



A NEW DEAL FOR THIS NEW CENTURY: RESTORING FDR'S VISION FOR GLOBAL TRADE

The election of Donald Trump, who campaigned throughout the Rust Belt on a platform critical of U.S. trade policy, surprised many. But no less a free-trader than *The Economist* has recognized that, in the United States, [labor's share of GDP relative to capital's has declined](#). Included among the explanations proffered: offshoring. In that context, Trump's strategy, and success, are not as surprising as they might seem at first blush.

Theory tells us that trade is good. We also associate post-World War II peace with, among other things, the Bretton Woods institutions and the effort to create a more rules-based international order, of which multilateral trade is a part. However, the merger of theory with our emotional connection to the post-war peace has led us to be so supportive of trade conceptually that we have foreclosed any meaningful discussion of the rules themselves. We believe trade is good, and anyone who questions the status quo is dismissed as a protectionist.

What people do not realize is that the current system reflects a laissez-faire race to the bottom that the visionaries who created the system never intended. One of those visionaries was John Maynard Keynes, author of *The End of Laissez Faire*. Others were lieutenants of Franklin Delano Roosevelt, the father of the New Deal.¹ They believed free enterprise would thrive in a system that included guardrails against the natural affinity for excess that they themselves witnessed in the runup to, and aftermath of, the Great Depression. Thus, in their view, the global trading regime should not consist solely of tariff cuts, but should include [enforceable labor rights; disciplines on foreign investors; comprehensive antimonopoly rules](#); and a mechanism for addressing currency manipulation.

This system never came to be because American industrialists refused to be subject to constraints on their conduct. These opponents, many of whom were "huge corporations, which were associated with German cartels before the war" wanted a laissez-faire regime.² GATT tariff cuts already in hand, the Chamber of Commerce, the National Foreign Trade Council, and the National Association of Manufacturers all came out against the Charter.³

Thus, the system suffers from an original sin that not only has never been corrected, but has been aggravated. The [most important legislative reform](#) to U.S. trade policy occurred in the 1970s. Congress adopted a suite of new rules that, according to legislative history, were designed to facilitate the rise in influence of multinational corporations. Congress authorized U.S. negotiators to move beyond addressing tariff barriers to addressing non-tariff barriers as well. Congress also created a trade advisory system that, as executed, gave MNCs increased

¹ For a discussion of post-World War II trade negotiations, see C. Donald Johnson, [The Wealth of a Nation](#).

² Johnson, *Wealth of a Nation*, at 419 (citation omitted).

³ Johnson, *Wealth of a Nation*, at 414.



influence over the formulation of U.S. negotiating positions. Finally, Congress created the “fast track” procedure that limited it, in theory, to a take-it-or-leave-it vote on trade deals negotiated by the Executive Branch.

Around the same time the U.S. government was increasing the role of MNCs in shaping trade policy, Milton Friedman’s view that companies’ primary responsibility was to shareholders took root—[facilitated by the decline in union density wrought by expanded MNC access to low-wage, non-union foreign labor](#). Thus, in an era that set the stage for hyperglobalization, MNCs began to wield greater influence over trade policy, with a framework that allowed them to ignore the consequences of their behavior on the community around them. It is at this point that organized labor in the United States – which had been supportive of liberalized trade – changed course. Then, in the 1990s, the United States began negotiating a spate of bilateral and regional trade agreements, all of which were premised on a framework largely influenced by MNCs, and largely focused on returns to capital.

We feel the consequences of this framework, itself a natural product of the rejection of the Havana Charter, today more than ever. Indeed, the absence of the Charter’s rules is what has allowed Chinese state capitalism to exploit the global system to its mercantilist advantage: no collective bargaining rules, no rules on anticompetitive behavior, and no clear rules on currency manipulation all favor the Chinese model.

Ironically, one of the principal American advocates for the Havana Charter urged Congress to approve it, arguing that the world faced two paths. One

leads in the direction of free enterprise and the preservation of democratic principles. The other road leads in the direction of Socialism and state trading.⁴

He was right.

