INTERNATIONAL ECONOMIC LAW FOR POST-COVID LATIN AMERICA: AN AGENDA FOR RECOVERY

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INTRODUCTION

Following the COVID-19 pandemic, Latin America has faced some of the most severe challenges of its history. Poverty has increased substantially and, in particular, a sense of disappointment with the democratic process took over the region. People took to the street in massive protests, demanding a deep transformation of an economic system that, after decades of liberalizations and privatizations, had only increased inequalities and failed to deliver on its promise of economic development and social inclusion.[1] Most importantly, the economic consequences of COVID-19 hit the young disproportionally hard – a generation of Latin Americans who were born during the commodity boom of 2003 – 2013, and had witnessed the economic fate of their parents improve slightly, were now seeing their own economic prospects rapidly closing.[2] Not surprisingly, several countries in the region then elected left-wing governments, thus creating a solid block of left-wing administrations in the region (Argentina, Bolivia, Chile, Colombia, Cuba, Honduras, Mexico, Nicaragua, Peru and, possibly, Brazil) that are now in charge of steering out of the crisis in the post-Covid era.[3]

To develop its policies, this new wave of progressive governments has drawn on a long intellectual tradition in the region that advocates a more active role of the state in the economy, often referred to as "structuralism." This approach, developed mainly in the context of the United Nations Economic Commission for Latin America and the Caribbean in the 1950s to the 1970s, was dominant in the region until the 1980s when it

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1. *See* Econ. Comm'n for Lat. Am. and Caribbean, *Social Panorama of Latin America*, at 16 (2019), https://repositorio.cepal.org/bitstream/handle/11362/44989/1/S1901132_en.pdf; *see* Liz Mineo, *From Bad to Worse in Latin America*, HARVARD GAZETTE (July 27, 2021), https://news.harvard.edu/gazette/story/2021/07/how-the-pandemic-has-affected-latin-america/.

2. *See* Mineo, *supra* note 1, at 3.

3. *See* Ernesto Londoño et al., *Leftists Are Ascendant in Latin America as Key Elections Loom*, N.Y. TIMES (Jan. 4, 2022), https://www.nytimes.com/2022/01/04/world/americas/leftists-elections-latin-america.html (explaining that many countries in Latin America, including Chile, Honduras, Colombia, Brazil, Venezuela, Nicaragua, Cuba, Mexico, Argentina, Bolivia, and Peru, have all been slowly changing into left-wing governments due to "economic suffering, widening inequality, and mismanagement of Covid-19.").

was explicitly rejected following the adoption of the Washington Consensus.[4] And now, following social discontent, such an intellectual tradition is having a rebirth, as civil society has given government the mandate to do *something* about the current level of poverty and inequality.[5]

The implementation of such new structuralist policies, though, needs to navigate the disciplines imposed by international economic agreements. After decades of liberalization, most Latin American states are part of a thick network of bilateral, regional, and multilateral economic agreements that provide the background norms to the progressive policies that are demanded in these agreements.[6] In this article, I explore the role of international trade law in this new economic and intellectual context in Latin America, and propose that more could be done to use the flexibilities of regulation to implement progressive polices, particularly with regards to subsidies and to state enterprises. However, in a region such as Latin America, with its long history of dictatorships and caudillos, subsidies and state enterprises could mean an important risk of authoritarianism and crony capitalism, which would undermine trust in democracy even further. To offset this risk, Latin Americans are able to turn to their own tradition of transformative constitutionalism, which for decades has provided a countervailing vocabulary to the excesses of neoliberalism and could now perform the same role in the context of a more interventionist state.

To make that argument, the first section of this article introduces the post-Covid 19 situation in Latin America, emphasizing the social unease and economic challenges faced by the region today. Section two then illustrates this situation in the

4. Cristóbal Kay, *The Latin American Structuralist School*, INTERNATIONAL ENCYCLOPEDIA OF HUMAN GEOGRAPHY 159, 163 (R. Kitchin and N. Thrift ed. 2009).

5. Guillermo R. Matamoros Romero, *The Power of Latin American Structuralism: A Compelling Example*, LAMEROLICA (Aug. 19, 2020), https://lamerolica.wordpress.com/2020/08/19/the-power-of-latin-american-structuralism-a-compelling-example/.

6. *See* Mikio Kuwayama et al., Econ. Comm'n for Lat. Am. and Caribbean, *Bilateralism and Regionalism: Re-Establishing the Primacy of Multilateralism a Latin American and Caribbean Perspective*, at 5 (Dec. 2005), https://repositorio.cepal.org/bitstream/handle/11362/4401/S05998_en.pdf?sequence=1&isAllowed=y.

intellectual context of structuralism – a distinctively Latin American approach to economic development – which has provided a wealth of theoretical resources to post-Covid reformers in the region. The next section then turns to international trade law, exploring how certain flexibilities in the system (particularly with regard to subsidies and state enterprises) could be used to implement a progressive agenda of economic transformation. Section four then considers the democratic risks implicit in an interventionist economic policy in Latin America and suggests that the region's own variant of transformative constitutionalism could provide tools to prevent authoritarianism and abuse. The final section concludes how Latin America's options to implement such a progressive strategy in terms of trade rules might get trapped in the great power competition between China and the U.S. regarding international trade, as subsidies and active state enterprises are precisely the issues in which the West feels threatened by Chinese-style capitalism – thus possibly limiting Latin America's ability to implement its own version of such policies.

II. LATIN AMERICA IN A PERFECT STORM

Latin America had been facing economic problems even before the COVID pandemic. Following the end of a commodities boom that improved the lives of millions in the region and doubled the middle class in Latin America to 200 million people[7], the decade of the 2010s saw a general backtracking of these achievements: by 2019, 72 million Latin Americans were living in extreme poverty[8], while 14 million children and adolescents lacked access to education and basic services.[9] Latin America was already the emerging world's slowest-growing region before the

7. Michael Penfold & Harold Trinkunas, *Prospects for Latin America's Middle Class After the Commodity Boom*, BROOKINGS (Feb. 10, 2015), https://www.brookings.edu/articles/prospects-for-latin-americas-middle-class-after-the-commodity-boom/ (last visited Aug. 21, 2022).

8. *See* Econ. Comm'n for Lat. Am and Caribbean, *supra* note 1, at 17.

9. UNICEF, *Children in Latin America and the Caribbean* (2019), https://www.unicef.org/lac/media/7121/file/PDF%20Cuadr%C3%ADptico%20Ni%C3%B1os,%20ni%C3 %B1as%20y%20adolescente%20en%20ALC%20-%20Panorama%202019.pdf.

pandemic, managing just 0.6% year-on-year increases in GDP on average from 2014 to 2019.[10]

And then, COVID struck. Lockdowns led to a sharp drop in income and, therefore, a contraction in household purchasing power. In Latin America, this effect was particularly important in certain service sectors whose operation requires greater physical contact between people, such as commerce, restaurants, hotels, and services tourism, and leisure activities, which generate the most jobs in the region (53% of the total)[11], and make a significant contribution to GDP in the region.[12]

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10. *Compare World Development Indicators Databank* (2022), https://databank.worldbank.org/reports.aspx?source=2&series=NY.GDP.MKTP.KD.ZG&country=LCN (last visited Sept. 24, 2022 4:37 PM) (indicating that the average GDP growth from 2014 to 2019 is 1.18%), *with* Econ. Comm'n for Lat. Am. and Caribbean, *Preliminary Overview of the Economies of Latin America and the Caribbean* 116 (2019), https://repositorio.cepal.org/bitstream/handle/11362/45001/129/S1901096_en.pdf (indicating that the average GDP growth from 2014 to 2019 is 0.64%, thus creating an average of 0.91% between the two estimates).

11. According to ILO estimates, "commerce, hotels and restaurants" created 24.6% of jobs in Latin America in 2020, while "communal, social and personal services" created another 28.4% in that same year. *Panorama Laboral 2021. América Latina y el Caribe*, INTERNATIONAL LABOR ORGANIZATION 65 (2022) http://www.ilo.org/americas/publicaciones/WCMS_836196/lang—es/index.htm.

