, REUTERS (June 29, 2017, 1:14 AM) <https://www.reuters.com/article/us-usa-trade-canada-outreach/hammer-hammer-hammer-canada-lobbies-u-s-before-nafta-talks-idUSKBN19K0GE> [<https://perma.cc/L4FW-83MX>]; Ana Swanson & Natalie Kitroeff, 'Army' of Lobbyists Hits Capitol Hill to Preserve NAFTA, N.Y. TIMES (Oct. 24, 2017) <https://www.nytimes.com/2017/10/24/us/politics/nafta-lobby-congress.html> (on file with the *Michigan Law Review*).

10. Throughout this Essay, we use "TAA" to refer specifically to Trade Adjustment Assistance programs as currently enshrined in current law; we use "adjustment assistance" to refer more generally to any policy that helps displaced workers.

11. See Kelly Phillips Erb, *It's Beginning to Look a Lot Like Tax Reform: Here's What's in the Final Version*, FORBES (Dec. 15, 2017, 9:30 PM), <https://www.forbes.com/sites/kellyphillipserb/2017/12/15/its-beginning-to-look-a-lot-like-tax-reform-heres-whats-in-the-final-version/#6577557f4d63> [<https://perma.cc/7TB6-LC79>]; Thomas, *supra* note 1.

authority was explicitly linked to innovative domestic measures addressing harmed workers.¹² And during the original NAFTA negotiations, Mexico and the United States created and committed to funding the North American Development Bank to invest in projects along the Mexico-U.S. border—a precedent for coupling free trade agreements with international cooperation to ameliorate the costs of such agreements.¹³

It is time to build on that history and seize this opportunity to not only get NAFTA back on track, but put NAFTA at the forefront of addressing social inequalities through trade agreements. We begin in Part I by explaining the *social contract of trade*—a bargain whereby trade liberalization occurs in a way that ensures the least well off among us are, at a minimum, not harmed. Parts II and III explain how contemporary trade policy can reclaim that vision.

I. THE SOCIAL CONTRACT OF TRADE AND ITS BREACH

International trade is crucial to any country's economic growth and stability.¹⁴ But the fundamental nature of international trade has been misunderstood or misrepresented, contributing to the political crisis that we now find ourselves in.¹⁵ Despite its huge contributions to poverty reduction and increased human welfare since World War II, trade liberalization has dramatic distributional implications, both across countries and within countries. Reducing trade barriers for manufactured goods has contributed to significant job losses, leading to economic calamity and social disruption in industrial heartlands from the midwestern United States to Manchester, England, and Wallonia, Belgium.¹⁶ Moreover, jobs of similar quality have not, as promised, emerged in these regions to replace those lost.¹⁷ Securing the long-term benefits of trade liberalization for ourselves and our fellow cit-

12. See *infra* notes 47–48 and accompanying text.

13. See *Mission*, N. AM. DEV. BANK, <http://www.nadb.org/about/mission.asp> [<https://perma.cc/7S64-SV99>]; *Origins*, N. AM. DEV. BANK, <http://www.nadb.org/about/origins.asp> [<https://perma.cc/3YXQ-WNJT>].

14. For a recent review of the argument for and against free trade as currently managed, see generally Meyer, *supra* note 7.

15. See generally FRANK J. GARCIA, *TRADE AND CONSENT: TRADING FREELY IN A GLOBAL MARKET* (forthcoming 2018). For an earlier treatment, see FRANK J. GARCIA, *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES 205–72* (2013) [hereinafter GARCIA, *THREE TAKES*] (discussing trade's consensual nature).

16. Cf. David H. Autor et al., *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 205 (2016) (“Alongside the heralded consumer benefits of expanded trade are substantial adjustment costs and distributional consequences. These impacts are most visible in the local labor markets in which the industries exposed to foreign competition are concentrated. Adjustment in local labor markets is remarkably slow, with wages and labor-force participation rates remaining depressed and unemployment rates remaining elevated . . .”).

17. *Id.* at 229–34.

izens—which would make free trade politically sustainable—requires including in trade law itself measures to address these significant costs.

This principle has deep roots in both philosophy and economics, including arguments for trade liberalization.¹⁸ It ensures that even those who do not perceive themselves to benefit from trade liberalization per se should nevertheless consent to it. In so doing, it protects the incredible benefits that flow from trade liberalization. Nearly fifty-five years ago, at the opening of the Kennedy Round of trade negotiations, our leaders understood trade policy in this way.¹⁹ This Part explores how the social contract of trade has evolved and the subsequent breach of that contract.

A. *The Social Contract of Trade*

A free trade regime forms part of what John Rawls calls the basic structure of a society: a set of institutions, policies, and practices that fundamentally shape the allocation of social resources and the life prospects of a community's members.²⁰ It is a choice toward a set of social arrangements that we hope collectively brings us the benefits of social and economic cooperation. Inherent in that choice, though, is the risk that these arrangements will also bring substantial costs, in the form of lost jobs or lost wages, for particular members of our society. For some, these economic losses may last their lifetimes. The social contract of trade, as we use the term, consists of our obligation toward those workers to hold them free from harm—or more precisely, to ensure they are no worse off than they would have been had we not undertaken a free trade policy.²¹ This obligation has deep roots in both liberal theory and the economic justifications for free trade, which we briefly sketch here.

Within liberalism, Rawls has argued that the choice of basic social structures, such as a health care regime or trade policies, must meet the criteria of “Justice as Fairness.”²² Justice as Fairness does not require equality in terms of the allocation of resources, but only that, to be justified, any inequalities in the allocation of social resources benefit the least advantaged. This is the so-

18. See *infra* Section I.A.

19. See *infra* Part II.

20. JOHN RAWLS, A THEORY OF JUSTICE 7 (1971), see John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36, 46–47 (1993) (linking the trade regime to the social choice for markets, and the need for fair background conditions as part of the basic structure). On the relationship between free trade and Rawls's earlier views in *A Theory of Justice*, see GARCIA, THREE TAKES, *supra* note 15 at 70–95 and sources cited therein.

21. Aaron James calls this “Collective Due Care,” one of the three equitable principles he finds inherent in the collective social practice he calls mutual reliance on markets, or mutual market reliance for short. AARON JAMES, FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR A GLOBAL ECONOMY 17–18 (2012).

22. See RAWLS, *supra* note 20, at 13–17.

called “Difference Principle,”²³ and its application to trade law is obvious and deeply intuitive. Studies—including an influential 2017 joint report from the WTO, the International Monetary Fund (IMF) and the World Bank—increasingly confirm that trade liberalization reallocates resources in an unequal fashion within society.²⁴ Practically speaking, the Difference Principle requires that workers whose life prospects are worsened by the inevitably unequal distributive effects of trade are entitled to social programs that help offset these effects, leaving them at least no worse off than if we had not embarked on a free trade regime at all.

Economists make a related argument. Liberalizing trade, they argue, delivers such enormous benefits to society that trade should not be curtailed in the name of inequality.²⁵ Instead, as Nobel Prize-winning economist Paul Krugman and IMF Chief Economist Maurice Obstfeldt argue, domestic adjustment assistance policies can more efficiently distribute the gains from trade.²⁶ Pairing trade liberalization’s creation of wealth with domestic policies that fairly distribute that wealth ensures that everyone gains from trade. In so doing, such domestic policies can also lock in political support for trade liberalization.

In short, the social contract of trade requires institutions and policies that protect those harmed by trade liberalization. Unfortunately, as our current political moment testifies, such policies are sorely lacking.

