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FORGING A NEW CONSENSUS ON TRADE.

The New NAFTA: Toward Enforcement that Works

As Congressional consideration of the new NAFTA moves forward, one source of debate is how the agreement will be enforced. The debate arises because it became clear, over time, that the original NAFTA's dispute settlement provisions included a structural flaw that, apparently inadvertently, allowed any party to block formation of a panel. In 2000, the United States used this flaw to block formation of a panel in connection with a dispute Mexico sought to bring involving sugar. Since that time, no disputes have been initiated under NAFTA. The new NAFTA has a chapter on dispute settlement, but it remains up to the three parties to affirmatively establish a panel – meaning that a party can decline to do so and effectively block panel formation.

The question of enforcement is acute when it comes to labor and environment. As discussed further below, although the original architects of the multilateral trading system included enforceable labor rights as part of the regime, the American business community rejected their vision. Ever since, it has been a struggle to have labor rights appropriately seen as economic issues, affecting conditions of competition, rather than as "social" issues that are not really "trade" issues.

Further, the system has been structured to prioritize the interests of multinational corporations, which are the beneficiaries of the ability to arbitrage labor and environmental standards. As a result, even after May 10th, the enforcement record on labor and environment is poor.

Even if the dispute settlement mechanism in NAFTA were fixed, experience tells us that it would not be enough to deliver real results for labor and the environment. Innovative measures are needed to ensure that labor and environmental enforcement is effective.

Particular Concerns over Labor and Environment: Arbitrage

The system as it was *executed* after World War II – not as it was *designed* – incentivizes arbitraging labor and environmental standards around the world. Because the system ended up prioritizing the free flow of, and returns to, capital, disciplines on arbitrage have been difficult to achieve, and even more difficult to enforce.

Enforceable Labor Standards at the GATT

The architects of the system came out of the Depression, and along with it the virulent nationalism that characterized World War II – a nationalism born in part out of political exploitation of poverty and despair. The system's architects did not seek to create a regime to exploit poverty and despair, but to alleviate it.

They understood that one of the risks associated with liberalization of trade was labor arbitrage. After all, the Tariff Act of 1930 included the original prohibition on imports of goods made with forced labor. It was not a human rights statute, but an unfair competition statute.

Recognizing the devastating effects of labor arbitrage, they included enforceable labor standards (as well as express disciplines on anticompetitive behavior and foreign investor conduct) in the Havana Charter, the treaty that was meant to replace the temporary General Agreement on Tariffs and Trade. Paragraph 1 of Article 7 of the Charter provides:

> The Members recognize that . . . all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.[1]

However, the U.S. business community did not want constraints and thus set about ensuring that the Havana Charter was never ratified. Opponents included the Chamber of Commerce, the National Foreign Trade Council, and the National Association of Manufacturers, who found the Charter inconsistent with free enterprise[2] – despite the fact that U.S. negotiators (themselves successful businessmen) had ensured that the Charter was consistent with U.S. law.[3] Also among the opponents:

> 'huge corporations, which were associated with German cartels before the war, and which are now under indictment for violations of the Sherman Antitrust Act.'[4]

The import of the absence of these provisions at the WTO even today was perhaps best exposed by the horrors of Rana Plaza in 2013. Rana Plaza involved the collapse of a building housing, perhaps illegally, garment factories. Even after giant cracks were found in the building, employees were ordered back to work. When they returned, the building collapsed, killing over 1100.[5] If labor standards had been the norm since the late 40s, perhaps these conditions would never have been tolerated.

Indeed, a regime that liberalizes capital flows while failing to protect workers is precisely why it is not surprising to see a resurgence of trade skepticism among those whose wages have stagnated or whose jobs have been offshored based on false comparative advantage. Trade Adjustment Assistance is the usual response to job loss due to trade, but it was never intended to address the offshoring of entire supply chains. Rather than attempting to restructure TAA to address the much broader scope of the modern problem, critics dismiss it as ineffective. To do so, they rely on research about TAA job seekers who were looking for jobs during the Great Recession. The real lesson to be learned from that report is not that TAA is ineffective, but that financial crises are devastating to the working class.[6]

In 1974, Congress instructed USTR (then the Special Trade Representative) to negotiate the inclusion of enforceable labor standards at the GATT. Section 121 of the Trade Act of 1974 provided that:

