

The Sustainable Equitable Trade Doctrine

Building Progressive International Cooperation to Counter
Right-Wing Economic Authoritarianism

Report by
Todd N. Tucker, PhD

March 13, 2017



About the Roosevelt Institute

Until economic and social rules work for all, they're not working. Inspired by the legacy of Franklin and Eleanor, the Roosevelt Institute reimagines America as it should be: a place where hard work is rewarded, everyone participates, and everyone enjoys a fair share of our collective prosperity. We believe that when the rules work against this vision, it's our responsibility to recreate them.

We bring together thousands of thinkers and doers—from a new generation of leaders in every state to Nobel laureate economists—working to redefine the rules that guide our social and economic realities. We rethink and reshape everything from local policy to federal legislation, orienting toward a new economic and political system: one built by many for the good of all.

About the Author

Todd N. Tucker, PhD, is a Fellow at the Roosevelt Institute, where he researches global economic governance, including dispute settlement and the domestic regulatory implications of international trade, investment, and tax treaties. His work has appeared in *International Studies Perspectives*, *Journal of International Dispute Settlement*, *Politico*, *Time Magazine*, and various other academic and popular publications.

Acknowledgements

I received wisdom and/or comments on earlier iterations from Paul Adler (Harvard University), Heather Boushey (Washington Center for Equitable Growth), Thomas Hale (University of Oxford), Jennifer Harris (Council on Foreign Relations), Michael Pyle (Blackrock), and Nell Abernathy, Andrew Hwang, Lenore Palladino, Dave Palmer, Tim Price, and Marshall Steinbaum at Roosevelt. Any errors are my own. Thanks to Cherrie Bucknor for help with data provision.

This report was made possible by the generous support of the Open Society Foundations.



Executive Summary

U.S. foreign policy and the need to cultivate international alliances increasingly conflict with U.S. domestic politics, particularly with regard to trade. The 2016 election featured an outgoing Democratic administration insisting the Trans-Pacific Partnership (TPP) was the U.S.'s last hope to show its commitment to the Asia-Pacific, a Republican candidate blaming it and other trade deals for all that ails the U.S. working class, and a Democratic candidate caught in the middle. Given the rise of right-wing economic authoritarianism that co-opts certain aspects of the trade policy critique of progressives, the latter are struggling with whether to pivot right, left, or center on trade questions.

This report outlines a Sustainable Equitable Trade (SET) doctrine that can make international cooperation more domestically palatable. I use "doctrine" not in the sense of "dogma," but rather as a broad set of policy goals through which specific policies (old and new) can be evaluated.

The doctrine has three pillars:

- I. Flip the class bias: Flaws in the legacy approach to trade policy go back much further than the 1990s fights over the North American Free Trade Agreement (NAFTA). Rather, the U.S.' business-friendly approach to global governance— detailed in this report— is over 100 years old. It is characterized by an excessive faith that international rule-making could function like domestic rule-making, without the checks and balances between branches of government that make the latter sustainable. While international economic cooperation agreements are essential to addressing shared global challenges, policymakers must focus intensely on ensuring their legitimacy with working-class voters. This requires flipping the class bias of international arrangements so that the working class majority is favored over elite minorities.
- II. Promote systemic participation: The international economic policies policymakers advocate must create and nurture their own political constituencies if they are to survive attack. This requires greater democratic participation and checks and balances in international bodies, as well as new ways of using domestic institutions. Active engagement with domestic and international institutions will allow policymakers to accomplish more comprehensive and rapid reform than will debates over individual treaties.
- III. Win power: In a continent-sized country with complex electoral institutions like the United States, political geography matters greatly. If the South and the coasts remain uncompetitive, the Midwest is a critical battleground, and as the last election shows, it can be won through fear-mongering. But a progressive game plan would focus on building cross-racial class power and institutions.

The report makes the following concrete recommendations:

1. Cooperate internationally on bigger-ticket items than tariff reductions. The benefits of international cooperation on fighting tax evasion, monopoly power, unstable financial markets, climate change, and macroeconomic imbalances from misaligned currencies far outstrip even the most optimistic projections for agreements like the TPP. In a policy environment where tariffs are low, the gains from further tariff liberalization are limited. This report makes detailed recommendations on changes to international trade agreements and domestic law that will focus foreign policy on the highest-value targets, not the meager and divisive.



