

REINVIGORATING THE WORLD TRADE SYSTEM

D R . B R Y A N S C H W A R T Z *

INTRODUCTION

This paper¹ is designed to discuss the successes of the World Trade Organization (WTO) and the challenges it currently faces, while making some immodest proposals on how to reinvigorate the world trade system. Crossing from one state to the other usually carries with it various hurdles that have to be overcome. The subject of this paper is about the most significant borders we have in the world today—economic borders. You have to have permission to bring your goods and services into a country, you may have to have permission to invest there, you may find that there are taxes for bringing your goods into the country—that is what a tariff is, a tax on imports. We have a world legal regime to deal with this, it used to be called the *General Agreement on Tariffs and Trade* (GATT),² now it is the WTO,³ and my subject is what it has done for us, why it's currently stagnating, and how we can reinvigorate it for the future.

Not too long ago, the Nobel peace prize was given to the European Union. Many people thought that giving the EU the prize was an absurdist and comical act⁴—there was a similar reaction when the United Nations itself

* LL.B. (Queen's), LL.M. (Yale), J.S.D. (Yale). Asper Professor of International Business and Trade Law, University of Manitoba.

¹ This is a refined and annotated version of a keynote address given at the Isaac Pitblado Lectures, November 30, 2012, Winnipeg, Manitoba.

² *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, Can TS 1947 No 25 (entered into force 1 January 1948) [GATT].

³ Jan Wouters & Bart De Meester, *The World Trade Organization: A Legal and Institutional Analysis* (Antwerp: Intersentia, 2007) at 10-13.

⁴ Luke Baker & Balazs Koranyi, "EU rebuffs critics as it accepts Nobel peace prize", *Reuters* (10 December 2012) online: Reuters <<http://www.reuters.com/article/2012/12/10/us-nobel-eu-idUSBRE8B906M20121210>>.

was given the Nobel peace prize.⁵ If we were looking for a candidate for the Nobel Peace Prize we could quite seriously put forward the World Trade Organization. This also sounds like a comical proposition. The WTO? That is about the soulless materialist exchange of economic items. The language in which it formulates its treaties is not high-sounding rhetoric about human freedom and betterment, it is more about countervailing tariffs and subsidies, and it seems difficult to imagine that this is about anything other than business and money.⁶

HISTORY / BACKGROUND ON THE WTO SYSTEM

In fact, the WTO was founded at the end of the Second World War, partly to promote prosperity, but not only to promote prosperity. It was recognized that one of the causes of the Second World War was a downward spiral of protectionism.⁷ Protectionism means you put up barriers of entry to goods and services in your own country in the hope that it will create more employment within your own borders. Even unilateral protectionism tends to be bad for an economy.⁸ But if you have every country doing that, and you have a cycle of retaliatory protectionism, and countries are putting up more and more barriers against each other, you make the world poorer and poorer. This was disastrously proved during the 1930s, when the depression was made much worse by measures such as the *Smoot-Hawley Act*, the American protectionist barriers that were erected.⁹ But this downward spiral went beyond standards of living—it tended to generate social unrest. It created an environment in which nationalism and xenophobia could rise. This made for demagogic dictators who were able to exploit that and take power, as they did

⁵ Jay Nordlinger, *Peace, They Say: A History of the Nobel Peace Prize, the most Famous and Controversial Prize in the World* (New York: Encounter Books, 2012) at 339-344.

⁶ Thomas Cottier, "A Two-Tier Approach to WTO Decision-Making" in Debra P Steger, ed, *Redesigning the World Trade Organization for the Twenty-first Century* (Ottawa: International Development Research Centre and Centre for International Governance Intervention, 2009) at 45.

⁷ Debra P Steger, *Peace Through Trade: Building the World Trade Organization* (London: Cameron May International Law & Policy, 2004) at 15-16.

⁸ Jagdish Bhagwati, *Protectionism* (London: The MIT Press, 1988) at 25-31, 36 [Bhagwati, *Protectionism*]; OECD Trade, *Protectionism – the case against*, online: OECD <<http://www.oecd.org/trade/protectionism-the-case-against.htm#more>>.

⁹ Wouters, *supra* note 3 at 8.

in places like Germany and Italy.¹⁰ And this environment made it easier for states to turn on each other militarily.¹¹

The erection of a world trade system was not only intended to promote the prosperity that comes from open trade, but also to enhance the peace that comes from economic interdependence.¹² If you are doing business with another country you are less likely to go to war with it—you have a stake in its prosperity.¹³ If you do business with another country you get to know the people as human beings. You have reasons to get to know its languages and cultures. Increasing economic interdependence leads to more political and diplomatic understanding.¹⁴ In fact, if you look at the drivers of social integration it starts, almost always, with economic integration. Canada was initially created as an economic free trade zone (if you look at the powers of the federal government, it's mostly to police a new economic union);¹⁵ same thing with the European Union; same thing with the United States. The more perfect union was originally a more perfect economic union. It was much later that the United States developed into, for example, a human rights union.¹⁶

ANCILLARY BENEFITS OF THE WTO SYSTEM

Good Governance

The benefits of trade go beyond peace and prosperity, they also promote good governance. All states are regulated internationally in the way that they are able to impose barriers to trade.¹⁷ This limits the ability of government to use trade as an instrument of political favouritism. If you look at the Canadian tariff schedule and ask why there are such high tariffs on

¹⁰ Michael A Heilperin, *Studies in Economic Nationalism* (Geneva, Publications de L'Institution Universitaire de Hautes Etudes Internationales, 1960) at 63-64.

¹¹ Steger, *supra* note 7.

¹² *Ibid* at 16.

¹³ Thomas L Friedman, *The Lexus and the Olive Tree* (New York: Farrar Straus Giroux, 1999) at 196-97; Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law*, 2d ed (Oxford: Hart, 2012) at 20.

¹⁴ Mark J C Crescenzi, *Economic Interdependence and Conflict in World Politics* (Lanham, MD: Lexington Books, 2005) at 9-14, 144 (an opposing view can also be found in this work). Erik Gartzke, Quan Li & Charles Boehmer, "Investing in the Peace: Economic Interdependence and International Conflict" (2001) 55 IO 391 at 391-95; Lester, *supra* note 13 at 16-20.

¹⁵ *Constitution Act of 1867*, 1867 (UK), 30 & 31 Victoria, c 3.

¹⁶ Bryan Schwartz, "Lawyers and the Emerging World Constitution" (2001) 1 *Asper Rev Int'l Bus & Trade L* at 1-2.

¹⁷ Michael Trebilcock, Robert Howse & Antonia Eliason, *The Regulation of International Trade* 4th ed (London: Routledge, 2013) at 28, 39-41.

things like textiles, and lower tariffs on products such as computers, it has everything to do with the power of their lobby groups, not the underlying social justice of the policy being pursued.¹⁸ To say that countries must reduce their barriers to trade, to say that they must treat their trading partners equally, to say that they must be open and transparent in the way that they administer trade laws, promotes the cause of good governance.¹⁹ The quality of governance in our own country has been greatly enhanced because international trade agreements apply to government procurement.²⁰ A significant portion of the economy is based on how the government itself buys and sells services.²¹ In the United States, for example, a huge part of the economy is national defence purchasing.²²

International agreements require that governments buy their own supplies in a way that is transparent and subject to appeal and review.²³ Canada traditionally has had a culture in which government procurement was an instrument of government favouritism and pork barrelling,²⁴ and that has actually been reduced by the fact that we now have to abide by the norms contained in trade agreements.²⁵

¹⁸ Bhagwati, *Protectionism*, *supra* note 8 at 43-44, 58-59; Kishore Gawande, Pravin Krishna & Marcelo Olarreaga, "Lobbying Competition Over Trade Policy", (2005) Working Paper 11371 NBER at 1-4.