In an effort to save capitalism, the Business Roundtable has rejected Milton Friedman’s approach, pledging to consider stakeholders other than shareholders. But as we saw above, it is the marriage of Milton Friedman’s theory with rules that are deeply structured to favor capital over labor and every other stakeholder that has led to the kind of inequality that is calling into question the viability of capitalism as we know it.

Thus, it is not enough to reject Milton Friedman. The very rules of the global trading regime must be reconsidered. If the American business community wants to fend off attacks on capitalism itself, then it must accept that the rules of globalization have to be reimagined.

One place to start is the rules the American business community rejected in 1948. From there, we can figure out how to modernize them to take account of new, pressing challenges, such as climate change.

⁴ Johnson, *Wealth of a Nation*, at 416.



I. **DIAGNOSING HOW WE GOT HERE: TRADE AGREEMENTS, CAPITAL, LABOR, AND ARBITRAGE**

A. The Global System: GATT and the WTO

As noted above, contrary to common understanding, the post-World War II trading regime was not meant to be tariffs cuts with little else. It was to include a comprehensive set of rules governing global conditions of competition, embodied in the [Havana Charter](#). The Havana Charter included:

- Enforceable labor standards;
- Disciplines on foreign investor behavior, and an affirmative governmental right to regulate;
- A comprehensive set of rules against anticompetitive behavior; and
- A regime to redress currency manipulation.

The tariff cuts were reflected in [an agreement](#) that was intended to be temporary, the General Agreement on Tariffs and Trade, or GATT. GATT entered into force in 1947. The Havana Charter was to follow shortly thereafter.

Folklore tells us Congress was simply isolationist and rejected the Charter on the grounds that it would have established an International Trade Organization. But that makes little sense in the era that launched the entire Bretton Woods system, including the World Bank and the International Monetary Fund. The more credible explanation for the demise of the Charter is the one offered above: American capitalists had the opportunity to secure tariff cuts without having to accept any constraints on their conduct, and persuaded Congress to see things their way.

The creation of the WTO is seen as some sort of fulfilment of the architects' original vision, as if the demise of the Havana Charter were [all about the ITO](#). But this is sophistry. The fundamental error of the 1940s was not failing to establish the ITO. The fundamental error of the 1940s was launching a laissez-faire trading system with no real guardrails against corporate excess.

Rather than addressing any of these issues – labor, investor conduct, anticompetitive behavior, or currency manipulation – the WTO in fact aggravated the system's bias in favor of capital. It did so by, for example, including a suite of rules favorable to [pharmaceutical companies](#) (and in many cases having little to do with trade). China leveraged the incentives in the system to lure capital to its shores and become the World's Factory Floor. American supply chains are now so dependent on China that it has gotten the attention of the [Pentagon](#). More recently [Members of Congress have expressed concern](#) over our dependency on imports of medicines from China. The breadth of the opposition to the tariffs on Chinese imports



highlights exactly how much we rely on Chinese production for our everyday goods, and how challenging it is to refashion the relationship.

The claims that the WTO has inadequate rules to address the threat of state capitalism are both right and wrong. The GATT and its successor were designed to exclude state trading economies from participating in the regime. In that context, it makes perfect sense that there are no rules to address it. On the other hand, if the Havana Charter had come into existence, China's entire accession package to the WTO would have to been different: enforceable labor rules, prohibitions on currency manipulation, and rules that actually address anticompetitive behavior would have been binding.

We have, however, forgotten most of this history, and thus we did not seek to correct for it when we created the WTO. Part of the reason for this oversight is that, for the United States, the system worked fairly well until the 1970s. The United States had made greater tariff concessions than its trading partners and otherwise buttressed the system. But by the 1970s, the United States had lost its manufacturing edge, and American policymakers were frustrated that [the Europeans and Japanese were undoing their tariff commitments](#) through the use of non-tariff barriers. In 1975, Congress authorized negotiators [to start going after these non-tariff barriers](#).

While in theory going after non-tariff barriers makes sense, in practice, non-tariff barriers are, essentially, regulations. In the same legislation authorizing negotiations on non-tariff barriers, Congress gave MNCs a more prominent role in influencing trade policy itself and constrained its own ability to consider the substance of trade agreements.