B. *Breaking the Social Contract*

Throughout the world today, voters clearly view this social contract of trade as broken. During the 2016 U.S. presidential campaign, a number of

23. Social and economic inequalities are just “only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.” *Id.* at 13–17, 75–80. We are speaking here of the domestic form of the principle (and the early, less technical version), and not the many efforts made since then to formulate an international Difference Principle applicable to translational inequality issues. See, e.g., GARCIA, *THREE TAKES*, *supra* note 15, at 72–81.

24. INT’L MONETARY FUND ET AL., *MAKING TRADE AN ENGINE OF GROWTH FOR ALL: THE CASE FOR TRADE AND FOR POLICIES TO FACILITATE ADJUSTMENT* 4 (2017), https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf [<https://perma.cc/YW5K-XLK8>]; see also ERA DABLA-NORRIS ET AL., *CAUSES AND CONSEQUENCES OF INCOME INEQUALITY: A GLOBAL PERSPECTIVE* (2015), <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf> [<https://perma.cc/BMC2-DEL9>]; François Bourguignon, Comment, *Inequality and Globalization: How the Rich Get Richer as the Poor Catch Up*, FOREIGN AFF., Jan.–Feb. 2016, at 11, 13–14. See generally Frank J. Garcia, *Globalization, Inequality & International Economic Law*, 8 RELIGIONS 78 (2017) (analyzing how international law has influenced inequality within states).

25. JOOST H.B. PAUWELYN ET AL., *INTERNATIONAL TRADE LAW* 25 (3d ed. 2016) (“[O]ne might support [trade] liberalization if one believes that the trading system is an inappropriate way to redistribute the gains from trade.”).

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

polls indicated that opposition to free trade enjoyed significant support in both parties. For instance, a July 2016 poll found that, while most Americans do not feel strongly either way about trade agreements, those that do feel strongly tended to be against free trade by about a three-to-one margin, regardless of party affiliation.²⁷ Similarly, a March 2016 Bloomberg poll asked voters about their views on a number of protectionist policies.²⁸ Two-thirds of respondents said they would prefer an American-owned factory in the United States that created only one thousand jobs to a Chinese-owned factory that created two thousand jobs.²⁹ Fully 82% of respondents said they would be willing to pay more for American-produced goods.³⁰ And 44% of respondents said NAFTA had been bad for the American economy, against only 29% who viewed the agreement as a positive.³¹

These views drove the success, or lack thereof, of presidential candidates. In the Democratic Party, Bernie Sanders's antitrade liberalization stance forced eventual nominee Hillary Clinton to abandon her prior support for the TPP.³² Donald Trump—who won the election by winning states such as Michigan, Ohio, and Pennsylvania that have lost significant numbers of manufacturing jobs³³—campaigns against NAFTA and the TPP, calling them “the worst trade deal in the history of the country” and “a rape of our country,” respectively.³⁴ In March 2016, 67% of Trump supporters and an astonishing 52% of Republicans—traditionally the party in favor of trade liberalization—expressed negative views of trade.³⁵ Similarly, an August 2017 poll found that only 34% of Republicans thought NAFTA was good for

27. Tobias Konitzer et al., *Who Cares About Free Trade? Not Many Americans, It Turns Out*, WASH. POST (Jul. 29, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/29/who-cares-about-free-trade/?utm_term=.bff23582b1f4 [https://perma.cc/Y3AW-LYDB].

28. John McCormick & Terrence Dopp, *Free Trade Opposition Unites Political Parties in Bloomberg Poll*, BLOOMBERG (Mar. 24, 2016, 6:00 AM), <https://www.bloomberg.com/news/articles/2016-03-24/free-trade-opposition-unites-political-parties-in-bloomberg-poll> [https://perma.cc/6V8C-Z7WK].

29. *Id.*

30. *Id.*

31. *Id.*

32. See Evan Halper, *In Big Break with Obama, Hilary Clinton Poised to Oppose Pacific Trade Deal*, L.A. TIMES (Oct. 7, 2015, 3:47 PM), <http://www.latimes.com/nation/politics/la-na-politics-clinton-pacific-trade-20151007-story.html> [https://perma.cc/UU2G-P3GK].

33. Todd Spangler, *The Rust Belt Gave Trump Victory, Now They Want Jobs in Return*, USA TODAY (Jan. 18, 2017, 1:30 PM), <https://www.usatoday.com/story/news/politics/2017/01/18/rust-belt-voters-donald-trump/96670922/> [https://perma.cc/VP3G-6TAN].

34. Elena Holodny, *Trump Signs Executive Order on TPP*, BUS. INSIDER (Jan. 23, 2017, 12:27 PM), <http://www.businessinsider.com/trump-signs-executive-order-on-tpp-2017-1> [https://perma.cc/A6DB-YMA7].

35. Bruce Stokes, *Republicans, Especially Trump Supporters, See Free Trade Deals as Bad for U.S.*, PEW RES. CTR. (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/republicans-especially-trump-supporters-see-free-trade-deals-as-bad-for-u-s/> [https://perma.cc/X578-F8PZ].

the United States, while 65% of Republicans thought Mexico engaged in unfair trade practices.³⁶ This distribution of sentiment is highly significant. Republicans control both houses of the U.S. Congress as well as the White House. Hence, even though polls often show general support for free trade among the general population, the views of Republican voters—especially in electorally decisive states such as Pennsylvania, Michigan, and Ohio—have relatively greater policy influence.

Similar viewpoints have found expression in elections throughout the developed world. Polling conducted after British voters chose to leave the European Union indicated that dissatisfaction with economic integration played a major role. Of those who voted to leave the EU, 49% said they did so primarily because regulations affecting the UK should be written in the UK, rather than Brussels.³⁷ Another 33% supported leaving the EU in order to regain control of the UK's borders.³⁸ No matter how they voted, 47% of all respondents felt the UK would be better off economically outside of the EU.³⁹ All three of these viewpoints embody a rejection of the trade-liberalization project at the center of European integration.

Euroskepticism is also alive and well on the Continent. Following the Brexit vote, Philip Cordery, a member of the French Parliament, remarked that “what happened in the UK at the referendum could have happened [in] almost every other country in the European Union.”⁴⁰ Polls conducted in Austria, France, Germany, Hungary, Italy, the Netherlands, Spain, and Sweden have all found strong support for referenda on leaving the EU.⁴¹ Most recently, in September 2017 the Alternative for Germany party—a Euroskeptic party founded in 2013 that favors reclaiming regulatory authority from Brussels—finished third in the German elections, enough to give it a substantial number of seats in the German Bundestag.⁴² The election marked

36. DINA SMELTZ & KAREN WHISLER, CHI. COUNCIL ON GLOBAL AFF., PRO-TRADE VIEWS ON THE RISE, PARTISAN DIVISIONS ON NAFTA WIDEN 9 (2017), https://www.thechicagocouncil.org/sites/default/files/brief_ccs2017-american-trade-views_170811.pdf [<https://perma.cc/LZ7W-V357>].

37. See Lord Ashcroft, *How the United Kingdom Voted on Thursday . . . and Why*, LORD ASHCROFT POLLS (June 24, 2016), <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/> [<https://perma.cc/RJ5B-5DJS>].

38. *Id.*

39. Lord Ashcroft, *EU Referendum ‘How Did You Vote’ Poll*, LORD ASHCROFT POLLS 174 tbl.35 (June 24, 2016), <http://lordashcroftpolls.com/wp-content/uploads/2016/06/How-the-UK-voted-Full-tables-1.pdf> [<https://perma.cc/H478-YCS3>].