2. Launch an Equitable Investment Act, Equitable Investment Convention, and Equitable Recognition Act to open up trade agreements and international litigation to broader societal interests. Currently, investors have litigation rights in trade deals that other groups (such as unions, environmentalists, and domestic investors) don't have. By putting all groups on a level playing field—and fixing how pact violations are remedied so as to ward off rent-seeking and speculation—global economic governance will gain legitimacy and defenders.
3. Appoint a Special Advisor for Equitable Trade and Globalization to reorganize government and treaty-making. The next generation of global economic governance needs to be much more inclusive. A new trade policymaking agency should be tasked with a much broader mission than simply signing new trade deals. Government statistical agencies must radically upgrade data collection to better understand the impact of trade on working people. And rather than engage in costly country-by-country negotiations, upgrades to treaties should be pursued on a unilateral or multilateral level to maximize the diffusion of progressive rules and rulemaking. Renegotiation of particular deals like the three-country NAFTA is only worth the time if the new deals can be joined easily by large numbers of countries committed to a refashioned agenda.
4. Enact a Sustainable Jobs Industrial Policy. While the new administration has pushed "Buy American, Hire American" rhetoric, it has done nothing to ensure that whatever rents are generated by this approach "trickle down" to workers. A smart industrial policy would focus benefits on firms that have the best labor practices, utilize production processes that require close collaboration between line-workers and designers, and make products that will be of ongoing importance to a green economy.
5. Establish a Trade Reparations Commission. For decades, policymakers have subjected U.S. workers to grinding competition with low-wage workers with no adjustment assistance anywhere near scale. However, 30 years in, unwinding supply chains and cancelling trade agreements is likely to do more harm than good. Instead, policymakers should admit their approach was flawed, but focus on building prosperity for the future by making financial reparations for the harm caused.

The report is organized as follows. Section I provides a background on the 100-year successes of and challenges raised by global economic governance, while Section II the political geography of reaction to this regime. Section III the beginnings of an alternative agenda that would bridge foreign and domestic policy priorities. It sketches examples of how the SET doctrine could help address several high-value policy areas for working-class people, including taxation, monopolies, and finance.

Finally, an important disclaimer is in order. The Roosevelt Institute is a non-partisan, not-for-profit think tank. This report is not and should not be construed as an endorsement of any party or candidate. Any party could run with some or all of the agenda articulated herein. Indeed, throughout U.S. history, the party that most robustly addressed the needs of working-class voters has gained support. In short, a pro-worker agenda is not only good policy, it is also good politics.



I: Rule-Setting in Global Economic Governance: Successes and Failures

Since World War II, governments around the world have worked to construct frameworks for international cooperation around trade—with mixed success. This agenda started off with a focus on tariff reduction, which has been enormously successful. According to the World Trade Organization (WTO), average tariffs were between 20 and 30 percent at the end of the war, and down to 4 percent by 2009.¹ The agenda gradually expanded *substantively* to reducing so-called “non-tariff barriers” to trade (including financial services rules, consumer regulations, environmental protections, and more), and *procedurally* to “de-politicizing” economic affairs by delegating disputes to court-like adjudication. This expanded agenda has largely failed. What trade lawyers consider “non-tariff barriers” (NTBs) look to other experts and citizens like domestic regulation. Moreover, their trade impact is difficult to quantify, so difficult to make rules for. (Moreover, intellectual property protection for technology and pharmaceuticals has been grafted onto the NTB-agenda, which perversely has the effect of limiting trade.)