12. According to ILO data, in 2020-21, the segments of "commerce", "lodging and restaurants", and "education, health and other services" contributed on average 39.2% of GDP growth in Latin America and the Caribbean where ILO data was available: 35% in Argentina, 34.6% in Brazil ("lodging and restaurants" not available), 52.9% in Chile, 49.4% in Colombia, 20.3% in Costa Rica, 44.9% in Guatemala, 42.9% in Jamaica, 46.4% in Mexico, and 26.9% in Peru. *Id.* at 34. In general, *see* Econ. Comm'n for Lat. Am. and Caribbean, *Economic Survey of Latin America and the Caribbean*, at 16, 27, 46-47 (2020), https://repositorio.cepal.org/bitstream/handle/11362/46071/85/S2000370_en.pdf [hereinafter *Economic Survey*]; Econ. Comm'n for Lat. Am. And Caribbean, *Recovery Measures for the Tourism Sector in Latin America and the Caribbean Present an Opportunity to Promote Sustainability and Resilience*, at 1–2 (July 2020), https://repositorio.cepal.org/bitstream/handle/11362/45767/4/S2000440_en.pdf (confirming important industries such as tourism were greatly restricted by Covid-19 harming Latin American Economies); *see also* Guillermo Beylis et al., *Going Viral Covid 19 and the Accelerated Transformation of Jobs in Latin America and the Caribbean* 4 (2020), https://openknowledge.worldbank.org/bitstream/handle/10986/34413/9781464814488.pdf?sequence=6&isAllowed=y (explaining informal employment involves high-contact); Roxana Maurizio, *Employment and Informality in Latin America and the Caribbean: An Insufficient and Unequal Recovery*, at 3–4, 11, 40 (Sept. 2021), https://www.ilo.org/wcmsp5/groups/public/—-americas/—-ro-lima/—-sro-

Latin American states needed financial resources to acquire medical supplies, vaccines, help industries, and provide direct cash transfers to the poorest citizens, who were in dire need of humanitarian aid. However, Latin American governments did not have resources to implement fiscal plans on a large scale. For example, while the U.S. implemented a fiscal plan equivalent to 19.2% of its GDP in 2020, fiscal packages in Latin America amounted only to 3.5% its GDP.[13] Countries such as Brazil, Chile, and Peru are exceptions, where it is estimated that each of the countries used stimuli of around 10% of its respective GDP, while the rest of the region only managed to implement packages of around 3.1% of its GDP.[14]

Despite this need for funding, the drop in income led to a sharp decline in tax revenue.[15] And, to make matters worse, fiscal risks quickly materialized in sovereign downgrades. Between March and May 2020, the main rating agencies had applied sovereign downgrades to 17 Latin American economies, with nine countries having their ratings downgraded and eight having their outlook cut.[16] Borrowing became initially expensive for states in the region. The emerging market bond index (EMBI) for Latin America increased, from 461 basis points (bps) to more than 750 bps between March and April 2020, which is the most drastic increase the region has seen since the economic crisis from 2008 to 2009.[17] However, once central banks all around the world

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port_of_spain/documents/genericdocument/wcms_819029.pdf (explaining informal employment makes up a majority of employment gains in the region).

13. Adriana Arreaza et al., *La Pandemia del COVID-19 en América Latina: Impactos y Perspectivas*, at 12–13 (2021), https://scioteca.caf.com/bitstream/handle/123456789/1788/La%20Pandemia%20del%20COVID19%20en%20Am%c3%a9rica%20Latina_Impactos%20y%20perspectivas.pdf?sequence=4&isAllowed=y; *see also* Congressional Research Service, *The Covid-19 Related Fiscal Response: Recent Actions and Future Options*, at 2 (Aug. 31, 2021), https://crsreports.congress.gov/product/pdf/IN/IN11734 (placing the amount of fiscal stimulus in the U.S. to be around 19.2%).

14. Arreaza et al., *supra* note 13, at 13.

15. *See* OCED et al., *Revenue Statistics in Latin America and the Caribbean 2022* 148–151 (2022), https://www.oecd-ilibrary.org/deliver/58a2dc35-en-es.pdf?itemId=/content/publication/58a2dc35-en-es&mimeType=pdf.

16. Arreaza et al., *supra* note 13, at 10.

17. *See id.* (confirming the EMBI bps used); *cf. Economic Survey*, *supra* note 12, at 34–35, 53 (demonstrating that the EMBI bps did increase dramatically).

started injecting resources into their respective economies[18], the general cost of borrowing decreased, and Latin America was able to benefit from this trend. In 2020, Latin American countries made the largest debt issuance of its history, reaching USD 65.1 billion, and more than 30% of this amount (USD 19.6 billion) was explicitly directed to finance the response to the pandemic of COVID-19.[19] While access to easy credit had the positive effect of buying time for governments in the region to tackle the most immediate health and humanitarian challenges of the pandemic, it also meant the level of public debt grew to a level never before[20] seen in the region[21]— a debt that had to be paid with tax revenue that was not forthcoming.

This level of domestic expenditures outpaced the region's exports by far, worsening its current deficit in the account balance.[22] In practice, much more hard currency (particularly dollars) was going out than coming into the economy.[23] Currencies in the region devalued massively against the US dollar following the COVID-19 pandemic. In 2021, the Chilean peso's value

18. *See Economic Survey*, *supra* note 12, at 16, 19–20, 31–33 (listing several central banks around the world that have injected resources in their economies); IMF, *Central Bank Support to Financial Markets in the Coronavirus Pandemic* 1, 6, https://www.imf.org/-/media/Files/Publications/covid19-special-notes/en-special-series-on-covid-19-central-bank-support-to-financial-markets-in-the-coronavirus-pandemic.ashx (last accessed Sept. 11, 2022) (confirming all central banks in advanced economies as defined by the IMF and 55 of 81 of the central banks in emerging economies took measures to support their markets).

19. Arreaza et al., *supra* note 13, at 11.

20. Although the current debt level of the region is very comparable to another decade's debt level (1980s), this combined with the largest economic contraction ever sums up to the financial crisis of the region.

21. *See Economic Survey*, *supra* note 12, at 33, 53–54 (offering evidence for easy access to international credit); *see also id.* at 19, 21–22, 81–82 (explaining that the need for expansionary spending to address the humanitarian and social crisis caused by the pandemic have caused a level of debt not seen since 1980s that is by some measures worse).

22. *Cf.* Econ. Comm'n for Lat. Am. and Caribbean, *Financing for Development in the Era of COVID-19 and Beyond*, at 3–4 (Mar. 11, 2021), https://repositorio.cepal.org/bitstream/handle/11362/46711/1/S2100063_en.pdf (explaining how a decline in exports exacerbate a current liquidity crisis that was caused by government expenditures).

23. Alicia Garcia Herrero, Asian Dev. Bank Inst., *Why are Latin American Crises Deeper Than Those in Emerging Asia, Including That of Covid-19?*, at 11–12 (2021), https://www.adb.org/sites/default/files/publication/684711/adbi-wp1221.pdf (describing how much of Latin American countries' money goes toward servicing foreign debt).

crashed down nearly 17% against the dollar. Similarly, the Colombian peso lost 16% of its value against the dollar, while the Peruvian sol weakened more than 9%. Brazil's real suffered its fifth consecutive year of devaluation, losing nearly 7%.[24]

The falling currencies created new problems and compounded others. The debt that Latin American countries acquired as a result of COVID became more expensive, as much of the debt is denominated in dollars.[25] This means a larger portion of tax income, that should have been directed towards efforts of helping either businesses or the poorest overcome the tragic result of COVID, would instead be directed to serving foreign debt.[26] Moreover, the pressure on Latin American currencies had an impact on local prices of imported goods, which triggered, in part, steep inflationary processes in the region.[27]

Most importantly, though, the lack of hard currency left most of Latin America in a position of extreme vulnerability to external shocks - which ultimately came in the form of Russia's invasion of Ukraine. While the invasion's impact on the price of oil and gas had, in principle, a positive impact on the countries in the region that are oil and gas exporters (Venezuela, Brazil, Ecuador, México and Colombia)[28], it affected other countries in the region that are

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24. Michael Stott, *Latin America's Currencies Signal Economic Damage Despite Commodities Boom*, FINANCIAL TIMES (January 17, 2022), https://www.ft.com/content/1784bcdc-63ac-4a70-8a9a-f87a0b4c128c.

25. *See* Garcia Herrero, *supra* note 23, at 12–14 (explaining that the changes the Federal Reserve Bank implemented had a profound debt on the liquidity of foreign debt in Latin America).

26. Econ. Comm'n for Lat. Am. and the Caribbean, *Fiscal Panorama of Latin America and the Caribbean*, at 44–45, 47 (2021), https://repositorio.cepal.org/bitstream/handle/11362/46809/1/S2100169_en.pdf (explaining that restructuring of tax systems and foreign debt relief programs are vital to ensure public health services and promote economic equality in Latin America).

27. Daniel Zaga et al., *Latin America Economic Outlook, June 2022*, DELOITTE INSIGHTS (June 23, 2022), https://www2.deloitte.com/us/ en/insights/economy/americas /latin-america-economic-outlook.html; *see also* Maximiliano Appendino et al., IMF, *Latin America Hit By One Inflationary Shock On Top of Another* (Apr. 15, 2022), https://www.imf.org/en/News/Articles/2022/04/15/cf-latin-america-hit-by-one-inflationary-shock-on-top-of-another (discussing the impact of inflation and commodity prices on the IMF's five main indicator countries for Latin America).