¹⁹ Daniel C Esty, "Good Governance at the World Trade Organization: Building a Foundation of Administrative Law" (2007) 10 JIEL 509.

²⁰ *Agreement on Government Procurement*, 15 April 1994, Marrakesh Agreement Establishing the WTO (entered into force 1 January 1996) [GPA]. The GPA imposes obligations on member states' government entities when awarding contracts. For example, article 3 of the GPA reinforces "national treatment" rules by obliging government entities to treat foreign products, services and suppliers "no less favourable than that accorded to domestic products, services and suppliers." The GPA also, *inter alia*, regulates the way in which technical specifications are formulated, and the way in which contracts are submitted, received, opened and awarded. Government entities are also required to publish a notice outlining certain pieces of information after a contract has been awarded. In order to ensure that government entities do not breach the GPA, article 20 provides a framework for challenging a procurement decision of a government entity.

²¹ James Bagnall, "The biggest game in town: Inside the government's \$25 billion spending machine", *The Ottawa Citizen* (3 December 2010), online: *Ottawa Citizen* <<http://www.ottawacitizen.com/life/biggest+game+town/3919245/story.html>>.

²² The White House, Office of Management and Budget, *Table 3.2—Outlays by Function and Subfunction: 1962–2018* (Washington: U.S. Government Printing Office, 2013). Total National Defense spending for 2012 is \$687 billion, equivalent to 4.4% of total GDP.

²³ GPA, *supra* note 20.

²⁴ Jeffrey Simpson, *Spoils of Power* (Toronto: Collins, 1988); SJR Noel, "From Parties to Symbols and Entourages: The Changing Use of Political Patronage in Canada" in Alain G Gagnon & A Brian Tanguay, eds, *Democracy with Justice: Essays in Honour of Khayyam Zev Paltiel* (Ottawa: Carleton University Press, 1992) at 197.

²⁵ See e.g. Rosslyn Young, "Trade Treaty Tsunami: New Compliance Challenges for Government Procurement", *Summit Magazine* (2011) 14 (May 2011) 20; Paul Emanuelli, *Government Procurement*, 3d ed

Social Justice / Less Poverty

So this web of global trade agreements has done plenty of good for the world. The rise in prosperity has helped not only the rich countries; they have helped numerous countries that were undeveloped to join the rich countries club, for example Korea and Mexico.²⁶ And, not only has this web of trade agreements allowed poor countries to move up into the ranks of rich countries, it has also allowed poor citizens to move up socio-economic classes in their own societies. Global trade agreements have helped increase social mobility within countries by providing more places, and people, to trade with. In many countries, especially protectionist countries, there can be a tremendous amount of wealth and power concentrated in a bureaucratic, business, and political elite who support each other. This can make it much more difficult for others to thrive. If external trade is liberalized, this opens up new markets allowing a person to completely bypass these obstacles.²⁷

Freedom and Morality

There is an underlying argument to open trade that tends to be spoken of little. This is a moral argument that is not articulated as often as it should be, and it has to do with borders. What are the borders that each of us face in our society? The borders of your city? Your province? Your country? Or are we citizens of the world?

Now people involved with the moving classes, such as myself, being a lawyer, we are used to the fact that you can read something that has been written by another academic anywhere in the world, and you can publish your materials, post them on the internet, and you can get your ideas across. That is a rather noble sounding concept. People involved in international civil society advocating for social justice are used to the idea that they can go to

(Markham, ON: LexisNexis Canada, 2012) at 10-16. For a brief overview of the Canadian International Trade Tribunal (CITT) and its role in reducing patronage see [Emanuelli] at 23-25.

²⁶ Jagdish Bhagwati, *In Defense of Globalization* (New York: Oxford University Press, 2004) at 62-64. For an opposing view of the effects of the WTO on developing countries see Martin Khor, *Rethinking Globalization and Policy Choices* (Halifax: Fernwood Publishing Ltd, 2001).

²⁷ Tomas Larsson, *The Race to the Top: The Real Story of Globalization* (Washington: CATO Institute, 2001). Tomas Larsson explores this theme in his book *Race to the Top*. Larsson relates the thoughts of a woman who he interviewed saying, "In the old, closed society of Thailand, perhaps contacts and nepotism could work reasonably well. But not in today's global economy. Sumalee is anxious to convey the right values to children, teaching them that it is hard work and individual achievement that count."

international conferences and can use their e-mail systems to agitate for social betterment. You are used to the fact that you are a global citizen.

What if your world is selling scrap metal? It is an integral part of your life. That is your business, and it is how you spend your waking hours...that is the way you provide for your family. You exercise your intellectual skills, you have a chance to be brave, you invest. You find out how you are as an employer. That is your world. In an open trade world, you extend globally. In a protectionist world, your world could be as small as Canada. In fact, within Canada we have had to reduce barriers to trade with a series of interprovincial free trade agreements.²⁸ For many people the borders of their world used to be the borders of their province. If we believe in freedom, then economic freedom is no small part of it. It may not be as fundamental as freedom of speech or freedom of conscience. But by no means does that render it insignificant.

In an episode in the movie *The Graduate*,²⁹ where Benjamin is confronted by an older contemporary of his parents who says, “Ben, I want to say one word to you—just one word...plastics.” We are supposed to think that this is somehow indicative of the crassness of the material world. Well what if you got into plastics and your manufacturer was making plastic toys? Your Barbie dolls could become the centre of the lives of little people. What if you were the person who innovated and produced the first plastic catheters and plastic scalpels that produce medical benefits? Or you produced the plastics that are used in iPads and iPods that connect people all over the world? Again, for the intellectual classes, it can be easy to underestimate the ways in which engaging in economic freedom provides people with an arena to be creative and express themselves. These are some of the most important dimensions of human existence.

SUMMING UP THE BENEFITS OF GLOBAL FREE TRADE

The world trade system has been a major success.³⁰ It has expanded—it used to only deal with trade in goods, now it deals with trade in services as a

²⁸ Canada, Industry Canada, *Agreement on Internal Trade*, (Ottawa: Industry Canada, 2012), online: Industry Canada <<http://www.ic.gc.ca>>.

²⁹ “The Graduate” (Movie) DEG Sale Company, BV (PWH), USA RE0000703052 (3 March 1995).

³⁰ UK, Department for Business, Innovation and Skills, *World trade and the Doha round: final report of the High-Level Trade Experts Group* by Jagdish Bhagwati & Peter Sutherland et al (2010) at 14-15, online: Government of the UK Publications <<https://www.gov.uk/government/publications>> [Bhagwati].

result of the 1994 Uruguay round.³¹ The world trade system has broadened. It started with a few dozen countries and now the overwhelming majority of states belong to it.³² It was unimaginable 30 years ago that China would join the WTO, whose official philosophy is open trade, and yet it has. Russia is joining. Most of the world has joined.