40. ‘Almost All EU States Could Follow UK, Leave Union’—French MP, RT (Sept. 27, 2016, 7:11 AM), <https://www.rt.com/news/360762-french-mp-eu-members-exit/> [<https://perma.cc/8R5Z-NQPK>].

41. See Meyer, *supra* note 7, at 999–1000.

42. Amy Held & Simon Schuetz, *Right-Wing Party Makes Strong Showing in German Elections*, NAT’L PUB. RADIO (Sept. 24, 2017, 3:06 PM), <http://www.npr.org/sections/thetwo->

the first time an “overtly right-wing party [has won] seats in the country’s federal parliament in over half a century.”⁴³

In response to this anti-free trade sentiment, European Commission President Jean-Claude Juncker recently proposed taking investment provisions out of EU trade deals.⁴⁴ Under European rules, national and regional parliaments in the EU must approve investment protections, especially investor-state dispute settlement, while the EU Council can approve trade agreements without, as it were, asking back home.⁴⁵ In 2016, the Parliament of Wallonia (a region of Belgium) nearly prevented the EU from entering a trade agreement with Canada.⁴⁶ Juncker’s proposal aims to strip parliaments of their say over trade deals precisely to remove this threat of a minority veto over trade liberalization. In other words, Juncker believes that resistance to trade agreements in Europe is likely to persist and that, given how EU institutions operate, that resistance jeopardizes efforts at trade liberalization.

II. RESTORING THE POLITICAL CONSENSUS IN FAVOR OF TRADE

It was not always thus. In 1962, the Trade Expansion Act gave birth to modern U.S. trade policy. At the core of the act was a bargain. The president would have the authority to negotiate reductions in trade barriers; in exchange, Congress created a program of Trade Adjustment Assistance (TAA), designed to hold harmless workers in import-competing sectors.⁴⁷ Confidence in this bargain was so high that George Meany, head of the AFL-CIO, enthusiastically endorsed the Trade Expansion Act.⁴⁸ Thus the modern social contract of trade was born.

Benefits under this first-generation TAA were limited to training programs to promote reemployment and some income support during the training period. Eligibility under the Act was also much more limited than

way/2017/09/24/553290413/merkel-victorious-in-germany-s-national-election (on file with the *Michigan Law Review*).

43. Charles Hawley, *Merkel Re-Elected as Right Wing Enters Parliament*, SPIEGEL ONLINE (Sept. 24, 2017, 6:55 PM), <http://www.spiegel.de/international/germany/german-election-merkel-wins-and-afd-wins-seats-in-parliament-a-1169587.html> [https://perma.cc/Y5KZ-VJFF].

44. Hans Von Der Burchard & Jakob Hanke, *Juncker’s Risky Bid to Rescue EU Trade Policy*, POLITICO (Sept. 12, 2017, 9:43 PM), <http://www.politico.eu/article/juncker-trade-sotu-risky-bid-to-rescue-eu-trade-policy/> [https://perma.cc/VG6P-24S7].

45. *Id.*

46. *Id.*

47. President Kennedy made this bargain explicit when he announced the creation of TAA as part of the negotiation mandate for the new Kennedy Round of General Agreement on Tariffs and Trades negotiations. President John F. Kennedy, Special Message to Congress on Foreign Trade Policy (Jan. 25, 1962), <http://www.presidency.ucsb.edu/ws/?pid=8688> [https://perma.cc/5SDZ-SMRK] (explaining that workers should not bear the full brunt alone of trade liberalization policies undertaken for the national good).

48. Ethan Kapstein, *Trade Liberalization and the Politics of Trade Adjustment Assistance*, 137 INT’L LABOUR REV. 501, 507 (1998).

under contemporary TAA programs, and many of the initial applications were denied.⁴⁹ By 1974, when Congress next revisited trade policy, support within organized labor for TAA had cratered, prompting the unions to dismiss TAA as nothing more than “burial insurance.”⁵⁰ In the 1980s, the Reagan Administration proposed abolishing TAA completely and the program lapsed briefly.⁵¹

Since then, the renewal of TAA has been tied to new rounds of trade negotiations. Congress has renewed or extended TAA each time it has granted the president trade-promotion authority or approved a new round of trade agreements, reinforcing the connection between decisions to trade and decisions to compensate at-risk workers, but underscoring its political vulnerability as well.⁵² TAA has become a political football rather than a social contract.

To solve the problems created by the current TAA treatment, we propose two solutions. First, we should reform domestic TAA, a collection of programs in the United States designed to support workers who lose their jobs due to competition from imports.⁵³ Since 1962, TAA—which purports to provide displaced workers with the re-training and relocation necessary to rebuild their lives and their communities⁵⁴—has been the primary vehicle through which we vindicate our responsibility to help those harmed by trade liberalization. Yet despite its critical role, TAA is widely acknowledged to have failed as currently implemented.⁵⁵ TAA should be refashioned to improve the quality of training; the depth and length of assistance; and to ensure the support provided is both responsive to actual economic needs and circumstances and effective in reaching its goals. Second, governments should incorporate an “Economic Development” chapter into trade agreements.⁵⁶ Such a chapter would create international obligations on governments to provide their own citizens with the adjustment assistance and economic opportunity more broadly. To be clear, we are not calling here for the internationalization of U.S.-style TAA. Rather, these international obligations would be flexible, allowing governments to adopt policies appropriate to their national circumstances. But the obligations would also be enforceable.

49. The first application accepted for benefits did not take place until November 1969. *Id.* at 508.

50. *Id.* at 509.

51. J.F. HORNBECK, CONG. RESEARCH SERV., R41922, TRADE ADJUSTMENT ASSISTANCE (TAA) AND ITS ROLE IN U.S. TRADE POLICY 9 (2013), <https://fas.org/sgp/crs/misc/R41922.pdf> [<https://perma.cc/KPX6-J5WT>].

52. *Id.* at 10–12.

53. *See infra* Section II.A.

54. TAA: *About Us*, U.S. DEP'T OF LABOR, <https://www.doleta.gov/tradeact/taa/about-us.cfm> [<https://perma.cc/5B7V-2YSQ>].

55. *See infra* Section II.C; *see also* Meyer, *supra* note 7, at 990.

56. *See infra* Section II.B.

ble through trade agreements' dispute resolution processes. A failure to provide adjustment assistance in at least some form could thus lead to trade sanctions, effectively linking adjustment-assistance policies to the trade liberalization that makes them necessary.⁵⁷

A. Reforming TAA

While the history of TAA demonstrates some efforts toward honoring trade's social contract, the program as currently designed is widely considered a failure.⁵⁸ Moreover, TAA funding in the United States has been fitful, limited, politically manipulated, and miniscule compared to adjustment assistance in other countries.⁵⁹ This is no way to honor a bargain.

The key to a successful TAA program is worker retraining toward sustainable reemployment. Not all trade-displaced workers, of course, will need assistance finding comparable employment. Herein, however, lies the heart of the challenge. The average TAA claimant is older than other unemployed workers, has a narrower employment history and fewer marketable skills, and has worked in an industry unlikely to recover either locally or regionally because of trade-related industrial shifts.⁶⁰ Congress created TAA to help these workers. But because they require more assistance transitioning to new jobs than their more flexible colleagues, they are also the workers our current TAA is especially poorly designed to assist. The key to remedying this state of affairs is through improving the program's design and funding.

57. See Meyer, *supra* note 7, at 1023–26. One of us has also argued that we should eliminate the most egregious asymmetries that come from coercive or exploitative negotiations between states. See GARCIA, *THREE TAKES*, *supra* note 15, at 262–63.