28. Econ. Comm'n for Lat. Am. and Caribbean, *Repercussions in Latin America and the Caribbean of the War in Ukraine: How Should the Region Face This New Crisis?*, at 7–

net importers such as those in Central America, the Caribbean, Chile, and Argentina.[29]

Similarly, the invasion raised the price of commodities, which benefited several states in the region: nickel in Colombia and Guatemala; lithium in Bolivia, Argentina and Chile; copper in Chile and Peru; phosphates in Venezuela, and, of course, grain from Argentina, Brazil, Paraguay, and Uruguay.[30] Yet, these commodity price increases proved to be only marginally relevant as the rising domestic prices of food and gas in the region erased any possible gains that Latin America had obtained from the window of trade opportunity by Russia's invasion. A crucially important problem is the increased price of fertilizers, which Latin America mostly imports.[31] Such a high price contributes to inflation in the region, as the price of food produced for local markets rises, the profits to be derived from exporting commodities are reduced.[32] Moreover, the region has been affected by the rise of fuel prices. For example, Brazil's Petrobras

8 (June 6, 2022), https://www.cepal.org/en/publications/47913-repercussions-latin-america-and-caribbean-war-ukraine-how-should-region-face-new.

29. Zaga et al., *supra* note 27 (concluding that petroleum exporting Latin American countries' economies were not as substantially impacted by the Russian invasion of Ukraine as many other countries worldwide).

30. Econ. Comm'n for Lat. Am. and Caribbean, *Developments in the Prices of Natural Resources for Export in Latin America and the Caribbean* (Apr. 29, 2022), https://www.cepal.org/en/insights/developments-prices-natural-resources-export-latin-america-and-caribbean; *see generally* OBSERVATORY OF ECON. COMPLEXITY, *The Best Place to Explore Trade Data*, http://oec.world (last visited Oct. 9, 2022) (providing data for the export and commodity markets for the referenced countries).

31. Ben van der Merwe, *Weekly Data: War in Ukraine Will Leave Commodity Prices High for Years to Come*, INVESTMENT MONITOR (May 4, 2022), https://www.investmentmonitor.ai/special-focus/ukraine-crisis/war-ukraine-commodity-prices-high-impact (citing WBG, COMMODITY MARKETS OUTLOOK: THE IMPACT OF THE WAR IN UKRAINE ON COMMODITY MARKETS 43 (Apr. 2022), https://openknowledge.worldbank.org/bitstream/handle/10986/37223/CMO-April-2022.pdf (noting that fertilizer prices were projected to increase nearly 70 percent in 2022)).

32. Manuel Rueda, *For Developing Countries, the War in Ukraine Means Even Higher Food Prices*, WORLD (Mar. 10, 2022), https://theworld.org/stories/2022-03-10/developing-countries-war-ukraine-means-even-higher-food-prices (reporting a first-hand account of how increasing food prices have affected local vendors in Colombia); Elizabeth Elkin & Tatiana Freitas, *Fertilizer Crisis Means Higher Prices for Every Plate of Food*, BLOOMBERG (Nov. 12, 2021, 1:45 PM), https://www.bloomberg.com/news/articles/2021-11-03/higher-fertilizer-prices-mean-more-food-inflation (interviewing a Brazilian coffee farmer about the impacts of fertilizer shortages and increasing costs).

announced a sharp increase in fuel prices in 2022 despite the opposition of President Bolsonaro. Bolsonaro wanted to contain Petrobras's fuel prices as he feared a possible punitive effect in the presidential elections.[33] Mexico, in turn, begun implementing a gasoline subsidy program the same year[34], while Colombia was forced to adopt the exact opposite policy and dismantle a fuel price stabilization system that had kept fuel prices artificially low for decades.[35] The implementation of fuel subsidies, which benefit not only the poorest, create even greater restrictions on the ability of states to use resources to benefit those who came out worse off from the pandemic - and, in a textbook Catch-22 situation, states that dismantle such subsidies will only add to inflation.

The end of the commodities boom, COVID-19, and the Russian invasion of Ukraine have created a perfect storm for Latin American economies. Most importantly, this challenge has exacerbated what has been Latin America's perennial challenge - inequality. It would take 11 generations for the descendants of parents in a typical poor Colombian family to reach the country's average income.[36] In Brazil, it would take nine, while it would take six in Argentina and Chile.[37] In contrast, it would take, on average, three and a half generations in OECD countries.[38] Latin America is, in most metrics, the most unequal region in the world: the top 1% of the national income share earned 24.8% of the

33. Carolina Pulice, *Brazil's Petrobas to Announce Fuel Price Increase, Alarming Government*, REUTERS (June 17, 2022, 7:45 PM), https://www.reuters.com /world/americas /brazils-petrobras-announce-fuel-price-increase-alarming-government-2022-06-17/.

34. Maya Averbuch & Carolina Gonzalez, *Mexico Spends $28 Billion in Subsidies to Tame Inflation*, BLOOMBERG (Aug. 2, 2022, 6:19 PM), https://www.bloomberg .com/news/articles/2022-08-02/mexico-spends-28-billion-in-subsidies-to-tame-inflation-spike.

35. Oliver Griffin, *Colombia's Government, Ecopetrol Will Shore up Fuel Price Fund*, REUTERS (June 17, 2022, 5:10 PM), https://www.reuters.com/world/americas/colombias-government-ecopetrol-will-shore-up-fuel-price-fund-2022-06-17/.

36. *Inequality in Latin America is Fuelling a New Wave of Populism*, THE ECONOMIST (Aug. 6, 2022), https://www.economist.com/the-americas/2022/08/06/ inequality-in-latin-america-is-fuelling-a-new-wave-of-populism.

37. *Id.* (showcasing data concerning the number of generations needed for decedents of a low-income person to reach the average income in Brazil, Argentina, and Chile).

38. *Id.* (showcasing data concerning the number of generations needed for decedents of a low-income person to reach the average income for an OECD country).

income in 2021; whereas, the top 1% earns 19% of income in North America and 21.5% of income in Sub Saharan Africa.[39]

The result of this economic context is widespread social unrest. Beginning in 2019, the region saw protests and demonstrations in Argentina, Bolivia, Ecuador, Brazil, Colombia, Chile, and Venezuela – all connected to the dire economic situation.[40] The key to understand these protests, though, is not merely the fact of inequality: for better or for worse, Latin America has been unequal for most of the last century.[41] The key is the frustration of unkept promises, between 2002 and 2012, Latin Americans saw a substantial decline in poverty (from 44% to 26%), and a rise of the middle class, from 22% to 35%.[42] With the end of the commodities boom and, in particular, with COVID-19, the hopes of many whose life had improved in the recent decade were simply shattered.

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39. *Top 1% National Income Share*, WORLD INEQ. DATABASE, https://wid.world/world/#sptinc_p99p100_z/XL;QP;XF/last/eu/k/p/yearly/s/false/9.445/30/angle/false/country (last visited Sep. 8, 2022).

40. *See* Enrique Peñaherrera & David Morales Olalla, *Inequality Triggered Protests Across Latin America. Here's How the Youth Can Help*, WORLD ECON. F. (Jan. 8, 2020), https://www.weforum.org/agenda/2020/01/inequality-triggered-protests-latin-america-2019 (discussing economic protests in Argentina, Bolivia, Chile, Ecuador, and Venezuela); *see also* Joe Daniels, *The Pandemic's Legacy Will Spur New Protests in Latin America*, FOREIGN POL'Y MAG. (July 29, 2021), https://foreignpolicy.com/2021/07/29/pandemic-protests-latin-america-colombia-brazil-chile (discussing economic protests in Chile, Ecuador, and Columbia); *see also* Rachel Pannett, *Thousands of Brazilians Take to Streets, Calling for Bolsonaro to be Impeached*, WASH. POST (Oct. 3, 2021), https://www.washingtonpost.com/world/2021/10/03/brazil-bolsonaro-impeachment-protests-covid (discussing economic protests in Brazil).

41. *See* Alicia Bárcena (Executive Secretary of the United Nations Economic Commission for Latin America and the Caribbean - ECLAC) & Winnie Byanyima, Econ. Comm'n for Lat. Am. and Caribbean, *Latin America is the World's Most Unequal Region. Here's How to Fix It* (Jan. 25, 2016), https://www.cepal.org/en/articulos/2016-america-latina-caribe-es-la-region-mas-desigual-mundo-como-solucionarlo (arguing that extreme inequality has led to loss of social cohesion in Latin America); Verónica Amarante et al., *Inequality in Latin America: A Global Measurement*, 118 REV. ECON. COMM'N FOR LAT. AM. AND CARIBBEAN 1, 26 (April 2016), https://repositorio. cepal.org/bitstream/handle/11362/40423/1/RVI118_Amarante.pdf (highlighting that Latin America has been one of the world's most unequal regions since reliable data could be gathered).

42. Francisco Ferreira & Marta Schoch, *Inequality and Social Unrest in Latin America: The Tocqueville Paradox Revisited*, WORLD BANK BLOGS (Feb. 24, 2020), https://blogs.worldbank.org/developmenttalk/inequality-and-social-unrest-latin-america-tocqueville-paradox-revisited.