INTRODUCING THE PROBLEM – DOHA IS STUCK

For all the philosophical differences among states, there is a remarkable consensus that promoting open trade and increasing the levels of open trade in the world betters—in the long run—the general conditions of humanity.³³ But now, this system is getting stuck. The current round of negotiations—the next round to improve and expand the system—has been going on for many years without making any progress.³⁴

It is rather like the dead parrot scene in Monty Python.³⁵ Some are declaring it non-existent; others are saying that it is merely pining for the fjords. But the bottom line is that this round of negotiations appears to be nowhere near reaching a conclusion. There are a number of reasons for that. There is no ability in international law to make somebody sign something; there is no majority voting rule.³⁶ Obviously with a great number of countries, it becomes harder and harder to achieve consensus.

Issues may be more complex as new technologies and social concerns have arisen. Originally the main issue was tariff barriers.³⁷ Nowadays the biggest issues may be very subtle issues; for example, whether a state is using environmental or health measures as a pretext for economic protectionism.

The scope of the GATT has increased, it now covers topics such as services,³⁸ and that makes negotiations more complex. So this round, for a lot of good reasons, is proving difficult. But perhaps it has not been managed as well as it could have been. In the area of tariff barriers, for example, there is no clean, simple concept driving things. There exists a general move to reduce

³¹ *Ibid* at 4.

³² WTO, *Members and Observers*, WTO (2013), online: World Trade Organization <<http://www.wto.org/>>.

³³ Bhagwati, *supra* note 30 at 13.

³⁴ Richard Baldwin, "The Future of the WTO" in Richard Baldwin & David Vines, *Rethinking Global Economic Governance in Light of the Crisis* (London: Center for Economic Policy Research, 2012) 121 at 121.

³⁵ "Monty Python's flying circus" (Movie), Python (Monty) Pictures, Ltd & Sony Pictures Worldwide Acquisitions, Inc, USA V3604D987 (16 March 2009).

³⁶ Bhagwati, *supra* note 30 at 45.

³⁷ *Ibid* at 4.

³⁸ *Ibid*.

tariff barriers, but there are many different exceptions. There are exceptions for less-developed countries, but on the other hand these countries include giants like China and India.³⁹ The system is not being driven by clear guiding principles; it has an awful lot of complexity to it. The more exceptions that are created, the more difficult it is to manage it from the purely intellectual negotiating standpoint, and the less compelling the ideas are. If there are a few simple, clear ideas, it is easier to manage the negotiations, for bureaucrats to report up the chain of command, and for populations to support making a deal where something important and valuable is being done.

INTRODUCING THE PROPOSAL – GET BACK TO BASICS

The WTO system is, after all, for all its technical language, founded on some very simple and elegant principles. There are some very simple principles of equality. Each country has to treat every other country in the GATT the same way. Canada has to treat all of its trading partners equally. If there is a 10% tariff on asparagus coming from Chile, there has to be a 10% tariff on asparagus coming from Russia.⁴⁰ Once goods get into the country you have to treat them as well as your most favoured local goods.⁴¹ These are two very powerful equality principles, and the objective is to bring down barriers to the most favourable level possible—so there is a progressive idea to it. There is a very simple idea that through progressive rounds we will negotiate lower and lower trade barriers.⁴² The details may not be clear, but the idea that we are always moving forward to eliminate trade barriers is an incredibly simple, compelling, and clear idea.

The idea that openness and transparency in the administration of barriers (customs, for example) will have to be administered in a fair and open way is another very simple and powerful idea that drives the WTO.⁴³ We have the idea of the rule of law now. As of 1994, there is a binding dispute settlement system.⁴⁴

³⁹ *Ibid* at 31.

⁴⁰ GATT, *supra* note 2.

⁴¹ Bhagwati, *supra* note 30 at 3.

⁴² Lester, *supra* note 13 at 66.

⁴³ *Ibid* at 66-67.

⁴⁴ World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, (Cambridge: Cambridge University Press, 2004)

For all the jargon and off-putting technical language that only maybe diplomats and economists understand—underneath it all there are some very simple, powerful ideas. But the current round is stalled, partly because there has not been the articulation of these simple and powerful ideas, but instead a welter of detail and complexity.

So how can we get things moving again? Here are some of my immodest proposals.

TRADE IN GOODS

The first dimension of trade is trade in goods. That was how the GATT system started, and we have been working at lowering these barriers for well over 50 years. What I would propose is to wrap up whatever we can salvage from the current round, and start another round that would be called the World Free Trade round. There would be a commitment to having a global standard of zero tariff barriers to trade. Is that inconceivable? Way too ambitious? Free trade only exists in limited regional contexts? Actually, it's quite feasible if you look at the direction in only the last 20-30 years. The average tariff barrier that was implemented by states in 1986 was 26.3%, in 2010 it was only 8%.⁴⁵ It's been reduced by 2/3 already. By squeezing the last 8% out of this system, you would actually have achieved world free trade. The average tariff barriers imposed by high income countries of the OECD, the "rich countries club", have gone from 9.5% in 1988 to only 2.8% in 2010.⁴⁶ The developing countries have moved from 30.8% to only 8.1% now.⁴⁷ If you can move that much in the developing countries in 22 years, how difficult would it be to eliminate the last 8%, particularly because this does not have to be done immediately? We can achieve this last reduction over 10 years or 15 years. But why not start now, a new round, where we state a clear, simple, universally enforced objective that we will achieve global free trade within 10 years, 20 years, or whatever is a reasonable length of time.

By having a clear and simple objective, the length of the negotiation itself could be greatly shortened, and time that would otherwise be spent going nowhere negotiating could be used by states to concentrate on taking the incremental steady series of steps necessary to get to zero tariff barriers in, say, 20 years.

⁴⁵ World Trade Organization - Reports, "Tariff Averages", World Trade Organization, online: <<http://tariffanalysis.wto.org/default.aspx>>.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

There is another salutary effect of going to world free trade. We could overcome the problem of the system disintegrating into a series of side deals. The WTO is based on a principle of equality amongst all the parties to the WTO. Everybody in the club is a Most-Favoured Nation (MFN) *vis-à-vis* every other party.⁴⁸ Basically, every country looks out into the world and treats every other country equally. There is a permitted exception which is for free trade agreements.⁴⁹ So Canada and the US have a FTA, we don't have to extend those benefits to, say, Russia. But as the world trade system has stagnated, more countries are putting their energy into negotiating these bilateral and regional⁵⁰ trade agreements.⁵¹ Canada is at the forefront—we will negotiate a free trade agreement with anybody who appears to be a significant trading partner.⁵² We have entered into free trade with the United States and Mexico.⁵³ Right now we are trying to engage in free trade negotiations with the European Union.⁵⁴ We have engaged in negotiations on free trade with the Pacific Rim countries.⁵⁵

⁴⁸ GATT, *supra* note 2, art I. The MFN principle is outlined in article I: "[...]any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

⁴⁹ *Ibid* at art XXIV.

⁵⁰ Technically, the term plurilateral might be more precise because the WTO does not confine free trade exemption to arrangements that are rooted in a defined geographical region. The term "regional" is used here because Canada's multilateral agreements, existing or proposed, are generally labelled with regional names such as North American Free Trade Agreement, Asia-Pacific Economic Conference, Free Trade Area of the Americas, etc.

⁵¹ Susan C Schwab, "After Doha: Why the Negotiations Are Doomed and What We Should Do About it" (2012) 90 Foreign Aff 104 at 113.

⁵² As of June 7, 2013, Canada has FTAs with Panama, Jordan, Columbia, Peru, Iceland, Norway, Switzerland, Liechtenstein, Costa Rica, Chile, Israel, USA and Mexico. Canada has also concluded an FTA with Honduras. Canada is also negotiating FTAs with Bolivia, Ecuador, Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Guatemala, El Salvador, and Nicaragua, Dominican Republic, European Union, India, Japan, South Korea, Morocco, Singapore, Brunei Darussalam, Malaysia, New Zealand, Vietnam and Ukraine. This data can be found at Canada, Foreign Affairs, Trade and Development Canada, *Negotiation and Agreements*, online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca>> [*Trade and Development*].