58. For a widely cited study commissioned by the Department of Labor on the effects of the 2002 TAA reforms, see PETER Z. SCHOCHET ET AL., SOC. POLICY RESEARCH ASSOCS., ESTIMATED IMPACTS FOR PARTICIPANTS IN THE TRADE ADJUSTMENT ASSISTANCE (TAA) PROGRAM UNDER THE 2002 AMENDMENTS (2012), https://wdr.doleta.gov/research/fulltext_documents/etaop_2013_10_participant_impact_report.pdf [<https://perma.cc/PX5L-LN2V>]. Criticisms run the gamut from eligibility criteria to the certification process to the nature of the benefits offered and their effectiveness. Reform proposals are similarly varied and include everything from specific program and funding reforms to increased Court of International Trade oversight to transforming the entire program into a broad-based active labor market policy for all displaced workers. See GRANT D. ALDONAS ET AL., FIN. SERVS. FORUM, SUCCEEDING IN THE GLOBAL ECONOMY: A NEW POLICY AGENCY FOR THE AMERICAN WORKER 46–50 (2007), https://financialservicesforum.org/wp-content/uploads/2014/06/20070626_succeeding_global_economy.pdf [<https://perma.cc/Q8B8-HH5X>]; Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT'L L. 797 (2012); Shana Fried, Note, *Strengthening the Role of the U.S. Court of International Trade in Helping Trade-Affected Workers*, 58 RUTGERS L. REV. 747 (2006).

59. See *Active Labour Market Policies: Connecting People with Jobs*, ORGANISATION FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/employment/activation.htm> [<https://perma.cc/SUJ7-2CEN>].

60. SCHOCHET ET AL., *supra* note 58, pt. 1, at 2–3; Park, *supra* note 58.

Current TAA offers support for worker training, including both classroom training and apprenticeship programs.⁶¹ Studies suggest, however, that the program has underperformed in terms of placing workers in new and adequate work.⁶² Data on current TAA effectiveness shows that when state training programs incentivize completion, do a better job of matching workers to jobs, or link classroom with on-the-job training, then TAA skills training improves re-employment chances by as much as eleven percent.⁶³ Further improving these success rates is both possible and cost-effective, but requires increased public investment and more careful program design.⁶⁴ Other member countries of the Organisation for Economic Co-operation and Development (OECD), such as Sweden, Germany, and Switzerland, enjoy higher success rates (in some cases as high as eighty to ninety percent of workers re-employed within a year), reflecting both increased investment in worker retraining as a percentage of GDP and a more effective training and apprenticeship process that better matches training to market needs, rewards early intervention (sometimes before unemployment even occurs), and offers more thorough and effective job counseling.⁶⁵

Relocation support is the second key element to effective reemployment assistance, perhaps even more important than training.⁶⁶ Even the most dynamic economic policy cannot ensure that new job opportunities appear in the same location as those lost. Current law, however, limits job search and relocation allowances to a lump sum of \$1,250.⁶⁷ This is pitifully inadequate for finding new and equivalent work and moving a family in today's economy of rising transportation costs and regional or nationwide job searches.⁶⁸

61. Park, *supra* note 58, at 815–16.

62. JOOYOUN PARK, EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, DOES OCCUPATIONAL TRAINING BY THE TRADE ADJUSTMENT ASSISTANCE PROGRAM REALLY HELP REEMPLOYMENT?: SUCCESS MEASURED AS MATCHING 2 (2011), https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2011-09.pdf [<https://perma.cc/Q3P8-B3N7>] (claiming that 52% of workers who received training did not appear to have found employment in the field of their training); Park, *supra* note 58, at 847–49. One cause appears to be a mismatch between the supply and demand of trainees, and suggests that training categories are poorly chosen. PARK, *supra* note 62, at 1–2.

63. See SCHOCHET ET AL., *supra* note 58, at 4; PARK, *supra* note 62, at 3.

64. Jun Nie & Ethan Struby, *Would Active Labor Market Policies Help Combat High U.S. Unemployment?*, ECON. REV., July–Sept. 2011, at 35 (citing data on positive unemployment effects of increased adjustment investment).

65. These successful cases are being studied widely and are starting to be emulated in other OECD countries. See ORGANISATION FOR ECON. CO-OPERATION & DEV., CONNECTING PEOPLE WITH JOBS: THE LABOUR MARKET, ACTIVATION POLICIES AND DISADVANTAGED WORKERS IN SLOVENIA 116–18 (2016).

66. Nie & Struby, *supra* note 64, at 44–46.

67. Park, *supra* note 58, at 816 n.59.

68. For example, assuming in a best-case scenario that *finding* the job costs nothing, just renting even the smallest ten-foot U-Haul truck for a move from West Virginia (where unemployment is at 4.8%) to Colorado (where unemployment rates are less than half that) blows the

Relocation support to help families successfully find and move to those new jobs should be increased beyond current nominal levels.

In terms of wage support, TAA currently provides 130 weeks, or two-and-a-half years, of enhanced unemployment insurance if workers are in a two-year training program, and limited wage support (\$10,000 toward a \$50,000 cap) for under-reemployed older workers (those over fifty).⁶⁹ But these limits fail to recognize what those workers hit hardest—that is, low-skilled and older workers—actually have to do to remake themselves for a new economy in which automation, not trade, accounts for the bulk of lost jobs, particularly given the poor quality of current TAA job counseling and training programs.

At a minimum, wage-insurance benefit caps should be raised above current levels and broadened out beyond older workers, recognizing what a secure middle-class life costs in the United States today and how difficult it is for workers supporting families at all age groups to find equivalent post-dislocation work.⁷⁰ For example, a middle-aged manufacturing worker formerly supporting his family on \$75,000 a year,⁷¹ who now must take a service-industry job at \$35,000 a year (less than half), can receive some support toward reaching a \$50,000 wage, which is still only two-thirds of his prior salary. Without more public investment, TAA as configured will only ensure more families enter the “working poor” rather than continue in their “pre-trade” middle-class life.

The bottom line is that, properly designed and implemented, active labor market policies such as TAA’s education, training, and relocation support are effective in reducing unemployment rates, are cost-effective in terms of net contributions to GDP, and could have a positive impact in the U.S. la-

budget, costing \$1,238 not including fuel. U-HAUL, <https://www.uhaul.com/Trucks/> [<https://perma.cc/4ZCQ-6MHX>] (search in “Pick Up Location” for “Charleston, WV”; then search in “Drop Off Location” for “Denver, CO”). For the unemployment rates in West Virginia and Colorado, see *Unemployment Rate—Seasonally Adjusted*, GOOGLE PUB. DATA EXPLORER, https://www.google.com/publicdata/explore?ds=z1ebjgpk2654c1_&hl=en [<https://perma.cc/JP2D-UDCG>].

69. Park, *supra* note 58, at 815–16 n.57.

70. The median U.S. income is approaching \$60,000 a year, and survey data suggests this closely tracks what U.S. consumers feel is necessary for a “living wage” for middle class families today, and even this would not be enough in many parts of the United States. See Libby Kane & Andy Kiersz, *How Much You Have to Earn to Be Considered Middle Class in Every US State*, BUS. INSIDER (Apr. 2, 2015, 1:06 PM), <http://www.businessinsider.com/middle-class-in-every-us-state-2015-4> [<https://perma.cc/3C4C-2MXX>]; Aimee Picchi, *How Much Money Do U.S. Families Need to Get By?*, CBS NEWS (Aug. 26, 2015, 5:00 AM), <https://www.cbsnews.com/news/how-much-money-do-us-families-need-to-get-by/> [<https://perma.cc/5LG2-YNQ8>].