> The President shall . . . take such action as may be necessary to bring trade agreements . . . entered into, . . . into conformity with principles promoting the development of an open, nondiscriminatory, and fair world economic system. The action and principles referred to in the

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[1] https://www.wto.org/english/docs_e/legal_e/havana_e.pdf
[2] C. Donald Johnson, Wealth of a Nation, at 414.
[3] C. Donald Johnson, Wealth of a Nation, at 416
[4] C. Donald Johnson, Wealth of a Nation, at 419, quoting the Christian Science Monitor.
[5] https://www.nytimes.com/2018/04/24/style/survivors-of-rana-plaza-disaster.html
[6] Mathematica, December 2012, Evaluation of Trade Adjustment Assistance Program. "TAA trainees completed their training and re-entered the labor market when the nation's economy was mired in severe economic recession, whereas the comparison group—who spent considerably less time in training—were more likely to have returned to the labor market before economic conditions deteriorated," at iv.

> preceding sentence include, but are not limited to, the following . . . the adoption of fair labor standards . . . in the GATT.[7]

USTR sought to execute this instruction with four minimum standards: forced labor, child labor, workplace health and safety, and discriminatory practices applied to exports.[8] However, other GATT members refused to agree. The Tokyo Round ended with a number of "codes" in other areas, favoring business. Americans tried again with the Uruguay Round, and failed[9] – even as agreements in new areas, such as intellectual property, were achieved.

This dynamic remains today. The United States is the only country that insists on labor and environmental standards in its trade agreements, putting these standards on the same enforcement footing as other chapters, including market access. I have been unable to identify a single agreement with such provisions where the United States was *not* at the negotiating table. That includes, for example, the EU-Canada agreement[10] and the EU-Japan agreement.[11] When dispute settlement is available for some chapters and not others, countries signal their priorities.

To be clear, having enforceable labor and environmental standards is a *bipartisan* position, precisely because these are issues of arbitrage, false comparative advantage, and competitiveness.

It is clear that Canada, for example, perceives labor and environment as "social issues" rather than as core competitiveness issues, and for that reason groups them with other "social issues" such as indigenous and gender rights.[12] However, this is mixing apples and oranges. There is no evidence that indigenous and gender rights are arbitraged through trade. As such, grouping "social issues" with competitiveness issues makes it *more* difficult to secure meaningful global disciplines on labor and the environment, because they are then viewed as part of a progressive wishlist, instead of as fundamental elements of competition. The latter is why there is bipartisan consensus on this issue in the United States. The former is why a Conservative Member of the Canadian Parliament sought to ensure that any gender and indigenous language in Canadian agreements was merely aspirational, and not binding.[13]

Indeed, something real for indigenous peoples *could* have been done: recognize the provisions of the Jay Treaty of 1794 allowing indigenous people on either side of the border to have privileged cross-border trading relationships, including through an exemption of the *de minimis* restrictions.[14]

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[7] https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg1978-2.pdf

[8] Carol J. Pier, Workers' Rights Provisions in Fast Track Authority, at 81. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1321&context=ijgls

[9] *Id.*

[10] http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ See Article 23.10. They claim the provisions are binding and enforceable, but mechanism has no teeth. It is even weaker than the NAFTA side letters.

[11] http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=440. See Article 16.7.1, which provides for consultations instead of binding dispute settlement.

[12] http://americanphoenixpllc.com/mad-dash-deem-trade-agreements-progressive

[13] Freeland refuses to say if Canada wants binding indigenous, gender rights in NAFTA, Inside US Trade, February 8, 2018. https://insidetrade.com/trade/freeland-refuses-say-if-canada-wants-binding-indigenous-gender-rights-nafta

[14] Canadian group says indigenous people should be at NAFTA negotiating table, Inside US Trade, August 21, 2017. https://insidetrade.com/daily-news/canadian-group-says-indigenous-people-should-be-nafta-negotiating-table

So it is that in the midst of a backlash against globalization, the United States, alone, presses for labor rights in trade agreements, enforceable on at least the same terms as the agreement's other provisions. As Foreign Minister Freeland pointed out, Canada is in no hurry to have the new NAFTA enter into force because Canada already enjoys access to the U.S. market.[15] In the meantime, Congress is – literally, with this hearing - struggling to figure out how to deliver genuine improvements in the Mexican labor regime. We have our warts, to be sure; but a little help in the effort to construct a global trading system that is premised on something other than exploiting the sweat of the poor would be most welcome.