The attempted workaround to these ambiguities was to delegate rule-making to adjudicators, which introduced its own problems, including:

- **Unviable rules, uneven compliance:** Faced with thorny problems of assessing the trade impact of domestic regulation, adjudicators have made rules that states would not have freely agreed to. As a consequence, powerful states may choose not to comply, weakening the system’s perceived evenhandedness and ability to deliver justice.
- **Inability to focus on highest-value problems:** There is no international legislature that can write new rules for new problems, and no executive empowered to maintain order through applying the rules and writing its own. International adjudication— in the absence of anything like an executive or legislative branch— can thus miss high-value cooperation problems and focus on low-value ones. For instance, the trade rules were written to apply to more-or-less free market economies, not the state capitalism now on the rise.
- **Political insulation produces political blowback.** The success on the right of Brexit and Trump— along with growing skepticism on the left about the Greek bailout and trade agreements— shows that politics can always unravel technocratic plans.

How did this idea of depoliticization emerge? It had its roots in the progressive project at the turn of the 20th century. Many of America’s most important accomplishments on international cooperation can be traced to ideas developed during Democratic administrations of the last 100 years. While the successes have been significant (e.g. easing tensions between the major powers), the compromises made to gain support from corporate and legal elites have insulated these systems from the popular scrutiny and support necessary to ensure their longevity. Understanding this history—and the concessions made along the way—is a vital part of constructing an alternative vision.

¹ ‘World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence’ (World Trade Organization 2011) <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf> accessed 17 February 2017.



The first set of conceptual advances (and practical setbacks) came during the Woodrow Wilson administration (1913-21). After extensive consultations with peace groups and progressives, Wilson attempted to articulate a workable international treaty version of their ideals around international cooperation and prosperity. In his Fourteen Points address to Congress in 1918, he argued for the U.S. to lead an agenda of (1) diplomacy accountable to the general public, (2) national self-determination for oppressed peoples, and (3) reductions in barriers to trade (which he saw as furthering the first two goals). This agenda challenged the conservative program of the era, which sought to insulate policymakers from popular pressure, maintain spheres of influence for the great powers that had prevailed in several iterations since the 1600s, and shield domestic industries behind high-tariff protectionism.²

To have a shot at gaining approval from a Republican-led Senate, Wilson attempted to peel off an amenable faction of conservatives. His predecessor, William Howard Taft, led one such group: the League to Enforce Peace. Less concerned with economic justice or public diplomacy, this group advocated international courts and arbitration as a way to judicially mandate global order. This set them apart from progressive groups. As historian Thomas Knock wrote:

[U]nlike the League to Enforce Peace, [progressives were] not 'absorbed in the machinery of international control,' but rather in the 'democratic principles which must shoot through' the League to make the peace settlement 'tolerable.' Would the organization become merely a league of governments, or one of peoples, as Wilson had often said it should? Did it deal adequately with the economic causes of war?³

While it did have some progressive elements, such as the International Labor Organization, the final League of Nations proposal in 1919 gravitated toward a more conservative vision of global order that punished the losers of World War I and delegated dispute settlement to judges. This mix had no political constituency in Congress, alienating both progressives and sovereignty-concerned conservative economic nationalists alike. (Faced with this revolt, even Taft muted his support.) The Senate ultimately voted down the proposal.

While the U.S. never joined the League, its Permanent Court of International Justice (PCIJ) set international precedents for a business-friendly "judicializing" of international relations (i.e. empowering judge-like actors relative to other actors, so that politics increasingly happens under the "shadow of the law"⁴). In one key case, a panel of judges set a standard that continues to shape the contours of international law. In *Chorzow*, a 1928 dispute between Germany and Poland, the PCIJ ruled that governments are obligated not to expropriate foreign investors. If they do, then the "reparation must, as far as possible, wipe out all the consequences of the... act and reestablish the situation which would, in all probability, have existed if that act had not been committed."⁵ In practical terms, this means putting a dollar figure on the state of the world pre-expropriation, and handing over that amount from the public purse to the private investor. This is still far more generous than what national governments—deferred to by their own courts—offer domestically to aggrieved national investors.⁶ Nonetheless, arbitrators for multimillion-dollar disputes in 2017 can cite this case's nearly 90-year-old precedent.⁷ Over time,

² Marc-William Palen, *The 'Conspiracy' of Free Trade: The Anglo-American Struggle over Empire and Economic Globalisation, 1846-1896* (Cambridge University Press 2016). On previous power arrangements from 1648 through the 1900s, see G John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (Princeton University Press 2000).