This is particularly true of younger Latin Americans, whose expectation of a better living standard (as they had observed, however briefly, in their own parents' life) was not fulfilled. Since COVID-19 hit industries where the young typically find their first job particularly hard, youth unemployment in Latin America is now at 30% on average, a rate that is three times higher than that of adults in the region.[43] And, even among the young people that do find jobs, seven out of ten find them in the informal economy, without access to basic labor protection.[44] As a result, more than 20 million young people in the region are neither working nor studying: a generation informally called the "ni-nis" (*ni trabaja, ni estudia* – neither works nor studies), that took over the streets in protest against a system that was simply not giving them any opportunity.[45]

This deep economic unrest has triggered passionate calls for structural change. Many Latin Americans have voted with their feet. After a decade of declining rates, migration from Latin America to the U.S. is on the rise again, as the number of single adult encounters at the U.S. Southwestern land border has increased significantly[46], with most migrants now coming from

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43. *See* Econ. Comm'n for Lat. Am. and Caribbean & Int'l Lab. Org., *Employment Trends in an Unprecedented Crisis: Policy Challenges, Employment Situation in Latin America and the Caribbean,* No. 23 LC/TS.2020/128, at 37–39 (Nov. 2020), https://repositorio.cepal.org/bitstream/handle/11362/46309/4/S2000600_en.pdf (arguing that COVID-19's impact on economic sectors with high youth employment caused greater increase in youth unemployment than other age groups).

44. *See* Roxana Maurizio, INT'L LAB. ORG., *Technical Note on Employment and Informality in Latin America and the Caribbean: An Insufficient and Unequal Recovery,* at 3, 52 (Sep. 2021), https://www.ilo.org/wcmsp5/groups/public/—-americas/—-ro-lima/—-sro port_of_spain/documents/genericdocument/wcms_819029.pdf (highlighting that 70 percent of job creation occurred in the informal economy).

45. Ferreira & Schoch, *supra* note 42 (arguing protests in Latin America during 2019 were caused by inequality and frustrations with economic stagnation); *see* Halsey Rogers, *The "Nini" Youth of Latin America: Out of School, Out of Work, and Misunderstood,* WORLD BANK BLOGS (Jan. 25, 2016), https://blogs.worldbank.org/education/nini-youth-latin-america-out-school-and-misunderstood (defining the term "ni-nis"); *see also* Franklin Briceño, *Peru President's Ouster Sparks Wave of Youth-led Protests,* AP NEWS (Nov. 13, 2020), https://apnews.com/article/legislature-latin-america-peru8cbcff13a172 f187fe37d7e 6d68f9782 (describing the protests of 2019 as being fueled by young people).

46. *Southwest Land Border Encounters,* U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (Oct. 21, 2022)

four countries: Mexico, Honduras, Guatemala, and El Salvador.[47] Most importantly, though, many Latin Americans went to the polls and elected a new generation of left-wing leaders who promised to radically change the systems. Following the massive protests of 2019-2020 (known as the *estallido social*"), Chileans voted to hold another Constitutional Convention after rejecting the adoption of a new Constitution, and then elected Gabriel Boric, the 36-year-old leader of the student movement, who ran on the promise of nationalizing the health and pension system, and providing free education to the younger generation, as President in 2021.[48] Similarly, in 2022, Colombians elected President Gustavo Petro, a former guerrilla member, and Vice President Francia Márquez, Afro-Colombian environmental leader, both of whom have proposed structural change in the economy, to include "the nobodies - *nadies*") – the poor, the Black, the women, and indigenous populations. In Brazil,[49] the election of Luiz Inácio Lula da Silva as President adds to a solid contingent of left-wing governments in Latin America, with Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Honduras, Mexico, and Nicaragua by leftist governments.[50]

(showcasing single adult encounters at the Southwest U.S. land border have increased from less than ~500,000 in 2019 to more than ~1,500,000 in 2022).

47. Jack Maguire, *Migration to the US is on the Rise Again – but it's Unlikely to be Fully Addressed During the Summit of the Americas, or Anytime Soon*, CONVERSATION (June 9, 2022, 8:42 AM), http://theconversation.com/migration-to-the-us-is-on-the-rise-again-but-its-unlikely-to-be-fully-addressed-during-the-summit-of-the-americas-or-anytime-soon-184611.

48. Nayareth Quevedo Millán, *Boric Wins Chilean Elections and Boosts the New Left in Latin America*, PUB. SERVS. INT'L (Dec. 21, 2021), https://publicservices.international/resources/news/boric-wins-chilean-elections-and-boosts-the-new-left-in-latin-america?id=12585&lang=en (discussing Boric's victory in the presidential election following social protests and a vote to hold a Constitutional Convention; and quoting Boric discussing his views on health care, pensions, and public education).

49. Alina Duarte, *The Nobodies Take Office in Colombia: An In-Depth Analysis*, COUNCIL ON HEMISPHERIC AFFS. (Aug. 11, 2022), https://www.coha.org/the-nobodies-take-office-in-colombia-an-in-depth-analysis/; Sara C. Motta, *Voices of El Pueblo: The Road to the Colombian Elections*, OVERLAND (July 7, 2022), https://overland.org.au/2022/07/voices-of-el-pueblo-the-road-to-the-colombian-elections/comment-page-1/.

50. Ernesto Londoño et al, *Leftists Are Ascendant in Latin America as Key Elections Loom*, N.Y. TIMES (Jan. 4, 2022), https://www.nytimes.com/2022/01/04/world/americas/leftists-elections-latin-america.html.

III. REDISCOVERING STRUCTURALISM

This call for social justice, particularly with regard to the distribution of resources, primarily concerns the role of the state in the economy, which has shifted substantially in the past few decades in the region. During the 1990s Latin American governments followed the prescriptions of the Washington Consensus – typically, the liberalization of markets (including the labor market), the privatization of national industries, the protection of foreign investment, and the liberalization of trade.[51]

For Latin America, the adoption of neo-liberalism implied a monumental shift in the mindset of international trade and economic development. Between the 1940s and 1960s, a group of economists active in the United Nations Economic Commission for Latin America and the Caribbean, developed a robust (and radically original) body of work that sought to account for the role of Latin America in international trade and investment, and to propose the appropriate role that the state should have in the economy – most notably, Chilean Raul Prebisch[52] (1901-1986), but also Celso Furtado[53], William Arthur Lewis[54], Juan Noyola de

51. Ilan Goldfajn, et al., *Washington Consensus in Latin America: From Raw Model to Straw Man*, 35 J. ECON. PERSPS. 109, 111–12 (2021); César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America, in* LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION 156, 160–61 (Yves Delazay & Bryant G. Garth eds., 2011).

52. Kay, *supra* note 4, at 159.

53. *See* Ricardo Bielschowsky, *Celso Furtado's Contributions to Structuralism and Their Televance Today*, 88 ECON. COMM'N FOR LAT. AM. AND CARIBBEAN REV. 7, 9 (Apr. 2006), https://repositorio.cepal.org/bitstream/handle/11362/11145/88007014I_en.pdf?sequence=1&isAllowed=y; *see also* Kay, *supra* note 4, at 159.

54. *See* Kari Polanyi Levitt, *W. Arthur Lewis: Pioneer of Development Economics*, https://www.un.org/en/chronicle/article/w-arthur-lewis-pioneer-development-economics (last visited Aug. 21, 2022); *see also* Kay, *supra* note 4, at 160.

Vásquez[55], Aníbal Pinto Santa Cruz[56], Osvaldo Sunkel[57], and Ignácio Rangel.[58]

These scholars developed a school labeled "structuralism"[59] that, when applied to international trade, criticized the notion of comparative advantage and questioned the benefits of free trade, instead arguing that trade was structured around the divide between the center and the periphery. "Dependentismo" is the concept that the center (rich economies), by extracting resources from the periphery (poor countries, particularly in Latin America), create a dependent relationship for the latter.[60] However, the periphery is not "underdeveloped" due to a lack access to international trade, but precisely because they engage in international trade with the center.[61] The central idea was that poverty is not an anomaly but is closely connected with the expansion of industrialized countries. Thus, structuralists rejected the idea that economic development is a process with evolutive "phases," where underdevelopment is a necessary first step; instead, "underdevelopment" is a manifestation of the very same process that creates development.[62]

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55. *See* Pedro Paz, *Juan Noyola de Vásquez: Precursor de la Vertiente Progresista del Pensamiento Estructuralista Latinoamericano* [*Juan Noyola Vásquez: Precursor of the Progressive Aspect of Latin American Structuralist Thought*], 43 INVESTIGACIÓN ECONÓMICA 313–30 (1984) (Mex.), *reprinted in* 88 EL TRIMESTRE ECONÓMICO 677-694 (2021) (Mex.); *see also* Kay, *supra* note 4, at 159.

56. *See* Gert Rosenthal, *Aníbal Pinto Santa Cruz*, 58 ECON. COMM'N FOR LAT. AM. AND CARIBBEAN REV. 7 (Apr. 1996), https://www.cepal.org/es/publicaciones/12008-anibal-pinto-santa-cruz; *see also* Kay, *supra* note 4, at 159.