The upshot of this structure is a global trading regime that not only failed to include guardrails against the excesses of capitalism, but also favors trade flows over regulation. Thus, the WTO has emerged as such an embodiment of libertarian principles that the [Cato Institute has endorsed](#) saving the WTO dispute settlement system.

Even in 2019, the global trading system encourages capital to flow to the lowest common denominator. The rules incentivize capital to build factories wherever labor and environmental rules are weakest. While theory tells us these countries will eventually raise their labor and environmental rules, reality tells us that [government and business will collude](#) to suppress the elevation of these rules, to preserve what is a false comparative advantage. These are manifest in, for example, Peru's notorious problems with illegal logging; Colombia's endemic violence against unionists; and, most prominently today, the debate over whether the new NAFTA does enough to address system labor rights issues in Mexico. The rules even make it possible for capital to challenge the sovereign right to regulate.

Compare that *again* with the Havana Charter, which blocked exploitative labor arbitrage, affirmed the government right to regulate, and recognized abusive foreign investor behavior as a problem that needed to be addressed.



If we want a new deal for a new century, let's start with the New Dealers' vision for global trade.

B. Bilateral and Regional Trade Agreements

The sheer size of the WTO, with over 160 members, and its operation by consensus make it difficult for the organization to reach new agreements. As WTO negotiations have stagnated, bilateral and regional trade agreements have proliferated.

The United States has been at the forefront of recognizing the way in which the global trading regime facilitates labor and environmental arbitrage. Since 2007, there has been [bipartisan agreement](#) to require enforceable labor and environmental provisions in all U.S. bilateral and regional trade agreements. The United States has reached such agreements with Panama, Peru, Colombia, and South Korea. Because of U.S. insistence, the Trans-Pacific Partnership included such provisions as well.

Enforceable labor and environmental provisions [are not, however, standard fare](#) when the United States is not at the table. The European Union has labor and environmental provisions, but they are not enforceable. Canada includes labor and environmental provisions in its agreements, but these are either not enforceable, or, in the case of its agreement with Colombia, enforceable through the types of [monetary penalties](#) that proved pointless when they were included in the original NAFTA.

The trading system has a long way to go to address the structural bias in favor of labor and environmental arbitrage.

Moreover, even the U.S. effort is incomplete. Although labor and environmental rules are enforceable against the parties to the agreement, they are *not* enforceable against non-parties. This would be irrelevant if the manufacturing rules in these agreements did not permit a majority of the content to come from *non-parties*. These weak manufacturing rules were one of the controversies over TPP in the 2016 campaign, where [Candidate Trump borrowed Michigan Democrat Sandy Levin's critique](#) of the rules as letting China *de facto* be a party to the agreement. China could supply 55% of the content of a TPP car, without adhering to any of the labor or environmental rules. Thus, despite the existence of labor and environmental rules in U.S. agreements, these agreements *still* facilitate arbitrage. In his Trade for America proposal, Presidential candidate Beto O'Rourke has [recognized the need to fix](#) the problem.

Beyond the endemic problem of arbitrage, these agreements also aggravate the bias in favor of capital in other ways. Here are some examples:

- ***Investor-State Dispute Settlement.*** Trade agreements are only enforceable by governments, against governments. U.S. implementing legislation specifies that there is no right for a citizen to sue based on any of the provisions in these



agreements. Except investors. Investors can sue a government directly based on certain claims. And they have done it. They have sued on [labor](#) and [environment](#).

In the meantime, labor groups have to beg the U.S. government to bring disputes, and are usually ignored. An [AFL-CIO complaint against Colombia](#) has been hanging out there for years, and despite [Administration promises to bring labor disputes](#), the AFL-CIO is still waiting – along with workers in Colombia.

Environmental disputes do not fare much better. The Obama Administration declined to pursue action against [Peru for derogating from its trade obligations](#) to attract investment, an express breach of the agreement. The Trump Administration filed a [complaint against Peru](#) for a different reason, and while the action is commendable, it seems likely it was done to appease Democrats being courted for NAFTA 2.0 votes.