Establishing the WTO is often hailed as the completion of the vision of the original architects, who sought to establish an International Trade Organization. That, however, is a frivolous take. The failure to include any of the conditions of competition in the Havana Charter – labor standards, disciplines on foreign investors, antitrust rules – means that core elements of their vision remain unfulfilled, 70 years later.

Environment

The visionaries who designed the as-yet incomplete architecture of the multilateral trading system recognized the importance of conservation. Two of the exceptions in GATT Article XX apply to the environment: nothing in the GATT is to be construed to prevent the adoption or enforcement by a party of measures "(b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

There are two issues. First, this language is an affirmative defense. That is, no obligations are imposed on Members to *provide* basic environmental protections. Instead, Members choosing to have environmental standards are afforded an affirmative defense should those standards be challenged. That means the burden of defending the standards rests with the Member that has them, not the Member challenging them. Second, the exception is caveated with the clause "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . . ."

The article recognizes the two competing interests – conservation on the one hand, and disguised protectionism on the other. How does the WTO balance them? In general, the WTO sees its primary role as *increasing* trade flows. It sets out its priorities, and while there's a nod to the environment, it's well after lowering barriers.[16] Its monitoring report on trade, for example, divides the world into trade-restrictive measures and trade-facilitating measures.[17] With that construct in mind, it is no surprise that while in general the WTO is willing to give a nod to the theory of environmental protection, in reality it is difficult to find an environmental measure that passes muster.[18]

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[15] https://www.theglobeandmail.com/politics/article-no-urgency-to-ratify-new-trade-deal-says-chrystia-freeland/
[16] https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm
[17] https://www.wto.org/english/news_e/news17_e/trdev_04dec17_e.pdf
[18] US – Gasoline (Brazil), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds2sum_e.pdfUS – Shrimp Turtle (India), https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds58sum_e.pdf; EC – Seals (Canada), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds400sum_e.pdf,

Notwithstanding the challenges at the WTO, it is worth noting the good that trade agreements can do – if they are properly negotiated. The Whaling Convention is part of the May 10th environmental agreements for which there is bipartisan consensus. During the TPP negotiations, Subcommittee staff urged USTR to ensure that the Whaling Convention was included, and so urged USTR with particular vehemence once Japan was floated as a potential party. USTR did not do so, TPP was signed, TPP-11 was signed, and Japan withdrew from the Whaling Convention[19] – the obligations of which would have nevertheless been enforceable against Japan, had they been in TPP.[20]

Special Mechanisms for Labor and Environment

Because the system has been structurally biased in favor of the concerns of MNCs for 70 years, these enterprises do not experience the same challenges in having their grievances heard, or acted upon.

It is not just here, either. When I was working for the Subcommittee, my portfolios included Colombia labor and Peru environment. A Canadian company invested in Colombia actively suppressed worker rights, even having union organizers who blocked a road arrested for kidnapping. Out of curiosity, I looked at the Canada-Colombia agreement to see what the respective provisions were. The company benefited from ISDS; the workers, on the other hand, only had recourse to a state-to-state mechanism leading to monetary penalties – similar to the NAFTA side letters.[21] This agreement was signed in 2011. How is it that the workers came to be released? Then-Ranking Member Levin traveled to Colombia on a fact-finding mission, and the government released the workers the same day. This example highlights the gross disparity in power between stateless enterprises and workers – power that is reinforced through these agreements unless the rules are enforceable *and enforced*.

In the meantime, a petition on Colombia labor has been pending for three years.[22] A year ago, Ambassador Lighthizer promised Senator Shaheen that if there were disputes to be brought, he would bring them.[23] Still, no disputes have been brought. It should not be a question of resources; Congress created a trade enforcement trust fund to address that very issue.[24] Notably, just a month before Ambassador Lighthizer's testimony, the Trump Administration had agreed to allow Colombia to join the OECD – something the Obama Administration had refused to do until Colombia addressed its labor problems.