Canada is also party to the Information Technology Agreement within the WTO which provides for elimination of duties by those WTO parties who choose to participate. There are currently seventy participants representing about 97 percent of trade in information technology products. See World Trade Organization, Information Technology Agreement, online: World Trade Organization <http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm>.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

Canada, a country very much committed to open trade in a great many dimensions, is a country which certainly has the capacity to be a leader in world trade talks, but is currently putting a substantial amount of its diplomatic and political energy into negotiating bilateral and regional free trade agreements. This means the world is not becoming simpler and more efficient in its global trade architecture. The global system becomes less and less important as regional and bilateral agreements become dominant. This has some very negative effects.

If Canada has a free trade deal with the United States, the rest of the world is on the outside looking in, and all these other countries might be losing trade that they used to have with Canada and the United States, this is called trade diversion and it is economically inefficient.⁵⁶ Managing free trade becomes very complicated because there needs to be rules of origin.⁵⁷ There is a computer coming in from the US, but was it actually made somewhere in Taiwan? Mostly in Taiwan? We do not want people using the United States as a way to sneak Taiwanese goods duty free into Canada. Then we have to have complicated rules of origin to determine what percentage of the product needs to be made in the United States, what percentage of the parts need to be made in the United States? These rules of origin can greatly complicate and distort trade.⁵⁸

Another aspect of these agreements has to do with the social justice implications of having a world of bilateral and regional trade agreements. With whom does Canada make trade agreements? United States, Mexico. The EU. The rich countries club. We want to make deals with economic powerhouses in the thriving Pacific Rim. We have a very small number of deals with less developed countries like Panama and Jordan,⁵⁹ but we put most of our energy into making deals with major trading partners, and the folks on the outside looking in are primarily going to be less developed countries. It is the less developed countries that are going to suffer most as the global system stagnates and energy is increasingly put into forming bilateral and regional agreements.⁶⁰ When the Copenhagen Consensus report was produced in 2008, it aimed to make a series of simple, powerful suggestions to improve the human condition. One of the suggestions was lowering trade

⁵⁶ Jagdish Bhagwati, *Termites in the Trading System* (New York: Oxford University Press, 2008) at 49-50.

⁵⁷ *Ibid* at 66-69.

⁵⁸ *Ibid*.

⁵⁹ *Trade and Development*, supra note 52.

⁶⁰ L Alan Winters, "Preferential Trade Agreements: Friend or Foe" in Kyle W Bagwell & Petros C Mavroidis, eds, *Preferential Trade Agreements: A Law and Economic Analysis*) 7 at 11.

barriers because doing so would particularly facilitate economic development in the least developed countries in the world.⁶¹ That has not happened.

GOODS INCLUDES AGRICULTURE

Would a world free trade agreement include agriculture? Agriculture is currently the problem child of free trade negotiations.⁶² Traditionally, agriculture is a sector that is allowed much more protection than is permitted in other sectors.⁶³ Some of the principal victims of this are some of the most desperate people on earth.⁶⁴ There are many third world countries that could enhance their prosperity if they were free to export their agricultural products, but suffer from the fact that there are very serious trade barriers or import limitations maintained by the rich countries.⁶⁵ Consumers in rich countries would benefit from having access to this production.⁶⁶ Producers in the third world would benefit if they could actually raise their standard of living by exporting to rich countries. This—to a very large extent—is not happening.

There is no reason, in principle, to treat agricultural goods any differently than other types of goods. We have, but we have to stop. One argument that is made is the argument about food security.⁶⁷ The argument is we should maintain these tariff barriers so we still have a domestic industry that can produce everything that we need.⁶⁸ That actually does not make any sense. If there is one area that is subject to variability and shortages it is agriculture. If there is a tornado, a bad year, droughts or floods, you may desperately need to import. It makes more sense to have a system of

⁶¹ Copenhagen Consensus Center, Press Release, “Copenhagen Consensus 2004” (28 May 2004), online: Copenhagen Consensus <<http://www.copenhagenconsensus.com>> [Copenhagen].

⁶² William P Avery, “Agriculture and Free Trade” in William P Avery, ed, *World Agriculture and the GATT* (Colorado: Lynne Rienner Publishers, 1993) at 1, 15; Anwarul Hoda & Ashok Gulati, *WTO negotiations on agriculture and developing countries* (Baltimore: The John Hopkins University Press, 2007) at 5.

⁶³ Kym Anderson & Ernesto Valenzuela “Agricultural Policy as a barrier to Global Economic Integration” (revised) in Edward Elgar *International Handbook for Economic Integration at 1***; Christina L Davis, *Food Fights Over Free Trade* (New Jersey: Princeton University Press, 2003) at 4-5.

⁶⁴ Merlinda D Ingco and John D Nash, “What’s at Stake? Developing-Country Interests in the Doha Development Round” in Merlinda D Ingco & John D Nash, eds, *Agriculture and the WTO: Creating a Trading System for Development* (Washington, DC: The International Bank for Reconstruction and Development, 2004) 1 at 2, 4.

⁶⁵ *Ibid* at 7-8.

⁶⁶ *Copenhagen*, *supra* note 61.

⁶⁷ Jimmye S Hillman “Introduction” in Jimmye S. Hillman and Andrew Schmitz, *International Trade Agriculture Theory and Policy* (Colorado: Westview Press, 1979) 3 at 9.

⁶⁸ Fred H Sanderson, “Overview” in Fred H Sanderson, ed, *Agricultural Protectionism in the Industrialized World* (Washington: John Hopkins University Press, 1990) 1 at 4.

interconnections and trade throughout the whole world. You achieve more security by making sure you have access to producers throughout the world, instead of putting up barriers, and then finding out in bad times that you do not have a supply. We in Canada, with our harsh climate and short growing seasons, should appreciate this. We regularly consume an array of agricultural products that are only available by virtue of imports.

If Canada wants to reclaim clean hands and take a leadership role in the global trade system, one of the ways we could do it is to eliminate a particularly problematic part of our own practices—supply management. We have a number of sectors, such as dairy and eggs, where you are only allowed to produce with a permit from the federal government.⁶⁹ The idea is to limit production, and give a secure source of living to the people who own quotas.⁷⁰ Who pays for this? The people who have to buy supply-managed sector products such as milk and eggs.⁷¹ The principal victims of this scheme are the least prosperous people in our society.⁷² You have to pay several times what you should in this country for milk and eggs, staples of life, because of supply management.⁷³ We have a system in which a small number of quota holders—people allowed to produce—hold these expensive quotas, and they are doing well.⁷⁴ They are doing well at the expense of much higher prices for staples across Canadian society. We have tolerated it, perhaps for political reasons; apparently they have a very good lobby.⁷⁵ But the fact of the matter is that the comparable state of Australia moved a number of years ago to eliminate its supply management system.⁷⁶ They have done it in a phased way. They have given the industry time to adapt.⁷⁷ They have fairly compensated the people who owned the quotas. And they are now in a position where consumers benefit, manufacturers benefit (who use dairy products for value-

⁶⁹ Martha Hall Findlay, "Supply Management: Problems, Politics - and Possibilities" (2012) 5:19 School of Public Policy 1 at 5.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at 2.