57. *See* Alicia Bárcena & Miguel Torres, *Osvaldo Sunkel: Una Semblanza Intelectual*, *in* DEL ESTRUCTURALISMO AL NEOESTRUCTURALISMO: LA TRAVESÍA INTELECTUAL DE OSVALDO SUNKEL 15–46 (Alicia Bárcena & Miguel Torres eds., 2019), https://repositorio.cepal.org/handle/11362/44825; *see also* Kay, *supra* note 4, at 159.

58. *See* Arthur Silva, *Ignacio Rangel e o BNDES: A Beleza do Desequilíbrio*, A REVELUÇÃO INDUSTRIAL BRASILEIRA (Mar. 2, 2021), https://rib.ind.br/ignacio-rangel-e-o-bndes-a-beleza-do-desequilibrio/.

59. Kay, *supra* note 4, at 159.

60. Girvan and Girvan, "THE DEVELOPMENT OF DEPENDENCY ECONOMICS IN THE CARIBBEAN AND LATIN AMERICA: REVIEW AND COMPARISON".

61. FERNANDO FILGUEIRA, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIOR SCIENCES 8433 (Neil J. Smelser & Paul B. Baltes eds., 1st ed. 2001); Kay, *supra* note 4, at 161.

62. Kay, *supra* note 4, at 161.

This body of ideas had widespread influence in Latin America in the 1960s and 1970s.[63] Most countries in the region saw that, given these external constrains to development, the government's main economic task was to intervene in the domestic market to navigate such external constraints, and participate more productively in international trade. Most importantly, the goal was industrialization, because they perceived that dependency derived from the fact that the center specialized in industrial manufacturing, while the periphery was forced to specialized in extractive industries and agriculture.[64] Most Latin American countries adopted a strategy of trade protectionism and import substitution to develop national industries, while central banks in the region tried to overvalue their own currencies in order to make their technology imports cheaper.[65]

After a couple of decades, this strategy came to an end in the 1980s, when the rise in interest rates (among others causes) led to the external debt crisis in Latin America.[66] This debt crisis coincided with a fundamental ideological shift in international financial institutions, which had adopted the Washington Consensus as the prescription developments. Within a couple of years, policymakers in Latin America changed from decades of structuralism to embracing neoliberalism with zeal; the objectives now were to liberalize trade as fast as possible, privatize the national industries that had taken decades to develop through import substitution strategies, and to attract

63. *Id.* at 162.

64. D.C.M Platt, *Dependency in Nineteenth-Century Latin America: An Historian Object*, 15 LAT. AM. RSCH. REV. 113, 120 (1980).

65. Sebastian Edwards, *Protectionism and Latin America's Historical Economic Decline*, 31 J. POL'Y MODELING 573, 575, 578–79 (2009); IMF, CHAPTER 7. TRADE AND INDUSTRIAL POLICY REFORM IN LATIN AMERICA, https://www.Elibrary.imf.org/view/book/9781557755179/ch07.xml (last visited Aug 21, 2022) (explaining that following the Latin American debt crisis, countries relied on the "pressure mechanics" of import substitution to lower costs of products from industrialization).

66. Robert Devlin & Ricard Ffrench Davis, *The Great Latin America Debt Crisis: A Decade of Asymmetric Adjustment*, 15 REVISTA DE ECONOMIA POLÍTICA [J. POL. ECON.] 117, 117 (1995); Jocelyn Sims & Jessie Romero, *Latin American Debt Crisis of 1980s*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/latin-american-debt-crisis.

direct foreign investment – even if it meant betting on extractive industries and agriculture to attract such investors.[67]

Such implementation of neoliberal strategies greatly increased inequality in the region. According to Huber and Solt, higher levels of liberalization and more radical processes of liberalization are associated with higher levels of inequality in Latin America.[68] By comparing the data available for most countries in the region, they found that the countries with the more liberalized economies as of 1995 started around 1982 with lower levels of inequality than the countries with the less liberalized economies as of 1995; the two sets of countries switched positions, with the more liberalized economies ending up with higher levels of inequality around 1995 than the less liberalized economies.[69] Similarly, in terms of poverty, they found that growth did not trickle down, and did nothing to relieve the higher levels of poverty, in the more liberalized economies.[70]

It is in that policy context that the post-Covid left-wing wave appears in Latin America. It is not that inequality did not exist during the impact substitution era in Latin America[71] or that a continuation of the structuralist strategy would have reduced inequality – though we will never know for sure. The point is that the main culprit behind inequality and the dire situation most Latin Americans face, especially those under 40 at the end of the pandemic, is primarily the passive role of the state prescribed by neoliberalism and the liberalization of trade and investment.[72] And, once the mobilization in the streets has calmed down, this demand has inspired a sharp intellectual and policy turn in the region, with the rediscovery of structuralism and a more active

67. Kay, *supra* note 4, at 163 ("Neoliberal policies focused on achieving macroeconomic stability by controlling inflation and reducing government expenditure...").

68. Evelyne Huber & Fred Solt, *Success and Failures of Neoliberalism*, 39 LAT. AM. RSCH. REV. 150, 156 (2004).

69. *Id.* at 156–57.

70. *Id.* at 156.

71. Roberto Korzeniewicz & William Smith, *Poverty, Inequality, and Growth in Latin America: Searching for the High Road to Globalization*, 35 LAT. AM. RSCH. REV., no. 3, 2000, at 7, 12.

72. *See id.* at 17; *see also* HUBER & SOLT, *supra* note 68, at 156.

role of the state in trade as part of the available repertoire for reform in Latin America.

IV. INTERNATIONAL ECONOMIC LAW FOR RECOVERY

Despite these strong critiques of the international economic system coming from Latin America, current international trade law lacks, for the most part, the tools to address the claims emerging from the young segments of the population in Lima, Santiago, or Bogotá. For decades, international economic law has been structured around the idea that the main goal of global trade is to increase growth through a more efficient allocation of resources, while issues of social justice and, in particular, welfare and equality, should fall to domestic policymakers.[73] However, as Dani Rodrick has argued, the domestic policy choice to compensate those on the losing end of trade almost never happens.[74]

Underlying this approach is the lack of any notion of distributive justice in international economic law – rather the implicit adoption of efficiency as the only viable criteria to determine justice in international trade.[75] This lack of self-reflection is often expressed in the form of a legalistic argument: international trade institutions such as the World Trade Organization (WTO) need not concern themselves with problem of justice (distributive or otherwise) because they act on the basis of state consent. From this perspective, the only economic duty of states is to fulfill its promises, defined by their own narrow self-interest: outside their legally binding obligations, there is no further legitimate demand that one can make to economic policymakers. In the words of the WTO Appellate Body:

> "The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an

73. DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 69-70 (1st ed. 2011).

74. *Id.* at 88. On the basic disconnection between trade and distributive justice, see Meredith Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 GEO. J. INT'L. L. 165, 177–78 (2007).

75. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L. L. 94, 99 (2002).

> exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits, they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement".76

And yet, this approach is too centered on state consent and, as such, fails to consider that the process involved in the adoption of international legal obligations often excludes those with less power in domestic societies[77] – most importantly in Latin America, indigenous populations, and future generations. Thus, while the argument under international law is sound, the indigenous and the young in the region cannot help but see that their demand for more state intervention is being dismissed based on state consent with regards to which they had no input whatsoever, and which was given as a reflection of the Washington Consensus policies that caused the radical inequality that plagues the region to begin with.

Outsourcing the question of distribution to the domestic setting, or calling for abstract programs of compensation for the "losers" of globalization, will not be enough to tackle the challenges emerging from Latin America. The rediscovery of structuralism means that the idea of social justice in the region requires a more active role for the state – a role that, up until now, has been limited by international economic law. The structuralist agenda is organized around at least two central tenets: the empowered ability of the government to protect their national industries[78] and strong industrialization policies.[79]

Now, some voices in the region consider that international economic law is beyond redemption. Critical activists and scholars argue that both international trade law and the law of

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76. OISIN SUTTLE, DISTRIBUTIVE JUSTICE AND WORLD TRADE LAW: A POLITICAL THEORY OF INTERNATIONAL TRADE REGULATION 46 n.105 (2018).

77. Howse, *supra* note 75, at 106.

78. Sandra Kuntz, *From Structuralism to the New Institutional Economics: The Impact of Theory on the Study of Foreign Trade in Latin America*, 40 LAT. AM. RSCH. REV., no. 3, 2005, at 145, 148.