It is commendable that Ambassador Lighthizer initiated the first environmental dispute ever, against Peru for its flagrant violation of our bilateral trade agreement. However, it cannot be ignored that two of the senior Members of the Committee, including the Chairman of this Subcommittee, have been vocal

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https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds401sum_e.pdf; US – Tuna (Mexico), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds381sum_e.pdf

[19] https://www.washingtonpost.com/world/japan-to-leave-international-whaling-commission-resume-commercial-hunt/2018/12/26/2c32fb20-08c9-11e9-892d-3373d7422f60_story.html?utm_term=.086481b7efb0

[20] The Peru Agreement complies with May 10. It provides in Article 18.2 that a "Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 18.2. . . ." That Article includes the International Convention for the Regulation of Whaling.

[21] https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/colombia.html#s02

[22] https://www.c-span.org/video/?448767-1/trade-representative-lighthizer-us-close-nafta-deal&start=7802

[23] https://www.c-span.org/video/?448767-1/trade-representative-lighthizer-us-close-nafta-deal&start=7802

[24] http://uscode.house.gov/view.xhtml?req=(title:19%20section:4405%20edition:prelim)

advocates of enforcing the Forestry Annex for years. If the Administration were not seeking support for the new NAFTA, including from influential Members who are vested in seeing the Annex enforced, there is a question as to whether the dispute would have been brought.

In the context of the system's structural bias in favor of arbitrageur MNCs, it is entirely reasonable to provide special mechanisms for enforcement of labor and environmental obligations. The Peru Forestry Annex is an important step and provides a model going forward. The Forestry Annex provides for, among other things, verifications of shipments, to be conducted jointly with Peru, and audits of the books of exporters and producers to ensure compliance with the law.

Rather than escalating to a state-to-state dispute, in which a government stands accused of not complying with its obligations, these innovative provisions allow for a *technical-level,* joint investigation of individual shipments to evaluate compliance with Peru's own laws. The foreign country is not sued for failing to abide by its obligations; the company is investigated for failing to comply with the law of the land. This mechanism promotes cooperation between the parties, instead of litigation.

The Wyden/Brown proposal uses just this model to support Mexico's labor reforms and to help them stick. Mexico itself has recognized concerns over the historical relationship between the government and labor and has taken steps to address those issues. Wyden/Brown enables the Mexican government to work with the United States to identify and address factory-level labor violations. If successful, it *reduces* the likelihood that the United States will challenge *Mexico* for failing to enforce its labor laws.

Binding Dispute Settlement and the "Law of the Jungle"

Experience tells us that it is not enough to have labor and environmental standards put on the same footing as other chapters. Doing so is certainly important in terms of signaling that these issues are just as important to conditions of competition as the other provisions in the agreement. (At the same time, the caveats "sustained and recurring" and "manner affecting trade and investment" continue to signal these are standards are somehow different.) The structural bias against viewing labor and environment issues as core trade issues inhibits not only the bringing of disputes, but perhaps even panels' willingness to find a breach. Thus, it is unlikely that state-to-state dispute settlement alone will result in true enforcement of these rules.

Apart from labor and environmental rules, however, empirical evidence shows us – surprisingly -- that parties do not necessarily dodge all their obligations when compliance with panel findings is voluntary rather than subject to sanctions. From 1947 to 1995, the General Agreement on Tariffs and Trade had what was essentially a voluntary enforcement regime. Panels issued decisions, but those decisions could only be adopted by consensus. As a result, the losing party could block adoption.

It would be reasonable to assume that the law of the jungle prevailed. But that is incorrect. Esteemed legal scholar William Davey wrote in 1987 that between the end of the Tokyo Round (1979) and the time of his writing, some 50 out of 52 GATT disputes were resolved after a panel report was issued.[25]

Apart from the labor and environment side letters, the NAFTA experience also suggests relatively high rates of compliance. Some disputes were diverted to the WTO, but given the size and integration of the

[25] William J. Davey, "Dispute Settlement in GATT," Fordham International Law Journal, 1987, at 86. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1169&context=ilj

economies, and the length of time that has passed, but a review of the WTO website suggests the number is relatively modest, 45.

- There were no disputes between Mexico and Canada.
- Of the 20 disputes Canada filed against the United States.
    - 15 involve trade remedies
    - Of which eight involve softwood lumber.

Grievances about breaches of NAFTA obligations *not* justiciable before the WTO are relatively few. As the softwood lumber dispute amply demonstrates, binding dispute settlement does not necessarily make the dispute go away.