⁷² Institute for Competitiveness and Prosperity, Press Release, "The poor still pay more: Challenges low income families face in consuming a nutritious diet" (21 Dec 2010), online: Institute for Competitiveness and Prosperity <<http://www.competeprosper.ca/index.php/media/>>.

⁷³ Danielle Goldfarb, Conference Board of Canada, "The Practices, Players, and Pressures Behind Dairy Supply Management" (Ottawa: Conference Board of Canada, 2009) at 12, online: The Conference Board of Canada <<http://www.conferenceboard.ca>>.

⁷⁴ Statistics Canada, *Statistics on Income of Farm Operators*, (Ottawa: Statistics Canada, 2012) at 24, 33-34, online: Statistics Canada <www.statcan.gc.ca>.

⁷⁵ Avery, *supra* note 62 at 6-11; Hoda & Gulati, *supra* note 62 at 2; Davis, *supra* note 63 at 2.

⁷⁶ Findlay, *supra* note 69 at 15-20.

⁷⁷ *Ibid.* at 16, 19.

added purposes), and they are in a much better position now to compete in world trade.⁷⁸ We should not wait until we are pushed. We should move boldly now on our own to eliminate supply management, and not just because it is bad policy. It is bad for consumers and puts us in a bad position to be international competitors. Canada should put its own house in order if it wants to be a leader pushing free trade on the world stage.

We have come a long way since the Second World War on eliminating tariff barriers for goods, and we have made significant progress on eliminating other types of non-tariff barriers to trade. Most of the tariff barriers have already been squeezed out of the system. The time has come to implement world free trade. We may have a different pace for agriculture because we are so far behind. Maybe it's 30 years. The period of time can be negotiated. But the principle should be clear and simple, free trade in all goods, and agriculture in the end treated like all goods. That would be a simple and visionary idea to reinvigorate trade talks. An idea that should be explained and sold, not only on the basis that it increases prosperity, but that it would promote peace and particularly advantage the least advantaged countries in our world.

TRADE IN SERVICES

The second dimension of open trade that is commonly discussed is trade in services. Most of the Canadian economy now consists of the service sector.⁷⁹ Services are things you trade that are not goods. Communications services, transportation services, professional services—this is Canada's service sector.⁸⁰ 1994 marked the first time the world trade system incorporated services into the system.⁸¹ It was done on a bottom up basis. You do not start with the presumption that there is open trade in services, and states can make

⁷⁸ *Ibid* at 18, 20. In her report Martha Hall Findlay notes that dairy is now New Zealand's biggest export earner, with over 95% of dairy produced in New Zealand being exported. Findlay also notes that Australian dairy exports increased by 200% during the period where industry support declined.

⁷⁹ Central Intelligence Agency, *The World Factbook 2013-14* (Washington, DC: CIA, 2013), online: Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/index.html>>. As per a 2012 estimate, the service sector comprises 69.8% of Canada's GDP.

⁸⁰ Statistics Canada, *Gross Domestic Product at basic prices, finance and other selected services*, (Ottawa: StatCan, 28 June 2013).

⁸¹ *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995), being Annex B to the Agreement Establishing the World Trade Organization, 15 April 1994, 33 ILM 1143 (entered into force 1 January 1995) [GATS].

exceptions. It starts in the opposite way.⁸² The WTO defines what constitutes open trade in services, but it only applies if a state sends in a schedule to the WTO that says, “Greetings WTO, we now agree that agricultural services are covered by the WTO system.” So states are invited to keep taking part in rounds of negotiations to keep adding to their schedules various sectors that are now subject to the rules on open trade.⁸³ Each state’s schedules apply to all WTO members. No clear and guiding principles, however, drive the extent to which states lower their levels of protectionism in services in each round of global negotiations. The proliferation of bilateral and regional trade agreements has further complicated matters and diverted attention away from improving the WTO system.⁸⁴

I would suggest we need some very simple guiding principles to make progress at the global level. One idea would be to require that every country across the board has to commit to scheduling half of its services to be covered by international trade norms. So states could say, we’ll open up accounting, we’ll open up advertising, we’ll still have restrictions on lawyering—but one way or another within 20 years you’ve got to get to half of your service sector.⁸⁵ Now I’m not saying that measuring all this will be easy, but we’re lawyers, we know how to overcome problems like that, you could say that the burden lies on the state to show that at least 50% of its service sector is now covered by international open trade.

Another possible solution would involve changing the current scheduling scheme for the GATS. Instead of states gradually scheduling their services to be covered, as they currently do, certain sectors could instead be

⁸² Trade in industry specific services are liberalized only if a state agrees that a particular service would be included under GATS. This is achieved by a country submitting a “schedule” to the WTO. States are invited to participate in subsequent rounds of negotiations “with a view to achieving a progressively higher level of liberalization.” Through these agreements, countries continue to add various sectors that are to be subject to GATS. This process is known as progressive liberalization. *Ibid*, art XIX.

⁸³ GATS, *supra* note 81, art XIX; (Lester), *supra* note 13 at 635-66; Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice*, 3d ed (np: LexisNexis, 2008) at 1560-70.

⁸⁴ Bryan Schwartz et al, *Admitted but Excluded: Enhancing Access to Regulated Occupations for Newcomers to Canada* (Winnipeg: Asper Rev Int’l Bus & Trade L, 2011) at 157. As it stands, the outcome of this process is a cumbersome group of bilateral and regional agreements entered into by different countries at different times. Worse still, these agreements are subject to an array of exceptions rendering the system extremely problematic. As Pascal Lamy, Director-General of the WTO, noted at a conference in 2007: “The complicated maze of different regional trade deals effectively stifles international trade on a large scale as governments, businesses and individuals alike require technical expertise of a multitude of agreements in order to participate.”

⁸⁵ Through such an agreement, a particular state could pick and choose a balanced package of specific sectors to liberalize, so long as the combination of open services reaches 50% within 20 years, or a similar designated timeframe.

presumptively covered from the start.⁸⁶ In other words, the status quo would be reversed in some selected sectors. From there, states could opt out if they choose not to liberalize that particular discipline.

FREE MOVEMENT OF INVESTMENT

The third dimension of world trade law is free movement of investment. If money can go to the areas where it is most likely to produce benefits and profit, we will have the best use of our capital to produce prosperity. The WTO system presently puts very little emphasis on the free movement of investment capital.⁸⁷ It is dealt with in depth in many bilateral and regional trade agreements.⁸⁸ For example, Canada had to revolutionize its approach to foreign investment when it entered into NAFTA.⁸⁹ Should the WTO system have some sort of comprehensive arrangement on investment?

The last time this was tried was in the late 1990s. The proposal was to have a multilateral agreement on investment. It would not have been part of the WTO system, but it would have been a global treaty.⁹⁰ The idea was that if somebody invests in your country you have to treat them according to a basic minimum standard of fairness. You cannot discriminate against them

⁸⁶ Ideal sectors for liberalization would be functional areas with high levels of political cooperation. Accountancy and telecommunications are two examples of disciplines that have seen significant progress in the way of open trade—practical areas such as these are more suited for liberalization as many people around the world are already involved in them. See Daniel Roseman, “Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects Under the GATS” in Aaditya Mittoo & Pierre Sauv , eds, *Domestic Regulation & Service Trade Liberalization* (Washington, DC: World Bank, Oxford University Press, 2003) 83 and Claude Trollet & John Hegarty, “Regulatory Reform and Trade Liberalization in Accountancy Services” in Aaditya Mittoo & Pierre Sauv , eds, *Domestic Regulation & Service Trade Liberalization* (Washington, D.C.: World Bank, Oxford University Press, 2003) 147. Sectors like healthcare are not viable candidates for the opt-out approach as they are fraught with domestic disagreements of a political and philosophical character over the extent to which protectionist measures are justified. For Canada’s schedule under GATS see WTO, *Canada – Draft Consolidated Schedule of Specific Commitments, S/DCS/W/CAN*, online: WTO <<http://tsdb.wto.org/simplesearch.aspx>>. For Canada’s schedule under NAFTA see Part Five of *North American Free Trade Agreement*, Canada, United States, and Mexico, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA].