The contrast between the automatic right of capitalists to have their rights vindicated, and the genuflection demanded of labor and environmental stakeholders even to be heard, highlights the disparity between these groups more than any other provision in these agreements, and it accounts for the invocation of ISDS as one of the most significant sources of contempt for U.S. trade policy today, despite the fact that the United States has “never lost a case.”

- **Pharmaceutical rules.** Pharmaceutical rules are a prominent feature of U.S. trade agreements. They establish patent terms for pharmaceutical products, as well as [other complex rules that operate to delay generic competition from coming online](#). There is no requirement that these products be made in one of the parties in order to benefit. Pharmaceuticals made in China benefit from these provisions, the same as those made in the United States.

These provisions are designed to amplify returns to capital. These companies are so adept at getting rules into these agreements that they have succeeded in including one [prohibiting the Food and Drug Administration from requesting information on marketing expenditures](#) as part of the *marketing approval process*. Why? Perhaps because these companies spend [more on marketing than on research and development](#), yet R&D is the justification for these extended monopoly periods.

In 2007, the bipartisan agreement on labor and environmental arbitration also included provisions to mitigate these rules for developing countries, in order to facilitate access to medicines for the poor. Increasingly, however, it has become clear that it is not just the poor in developing countries who need protection from these rules, but the poor, and the middle class, in the United States itself. This is the reason the biologics provisions in the new [NAFTA are among Democrats’ primary targets](#) for renegotiation before Speaker Pelosi will consider putting implementing legislation on the House Floor.



- **Weak manufacturing content requirements.** The benefits of these agreements are supposed to flow to the parties to the agreements. As noted above, however, the manufacturing content requirements are so low that in many cases non-parties can supply the majority, even the vast majority, of content. That means workers outside the region benefit as much, if not more, than workers in the region.

Moreover, as noted above, the labor and environmental rules in these agreements apply to the parties that sign the agreement. They do not apply to third parties. That is an even greater incentive for firms to source most of the content for these agreements from non-parties.

TPP has particularly weak manufacturing content rules. Given that there are 11 countries, including manufacturing hotbeds Vietnam and Malaysia, these low content requirements are indefensible unless the goal is to maximize profits for corporations that source from outside the region. [By contrast](#), most of the agricultural rules require as much as 90% content, and in some cases 100%.

The old NAFTA had better rules than TPP. TPP reflects a persistent erosion of content requirements over the past 20 years, due to the influence of corporations that prefer to have minimal constraints on sourcing. For example, products subject to a 35% rule in the TPP tend to be 60% in NAFTA, which has only three parties, not 11 (or 12 at the time the rules were negotiated). Still, while the new NAFTA has heightened the requirements for autos, at least nominally, it has not strengthened many of the other industrial rules. Thus, despite the Administration's concern over China, it [does not seem to have closed many loopholes](#) buried in the content rules.

[Compare the manufacturing rules to the agricultural rules.](#) The agricultural rules are much stronger than the manufacturing rules, requiring as much as 90% to 100% of the content to come from the parties. No wonder the agricultural sector loves trade agreements, while manufacturing workers responded to candidate Trump's critique of the system as being a bunch of bad deals.

- **Unfettered investment commitments.** The investment chapters in U.S. trade agreements emphasize the free flow of capital and restrict the ability of governments to impose conditions on investment. This is contrary to the post-war vision for the trading system, in which governments were expressly accorded the right to set conditions on investment, and imposing constraints on foreign investor behavior was a subject the founders of the system intended to explore further.

In contrast to ISDS, the investment chapter contains what is effectively a prohibition on corporate social responsibility. There is no justification for such a provision in a trade agreement. As long as the party in question is not discriminating against the



investor based on its foreign status, why is requiring corporate social responsibility prohibited?

- **Competition**. The competition chapter pays lip service to addressing anticompetitive behavior. But it contains [no substantive rules](#) that would explain just what anticompetitive behavior is. The bulk of the rules in the chapter are designed to provide due process protections for merger candidates. In era of increased scrutiny of corporate concentration, rules promoting mergers stand out as reflections of the principal purpose of these agreements today: increasing returns to capital.