71. This figure represents the median salary for a middle-class manufacturing job for a middle-aged worker. See Patrick Gillespie, *\$75 a Day vs. \$75,000 a Year: How We Lost Jobs to Mexico*, CNN (Mar. 31, 2016, 9:46 AM), <http://money.cnn.com/2016/03/31/news/economy/mexico-us-globalization-wage-gap/index.html> [<https://perma.cc/2YAC-B3HK>].

bor market.⁷² All of this takes money, however, and here we find TAA's most spectacular failure.

Overall, there has been no effort to link funding levels to data on levels of demand or need for the program.⁷³ As a result, TAA funding has consistently been set too low for program needs and has fluctuated because of political trends rather than political commitments. For example, the most recent TAA reauthorization was in 2015, extending TAA through 2021 and capping the annual funding at \$450 million, a *reduction* from the amounts authorized in 2009 and 2011.⁷⁴

In comparative terms, the United States is consistently near the bottom of all OECD countries in terms of adjustment spending, reflecting the fact that the United States is also near the bottom of all OECD states in overall labor-market policy spending and in the relative percentage of that spending devoted to active labor-market policies, the most effective component.⁷⁵ Paradoxically, at a time in which the need has never been greater, the resource allocations diminish. This has repercussions through all areas of program design and implementation, since an effective TAA program requires meaningful public investment. We shall return to this theme in Part III.

B. *Internationalizing Adjustment Assistance*

Obtaining sufficient adjustment assistance faces another impediment. Unlike the trade-liberalization policies that make TAA necessary, free trade agreements do not require governments to adopt any adjustment assistance policies. Consequently, international trade law pressures states to liberalize their economies without providing any similar pressure to provide the adjustment assistance that makes trade liberalization politically sustainable. To correct this deficiency, governments should enshrine adjustment assistance commitments directly in their trade agreements. This could be done in the form of an "Economic Development" chapter within trade agreements. Such a chapter would not internationalize U.S.-style TAA programs. Instead, it would create a general, binding, and flexible obligation for nations to invest some of the gains from trade in policies that create economic opportunity for

72. Nie & Struby, *supra* note 64, at 43, 48, 51–54.

73. Park, *supra* note 58, at 847–48.

74. Meyer, *supra* note 7, at 1010–11; U.S. DEP'T OF LABOR, SIDE-BY-SIDE COMPARISON OF TAA PROGRAM BENEFITS UNDER THE 2002 PROGRAM, 2009 PROGRAM, 2011 PROGRAM, AND 2015 PROGRAM 2 (Nov. 9, 2015), <https://www.doleta.gov/tradeact/pdf/side-by-side.pdf> [<https://perma.cc/3YA8-MNVA>].

75. Nie & Struby, *supra* note 64, at 41 (demonstrating that the United States is third from the bottom of twenty-one OECD countries studied); *Active Labour Market Policies*, *supra* note 59 (demonstrating that the United States currently ranks second from the bottom among the thirty-five OECD countries in its level of TAA as a percentage of GDP, ahead of only Mexico).

those left behind by trade liberalization. More specifically, an Economic Development chapter would have two key features.⁷⁶

First, it would require states to spend a certain amount of money on programs designed to assist those hurt by trade liberalization. This amount should be established against a baseline amount of spending, such that governments commit to spending “new money.” This requirement would ensure that governments do not simply count programs that already exist but would instead make a meaningful commitment to provide additional assistance. The spending requirements should be indexed so that they rise and fall with the degree of economic harm suffered as a result of trade liberalization. Amending trade agreements is difficult, so this indexing—which could be done in a number of different ways—ensures that the Economic Development chapter continues to require financial assistance when it is necessary. Equally important, if the gains from trade are distributed in a way that does, in fact, create net benefits for all, the indexing would ensure that the obligation to provide assistance naturally sunsets.

Second, the Economic Development chapter would provide significant flexibility to states in terms of the kinds of programs that would qualify. Domestic TAA programs would, for instance, certainly count. But greater spending on a general social safety net should also qualify. So too would additional spending on education and investment in infrastructure, two areas in which public investment can most directly create economic opportunity. Indeed, these latter two priorities are already reflected in a “development” chapter in the TPP.⁷⁷ The Economic Development chapter we call for here uses the TPP’s development chapter, already agreed to by negotiators from twelve countries, as a model, although our proposal expands the existing chapter by requiring the imposition of binding spending commitments.

The benefits of an Economic Development chapter would be several. Most importantly, an Economic Development chapter would provide an international enforcement mechanism that would help ensure that individual nations honor their commitment to help those harmed by trade liberalization. The development obligations should be subject to the same state-to-state enforcement procedures as the rest of a trade agreement, including existing chapters on labor and environmental standards. As a result, if a nation failed to honor its development obligations, it could be subject to retaliation by other members and the suspension of concessions equal to the level of benefits the government failed to provide.⁷⁸

76. For a greater exposition as to what an Economic Development chapter might look like, see Meyer, *supra* note 7, at 1012–23.

77. Trans-Pacific Partnership Agreement ch. 23, <https://ustr.gov/sites/default/files/TPP-Final-Text-Development.pdf> [<https://perma.cc/AX57-6B89>].

78. See, e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”).

One might reasonably ask why Mexico, for instance, would bring a trade case because the United States failed to implement adjustment assistance provisions that benefit U.S. workers. To be sure, it seems unlikely that nations would bring many cases in order to assist foreign workers. But it isn't impossible to imagine. In 2011, for example, the United States brought a case under the Central American Free Trade Agreement against Guatemala for labor violations that Guatemala committed against its own workers.⁷⁹ That case, and the greater enforcement of labor and environmental rights it represented, reflected part of the political bargain known as the "May 10th Consensus," a 2007 deal between the George W. Bush Administration and Congress that led to the approval of a number of twenty-first century trade agreements.⁸⁰ Enforcement, in other words, could be—and likely will be in future trade agreements—part of the bargain necessary to approve new trade agreements domestically.

States might also view bringing development cases as being in their own self-interest for a number of reasons. A Mexican case against the United States might benefit Mexican Americans, while a similar case by the United States against Mexico might improve working conditions in Mexico and thereby stem illegal immigration into the United States. Trade cases are also often brought on a tit-for-tat basis, with a trade case by country *A* against country *B* prompting a case by country *B* against country *A*. In this context, a nation might bring a development case purely for leverage in negotiations. Despite this cynical motive, though, the case could still lead to higher levels of adjustment assistance.

Beyond enforcement, the Economic Development chapter would create a committee charged with gathering data on communities, regions, and sectors of member states' economies adversely affected by trade. Indeed, the development chapter in the TPP already creates such a committee.⁸¹ Members would also report to the committee the measures they have taken to comply with their development obligations. This softer monitoring effort would resemble the reporting and monitoring mechanisms under human rights treaties. While it would not result in sanctions, it provides information and feedback that nudges states to take greater action.

Contemporary TAA falls short in two ways. It inadequately funds and supports those workers who require it the most. It also faces structural im-

79. In 2017, the panel ruled against the United States. *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR: Final Report of the Panel*, INT'L TRADE ADMIN. (June 14, 2017), [https://www.trade.gov/industry/tas/Guatemala%20-%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20-%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf) [<https://perma.cc/93ER-XZ5W>].

80. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, BIPARTISAN TRADE DEAL 1 (2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf [<https://perma.cc/9EM9-RHDP>].

81. Trans-Pacific Partnership Agreement, *supra* note 77, at art. 23.7.

pediments. Free trade agreements require trade liberalization but not the adjustment assistance that liberalization makes necessary. Mandating expanded adjustment assistance through an Economic Development chapter goes a long way toward addressing these shortcomings.