⁸⁷ Kevin C Kennedy, “A WTO Agreement on Investment: A Solution in Search of a Problem” (2003) 26 U Pa J Int’l Econ L 77 at 96, 101; Andrew Jackson, “The MAI. What Is It!” in Andrew Jackson & Matthew Sanger, eds, *Dismantling Democracy* (Ottawa: Canadian Center for Policy Alternatives, 1998) 6 at 7.

⁸⁸ Ryan J Bubba & Susan Rose-Ackerman, “BITs and bargains: Strategic aspects of bilateral and multilateral regulation of foreign investment” (2007) 27 Int’l Rev L & Econ 291 at 292-293, 295-296; David Henderson, *The MAI Affair: A Story and its Lessons* (London: Royal Institute of International Affairs, 1999) at 14.

⁸⁹ Jackson, *supra* note 87 at 18.

⁹⁰ The OECD endeavoured to create the Multilateral Agreement on Investment. The agreement would be binding on the OECD countries and any country could later accede to its terms. *Ibid* at 7.

vis-à-vis your own investors. And if you expropriate, you have to compensate.⁹¹ The MAI had many more complicated ideas than that, but those were among the key ideas. Ultimately the MAI failed.⁹² Left-wing critics argued that it was just a charter of rights for multinational corporations at the expense of national sovereignty and the flexibility that countries need to regulate big companies.⁹³ The concern that the MAI would be a “charter of rights for transnational corporations” was exacerbated by the fact that it was crafted by the OECD, the “rich countries club,” rather than a more inclusive world organization, such as the WTO.⁹⁴

In the meantime, as with trade in goods and services, if the global system is not getting very far, the energy will get diverted into bilateral and regional agreements. We now have over 2000 BITs in the world, these are Bilateral Investment Treaties.⁹⁵ They tend to make similar statements, although often with intriguingly different variations in the precise words that are chosen. If Canada wanted to put forward a major initiative on establishing a global system on freedom of investment and protection of investment, here is what I would suggest. Instead of all the complicated rules of the MAI, a more modest treaty with all the key elements of the various BITs, with all the countries of the world invited to sign onto this one MAI. The Canadian initiative could incorporate generally accepted developments in the law concerning investor protection in the era since the demise of the MAI. Decisions by international arbitration panels in investor-state cases might, for example, have contributed to a clearer understanding of what constitutes an “expropriation” and alleviate concerns that the concept extends into mere governmental regulation.⁹⁶ At the same time, every state entering into this new agreement would also have to sign into some other ones. Every state that signed into this scaled down, but still useful, treaty would also be required to enter into the OECD’s convention on the elimination of all

⁹¹ David Singh Grewal, “Network Power and Global Standardization: The Controversy Over the Multilateral Agreement on Investment” (2005) 36 *Metaphilosophy* 128 at 129.

⁹² Henderson, *supra* note 88 at ix.

⁹³ Bob White, “What the MAI means for Canadians” in Jackson, *supra* note 87 at 1; Grewal, *supra* note 91 at 131.

⁹⁴ White, *ibid.*

⁹⁵ Henderson, *supra* note 88 at 24.

⁹⁶ *Metalclad Corporation v The United Mexican States*, (2000) No ARB(AF)/97/1 (NAFTA); *Pope & Talbot v The Government of Canada* (2000) (NAFTA); *Methamex v United States of America* (2005) (NAFTA); *Siemens AG v The Argentine Republic* (2007) No ARB/02/8 (ICSID).

forms of corruption,⁹⁷ and they may also be asked to sign onto the OECD's guidelines on corporate social responsibility.⁹⁸ So there would be a comprehensive package that would say we want the world to be one where investment capital can move, and again it is the most impoverished countries in the world that will benefit⁹⁹ (capital will only go there if there are assurances that it will be treated fairly), but we want to make it clear that this is not just about promoting the rights of investors (as much as that may benefit countries ultimately), we want to also make sure that there is a social conscience side to this agreement.¹⁰⁰ As an example, suppose there will be a package deal that includes a multilateral agreement on investment, which again would include some simple and compelling ideas on the protection of investment capital, but would also commit those countries to eliminating corrupt practices by multinationals, and would encourage countries to enter into the OECD's guidelines on corporate social responsibility. What that does is essentially say that there are certain broad principles that companies should follow when doing business in a country—like following the local law and developing the talents of local employees and entrepreneurs—and that there is some sort of mediation process established in case, for instance, people think a Canadian national is not following those principles, they have a place to complain to and a forum in which to discuss the issues.

⁹⁷ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (2011), online: Organization for Economic Co-operation Development <<http://www.oecd.org/bribery>>.

⁹⁸ OECD, *Guidelines for Multinational Enterprises*, (OECD Publishing, 2011), online: Organization for Economic Development <<http://www.oecd.org>>.

⁹⁹ Robert Cooter & Hans Bernd Schaefer, "Academic Scribblers and Defunct Economists", (2010) 60:2 *University of Toronto Law Journal* 467 at 469. To see a conflicting viewpoint on the effects of an MAI on impoverished countries read Martin Khor, "MAI & Developing Countries" in Andrew Jackson & Matthew Sanger, eds, *Dismantling Democracy* Toronto: Canadian Center for Policy Alternatives, 1998) 275.

¹⁰⁰ In addition to signing onto the OECD guidelines on corporate social responsibility, there are other international conventions that could be used as tools to promote the social conscience aspect of this deal. The United Nations has a Global Compact aimed at increasing corporate social responsibility among multi-national corporations. This Compact is voluntarily committed to by the corporations themselves. The Global Compact, however, could be modified to make the states become the participants while utilizing the same ten principles currently in the Global Compact (UN, *Global Compact*, (New York: UN, 2011), online: United Nations Global Compact <http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf>.)

FREE MOVEMENT OF PEOPLE

Philosophical Arguments and Practical Challenges

The fourth area of global free trade to be discussed is free movement of people. Traditionally, this has been by far the most difficult area to make progress at the international level. People are actually much more conflicted about what they think about free movement of people than they are about what they think about free movements of goods and services.¹⁰¹ The columnist Andrew Coyne once penned an article where he said that, in principle, anyone in the world who wants to come to Canada should be able to do so, and it is discrimination not to allow them to come to Canada.¹⁰² We should just have an open world where you can go and live and work anywhere you want. Is this inconceivable? No it is not, the European Union has already established that principle. Anyone in the European Union is free to go work and live anywhere they want in the European Union. But even the European Union, with about 400 million people, is still a fairly small part of the globe.