II. SAVING THE GLOBAL TRADING SYSTEM: SOLUTIONS

There is a tendency to dismiss critiques of the global trading system as the complaints of special interests. But if “labor” is a special interest, so is “capital.” As shown above, the very structure of the system has evolved in a way that benefited capital over labor, aggravated income equality, and fanned the flames of the system’s own existential threat. Saving the system requires systemic reform.

A. *The WTO*

It is long past time for the WTO to redress the structural omissions that arose after the United States refused to approve the Havana Charter. The current regime reflects a bias toward liberalizing trade at the expense of the sovereign right to regulate. As long as that is the case, the dispute settlement system will continue to churn out decisions that encroach on governments’ ability to regulate.

In this vein, a survey of WTO cases [does not to reveal an example](#) of a government’s successfully defending its right to maintain an environmental regulation that impinged on trade.⁵

In 1947, it was understandable that the goal of the system was to increase trade flows. In 2019, with climate change a source of global anxiety, an organization that wishes to be seen as credible cannot allow liberalizing trade flows to be its only priority.

The following reforms at the WTO would create a more balanced system.

- **Enforceable labor rights**. This is simple enough: Article 7 of the Havana Charter sets out provisions with enforceable labor rights. Given that 53 nations, including

⁵ The WTO’s own website tends to provide confirmation. The WTO represents a successful defense of an asbestos measure as an environmental issue, but it was a measure involving human health rather than the environment per se. The WTO also cites to a dispute involving shrimp, but the United States lost that dispute. https://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm



significant parts of the independent developing world – for example, most of Latin America and India -- signed the Charter at the time, there is no valid reason the same language cannot be adopted at the next WTO Ministerial.

It is plausible to contend that if this language had been executed, tragedies such as the collapse of a garment factory in [Bangladesh in 2012](#) would not have happened. Instead of tolerating exploitative labor conditions as a rule and condemning only the most exceptional abuses, the global trading community would have had a mechanism for ensuring that exploitative conditions were addressed as they arose. Even the deaths of 1,000 people have not resulted in any movement by the WTO to address labor arbitrage.

- ***Rules addressing anticompetitive behavior.*** The Havana Charter had an entire chapter full of rules on addressing anticompetitive behavior. This is the opening paragraph:

Each Member shall take appropriate measures and shall cooperate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.

Again, 53 nations signed the Charter. It would be straightforward enough to include the provisions in the chapter at the next WTO Ministerial.

Moreover, WTO Members are fumbling about trying to figure out ways to address anticompetitive Chinese behavior. The competition provisions of the Havana Charter provide a solid basis for addressing anticompetitive behavior, without getting bogged down in whether the anticompetitive behavior involves a state-owned enterprise. The Charter's provisions make clear that they apply to both private and commercial enterprises.

Perhaps more importantly, while trade is generally considered to be good for development, nothing in the WTO suite of agreements prevents the wealth flowing to developing countries from being concentrated in the hands of a few industrialists. Provisions designed to address monopolistic behavior could result in more equitable distribution of the benefits of trade *within* countries.

- ***Currency manipulation.*** Of course the architects of the global trading system felt currency manipulation had to be addressed. The trigger for the beggar-thy-neighbor tariff policies of the 1930s was *not* Smoot-Hawley, which was a run-of-the-mill piece



of legislation for the time, but a currency crisis itself resulting from the failure of an Austrian bank in 1931.⁶

The GATT has somewhat cryptic [currency manipulation provisions](#), prohibiting members from using “exchange action” to “frustrate” the intent of the provisions of the agreement. But read in conjunction with the Havana Charter, these provisions make more sense. Article 24 of the Charter explains that in cases involving exchange claims, the International Monetary Fund will make, and the ITO would accept, any factual determinations. Today, the IMF [has criteria](#) for evaluating when currency manipulating is occurring. Thus, in a claim involving currency manipulation, the dispute would be brought to the ITO (today the WTO), the IMF would make a factual determination as to whether currency manipulation occurred, and the WTO would respect that factual determination in the course of adjudicating any dispute.⁷

- ***Environment.*** Although environmental concerns were not as prominent in the 1940s as they are today, the architects of the global trading system nevertheless recognized the need to regulate to protect human, plant, and animal health. Thus, the right to regulate in these areas is framed as an exception to the overall rules, both in Article XX of the GATT and Article 45 of the Havana Charter.