79. *Id.*

foreign investment are inherently biased in favor of a free-market economy and against state intervention, and that it reproduces structures of colonial violence, which protect the center and exploits the periphery.[80] This article adopts a less radical stance. The participation of Latin America countries in a rules-based international trading system is desirable, as they lack the military or economic power to defend their interest against their trading partners or competitors. Latin America has much to gain from an active and effective World Trade Organization: it reduces trade barriers that richer economies often impose to protect their industries, it disciplines export subsidies that lower world prices, and features a dispute settlement mechanism that has proved useful for developing countries – when it is allowed to work.[81]

As it stands today, international economic law lacks the vocabulary to consider distributive choices, but it is possible to use some of its flexibilities to open the space for states in Latin America to adopt policies that are responsive to the demands of its population, and still participate in the international trading system. The alternative – withdrawing from the WTO and standing free trade agreements – seems not to be plausible. Moreover, such rhetoric risks feeding nationalists' perspectives that is dangerous in the Latin American context, where strong-man nationalist *caudillismos* rise its ugly head ever so often – for example in Venezuela and Nicaragua.[82]

Now, the law of the WTO has never been a one-size-fits-all affair, and it does include certain flexibilities.[83] With regards to the ability of states to promote a structuralist style of industrial policy, article XVII of the GATT allows states to use measures not ordinarily permitted under the GATT, such as quantitative

80. ENRIQUE PRIETO-RÍOS, SYSTEMIC VIOLENCE OF THE LAW: COLONIALISM AND INTERNATIONAL INVESTMENT (2021).

81. *See* Henry Gao, *Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis*, THE APPELLATE BODY OF THE WTO AND ITS REFORM 1, 4 (Chang-fa Lo, Junji Nakagawa, & Tsai-fang Chen eds., 1 ed. 2020) (describing the potential effects of a strong World Trade Organization by outlining the current substantive issues).

82. *See* Carlos De la Torre, *Populism and Nationalism in Latin America*, 24 JAVNOST – THE PUBLIC 375, 387 (2017).

83. ISABEL FEICHTNER, THE LAW & POLS. OF WTO WAIVERS: STABILITY & FLEXIBILITY IN PUB. INT'L L. 2–3 (2012).

restrictions, "in the interest of its program of economic development and reconstruction."[84] However, the article requires a notification to all contracting parties, negotiating with other contracting parties that might be "substantially affected" by the proposed measures, and obtaining the approval of the contracting parties.[85] Due to this heavy requirement, developing states have used the possibility opened in GATT Article XII, which allows for import restrictions in the case of a crisis in the balance of payment; that is, to stop a serious decline in its monetary reserves, or to achieve a reasonable rate of increase in its monetary reserves. While developing countries did use the balance of payments widely under GATT and the WTO (220 reviews from 1960 to 2005) the Understanding of the Balance-of-Payments Provisions tightened the requirements for its use, with only three reviews from 2005 to 2014.[86]

Moreover, GATT Article XIX and the WTO Agreement on Safeguards allow all member states (and not only developing states) to raise tariffs or apply quotas as safeguards if an increase of imports causes "serious injury" to a domestic industry.[87] Similarly, with regard to subsidies, Article 27 of the GATT gave developing countries certain flexibility to phase out their export subsidies, which are forbidden for developed countries. These flexibilities are bound to expire in 2023 for developing countries, and in 2030 for least developed countries.[88] Moreover, the WTO Agreement on Subsidies and Countervailing Measures (SCM) does allow (in Articles 5 and 6) some space for an industrial policy, as it allows subsidies that are not directly linked to export performance or the use of domestic products over imported ones, or cause "adverse effects" to another WTO member.[89] WTO litigation can take years, and some developing countries have

84. *Id.* at 103 n. 222.

85. WTO, *World Trade Report 2014*, 195 (2014), https://www.wto.org/english/res_e/booksp_e/world_trade_report14_e.pdf (describing that, in the interest of positive development, the notification to contracting parties is necessary).

86. *Id.* at 196.

87. *Id.*

88. WTO & EIF, *Trade impacts of LDC graduation: Matters related to the WTO agreements*, 4 (2022), https://www.wto.org/english/res_e/booksp_e/ldc_graduation_ pocket _e.pdf.

89. WTO, *World Trade Report 2014* at 196.

played a game of "catch me if you can," providing subsidies to their infant industries in contravention of the SCM, and then eliminating such subsidies when litigation brought forward by those affected before the WTO is close to completion.[90] Finally, also regarding subsidies, Article 9 of the SCM Agreement gives developing country products an exemption from safeguard actions, if the product does not exceed three percent of total imports and article 27 Article 27.10 of the SCM Agreement requires members to terminate a countervailing duty investigation of developing country imports, if the challenged subsidies do not exceed two percent of the value of the product.[91]

These flexibilities, though, are not enough. Latin American economies are already relatively open.[92] This means that, as Dani Rodrick has shown, if trade barriers are already low, further liberalization tends to have a higher redistribution impact on trade, and the net gains in efficiency tend to be lower.[93] Currently, problems in Latin America arise in economies with already reduced trade barriers, which means that pushing forward with liberalization might not bring high efficiency gains and, on the contrary, might reinforce patterns of inequality that are challenging basic democratic stability in the region.[94] More flexibilities in terms of policy space could be used by states in the

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90. Sonia E. Rolland, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law*. By Gregory Shaffer. Cambridge, UK: Cambridge University Press, 2021. Pp. xxii, *321.*, 116 AM. J. INT. LAW 452, 455 (2022) (describing India as an example of a "catch me if you can" policy due to flexibilities in the WTO).

91. WTO, *supra* note 85, at 26.

92. *See* Adolfo Roquez-Diaz & Lorenzo Escot, *Relationship Between Trade Openness and Economic Growth in Latin America: A Causality Analysis with Heterogenous Panel Data*, 22 REV. DEV. ECON. 658, at 659–663, 680, 684 (2018).

93. Dani Rodrik, *The Rush to Free Trade in the Developing World: Why So Late? Why Now? Will It Last?*, *in* VOTING FOR REFORM: DEMOCRACY, POLITICAL LIBERALIZATION, AND ECONOMIC ADJUSTMENT 61, 65–66 (Stephan Haggard & Steven Benjamin Webbs eds., 1994); *Accord* Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. POL'Y 12, 15 (2018).

94. RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE 14, 20–21 (Narcís Serra & Joseph E. Stiglitz eds., 2008); Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. POL'Y 12, 15 (2018); Adolfo Roquez-Diaz & Lorenzo Escot, *Relationship Between Trade Openness and Economic Growth in Latin America: A Causality Analysis with Heterogenous Panel Data*, 22 REV. DEV. ECON. 658, at 659–663 (2018).

region, which is not necessarily a move towards protectionism, but rather towards better integration in global capitalism – precisely what people in Latin America are demanding.

Two problem areas can be considered. The first is subsidies for infant industries. Economists have often said that subsidies make no economic sense for the subsidizing state, as they make the latter's products cheaper and affect its terms of trade, while making the importing state better off, as their consumers pay a lower price.[95] However, the demand for middle-class jobs in Latin America, particularly for the younger generation, and the rediscovery of structuralism by these same activists, seem to point towards a process of reindustrialization that requires a level of subsidies to infant industries.

The WTO's SCM originally allowed, under Article 8, for certain kinds of subsidies (research, assistance of a particular region, and subsidies for the adaptation of facilities to comply with environmental requirements).[96] These subsidies are now forbidden.[97] However, as Gregory Shaffer suggested, one could consider that developing countries (particularly Latin American states) could start by adding the promotion of infant industries to these exceptions to the prohibition of subsidies, subject to requirements in terms of the per capita income of the subsidizing state, time limits so that ineffective programs are abandoned, and some requirements of reporting and transparency.[98] This list of non-actionable subsidies could be further narrowed, for example, to include a green list of subsidies that are particularly important for Latin America for social purposes. This might include production in areas affected by armed conflicts or produced with the collaboration of indigenous communities. Of course, developed nations can adopt countervailing measures that would offset the subsidy to protect their domestic industries. In that sense, this conversation in the context of the WTO should be accompanied by a stricter standard to establish "serious injury"

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95. ROBERT M. DUNN & JOHN H. MUTTI, INTERNATIONAL ECONOMICS 122–23 (6th ed. 2004).

96. Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 UNIV. ILL. L. REV. 1, 39 (2019).

97. *Id.*

98. *Id.* at 39–41.

to the industry of rich nations when they adopt countervailing measures against subsidies in developing states intended to protect infant industries.

The second area of problem is state enterprises. Article XVII of the GATT requires that state enterprises act in the market "solely in accordance with commercial considerations" and forbids them from discriminating against foreign traders.[99] State enterprises could be a vehicle for providing subsidies. For that reason, Article 1.1 of the SCM prohibits contributions "by a government or any public body" to a private party.[100] Through these two provisions, the WTO regime assumes that the action of a state enterprise can reflect a state order or policy, which includes the enterprise's noncommercial or discriminatory behavior.