III. FUNDING THE SOCIAL CONTRACT OF TRADE: A FINANCIAL TRANSACTION TAX IN FREE TRADE AGREEMENTS

But designing better adjustment assistance policies is at best half the challenge. Whether operationalized at the domestic level, the treaty level, or both, we need to guarantee funding for adjustment assistance in a manner consistent with its overall role in the social contract. The history of adjustment assistance demonstrates that even the best policies will fail if not properly funded. We argue that, as a promise from all of us to those most at risk from free trade, free trade agreements themselves should require funding domestic adjustment assistance programs. This can be accomplished by incorporating a financial-transactions tax (FTT) into all new or renegotiated trade agreements, starting with the current NAFTA renegotiations. As we explain below, an FTT with revenue earmarked for adjustment assistance would place entities that benefit tremendously from trade liberalization—major financial institutions—in the role of assisting those who suffer most from the same.⁸²

Such a tax would directly harness the wealth-creating potential of trade agreements and tie funding for adjustment assistance to the financial parties benefitting significantly from the agreements themselves. Equally important, such a tax is politically feasible. The United States is about to undertake a tax overhaul for the first time in thirty years. During debates leading up to the passage of the Tax Cuts and Jobs Act of 2017, a major proposal from the Republican leadership aims to make the trading system fairer through the tax system.⁸³ Moreover, certain features of the bill make it likely that Congress will have to revisit tax policy in the relatively near future, leaving tax reform on the policy agenda for the time being.⁸⁴ At the same time, the United States, Canada, and Mexico are renegotiating NAFTA, presenting a unique opportunity to use the tax system to restore faith in fair trade within North America.

82. For an earlier call to shift TAA funding to a transnational model, see Park, *supra* note 58, at 862, which argues that the TAA should be delivered by transnational worker payments through a global adjustment fund supported by state budgetary contributions. Park's model, however, fails to link TAA support directly to the trade benefits enjoyed by others.

83. TAX REFORM TASK FORCE, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA—TAX (2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [<https://perma.cc/DVR4-FU9B>].

84. David Leonhardt, *The Best Parts of a Dreadful Tax Bill*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/opinion/tax-bill-vote-congress.html?_r=0 (on file with the *Michigan Law Review*) (“[N]o matter which party is in charge, Congress and the White House will have to revisit tax policy in coming years . . .”).

A. *How an FTT Works*

FTT proposals are not new. In 2009, following the Great Recession, the G20 tasked the IMF with examining “the range of options countries have adopted or are considering as to how the financial sector could make a fair and substantial contribution toward paying for any burden associated with government interventions to repair the banking system.”⁸⁵ In response, the IMF produced a 2010 study that surveyed the existing literature on taxing financial activities, including mechanisms such as a “Tobin” tax on currency transactions, an FTT on the sale of securities, and a global resource tax.⁸⁶ More recently, in his magisterial 2014 study *Capital in the Twenty-First Century*, Thomas Piketty offered the most recent comprehensive proposal in the form of a global tax on wealth.⁸⁷

A number of these mechanisms have been adopted or proposed around the globe. For instance, large financial centers such as Hong Kong, Mumbai, and Seoul currently have FTTs in place, collectively raising £12 billion per year.⁸⁸ In Europe, ten EU member countries (Germany, France, Italy, Spain, Austria, Belgium, Greece, Portugal, Slovakia, and Slovenia) have announced

85. IMF, *A Fair and Substantial Contribution by the Financial Sector*, Final Report for the G-20, at 6 (June 2010) (emphasis omitted).

86. IMF Staff, *A Fair and Substantial Contribution by the Financial Sector*, in FINANCIAL SECTOR TAXATION: THE IMF’S REPORT TO THE G-20 AND BACKGROUND MATERIAL 2, 16–17 (Stijn Claessens et al. eds., 2010), <https://www.imf.org/external/np/seminars/eng/2010/paris/pdf/090110.pdf> [<https://perma.cc/L9K2-BDFC>]; Thorton Matheson, *Taxing Financial Transactions: Issues and Evidence*, in FINANCIAL SECTOR TAXATION, *supra*, at 144, 146. The “grandfather” of transnational taxation schemes is the Tobin tax, proposed in 1972 by Nobel Prize-winning economist James Tobin. He proposed an internationally agreed uniform tax on all currency market transactions in order to “throw some sand in the wheels” of global finance, discouraging currency speculation by making short-term financial movements uneconomical. Each government would levy the tax and pay the proceeds toward a global financial body such as the World Bank or IMF, and that the revenue raised would be used as economic and social aid for developing countries. See James Tobin, *A Proposal for International Monetary Reform*, 4 EASTERN ECON. J. 153, 153–59 (1978). See generally CHRISTOPHER L. CULP, COMPASS LEXICON, FINANCIAL TRANSACTION TAXES: BENEFITS AND COSTS (2010), <http://www.rmcsinc.com/articles/FTTCLC.pdf> [<https://perma.cc/5KBY-6YKQ>]; THOMAS W. POGGE, WORLD POVERTY AND HUMAN RIGHTS (2d ed. 2008); Ross P. Buckley, *A Financial Transactions Tax: The One Essential Reform*, 47 INTERECONOMICS 99 (2012); Paula Casal, *Global Taxes on Natural Resources*, 8 J. MORAL PHIL. 307 (2011).

87. See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 515–34 (Arthur Goldhammer trans., 2014).

88. Q&A: *What Is the Tobin Tax on Financial Trading?*, BBC NEWS (Sept. 10, 2013), <http://www.bbc.com/news/business-15552412> [<https://perma.cc/KW7Q-8PML>]. A form of the Tobin Tax was adopted as a means to stabilize these markets in response to high frequency trading. Charles Li, chief executive of Hong Kong’s stock exchange, has said that such a tax “effectively limits high-frequency trading, just like a highway with many toll booths discourages speeding.” Jeremy Grant, *HKEx Reveals ‘Urgent’ Plan to Remain Competitive*, FIN. TIMES (Jul. 28, 2011), <https://www.ft.com/content/326818c2-b935-11e0-b6bb-00144feabd0> [<https://perma.cc/X79K-9CK9>].

plans to implement an FTT to help states recoup some of the losses from the many bailouts within Europe.⁸⁹ Members of the U.S. Congress—including Senator Bernie Sanders, whose views on international trade closely resemble President Trump's—have repeatedly proposed and introduced legislation to implement an FTT in recent years.⁹⁰

In general, these FTTs are small taxes of 0.01% to 0.1% on different kinds of financial activities. For instance, the proposals in both the EU and the United States would tax securities transactions.⁹¹ Typically, the tax is imposed on any transaction in which at least one party is located in the taxing jurisdiction.⁹²

A comprehensive review of the extensive literature on FTTs is beyond the scope of this Essay, but the underlying policy rationales are worth noting briefly. First, FTTs make trading slightly more expensive, which has two effects. These higher costs can discourage risk-taking, particularly high-frequency trading that can lead to market volatility.⁹³ Moreover, when imposed at the national level, FTTs also raise the possibility that financial transactions will move offshore to avoid taxation.⁹⁴ After all, capital is highly mobile.