However, because the Havana Charter never entered into force, the GATT emerged as an institution solely concerned with liberalizing trade flows, initially through tariff cuts and eventually through non-tariff barriers. As a result, environmental regulations [do not survive the WTO dispute settlement system's scrutiny.](#)

Beyond that, the WTO rules include no affirmative obligations for the parties to do anything to protect the environment, or frustrate environmental arbitrage.

The absence of such obligations, combined with the organization’s bias against regulation that impinges on trade, means the WTO is simply not fit for purpose in an era where climate change is an overriding concern for the next generation.

The United States has pioneered the use of trade agreement dispute settlement mechanisms to enforce environmental agreements. Trade agreement dispute mechanisms tend to be strong because they are enforced with trade sanctions, such as the suspension of tariff benefits. By contrast, the dispute settlement mechanisms of environmental agreements are relatively toothless. To provide teeth, the United

⁶ Douglas A. Irwin, [Clashing over Commerce](#), at 404-405.

⁷ Although the appellate mechanism is stymied, disputes can nevertheless proceed through the panel stage. In that sense, the system reverts to the system that existed prior to the creation of the WTO. While the losing party could block the adoption of a panel report under those rules, there was nevertheless a [relatively high compliance rate](#) in the years preceding the creation of the WTO. For a discussion of dispute settlement in this context, see <https://docs.house.gov/meetings/WM/WM04/20190522/109520/HHRG-116-WM04-Wstate-BaltzanB-20190522.pdf>.



States insists on rendering certain multilateral environmental agreements enforceable through trade agreements. Among these MEAs is the Convention on Trade in Endangered Species.

There is no reason the Paris Agreement cannot be enforceable through the WTO. The only reason not to is if parties to Paris were willing to make concessions under precisely because they were counting on [no real enforcement](#).

The WTO also needs to reorient itself. The prioritization of increasing trade flows gives the WTO's dispute settlement system a proclivity to find against environmental regulations on the grounds that impinge on trade. Individual WTO Members must be permitted to have basic environmental standards as a condition of importation, as long as these standards are applicable to imports as they are to products made domestically. That is one way to address arbitrage in areas such as air pollution, for example.

B. U.S. Bilateral and Regional Trade Agreements

As noted above, the United States already includes enforceable labor and environmental rules in its agreements. These rules, however, need improvement.

- ***Labor***. The [new NAFTA includes language](#) prohibiting imports made with forced labor, addressing violence against organized labor, protecting workers against various forms of discrimination, and providing protections for migrant workers. Previous agreements do not. These provisions should be standard in all U.S. agreements.

Even for agreements including enforceable labor obligations, there are conditions that limit the ability to trigger enforcement. Disputes can only be brought if the breach occurred “in a manner affecting trade or investment” between the parties. This conditionality constitutes an unnecessary obstacle to bringing claims, and in fact was one of the reasons the lone U.S. labor dispute, against Guatemala, failed. Compare the labor chapter to the intellectual property chapter. As noted above, it has a series of rules having nothing to do with trade or investment. Yet there is no requirement that a claimant must prove that the breach occurred “in a manner affecting trade or investment” between the parties.

Similarly, some of the labor claims are conditioned on proof that the breach was “sustained or recurring.” Again, there is no analog in the intellectual property chapter. As a practical matter, a government is unlikely to bring a claim against another for a single incidence of violence. Accordingly, including language that suggests that individual instances of violence are somehow tolerable is embarrassing.



- **Environment.** As with the WTO, there is no reason the Paris Agreement cannot be included in the list of multilateral environmental agreements that are enforceable through trade agreements. Indeed, a bilateral or regional agreement should seek to be *more* ambitious than an agreement reflecting the lowest global common denominator.

In addition, however, there are provisions in existing agreements that are unnecessarily weak. For example, TPP reflects a watered-down version of the Obama Administration’s goal of prohibiting imports of goods that were illegally harvested (“illegal take and trade”). While agreements like CITES addressed species that the parties to CITES agree are endangered, there are other species not on the CITES list that countries nevertheless seek to protect. This is one way to protect against deforestation of the Amazon, for example, which has forests that do not necessarily compromise only trees on the CITES lists. Aside from being bad for the environment, illegal take and trade is used to fund terrorism and thus is a global security threat.