A dissonance emerges, as Howse has written, from the fact that the basic rules governing state enterprises (mainly the GATT) were written after the Second World War. It was assumed, particularly in Europe, that states owned enterprises, and that they used them to direct the economy – an observation that maps well with the insights of the structuralists in Latin America during the 1960s and 1970s.[101] However, the WTO's rules regarding subsidies (particularly the SCM Agreement) were negotiated in a completely different moment: in the 1990s, at the peak of the Washington Consensus, when state-owned enterprises were a rarer sight after years of privatization both in the Global North and in the South (particularly, as we have seen, in Latin America).[102] The notion of "public body" included in the SCM reflects such an ambivalent nature of state enterprises

99. General Agreement on Tariffs and Trade art. XVII, Jan. 1, 1948, 61 Stat. A-11, 55 U.N.T.S. 250.

100. Agreement on Subsidies and Countervailing Measures art. 1.1, Jan. 1, 1995, 1869 U.N.T.S. 14.

101. Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of the WTO Rules on Subsidies and State Enterprises*, 23 J. INT'L ECON. L. 371, 385 (2020).

102. *Id.*; *History of the Multilateral Trading System*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited Sept. 9, 2022).

which are often private enterprises that, nonetheless, are still controlled by the state through their board.[103]

Facing this ambivalence, the WTO's Appellate Body (AB) decided in *US-Countervailing Measures (China)*[104] and US-ad/*CVD(China)*[105] to apply a strict standard regarding the link between the enterprise and the government. The AB applied customary international law as crystallized in the International Law Commission (ILC) Articles on State Responsibility, particularly Article 5, and found that state enterprises are relevant in terms of subsidies when they can be considered as exercising governmental authority. For example, by adopting regulations or exercising police powers.[106] The mere fact of government ownership is not enough to conclude that an enterprise action is a reflection of government policy and should thus make the enterprise a "public body."

The AB's legal reasoning when defining "public bodies" has been subject to critique, particularly in its choice of adopting the ILC's Article 5 standard of governmental authority as relevant.[107] However, this approach might open the space for a more active policy of state enterprises in Latin America. Again, it is relevant to keep in mind this region is now emerging from decades of liberalization and privatization. An active industrial policy emerging from this context will require state enterprises that operate on the privatized structure of Latin American society; that is, state enterprises that adopt the form of private entities, but are controlled by the state. From that perspective, it seems useful for the development of an industrial policy that such state enterprises are very rarely considered as public bodies, enjoying

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103. Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises,* 23 J. INT. ECON. LAW 371, 386 (2020).

104. Appellate Body Report, *United States — Countervailing measures on Certain Products from China,* ¶ 4.167, WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014).

105. Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* ¶ 366–70, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011) (commenting on what considerations to evaluate when distinguishing between subsidies from the private sector (i.e., enterprise) and subsidies from a public body (i.e., government)).

106. *Id.* ¶ 317–18.

107. Howse, *supra* note 103, at 385.

instead of a wide space of intervention in the market. While most states in the region (except Brazil) have not implemented an active industrial policy for decades[108], its future development will have to allow for the reasonable development of some state enterprises to provide fiscal and labor stability in the post-Coronavirus phase in the region.

V. INTERNATIONAL TRADE LAW AND TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA

While public protests in Latin America have questioned the economic model and its resulting inequality, other common targets are police abuse and government corruption. This points to a crucial paradox in the region: while reversing inequality requires an enhanced role for the state (e.g., as has been suggested above, through certain subsidies to promote an industrial policy and the reinvigoration of state enterprises), such structuralist policies would empower a state apparatus which already has the reputation in Latin America for violence, corruption, and a lack of accountability.[109] Such is the main risk of opening new spaces in international trade law for state steering of the economy in Latin America. Beyond the economic risk implicit in an ill-advised strategy of development, subsidies and state enterprises in Latin America creates a risk of authoritarianism and crony capitalism which would further undermine trust in trade and democracy.

To address such a challenge, Latin America can draw on its tradition of transformative constitutionalism, which could provide not only a distributive theory of justice that would guide the adoption of economic policy in the region but would also provide a system of checks and balances (in the form of judicial review and democratic accountability) that could help prevent the worst abuses of power that the unaccountable redistribution of resources could trigger.

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108. David Kupfer, Joáo Carlos Ferraz & Felipe Silveira Marques, THE RETURN OF INDUSTRIAL POLICY IN BRAZIL 327–28 (Joseph E. Stiglitz & Justin Yifu eds., 2013).

109. Jason Ross Arnold, *Political awareness, corruption perceptions and democratic accountability in Latin America*, 47 ACTA POLITICA 67–68 (2012).

Widespread corruption was part of the argument that justified the adoption of the Washington Consensus in the region.[110] The implementation of structuralist ideas like assigning subsidies and choosing industries that would benefit from import substitution strategies soon became conducive to corruption.[111] As a result, privatization and liberalization were in part justified as a way of reducing the corrupting effects of interventionism.[112] For this purpose, the Washington Consensus had its very own view of constitutionalism: in essence, a Constitution that would be effective in (a) limiting the power of the state (e.g., limiting its ability to intervene in the economy); and (b) protecting civil rights (e.g., property or liberty) but being hesitant in adopting positive measures to protect social and economic rights.[113]

While economists led the way in the design and implementation of trade liberalization, a similar group of elite lawyers were returning to the Latin America, often trained in universities in the Unites States and Europe.[114] These jurists were excited by the possibilities of the interpretative turn in jurisprudence, keen in going beyond mere legal formalism, and sought to empower courts in fostering structural changes in society. They held a view of the constitution that was different from that of the neoliberal reformers. Following like-minded Latin American scholars and activists, this group of jurists believed that the Constitution was there to serve as a platform for a massive effort of social transformation, which would use the language of rights to solve distributive problems.[115]

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110. John Williamson, A SHORT HISTORY OF THE WASHINGTON CONSENSUS 17 (Narcís Serra & Joseph E. Stiglitz eds., 1st ed. 2008).

111. Douglas Irwin, THE RISE AND FALL OF IMPORT SUBSTITUTION, NAT'L BUREAU OF ECON. RSCH., 13–14 (2020).

112. Luigi Manzetti & Charles H. Blake, *Market reforms and corruption in Latin America: New means for old ways*, 3 REV. OF INT'L POL. ECON. 666, 668 (1996).

113. Alvaro Santos, THE WORLD BANK'S USES OF THE "RULE OF LAW" PROMISE IN ECONOMIC DEVELOPMENT 257 (David M. Trubek & Alvaro Santos eds., 2006).

114. César Rodríguez-Garavito, TOWARDS A SOCIOLOGY OF THE GLOBAL RULE OF LAW FIELD: NEOLIBERALISM, NEOCONSTITUTIONALISM, AND THE CONTEST OVER JUDICIAL REFORM IN LATIN AMERICA 166 (Yves Dezalay & Bryan Garth eds., 2011).

115. Rodrigo Uprimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW

These lawyers thought of themselves as bringing a new law to the debate: a "neo-constitutionalism" of sorts – a notion used here to describe the legal consciousness[116] that characterized much of constitutional thinking in Latin America in the 1990s. The label was first used retrospectively by the Genoa School[117] and described "the assumption [that] the notion of law together with its forms of identification, application and cognition (that is in its ontological, phenomenological, and epistemological dimension) requires to be radically revisited because of the prominent role and pervasive influence fundamental rights have been acquiring since the conclusion of the Second World War both in the domestic law of an ever-increasing number of (Western) countries, and in international law. In other words, the assumption is that fundamental rights have been so deeply affecting law in all its major aspects, to justify the need and to urge the claim for a new understanding of its notion."[118] While loosely inspired by the work of some American scholars (most prominently, Ronald Dworkin), this new approach to law gained little traction in the US or the UK.[119] In contrast, it spread over Latin America like wildfire during the 1990s. The idea that fundamental rights and activist courts could transform the

DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 127, 127–28 (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006).

116. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 21, 22 (David M Trubek & Alvaro Santos eds., 2006) (describing a new form of legal consciousness that emerged in the latter half of the twentieth century).

117. *See* Paolo Comanducci, *Formas de (neo)constitucionalismo: un análisis metateórico*, *in* NEOCONSTITUCIONALISMO(S) 89, 97 (Miguel Carbonell trans., 2d ed. 2003); PAOLO COMANDUCCI, DANIEL GONZÁLEZ LAGIER & MARIA ÁNGELES AHUMADA, POSITIVISMO JURÍDICO Y NEOCONSTITUCIONALISMO 159, 162–63 (2010).

118. Tecla Mazzarese, *Towards a Positivist Reading of Neo-constitutionalism*, 6 ASS'NS: J. FOR LEGAL AND SOC. THEORY 233, 234 (2002).

119. *See generally* Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 Tex. L. Rev. 1587–90 (2011) (discussing the intense period of constitutional change seen in Latin America in the late 1900s, and how most constitutional reforms embodied some notions of fundamental rights).

difficult economic situation of the region appealed to scholars and judges in Argentina,[120] Brazil,[121] Ecuador,[122] and Mexico.[123]

Most important for the purpose of this article, these groups of jurists adopted a transformative mindset, understanding that the practice of interpreting and applying constitutional norms should be geared to promote deep social change.[124] By focusing on the protection of human rights in practice (particularly socio-economic rights), transformative constitutionalism has served as a balance to some of the excesses of neoliberalism in Latin America[125] – for example, through the protection of the right of an

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120. Alfonso Santiago, *Sistema jurídico, teoría del derecho y rol de los jueces: las novedades del Neoconstitucionalismo*, 22 DÍAKON 131, 152 (2008).