89. Leigh Thomas, *Macron Says European Financial Transaction Tax Must Make Sense*, REUTERS (July 13, 2017, 7:55 AM), <https://www.reuters.com/article/us-france-tax-fft/macron-says-european-financial-transaction-tax-must-make-sense-idUSKBN19Y1B7> [https://perma.cc/82BB-74YE]; see *Europe Rejects UK's Financial Transaction Tax Challenge*, BBC NEWS (Apr. 30, 2014), <http://www.bbc.com/news/business-27218615> [https://perma.cc/M4BU-BXZR]. The European proposal would apply to shares and bonds, and derivatives on shares and bonds, with a proposed tax rate of 0.1% on shares and bonds, and a 0.01% tax rate on derivatives of shares and bonds. European Commission Press Release IP/13/115, *Financial Transaction Tax Under Enhanced Cooperation: Commission Sets Out the Details* (Feb. 14, 2013). The tax is projected to raise more than thirty billion euros by 2020 and possibly up to fifty billion euros if currency transactions are included, and the revenue from the tax would go to the general EU budget. *Id.*; European Commission Press Release IP/12/300, *The Financial Transaction Tax Will Reduce Member States' GNI Contributions to the EU Budget by 50%* (Mar. 23, 2012); see *Taxation Papers: Financial Sector Taxation*, at 12 n.19 (Nov. 25, 2010), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_25_en.pdf [https://perma.cc/TN8X-LQA2].

90. See Will Doran, *Donald Trump Says He and Bernie Sanders Are 'Very Similar' on Trade*, POLITIFACT: N.C. (July 27, 2016, 5:53 PM), <http://www.politifact.com/north-carolina/statements/2016/jul/27/donald-trump/donald-trump-says-he-and-bernie-sanders-are-very-s/> [https://perma.cc/54FQ-VVTK]; see, e.g., S. 1787, 112th Cong. (2011); Jim Zarroli, *How Bernie Sanders' Wall Street Tax Would Work*, NAT'L PUB. RADIO (Feb. 12, 2016, 5:00 AM), <http://www.npr.org/2016/02/12/466465333/sanders-favors-a-speculation-tax-on-big-wall-street-firms-what-is-that> [https://perma.cc/BLK7-SBD8].

91. See S. 1787, 112th Cong. (2011); European Commission Press Release IP/13/115, *supra* note 89.

92. See, e.g., S. 1787, 112th Cong. § 4475(d)(1)(B) (2011).

93. Ross P. Buckley & Gill North, *A Financial Transactions Tax: Inefficient or Needed Systemic Reform?*, 43 GEO. J. INT'L L. 745, 759, 763 (2012).

94. See *id.* at 779.

Second, and most importantly for our purposes, FTTs raise revenue. Usually, policymakers tie the use of this revenue to addressing specific risks created by the financial system or, as noted above, to compensating the public fisc for bailing out the financial sector.⁹⁵ The congressional Joint Committee on Taxation, for instance, estimated a proposed FTT in the United States would have raised \$180 billion between 2015 and 2023.⁹⁶ An FTT tied to free trade agreements could thus raise hundreds of millions or even billions of dollars for adjustment assistance.

B. *Funding Adjustment Assistance Through an FTT*

Our innovation is to use the revenue from an FTT to address a different kind of systemic economic risk: the risk to the global trading system from economic inequality and the resulting political unrest. This risk imperils all who benefit from globalization, from ordinary consumers to the financial companies that reap millions in profits from trading stock. Specifically, we propose that parties to a free trade agreement agree that each party shall impose an incremental tax on specified financial transactions (such as securities, derivatives and currency trades) of anywhere from 0.01% to 0.1% (the rate to be the same in each member state). This is not enough to discourage productive investment transactions, yet it is enough to generate hundreds of millions for adjustment assistance for workers sharing the risks but not getting the benefits of trade's joint venture.

The creation of any tax raises complex economic, political, normative, and technical issues, and we can only sketch the outlines of such a proposal here.⁹⁷ First, the complexity of modern finance requires detailed, careful, yet clear delineation of the scope of any tax on financial transactions. In general, the FTT should be designed to tax wholesale capital-market transactions (stocks, bonds, derivatives, and currency trades) between major financial institutions such as banks, investment firms, insurance companies, pension funds, and hedge funds, and not "retail" transactions such as home mortgages and business loans.⁹⁸ It is important for political as well as normative rea-

95. See Thomas, *supra* note 89; Zarroli, *supra* note 90.

96. CONG. BUDGET OFFICE, OPTIONS FOR REDUCING THE DEFICIT: 2014 TO 2023 172 (2013).

97. For an instructive analysis of some of the technical issues, see *FTT—Collection Methods and Data Requirements* (Oct. 2014), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/other_taxes/financial_sector/ftt_final_report.pdf [<https://perma.cc/BRY8-Z6XE>]. For a quick overview of policy issues and common misconceptions, see Buckley, *supra* note 86.

98. See generally *Proposal for a Council Directive Implementing Enhanced Cooperation in the Area of Financial Transaction Tax*, at 17, 36, COM (2013) 71 final (Feb. 14, 2013) [hereinafter *Proposal for a Council Directive*] (weighing the costs and benefits of taxing various transactions and institutions, and concluding that certain institutions, including refinancing institutions, should not be taxed with an FTT).

sons that the tax not apply to ordinary consumers at the retail level.⁹⁹ For similar reasons, the EU's FTT proposal exempts IPOs, and we do as well, to make it clear that the FTT would have no impact on raising productive capital.¹⁰⁰ The EU proposal, however, has been criticized for excluding currency trades, and we propose including them here.¹⁰¹

Jurisdictionally, taxable transactions could be defined as those between counterparties when at least one counterparty is resident within the free trade area, as the EU does.¹⁰² But in the context of free trade agreements, thought should be given to whether the proposal should require both counterparties to be resident. This would reduce the scope (and yield) of the tax, but could strengthen the normative case in favor of it and minimize some of the externality objections.¹⁰³ Either way, given the flexibility of modern finance, jurisdictional rules must be carefully drawn to avoid circumvention by offshoring. For example, the proposal could require the counterparty to pay the tax appropriate to its residence regardless of the location of the actual trade.¹⁰⁴

Even with such jurisdictional and scope limitations, such a tax could generate considerable revenue toward funding TAA obligations. The EU Commission calculated that its earlier 2011 FTT proposal could generate as much as €57 billion with a tax rate of 0.1% on all wholesale stock and bond transfers and 0.01% on all derivatives trades, with all twenty-seven member states participating.¹⁰⁵ An FTT with the same tax rate and jurisdictional

99. See Len Burman & William G. Gale, *The Pros and Cons of a Consumption Tax*, BROOKINGS (Mar. 3, 2005), <https://www.brookings.edu/on-the-record/the-pros-and-cons-of-a-consumption-tax/> [<https://perma.cc/WA73-KXJJ>].

100. *Proposal for a Council Directive*, *supra* note 98.

101. CARSTEN SIELING, FRIEDRICH-EBERT-STIFTUNG, FINANCIAL TRANSACTIONS TAX: SENSIBLE, FEASIBLE, OVERDUE 3 (2012), <http://library.fes.de/pdf-files/id/ipa/09063.pdf> [<https://perma.cc/HQD5-48TX>]. Tobin's original proposal was specifically aimed at such transactions, for what we consider good reasons. *Id.* at 1.

102. *Proposal for a Council Directive*, *supra* note 98, at 18.

103. Particularly when the FTA zone would include a major financial center such as New York in the case of a U.S. FTA, or the city in the case of an EU or (potentially) UK FTA, it is easy to object that applying the tax when only one counterparty is resident risks an unjustifiably large tax base.