Whether people would embrace—even in principle—the idea that people should be able to live and work anywhere they want seems to me to be very questionable. At the very least, people would say that even if it is a good idea in principle, in practice, unless immigration is staged, there is going to be a swamping of local cultures and institutions.¹⁰³ People are going to need time to adapt. If people are coming to Canada, we want them to adopt Canadian principles of tolerance and democracy. You might be concerned that people who have not paid into the social safety net—the CPP scheme—are here all of the sudden and require social assistance or other forms of public support. I am not here to try and resolve all the philosophical problems, but simply to acknowledge that we are nowhere near a stage in global development where proposing a global treaty on the free movement of people is feasible, whatever we think about it philosophically.

¹⁰¹ Antoine Pécoud & Paul de Guchteneire, "Introduction: the migration without borders scenario" in Antoine Pécoud & Paul de Guchteneire, eds, *Migration Without Borders: Essays on the Free Movement of People* (Paris, New York; UNESCO, Berghahn Books, 2007).

¹⁰² Andrew Coyne, "Immigrants and our right to decide", Editorial, *The [Montreal] Gazette* (10 January 1998) B5.

¹⁰³ Pécoud, *supra* note 101 at 15-18, 21-22.

Fair Treatment of Migrant Workers

But Canada could make progress in several ways. We could pick one particular area of international mobility that has a humanitarian component to it—for example, fair treatment of guest workers. Many people move around to take jobs in sectors like construction and agriculture which local inhabitants are less inclined to do.¹⁰⁴ They frequently have to enter illegally because there is an attitude that states: “Yes we want you here to provide cheap labour, but we will not actually legitimize or authorize that.” As a consequence, they will be more vulnerable if they are brought in this way rather than as a legal presence.¹⁰⁵ The UN has a treaty on the treatment of guest workers, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*,¹⁰⁶ perhaps that is one area where Canada could move to the forefront. Canada could further review and refine its own policies in this area to make sure they are exemplary, and lead a campaign to greatly increase ratifications of the 1990 United Nations Treaty, which are currently meager. Another alternative would be for Canada to propose a supplemental or replacement treaty in the area that would include

¹⁰⁴ UNESCO International Migration Programme, *United Nations Convention on Migrants' Rights – Information Kit*, (Paris: UNESCO, 2005) at 17-18.

¹⁰⁵ Joseph H Carens, “The Rights of Irregular Migrants” (2008) 22 *Ethics Int Aff* 163.

¹⁰⁶ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, UNTS 2220 at 3, (entered into force 1 July 2003). The Convention’s key concepts include: migrants’ access to decent living and working conditions; migrants’ access to remain connected to their country of origin; the promotion of “sound, equitable, humane and lawful conditions” by participating states for the international migration of workers and their families; undocumented migrants’ entitlement to fundamental human rights regardless of their legal status. It is also worth mentioning that the Convention contains a supervision mechanism to monitor states’ commitment to their obligations. For further insight on the content of the Convention see Antoine Pécoud & Paul de Guchteneire, “Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers’ Rights” (2006) 24 *Windsor YB Access Just* 24 at 246-48. As of August 1, 2013, the convention has been ratified by Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Guyana, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Libya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Niger, Nigeria, Paraguay, Peru, Phillipines, Rwanda, Senegal, Seychelles, Sri Lanka, St. Vincent and the Grenadines, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda, and Uruguay. No single Western immigration country has ratified the convention. To understand why the ratification record of the Convention is extremely low in comparison to other UN treaties, see Pécoud, *Migration* at 252-63. Pécoud and de Guchteneire highlight four major obstacles impeding ratification: content, administrative, financial, and political. For another perspective on the obstacles to ratification, see Martin Ruhs, “The Human Rights of Migrant Workers: Why Do So Few Countries Care?” (2012) 56 *ABS* 1277 at 1281-86.

some fresh ideas¹⁰⁷ and address any reasonable concerns that have stalled the widespread acceptance of the 1990 treaty. A Canadian initial on temporary workers would send a message about its overall commitment to a renewed global trade policy. It would reinforce the idea that open trade is not a plutocratic agenda. Rather, it is one that aims to promote increased opportunities for all, including individuals in low-income societies, to achieve greater freedom and prosperity. Focusing on an area of human mobility, guest workers, which has a special significance to some of the least economically developed countries, and to many vulnerable individuals within those societies, could be an effective signal that Canada is pursuing a global open trade agenda in a humanitarian spirit, rather than only promoting its own material interests as a member of the rich countries club.

¹⁰⁷ In 2009, the House of Commons' Standing Committee on Citizenship and Immigration (SCCI) and the Auditor General made policy recommendations to better enforce the protection of these migrant workers' rights. For the full report see House of Commons, Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers* (May 2009) (Chair: David Tilson), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=&Mode=1&Parl=40&Ses=2&DocId=3866154&File=0>>; House of Commons, Auditor General of Canada, *Fall Report : Chapter 2 - Selecting Foreign Workers Under the Immigration Program, The Temporary Foreign Worker Program* (2009). For Canada's response see Government of Canada, *Government of Canada Response to the Report of the Standing Committee on Citizenship and Immigration: Temporary Foreign Workers and Non-Status Workers*, online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=&Mode=1&Parl=40&Ses=2&DocId=4017803&File=0>>. Arguably, the most compelling of these recommendations would involve replacing the employer-tied work permit with an "open" work permit in the form of a province-specific, sector-specific, or occupation-specific permit. This recommendation enables a worker's right to remain in Canada not to be tied to a single employer who may be exploitative or abusive. The government of Canada has so far been reluctant to move away from employer-tied permits, but perhaps it can adopt a middle ground that links permits to sectors or areas.

Among other international norms that Canada might consider proposing include: clarity and transparency by host states in defining the availability of temporary work permits and their essential features; reasonable efforts by host states to inform temporary workers and employers about their rights and responsibilities; a duty on the part of host states to establish licensing and registration regimes for enterprises that recruit temporary workers; a requirement that host states permit temporary workers to apply for and obtain permanent residence if they have accumulated many years of employment in a particular host state; affirmative duties on the part of host states to monitor and report on the conditions of temporary workers to an international body. See generally Eugénie Dépatie-Pelletier, 2011 Federal Reform: Making the Canadian Migrant Workers Pay if Employer Found Abusive" in Eugénie Dépatie-Pelletier & Khan Rahi, eds, *Mistreatment of Temporary Foreign Workers in Canada: Overcoming Regulatory Barriers on the Ground* (Montreal: Quebec Metropolis Centre - Immigration and Metropolis, 2001) 7 at 8-20. See also Judy Fudge & Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2009) 31 *Comp Lab L & Pol'y J* 101 at 27-42; Delphine Nakache & Paula J Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" (2010) *Study No 5 IRPP* at 21-30; Sarah Zell "Contracting Out Accountability? Third-Party Agents in Temporary Foreign Worker Recruitment to British Columbia" in Eugénie Dépatie-Pelletier & Khan Rahi, eds, *Mistreatment of Temporary Foreign Workers in Canada: Overcoming Regulatory Barriers on the Ground* (Montreal: Quebec Metropolis Centre - Immigration and Metropolis, 2001) 27 at 31-37.

Recognition of Foreign Credentials

Within Canada, there is much more we could do with respect to the free movement of people. We invite all types of people from across the world to come into this country. Or more specifically, we invite all types of highly skilled and trained people from across the world into this country.¹⁰⁸ Our immigration system puts a premium on having advanced education and training.¹⁰⁹ We invite people to come in because we say we do not have enough people to work in some of the most sophisticated professions we have, whether it is in medicine or technology. Then people get here and they discover that their credentials and competencies are not recognized.¹¹⁰ A woman may be a neurosurgeon in Ukraine, but she comes here and they will not recognize her degree or they will not recognize her professional accreditation, and now instead of using her highly advanced skills that very reasonably brought her into this country, she ends up polishing nails at a beauty shop. Not an ignoble profession in and of itself by any means, but a waste of the human capital that has been developed, is needed, and is rare in our society. This is a huge loss to the Canadian economy.¹¹¹ It takes a terrible price from the people who suffer under it. Imagine uprooting yourself from your country of birth, you have not only succeeded and achieved a high station of prosperity and respect in your own society—you are a medical specialist or skilled technologist—and you come to Canada and the professional regulators are telling you, "we do not believe you are competent enough to be admitted to the profession." And maybe you are not a recent graduate, but this is what your life has been in another country.