Amidst the acrimony of disputes, it is often forgotten that trade agreements are ultimately diplomatic agreements. Scholarship at the time of the Uruguay Round argued that a more adversarial, binding dispute settlement system, such as we have now at the WTO, might lead to a more acrimonious, less diplomatic, and ultimately less cooperative regime.

> Critics of [binding dispute settlement] claim that it will promote conflict and contentiousness in an organization that must promote negotiated solutions to achieve its goals.[26]

It is worth asking if the Canada/U.S. relationship has improved because of the eight WTO disputes over softwood lumber, or whether the constant litigation has exacerbated the rancor and made resolution *more* difficult. The undertaking might lead to innovative solutions to the dispute settlement process itself, or even an alternative.

At the same time, the question of the importance of binding dispute settlement should not be confused with the importance of binding *words.* The language used in a provision conveys the strength of the obligation, and the intention of the parties to adhere to it. Aspirational language (affirm, confirm, should, endeavor, strive) is just that – an indication that the provision is aspirational, not mandatory.

The Ultimate Check on Bad Behavior: The Sunset Clause

The history of U.S. trade policy exposes particular challenges with Europe and Japan, who have had a penchant for agreeing to tariff concessions and then using non-tariff means to undermine those concessions. It was one of the motivations for Congress to authorize USTR to negotiate non-tariff barriers in 1974.[27] At least in the run-up to the Uruguay Round, Europe and Japan were viewed as considering GATT rules to be aspirational norms, rather than binding obligations.[28] That does not seem to have changed for the Europeans, at least, as they, of the WTO Members who have lost more than 10 disputes, have the lowest dispute settlement compliance rate, at less than 40%.[29]

In an effort to foreclose these types of dodges, the U.S. response has been to make trade agreements ever-more prescriptive, with increasing constraints on government flexibility, with binding dispute settlement. However, this kind of constraint on government flexibility is precisely why there are more and more complaints that these agreements are, effectively, vehicles for deregulation. It was one of the

[26] *Id.*at 70.
[27] Congressional Record, December 11, 1973, at 40790.
[28] https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1169&context=ilj, n.72.
[29] Data courtesy of Professor Jeff Kucik, https://sgpp.arizona.edu/user/jeff-kucik. The U.S. compliance rate is 65%.

reasons the Obama Administration's negotiations with the Europeans became bogged down. The Europeans were concerned about rules that would compromise their food safety regime, and the Americans were worried about rules that would compromise our post-financial crisis regime.

These prescriptive rules do not stop sovereign entities – particularly ones not subject to the same transparency strictures as those in the United States – from blocking imports. Even with binding dispute settlement. Sovereign entities will do what sovereign entities want to do. For this reason, the assumption that the tariff elimination provisions in TPP would automatically mean more access for U.S. exports is inconsistent with the U.S. experience over the past 70 years. As former USTR Sue Schwab pointed out,

> I worked with Robert S. Strauss, who was the United States trade representative in the Carter administration at the time and my first mentor. He took me to Capitol Hill when he met with Congressional delegations. We were trying to get beef into the Japanese market, and I'm still trying to do that 30 years later.[30]

Having these agreements be permanent only encourages that kind of behavior. Binding dispute settlement does not address the issue because the actions are taken either within the letter of the agreement, or through non-transparent means that make it impossible to meet the burden of proof.

If, on the other hand, our trading partners were aware that the agreement would not automatically be renewed, but instead would be subject to an affirmative decision by each of the parties, the incentive to comply with the terms of the agreement would be heightened.

Businesses claim they need certainty. Certainty for what? To recoup their investments. This was an intrinsic part of the discussion of the renewal of the African Growth and Opportunity Act in 2015. Democrats wanted a 15-year term, and Senate Republicans wanted a 5-year term. House Republicans, who wanted to see increased investment in Africa, were focused on the amount of time business would need to recoup that investment. The extension was ultimately granted for 10 years.

The Committee Report had this to say about the period of extension:

> As part of its oversight function, the Committee has conducted a thorough process of reviewing AGOA legislation and consulting with interested stakeholders about the possibility of extending and renewing AGOA. This process includes congressional hearings, participation in AGOA Forum meetings by Committee Members and staff, informal consultations with interested stakeholders including the African diplomatic corps and senior African officials, as well as studies from the International Trade Commission and the General Accountability Office. All of these efforts have informed the Committee's development of this legislation and confirmed the need to extend AGOA for another ten years.[31]

There is no reason bilateral or regional agreements should be treated differently.