³ Thomas J Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (Revised ed edition, Princeton University Press 1995), at 235.

⁴ Karen J Alter, Emilie M Hafner-Burton and Laurence R Helfer, 'The Judicialization of International Relations' (2016).

⁵ Case Concerning the Factory at Chorzow (Claim for Indemnity) (Merits) (Germany v Poland) [1928] Permanent Court of International Justice Ser. A, No. 17, at 47.

⁶ Brice M Claggett and Daniel B Poneman, 'The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law' (1988) 22 *The International Lawyer* 35.

⁷ Manuel A Abdala and Pablo T Spiller, 'Chorzow's Standard Rejuvenated: Assessing Damages in Investment Treaty Arbitrations' (2008) 25 *Journal of International Arbitration* 103.



the *Chorzow* standard was stretched from its roots in expropriations to apply to regulations more generally.

The Democratic presidents that followed Wilson attempted their own progressive upgrades to global economic governance, with similarly compromised results. As World War II drew to a close, Franklin Roosevelt's administration developed proposals to globalize the progressive, active state management of the economy embodied domestically in the New Deal and hemispherically in the Good Neighbor policies that supported Latin American economic development. At the 1944 Bretton Woods Conference, Roosevelt's deputies came to an agreement with the progressive British economist John Maynard Keynes on the creation of institutions to rule this new order: the World Bank, International Monetary Fund (IMF), and International Trade Organization (ITO).¹¹

Roosevelt's successor Harry Truman succeeded in including in the ITO provisions that progressives today argue should be part of the WTO, such as requiring the balancing of trade deficits and surpluses, prioritizing full employment and sustainable agriculture, and tackling monopolies.¹² The original vision of the ITO—like the IMF and World Bank—prioritized agreement between diplomats and experts, not legal dispute settlement. This reflected a concern that lawyers turn "problems of an economic character" into legal ones.¹³ In the early negotiations for the ITO, the U.S., U.K., and Australia attempted to limit judicialization, mindful of the role of checks and balances between executive and judicial functions in their own systems—separate functions that had weak if any corollaries at the international level.

Unfortunately, history was to repeat itself. After business groups like the National Foreign Trade Council (NFTC) came out for more judicialization, Truman softened his opposition and allowed the U.S. negotiators to agree to

How U.S. Trade Policy Is Made

Another Democrat, John F. Kennedy, created the structure of U.S. trade policymaking, which is led by the Office of the U.S. Trade Representative (USTR).⁸ Officially part of the Executive Office of the President, its leader is one of the only Cabinet-level positions that does not head one of the 15 autonomous "departments."⁹ As part of the executive office, USTR enjoys special access to the president and a unique relationship with other agencies, and has broad intellectual and agenda-setting power over the whole of trade policy.

The political economy of USTR's mission has evolved over time. The agency's existence was originally justified as a way to have trade policy be more responsive to the legislative branch. Senators and representatives felt that their states' and districts' concerns over import competition had been given short shrift by FDR's Secretary of State, Cordell Hull, and by subsequent leaders in the diplomacy-oriented State Department. But this shifted under Nixon, when the shell created by Kennedy was filled with a system of 16 industry trade advisory committees (ITACs). These committees are filled with corporate representatives and lobbyists, who enjoy privileged access to USTR and to negotiating documents. Their meetings serve as an institutionalized forum for business groups to get on the same page about their desired trade policies, which their recommendations help influence.¹⁰

⁸ Between 1962 and 1980, called the "Special Trade Representative."

⁹ The others are the heads of the Council of Economic Advisors, Environmental Protection Agency, Office of Management and Budget, and Small Business Administration. The Ambassador to the UN and White House Chief of Staff are also Cabinet-level positions.

¹⁰ IM Destler, *American Trade Politics*, Fourth Edition (Institute for International Economics 2005).

¹¹ Eric Helleiner, *Forgotten Foundations of Bretton Woods: International Development and the Making of the Postwar Order* (Cornell University Press 2016).

¹² Richard Toye, 'The International Trade Organization' in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on The World Trade Organization* (Oxford University Press 2012).