With a group of students at the University of Manitoba, I recently published a book called *Admitted but Excluded*.¹¹² Admitted in the sense that people get into the country, but excluded in that they are unable to get into the regulated professions. The object of the book was to propose a number of measures that Canada could take to remedy these problems. I will just discuss a few key points of the book here.

¹⁰⁸ Citizenship and Immigration Canada, *Canada – Permanent residents by category, 2008-2012* (Ottawa: CIC, 27 February 2013).

¹⁰⁹ Citizenship and Immigration Canada, *Immigrate – Federal Skilled Workers* (Ottawa: CIC, 3 May 2013).

¹¹⁰ Schwartz, *supra* note 84 at 60.

¹¹¹ *Ibid* at 34. The underuse of immigrants' skills are estimated to amount to a \$15 billion annual economic loss.

¹¹² *Ibid*.

Some people have used human rights law as a vehicle to try and overcome barriers to access in the regulated professions.¹¹³ We think it very important that human rights law be strengthened to include place of training as a prohibited grounds of discrimination.¹¹⁴ But, proving that a ground of discrimination has been a barrier to admission to practice may prove very difficult. Only a few people have succeeded in winning these kinds of complaints, and my experience (and I have represented some of these people) is that what happens in these cases is that working through a human rights case and the complexities of discrimination law takes so long and is so demoralizing to be in a position where your competence is publicly rejected by the regulators that people simply give up.¹¹⁵ They either go into another line of work in Canada, or they just go to another country that is much more appreciative of what these people have to offer.

The second recommendation, and this might be of even more practical importance, would be: All provinces in Canada should pass fair access legislation.¹¹⁶ Ontario and Manitoba, for example, have fair access laws that say that registration practices in the regulated professions must be open and transparent. The problem with the laws that were passed in Manitoba and Ontario is that nobody can actually bring a complaint based on them. They are basically paper tigers.¹¹⁷ Furthermore, they are not well defined. It should be clear that regulated professions should not have barriers to entry that are not substantively justified. Even if the process is fair, we explain the rules and so on, the regulated professions and occupations should only be able to maintain barriers to entry that are substantively justified.¹¹⁸ This is always good for the people already in the profession because they always grandfather themselves. They say, "oh yeah you have got to have another year of training, you have to do this that and the other thing," but they do not apply it to people already in the profession, they just make it harder for newcomers to come in. In some professions or occupations, most of the newcomers, or at least a significant number, are from other countries. So we need fair access legislation that is well defined and legally enforceable.

¹¹³ *Ibid* at 18.

¹¹⁴ *Ibid* at 20-21.

¹¹⁵ *Ibid* at 18.

¹¹⁶ *Ibid* at 33-57.

¹¹⁷ *Ibid* at 45-46.

¹¹⁸ *Ibid* at 38.

In our paper, we also suggest reforms to competition law.¹¹⁹ Federal competition law should apply to regulated professions and occupations that have excessive barriers to entry for newcomers. And the federal government, which does not directly regulate the occupations, should be exercising a leading role by using its competition policy to encourage the provinces to adopt fair access legislation at the provincial level.

There should be reform to the Canadian immigration system so that the points system accurately reflects the value of a potential immigrant's credentials in Canada, rather than being based on some theoretical notion that since you are called a neurosurgeon in your home country you will be able to practice as a neurosurgeon in Canada. The points system should be based in part on how your credentials will be recognized in Canada. We need to make sure people understand what types of obstacles they will face when it comes to using their skills when they arrive here.

These are all measures that Canada could take on its own. Canada is also permitted under the GATS to enter into bilateral or plurilateral agreements whereby states recognize the occupational credentials issued by each other.¹²⁰ Canada should seek more opportunities to do so. The GATS provides that where such arrangements are reached by a state, it must provide adequate opportunities for other states to reach similar agreements.¹²¹ Canada can also incorporate provisions on occupational mobility in the context of the many bilateral and regional free trade agreements it is negotiating.¹²² In the spirit of this proposal, however, Canada is especially urged to play a leading role in liberalizing reforms on occupational mobility that apply on a system-wide basis. The Council on Trade under the GATS has developed a set of guidelines for members to adopt on the licensing of

¹¹⁹ *Ibid* at 59-90.

¹²⁰ Under GATS, Members are provided the opportunity to recognize foreign credentials with certain countries, and that recognition does not necessarily apply to all Members across the board. That said, GATS dictates that the rules agreed upon to govern the mutual recognition between those parties must apply to all Members of the WTO. In other words, "all Members not included in a recognition agreement or given preferential treatment under a Member's domestic regime must be afforded adequate opportunities to either negotiate a similar recognition agreement or to demonstrate that 'education, experience, licenses, or certifications obtained or requirements met in that ... Member's territory should be recognized.'" [GATS], *supra* note 81 art VII; Schwartz, *supra* note 84 at 103-106.

¹²¹ *Ibid.*

¹²² GATS, *supra* note 81, art VI.

accountants.¹²³ Canada could now be active in promoting the development of such disciplines in other occupations.

In the spirit of advancing the global system, rather than focusing on side deals, Canada could play a prominent role in the GATS system in developing disciplines concerning occupational mobility that are global in scope.

CONCLUSION

So those are my immodest proposals for reshaping the world trade system. There is a joke that the most boring conceivable headline in the world is “worthwhile Canadian initiative.” I think the initiatives here would do a tremendous amount to make this world better, but why would Canada be an appropriate country to be at the forefront? Canada has all the clout that comes from being a major economic power...not as big as the EU or the US...but certainly a significant one. From having the diplomatic contacts that come from being a member of the G20 and the G8, and being a participant in a great number of regional FTAs. If Canada, which is currently at the forefront of the world in terms of RTAs, says we have to get the global system going again, that would be a very powerful message to send. Canada has a sophisticated infrastructure in terms of experts and negotiators in the trade law area, and a government that is currently very much committed to the principles of international trade.¹²⁴ This is a historic time for Canada to play a role in promoting free trade throughout the world.

Those are my suggestions for four dimensions which Canada could propose and advocate for, and I hope in the end be a major player in realizing. These are ways in which, by increasing human freedom in the economic arena, we can not only promote the cause of freedom but make this world more peaceful, more fair, and more prosperous.

¹²³ WTO Secretariat, *Guide to the GATS: An Overview of Issues for Further liberalization of Trade in Services* (The Hague: Kluwer Law International, 2001) at 7-37.

¹²⁴ Foreign Affairs, Trade & Development Canada, News Release, “Harper Government Advances Pro-Trade Plan to Open New Markets in 2012” (17 December 2012), online: Foreign Affairs, Trade & Development Canada, <<http://www.international.gc.ca>>; Government of Canada, News Release, “Jobs Growth & Long Term Prosperity: Economic Action Plan 2013” (21 March 2013) online: Budget 2013 <<http://www.budget.gc.ca>>.