The illegal take and trade language [in TPP](#) is weak and reflects a lack of commitment by the parties to address the issue.⁸ Similar language is in the new NAFTA.

Beyond these issues, bilateral and regional agreements are in a position to lead the way in tackling environmental concerns that remain inadequately addressed, particularly industrial pollution. While it is a challenge to have 160 WTO Members reach agreement on environmental standards – and environmentalists might not want the WTO drafting such standards, given its track record – there is no reason agreements among fewer countries cannot begin to set affirmative standards to mitigate arbitrage in industrial pollution rules.

- **Enforcement of labor and environmental rules.** Even fixing flaws in labor and environmental rules will be of limited value if the rules are never enforced. In this regard, labor and environmental rules are distinct from other rules in these agreements. There is a [surprisingly high compliance rate among parties](#) to trade agreements even when enforceable dispute settlement is not available. But because labor and environmental rules are cross-cutting and precisely the areas where multinational corporations engage in arbitrage to maximize profits, these sectors are particularly susceptible to non-compliance. Moreover, as noted above, governments are conspicuously reluctant to bring state-to-state disputes to address breaches.

⁸ Article 20.17.5 (“each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party’s law or another applicable law, the primary purpose of which is to conserve, protect, or manage wild fauna or flora.”)



Accordingly, labor and environmental rules require special enforcement mechanisms. The U.S.-Peru agreement has a forestry annex, for example, that allows the countries' authorities to cooperate to investigate and address exports of illegally-harvested logs to the United States. Senator Brown and Wyden have proposed adapting that model in the context of the new NAFTA to address labor violations in Mexican factories.

These mechanisms do not require dispute settlement procedures and provide a basis for the parties to cooperate to address these endemic issues.

- **Close manufacturing content loopholes.** If these agreements are meant to build trading blocs among like-minded countries, then the free-riding from third parties must stop. If Congress requested an audit of the supply chain of manufacturing imports claiming a trade agreement preference, it might well find that many of these goods are made with components from China, with mere assembly occurring in one of the trade agreement parties.
- **Discipline investment.** Even [The Economist](#) has concluded that investor state dispute settlement is not necessary when state-to-state dispute settlement is available. Thus, ISDS may have been a useful mechanism in circumstances where the only alternative was relying on judicial systems that might be dubious. But once investor rights were included in trade agreements, the mechanism of state-to-state dispute settlement became available. The question remains: why are investors entitled to a special mechanism, when no other stakeholder is?

Parties should be able to discipline investment provided they do so on a non-discriminatory basis. The *de facto* prohibition on compulsory corporate social responsibility should be removed.

These agreements should also provide incentives for good investor behavior. While it is difficult to structure agreements to impose obligations on firms, rather than governments, these agreements could nevertheless provide some incentive for companies to comply with accepted codes of corporate conduct – [such as the OECD guidelines](#). For example, failure to comply with these rules could be an affirmative defense in the event a government is subject to a claim under state-to-state dispute settlement (or ISDS, if it is retained).

- **Repurpose the Intellectual Property Rules.** The intellectual property provisions are not tied to trade or investment between the parties, and thus represent a straightforward effort to impose a particular U.S. regulatory regime on other countries. Moreover, the intellectual property chapter of TPP is 75 pages long, and the chapter in the new NAFTA is 64 pages long. Proposals to correct for the excess include:



- *Tie the rules to the trading region.* The manufacturing and agricultural content rules are drafted, at least in theory, to ensure that the benefits of the agreement flow to the parties to the agreement. (As noted above, the manufacturing rules need to be tightened.) The IP similarly needs rules to ensure that the benefits of any rules included in it flow to the parties to the agreement. At present, the benefits flow to products no matter where they are manufactured, and they benefit companies no matter where they are located. Thus, a pharmaceutical product made in China enjoys the same benefits as a pharmaceutical product made in the United States, even though China is not a signatory to the agreement and is not bound by the agreement's disciplines.