Beyond encouraging compliance, these sunset clauses also force us to reconsider provisions that seemed appropriate at the time but are eventually obsolete, or even damaging. At one point, we believed prohibitions on capital controls were appropriately included in our trade agreements; then the financial

[30] https://www.nytimes.com/2008/09/28/jobs/28boss.html
[31] https://www.congress.gov/114/crpt/hrpt101/CRPT-114hrpt101.pdf, at 4.

crisis happened, and countries like Iceland found that capital controls were a necessary lifeline.[32] Sometimes certainty means we are certainly wrong.

How did we get here?

The system structurally favors the interests of MNCs over stakeholders. How did this come to be?

The most significant change to the architecture of modern U.S. trade policy occurred with the passage of the Trade Act of 1974. That Act included:

- Fast-track, waiving the Senate filibuster;
- The authorization for USTR to negotiate not just tariff barriers, but non-tariff barriers; and
- The creation of industry trade advisory committees

This architecture was the brainchild of George Ball, a Lehman Brothers executive and State Department official.[33] An American diplomat who participated in the reconstruction of Europe after World War II, Ball was deeply troubled by nationalism and believed that MNCs would provide a mechanism to supersede the state.

While most of the focus on the Trade Act of 1974 has been on fast-track, the importance of the other two changes are insufficiently appreciated for heightening the influence of MNCs over global regulation today. Although Congress indicated that labor should sit on every individual ITAC,[34] USTR's practice instead been for labor to sit on only the odd ITAC. Congress did *not* intend for the Labor Advisory Committee to be a substitute for having labor on the individual ITACs. It is not a coincidence that the Trade Act of 1974 marked a fulcrum in history, when Labor, which had historically been supportive of U.S. trade policy, parted company with the government.

Congress authorized USTR to negotiate NTBs because of frustration that the Europeans and Japanese had been circumventing their tariff concessions through NTBs.[35] Thus, in Section 102 Congress authorized USTR to negotiate their elimination of NTBs.

Today, there are concerns that trade agreements are ultimately vehicles for deregulation – or, in some cases, regulation favoring business. With governments' hands tied through these agreements, MNCs ultimately control rulemaking. The debate over the period of exclusivity for biologics is just one example. Indeed, there is a larger concern with the IP chapter itself: the benefits are not restricted to companies located in the region, nor products made in the region. As such, the benefits flow as readily to Swiss and Irish employees of Swiss and Irish pharmaceutical companies as they do to North American employees of North American pharmaceutical companies. It is difficult to square that outcome with Trade Promotion Authority, which requires the benefits of the agreement to inure to the *parties* to the agreement. Section 106(a)(3):

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[32] http://americanphoenixpllc.com/nafta-2-0-sunsets

[33] Congressional Record, December 11, 1973, at 40769. ("The requirement that the President also establish advisory committees for particular product sectors to be representative, so far as practicable of all industry, labor, or agricultural interests in the sector concerned . . . .")

[34] Congressional Record, December 10, 1973, at 40509.

[35] Congressional Record, December 11, 1973, at 40790.

> In order to ensure that a foreign country that is not a party to a trade agreement . . . does not receive benefits under the agreement unless the country is also subject to the obligations under the agreement, the implementing bill . . . shall provide that the benefits and obligations under the agreement apply only to the parties to the agreement . . . .

This is equally true of manufacturing rules of origin, where the content requirements are so low that third parties, such as China, are *de facto* beneficiaries. These rules benefit MNCs because the more options they have for sourcing, the more opportunities they have for arbitrage. For that reason, these weak content rules do not promote the regional integration that agreements are sold as delivering.

Even if George Ball's philosophy were correct - that we would have a better world if the role of the nation-state were minimized -- the combination of the change in U.S. trade policy *and* Milton Friedman's view that companies are only obliged to maximize shareholder returns[36] means that MNCs do not look after the national interest, or even the international interest, but their *own* interest. And with the current incentive structure in the multilateral trading system, that means labor, environmental, and tax arbitrage.

Although Adam Smith is often cited as a champion of free trade (it is less well-known that supported tariffs for national defense[37] and to achieve reciprocity[38]), he anticipated, and rejected, the idea of corporations as governors.