¹³ Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015), at 6.



these provisions in the final ITO package.¹⁴ But, in a repeat of Wilson's backfiring overtures to Taft, Truman's concessions on judicialization failed to win over the NITC and other business groups to the ITO package as a whole, which they saw as international socialism. These multinational business lobbyists made an alliance of convenience with protectionist nationalists like the American Tariff League and derailed congressional support for the package. Truman, occupied with the Korean War, abandoned the ITO, leaving only the tariff reductions framework of the General Agreement on Tariffs and Trade (GATT) in its place.¹⁵

It was not long before policymakers began wondering if the GATT could be expanded to include rules on more than just tariffs. For example, policies such as tax rebates on exports to promote trade surpluses were not tariffs, but nonetheless affected trade. As the U.S. began running its first post-war trade deficits, the Nixon administration wondered whether these "non-tariff" rules could be behind it all. But how to get other countries to agree to expand the GATT's reach? Nixon created a sense of urgency by imposing an across-the-board import surcharge in 1971 and launching a slew of GATT cases, including one that produced a favorable ruling for the U.S. against European countries' tax rebates. This led Europeans to plea for mercy, and Congress to seek to normalize the situation by authorizing Nixon to negotiate a formal expansion of GATT rules into non-tariff areas like subsidies, product standards, and government procurement.¹⁶ This multi-pronged strategy—while seen as aggressive and protectionist—was ultimately successful on its own terms.

Ultimately, much of the work of the trade negotiations known as the Tokyo Round fell to the Carter administration, which succeeded in getting other countries to formalize trade dispute settlement bodies' forays into new domestic policy areas. However, this created new problems. First, since any policy, however parochial, can potentially impact trade, Carter opened the door to international second-guessing of routine democratic decision-making. Second, and relatedly, the complexity of the task created a need for further delegation of power to judge-like actors. How to ensure they had necessary subject area expertise? The Tokyo Round attempted to address this by creating separate dispute settlement mechanisms for each new non-tariff policy issue area. These bodies did not need to come to agreement with one another, which created chaos and uncertainty. This, in turn, created an obvious need for a unified dispute settlement body, which Democrat Bill Clinton sought to address by pushing the WTO through Congress.¹⁷ Lawyering begat more lawyering.

As Democrats were making the trading regime more law-and-order oriented, they were doing the same for the regulation of investment—and doing so with a clear preference for elite over non-elite interests. In the 1960s, the Lyndon Johnson administration supported the World Bank's efforts to allow foreign companies to directly sue host state governments over regulation. This system—investor-state dispute settlement (ISDS)—effectively took out the middle-man of the foreign companies' home states, which traditionally would have had to address their claims through diplomatic channels. ISDS allows teams of three untenured arbitrators to determine the international law compatibility of domestic policies that affect foreign investment, including regulations on the environment, the financial sector, and more. Congress agreed to join the World Bank's initiative, with the understanding that the U.S. would not itself sign the further treaties that would be necessary to authorize lawsuits from foreign investors against its own policies.¹⁸ Then, the Carter administration determined that it would explore signing on to such treaties, although the targeted negotiating partners were relatively poor and unlikely at that time to have investments in the U.S.¹⁹ Moreover, negotiators assured Congress that the U.S. would be unlikely to be sued, claiming ISDS was only a replica of U.S. law.²⁰ After several treaties were concluded with ISDS under the Reagan and Bush I administrations and there had been no explosion in lawsuits (and none against the U.S.), the Clinton administration took the significant step of extending the mechanism to Canada through the North American Free Trade Agreement (NAFTA). In congressional hearings, they emphasized rights for U.S. investors in

¹⁴ Seymour J Rubin, 'The Judicial Review Problem in the International Trade Organization' (1949) 63 Harvard Law Review 78.

¹⁵ William Diebold, *The End of the ITO*, vol 16 (International Finance Section, Department of Economics and Social Institutions, Princeton University 1952).

¹⁶ Robert E Hudec, 'GATT Dispute Settlement after the Tokyo Round: An Unfinished Business' (1980) 13 Cornell International Law Journal 145.