Accordingly, the benefits of the chapter should be limited to products or services made in the region.

- *Pare back the rules themselves.* By way of example, there is no need to specify periods of protection for patents or copyrights. The labor chapter does not establish a specific minimum wage, for example. It provides a framework of rules within which the parties are able to exercise flexibility depending on their domestic circumstances.

The chapter's venture into criminal provisions should also be reversed. The decision over what to criminalize is a core sovereign right.

- ***Revisit other constraints on governmental regulatory flexibility.*** The IP chapter is just one example of the way these agreements have become prescriptive regulatory – or deregulatory – vehicles. One of the unexpected results of creating a rules-based system is that we have come to believe that rules, and more of them, are the response to any trade problem. That is how these agreements are as much as 6,000 pages long -- and full of constraints on government flexibility. The big sell for the new NAFTA is "[regulatory certainty](#)." But while regulatory certainty is good for MNCs, it is not clear that hamstringing governments from regulating is good for other stakeholders.

At some level, the prescriptiveness borders on the absurd. [TPP prohibits](#) parties from requiring their suppliers to include sell-by dates on wine or distilled spirit containers. These agreements are marketed as promoting peace among like-minded countries. Is that advanced by prohibiting sell-by dates on bottles of alcohol?

- ***Address anticompetitive behavior.*** As noted above, the founders of the modern trading system considered competition such an important element of the regime that they devoted an entire chapter of the Havana Charter to addressing anticompetitive behavior. Their foresight was such that the rules can simply be transposed into any existing trade agreement. Again, 53 countries signed the



Havana Charter in 1948. It should not be a heavy lift for countries to agree to it today.

The bonus is not just that rules promote global competition, but they also provide a solid approach to addressing anticompetitive behavior by the Chinese government. These efforts tend to focus on state-owned enterprises, such as the chapter in TPP. Not only is this focus unnecessary, but it is almost impossible to define an SOE in such a way to preclude easy evasion of the rules. Thus, whatever the promotion of these SOE chapters as a way to address Chinese behavior, the reality is that the benefits would be illusory even if China were subject to them.

- **Embrace a sunset clause.** Trade agreements are essentially permanent. As noted above, although efforts to pass any new agreement will emphasize the opportunities to amend provisions as needed, such amendments are the exception rather than the rule. Businesses argue that they need certainty, but there is a difference between certainty and permanence. Moreover, if certainty were the only social good, we would never alter conditions of competition in the first place – the very signing of a trade agreement creates uncertainty for producers facing new competition.

Under the existing construct, with so many provisions in these agreements that have nothing to do with tariffs, certainty is really a euphemism for constraining government regulatory flexibility.

A sunset clause would provide for a default termination date for these agreements. It would give the parties a concrete opportunity to review any rules that have become outdated, or to include new rules as appropriate.

III. CONCLUSION

Too often, the debate over trade devolves into tribalist claims that one side is protectionist and the other is globalist. This bifurcation obstructs a constructive discussion of how trade agreements can be reformed so that they serve the interests of a wider group of stakeholders. The founders of the global trading system recognized that a properly functioning regime requires a balance among interested parties. Contrary to popular belief, they did not believe that global laissez-faire would produce peace and prosperity on its own.

However, because of this popular misunderstanding of the post-World War II construct, many believe that more trade is always better, and that trade agreements are inherently positive instruments. As a result, that has been inadequate oversight of just what these trade agreements do.

Trade can be a force for good. But trade agreements that reflect multinational corporate capture do not inherently serve the public interest. Promoting returns to capital while reducing the returns to labor creates the kind of instability that Keynes and FDR sought to avoid.



Moreover, as climate change takes on increasing importance, the system's bias in favor of capital and against environmental protection leaves the global trading regime open to criticism that it is not fit for purpose in the modern era.

Having played such a pivotal role in blocking the Havana Charter, which would have set a more equitable framework for global trade, the American business community can now play a pivotal role in restoring public confidence in the global trading system. A simple place to start is to endorse the Havana Charter itself, and to embrace a discussion of the substantive ways in which changes to the WTO and to bilateral and regional trade agreements can serve the interests of a broader array of stakeholders.