121. SUSANNA POZZOLO & ÉCIO OTO DUARTE, NEOCONSTITUCIONALISMO E POSITIVISMO JURÍDICO: AS FACES DA TEORIA DO DIREITO EM TEMPOS DE INTERPRETAÇO MORA DA CONSTITUIÇÃO (2006); REGINA QUARESMA ET AL., NEOCONSTITUCIONALISMO (1st ed. 2009).

122. JORGE E ZAVALA EGAS, DERECHO CONSTITUCIONAL, NEOCONSTITUCIONALISMO Y ARGUMENTACIÓN JURÍDICA (2010).

123. MIGUEL CARBONELL & LEONARDO GARCÍA JARAMILLO, EL CANON NEOCONSTITUCIONAL (2010).

124. Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 150 (1998). "By transformative constitutionalism," says Klare, "I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law." *Id.* For Francois Venter, by contrast, the notion of transformation in South Africa has become "pliable, and ideologically compromised." *See* Francois Venter, *The Limits of Transformation in South Africa's Constitutional Democracy*, 34 S. AFR. J. ON HUM. RTS. 143, 165 (2018). Klare, who argues that transformative constitutionalism is part of "post-liberal law," is keen on giving his conception a "critical legal studies" bend. Following the South African scholar Theunis Roux, we believe, however, that the transformative approach to interpretation can be squared with liberal constitutionalism. *See also* Theunis Roux, A *Brief Response to Professor Baxi, in* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 48–51 (Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., 2013) (arguing that transformative constitutionalism is fundamentally a liberal constitutional project).

125. *See* Rene Uruena & Mariana Mota-Prado, *Economic Regulation and Judicial Review, in* THE LATIN AMERICAN CASEBOOK: COURTS, CONSTITUTIONS AND RIGHTS 227–34 (Juan F. González-Bertomeu & Roberto Gargarella eds., 2016) (arguing that neo-constitutional lawyers' use of the court system over regulatory agencies led to results that were more responsive to the socioeconomic realities of the country).

adequate standard of living,[126] or the recognition of a human rights to water.[127]

Transformative constitutionalism should play a similar taming role in the context of the turn towards more state intervention in Latin America. The effective protection of human rights provides a normative guide to what should guide distribution in the context of international trade regulation. As Thomas Pogge has shown, international economic institutions systematically produce outcomes that create rights deficits – particularly among the more vulnerable. For Pogge, governments have the collective responsibility to use human rights as a normative criterion to evaluate such institutions and reform them.[128] And, at the domestic level, human rights provide a valuable normative criterion to guide the distribution of resources in society – particularly building on the case law of courts like the Colombian Constitutional Court, or the Inter-American Court of Human Rights, whose adjudication of socio-economic rights have deeply influenced the trajectory of macroeconomic policy[129] and key industries in the region.[130]

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126. *See* René Urueña & María Cecilia Ibáñez, *Adequate Standard of Living, Right to*, *in* ELGAR ENCYCLOPEDIA OF HUMAN RIGHTS 1, 2, 24–25 (Christina Binder et al. eds., 2022).

127. *See* René Urueña, *Global Water Governance and the Rise of the Constitutional Regulatory State in Colombia*, *in* THE RISE OF THE REGULATORY STATE OF THE SOUTH 27, 37–38, 44–47 (Navroz K. Dubash & Bronwen Morgan eds., 2013) (discussing the expanded role of the Colombian Constitutional Court in water regulation as a reaction to the neoliberal agenda).

128. THOMAS W. POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 94–128 (2002) (arguing that rich societies should attempt to mitigate nationalism and suggest multilateral reforms to protect the global poor that affect all rich nations equally, with each such nation conditionally supporting the reform as long as others do so as well).

129. For examples of the Colombian Constitutional Court influencing macroeconomic policy, see Manuel José Cepeda-Espinosa, *Transcript: Social and Economic Rights and the Colombian Constitutional Court*, 89 TEX. L. REV. 1699, 1699–1702 (2011) (discussing instances where the Colombian constitutional courts passed judgments concerning the rights of internally displaced persons and structural healthcare, both of which were conditioned on whether the government's plan in each case was financially sustainable).

130. For examples of the Inter-American Court's influence on the extractive industry through its interpretation of the prior consultation standard, see Sorily Carolina Figuera Vargas & Meylin Heleana Ortiz Torres, *El derecho a la Consulta previa a los pueblos*

Human rights law, interpreted as a transformative practice, could play the same role with regard to more interventionist economic policies and help tame the worst instincts of a powerful government. Of course, this strategy has clear limitations: not all economic injustices are human rights violations, and there are limits to what even the most activist courts in the region can do without distorting the democratic process.[131] Moreover, human rights law (and, particularly socioeconomic rights adjudication) has focused mostly on guaranteeing a minimum standard to the most vulnerable but lacks a robust engagement with issues of inequality.[132] Despite these limits, Latin America can draw in a rich repertoire of transformative constitutional practices that can help the process of adopting an international economic law that will empower the executive branch of power in a region with a strong tendency to strong presidencies and, often, authoritarianism.[133]

VI. CONCLUSION: THE LATIN AMERICAN CHINESE PROBLEM

Latin America is living in a crucial moment where civil society is demanding active measures from its governments, to reduce the gap between those who have been able to accumulate wealth, access, and opportunities in the liberalization years, and those who have been left behind. Much is at stake: in a region with a long tradition of nationalist caudillos, it is important that international trade is not perceived as an obstacle to achieving basic distributive demands, but rather as part of the solution. While international trade law seems to have basically relegated

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indígenas en el Sistema Interamericano de Derechos Humanos. Casos de estudio: Ecuador y Colombia, 19 CIVILIZAR CIENCIAS SOCIALES Y HUMANAS 59, 61–64 (2019).

131. *See, e.g.*, Manuel José Cepeda Espinosa, *The Judicialization of Politics in Colombia: The Old and the New*, *in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 67, 97–99 (Rachel Sieder, Line Schjolden, & Alan Angell eds., 1st ed. 2005) (discussing the power and decision-making limits of the Colombian Constitutional Court).

132. This argument is made in SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

133. Diego Valadés, *The Presidential System in Latin America: A Hallmark and Challenge to a Latin American Ius Constitutionale Commune*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 191, 204–05 (Armin von Bogdandy et al. eds., 2017).

the question of distributive justice to the domestic setting, it is in any case important that, at least, it opens spaces for domestic strategies of attending popular demands. In Latin America, such demands draw on a rich theoretical apparatus (structuralism) which implies a more active intervention of the state in the economy.[134] Moreover, it could draw on the also distinctively Latin American tradition of transformative constitutionalism, which for decades has provided a countervailing vocabulary to the excesses of neoliberalism and could now perform the same role in the context of a more interventionist state.

This article explored two such areas where more flexibility could be useful for the region (subsidies and state enterprises). And yet, these two very issues are trapped in the great power competition between China and the US regarding international trade. As Wu has explained, China uses a sui generis form of economic governance in which state enterprises, but also other forms of formal and informal influence on purely private enterprises, end up facilitating the constant alignment of corporate activity with the Chinese government's interests.[135] In that context, any proposal that touches upon the state enterprises and subsidies seems like a non-starter in today's charged geopolitical climate.[136] And yet, it is also clear that Latin American states' efforts to intervene in their liberalized markets are not likely to have a global impact on Chinese strategies; moreover, as Wu has shown, the Chinese government does not even need state enterprises to influence market behavior, as it has at its disposal formal and informal ways of achieving such

134. Emilia Ormaechea & Víctor Ramiro Fernández, *Discontinuous Continuity: Structural Change and its (Divergent) Meanings in Latin American Structuralism and Neo-Structuralism*, 39 CUADERNOS DE ECONOMIA (SPECIAL ISSUE) 445, 445–51 (2020).

135. Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT. LAW J. 261, 264–65, 270–72, 272, 275, 278–84 (2016).

136. *See generally*, Steven S. Roach et. al, *The Post-Global Economy*, PROJECT SYNDICATE (2022), https://www.project-syndicate.org/onpoint/the-post-global-economy (last visited Sep 7, 2022) (pointing out the increasing tensions between the US and China due in part to increased tariffs on and lower demand for Chinese goods in the past few years); Minxin Pei, *China: Totalitarianism's Long Shadow*, 32 J. DEMOCRACY 5, 5–6, 9, 18 (2021) (discussing the difficulties in democratizing China's communist totalitarian system and the uncertainty of the future of U.S.–China relations).

influence.[137] Not for the first time, Latin American states are trapped in this geopolitical conflict, which requires that they start their trade strategy by differentiating their situations and demands from that of China and its *sui generis* case. This process of differentiation, and the parallel strengthening of the guarantees of transformative constitutionalism, as crucial starting points for an agenda of recovery.

137. Wu, *supra* note 135, at 281–84.