104. This is the EU's approach. *Proposal for a Council Directive*, *supra* note 98. Other issues to be resolved include whether the FTT should include secondary trades of instruments issued within the FTA zone, the so called "residence + issuance" rule in the EU FTT. *Id.* However the jurisdictional questions are ultimately determined, they must also be clear or the tax risks confusion. See *FTT—Collection Methods and Data Requirements*, *supra* note 97, at 14–15 (arguing that the Italian FTT is unclear as to counterparty status, creating inefficiencies).

105. *Commission Proposal for a Council Directive on a Common System of Financial Transaction Tax and Amending Directive 2008/7/EC*, SEC (2011) 1102–03 final (Sept. 28, 2011). This would calculate to a tax yield of 0.3% of total EU nominal GDP for 2011 (€18.3 trillion), using GDP as a proxy for the tax base, although other measures such as total EU volume of wholesale capital market transactions could be more accurate. See, e.g., *European Union GDP, TRADING ECON.*, <https://tradingeconomics.com/european-union/gdp> [<https://perma.cc/3UQW-8FBV>].

structure, if applied in the NAFTA zone today, could yield as much as \$64 billion toward adjustment costs in the NAFTA area.¹⁰⁶ To put this in perspective, the combined annual budget for *all* active labor-market policies, TAA included, among the United States, Canada, and Mexico totaled \$25 billion in 2015.¹⁰⁷ Not only would an FTA-based FTT cover the cost of TAA as currently configured, but it would also allow for the necessary reforms and expansions without burdening the public.

We recognize that other versions of an FTT are possible and might, for various reasons, be politically more feasible. For instance, services such as financial sector services are generally taxed at a lower rate than goods.¹⁰⁸ An increased tax on the provision of financial services generally might help level the playing field between that sector and the manufacturing sector that the Trump Administration has focused on rescuing. Another alternative would be to tax commercial real-estate transactions by foreign or foreign-owned entities. The primary advantage of such a tax is that real estate cannot flee to another jurisdiction.¹⁰⁹ A real-estate transaction tax would also impose a one-time cost on companies acquiring property for foreign operations, a politically advantageous feature that would do little to distort the markets for goods and services produced on such real estate.¹¹⁰

Whatever version of an FTT is imposed, embedding it in a free trade agreement like NAFTA can address the problem of capital mobility. Like any tax, FTTs can cause productive activity to relocate to jurisdictions with lower tax rates. Imposing an identical tax through an international agreement can reduce this incentive. A party could not avoid the tax simply by relocating to another country within the free trade area. Consider, for instance, the example of securities traded on North American stock exchanges. The United States is, of course, home to the world's two largest stock exchanges, the New York Stock Exchange and the NASDAQ.¹¹¹ Canada and Mexico, however, also have significant stock exchanges. The Toronto Stock Exchange is the

106. Assuming the same 0.3% calculation on a 2016 combined NAFTA GDP of \$21.4 trillion. See *Report for Selected Countries and Subjects*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2017/01/weodata/weorept.aspx?sy=2016&key=2016&scsm=1&ssd=1&sort=subject&ds=.&br=1&c=273,156,111&s=NGDPD,PPPGDP,LP&grp=0&a=&pr.x=53&pr.y=13> [https://perma.cc/R94U-J2S8]. Apportionment of these revenues would of course have to be worked out among the FTA participants.

107. *Public Expenditure and Participant Stocks on LMP*, ORGANISATION FOR ECON. CO-OPERATION & DEV., <https://stats.oecd.org/Index.aspx?DataSetCode=LMPEXP#> [https://perma.cc/99WY-HT27].

108. Michael Keen et al., *The Financial Activities Tax*, in FINANCIAL SECTOR TAXATION: THE IMF'S REPORT TO THE G-20 AND BACKGROUND MATERIAL, *supra* note 86, at 122–23 (noting the “under-taxation” of the financial services sector).

109. Matheson, *supra* note 86, at 146.

110. See generally *id.*

111. *List of Stock Exchanges*, STOCKMARKETCLOCK, <https://www.stockmarketclock.com/exchanges> [https://perma.cc/9WNB-KBLE].

third largest in the Americas and ninth largest in the world, while Mexico's largest exchange, Mexbol, is the second largest exchange in Latin America.¹¹² Covering the entire NAFTA region thus ensures a very broad tax base and reduces the risk of capital flight. Expanding the tax in subsequent trade agreements will further reduce the risk of capital flight.

The last issue we address is how the tax revenue generated by an FTT should be allocated among parties to an FTA. One principle, of course, would be to simply allow each country to keep the revenue it generates within its own borders. Under this approach, the primary value of including the FTT in a trade agreement would be (1) to equalize the tax across nations participating in the agreement to reduce capital flight and (2) to use the international agreement to create a credible commitment to devote the resulting revenue to adjustment assistance.

Precedent exists, however, for a more cooperative approach. When NAFTA was created, the United States and Mexico created the North American Development Bank (NADB).¹¹³ The two governments fund the bank through "subscriptions" to shares of the bank's stock.¹¹⁴ The bank, in turn, finances and oversees the implementation of projects "to preserve and enhance environmental conditions and the quality of life of people living along the U.S.-Mexico border."¹¹⁵ Some (or all) of the tax revenue raised through an FTT could be devoted to a development bank with a broader mandate: to finance projects and assistance programs throughout the free trade area. The bank could be directed to expend funds within the region in proportion to criteria tied to the effects of trade.¹¹⁶ For instance, funding could be tied to estimates of job losses in each country stemming from the trade agreement or, perhaps, trade deficits among the parties.¹¹⁷

However implemented and allocated, our FTT proposal represents a breakthrough in trade adjustment financing and, more broadly, in mechanisms to address the social costs and inequality effects of trade. Linking such a tax to transactions within the economic zones that free trade agreements create would directly harness their wealth-creating potential and tie the funding for TAA to financial parties that benefit tremendously from the

112. *See id.*

113. *Origins, supra* note 13.

114. For more information, see *Capitalization, N. AM. DEV. BANK*, <http://www.nadbank.org/about/capitalization.asp> [<https://perma.cc/83WJ-JEER>].

115. *Id.*

116. Such direction could be either formal in the bank's charter, or informal as with the allocation of governance responsibility in many international organizations. See Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and its Critics*, 103 AM. J. INT'L L. 209 (2009).

117. Emphasizing trade deficits might make sense politically, although economists disagree about the significance of bilateral trade deficits. James McBride, *The U.S. Trade Deficit: How Much Does It Matter?*, COUNCIL ON FOREIGN REL. (Oct. 17, 2017), <https://www.cfr.org/background/us-trade-deficit-how-much-does-it-matter> [<https://perma.cc/9ZR2-J4L3>].

agreements themselves. Such a mechanism is rooted directly in the social contract of trade itself, and not more general calls for transnational wealth redistribution, however justified (or not) the latter may be for other reasons.

CONCLUSION

The time has come for a free trade–linked FTT to stabilize and improve adjustment assistance funding. Politically, such an initiative could garner bipartisan support in the United States and perhaps other jurisdictions as well. Supporters of trade liberalization could see businesses again enjoying the benefits of open markets and fairer rules around the world, for only the cost of an invisible increment. Supporters of labor—traditionally Democrats but increasingly Republicans as well—would for the first time see a truly adequate benefits package for workers as a condition of opening markets, but one funded progressively from those financial parties benefitting directly from trade liberalization itself, and not the general public.

Most importantly, workers would feel properly supported, rather than betrayed. If, as the Trump Administration has declared, every decision on trade will be made to benefit American workers and American families, enacting a trade-related FTT should be easy. Increasing our commitment to adjustment assistance programs—and finding a way to fund them appropriately—is a way to fulfill that promise, restore that contract, and deliver true and sustainable long-term economic growth and prosperity for all.