> But the mean rapacity, the monopolizing spirit of merchants and manufacturers, who neither are, nor ought to be, the rulers of mankind, though it cannot perhaps be corrected may very easily be prevented from disturbing the tranquillity of anybody but themselves.[39]

Any doubt that this dynamic has a material effect on the agreements' content is laid to rest by a quick comparison of the intellectual property chapter on the one hand, and the labor and environment chapters on the other.

As noted above, the rules in the intellectual property chapter require no trade nexus. By contrast, the labor and environment chapters are shackled with the condition that any dispute can only be brought to the extent the breach occurs in a manner affecting trade or investment between the parties.[40] This burden of proof proved problematic in the first, and only, labor dispute the United States has brought, against Guatemala.[41] Similar language is in the environment chapter.[42] This language looks particularly absurd in the context of the otherwise laudable new USMCA text on violence against workers. Article 23.7 provides:

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[36] https://www.forbes.com/sites/stevedenning/2013/06/26/the-origin-of-the-worlds-dumbest-idea-milton-friedman/#6354a687870e

[37] https://www.marxists.org/reference/archive/smith-adam/works/wealth-of-nations/book04/ch02.htm

[38] Adam Smith, Wealth of Nations, (Modern Library 2000), at 492-500.

[39] Wealth of Nations, at 527.

[40] http://americanphoenixpllc.com/wp-content/uploads/2018/11/Analysis-of-Labor-Provisions-in-NAFTA.Nov-8.pdf

[41] https://www.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf

[42] http://americanphoenixpllc.com/wp-content/uploads/2018/11/NAFTA-2.0-Environment-Chapter.pdf

> Accordingly, no Party shall fail to address cases of violence or threats of violence against workers, directly related to exercising or attempting to exercise the rights set out in Article 23.3 . . . through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

Violence against workers is not bad enough on its own. It must be sustained or recurring, and affect trade or investment. Meanwhile, the IP Chapter, with no burdensome proof requirements, is riddled with opportunities to send people to jail. The word "criminal" appears 31 times.

Saving Capitalism: A Grand Bargain

Larry Fink, Jamie Dimon, Patriotic Millionaires – we are starting to see a movement not just from the grassroots, but from the grasstips, that capitalism is in danger of consuming itself. Millenials are asking whether socialism is a better model. The backlash against inequality has led to nationalistic surges not just here at home, but in Europe and Latin America.

When four trade bills were being considered in 2015, not a single company lent a hand to renew Trade Adjustment Assistance, nor to support the labor and environmental provisions of TPP. In fact, companies lobbied *against* closing a loophole on imports made with forced labor.

MNCs thwarted efforts to secure true conditions of global competition in the late 1940s, setting the stage for the proliferation of trade skepticism today. But they can also choose to be part of the solution. As the American public becomes more concerned about sustainability, forward-thinking businesses do just that.

It became a meme during the TPP debate that 95% of the world's *population* is outside of our borders. But isn't it more relevant where 95% of the world's *purchasing power* is? Much of it is right here at home. In its attempt to discredit the Administration's efforts to shore up the automotive rules of origin, the Center for Automotive Research accidentally tells the truth: most cars manufactured in the United States *are purchased in the United States*. A comparatively small number are exported.[43] Discussions around trade are so focused on exports that we sometimes forget that our own market is our best source of customers – and the best source of customers for our trading partners. Increasingly, that population is becoming aware that a cheap t-shirt isn't worth the deaths of a thousand workers. Increasingly, that population is concerned about sustainability.

Moreover, if we want the other 95% to have the purchasing power to buy our products, then the incentives to create false comparative advantages through suppression of labor and environmental rules must stop.

Some argue that it is time for a new Grand Bargain.[44] Business has had 70 years of essentially writing the rules to suit itself; now it can participate in ensuring that the rules no longer facilitate a race to the bottom, but create, as the OECD has put it, fair competition in the global economy.

As former Canadian Liberal Leader Michael Ignatieff has said:

[43] http://americanphoenixpllc.com/wp-content/uploads/2018/05/Assessment-of-CAR-briefing.pdf
[44] https://democracyjournal.org/magazine/48/making-trade-address-inequality/

it is not the anger of globalization's losers that ought to worry us most, but the blindness of its winners.[45]

[45] https://www.ft.com/content/baee9688-743a-11e6-bf48-b372cdb1043a