¹⁷ Marceau (n 12), at 32.

¹⁸ J William Fulbright, *Convention on the Settlement of Investment Disputes 1966*, at 55.

¹⁹ Kenneth J Vandeveld, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14 Michigan Journal of International Law 621, at 639.

²⁰ Claiborne Pell, *Bilateral Investment and Tax Treaties 1988*, at 15.



Mexico, not Canadian investors in the U.S.²¹ The few claims that emerged against the U.S. were controversial at the time, with some observers claiming that Congress would have never approved NAFTA had they known that U.S. laws could be targeted.²² But the U.S. successfully batted off the few claims that came, giving cover for Barack Obama to try to put ISDS into the core of trading relationships between the top economies: Japan through the Trans-Pacific Partnership (TPP), Europe through the Trans-Atlantic Trade and Investment Partnership (TTIP), and China through a proposed bilateral investment treaty (BIT).

In short, by the turn of the century, presidents of both parties were used to thinking of further judicialization as the default tool for setting rules for global commercial and investment flows. Democrats in particular tried to sell it on rule-setting grounds, while Republicans (aware of nationalist tendencies in their ranks) sold them as advancing the national interest. In 2000, Clinton pushed for China to join the WTO, which he described as "a system in which actions will be subject to rules embraced and judgments passed by 135 nations."²³ Over 15 years later, Obama used similar language to describe his signature trade policy, the TPP, saying, "Other countries should play by the rules that America and our partners set, and not the other way around. That's what the TPP gives us the power to do."²⁴ Indeed, further legalization became justified by the massive stock of prior legalization. This was Obama's major defense of ISDS: "It's not new. There are over 3,000 different ISDS agreements among countries across the globe. And this neutral arbitration system has existed since the 1950s... Under these various ISDS provisions, the U.S. has been sued a total of 17 times. We've won them all."²⁵ In short, the message is *the rules are rules, and they don't affect us*.

WHAT'S THE PROBLEM WITH JUDICIALIZATION?

From the Wilson administration through the Obama administration, negotiators have left the rules in international agreements very imprecise. This makes sense in the short term, as it is difficult to get negotiators from different political and legal cultures to agree on much of anything. Over the long term, however, imprecision shifts power from elected officials to the lawyers and judge-like actors who must interpret what the treaties mean.²⁶ Long after negotiating teams and journalists have gone back home, new international courts put meat on the bones of governments' obligations, determine whether they are complying, and decide what the punishment should be if they are not. These courts are not only judge and jury but legislator as well. Delegation weakens the case that international economic agreements amount to "rule-setting." Rather, they defer rule-setting to other actors at a later date.

Judges have a number of peculiar ways of problem-solving, some of which are useful but all of which are best checked by legislatures with popular support and executives with subject matter expertise. Judges are not as responsive to social demands as elected politicians, nor systematic in their use of social and economic data. They may work mightily to obscure non-legal influences on their decision-making—a problem for transparency and accountability. They can misuse so-called "judicial economy": deciding too little of a case, or deciding too much. They think casuistically, which means focusing on the case at hand to try to get it off the docket rather than about how the case will influence future disputes.²⁷ This tension between judicial review and democracy goes back to the debate over the constitution. The forerunners to

²¹ Claiborne Pell, *Bilateral Investment Treaties 1993* [103–292], at 20.

²² Adam Liptak, 'Review of U.S. Rulings by Nafta Tribunals Stirs Worries' *The New York Times* (18 April 2004) <<http://www.nytimes.com/2004/04/18/us/review-of-us-rulings-by-nafta-tribunals-stirs-worries.html>> accessed 14 October 2015.

²³ Bill Clinton, 'China Speech' (Johns Hopkins University, 8 March 2000) <<https://partners.nytimes.com/library/world/asia/030900clinton-china-text.html>> accessed 18 January 2017.

²⁴ Barack Obama, 'President Obama: The TPP Would Let America, Not China, Lead the Way on Global Trade' *The Washington Post* (2 May 2016) <https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.b5b69328f9a2> accessed 27 September 2016.

²⁵ Greg Sargent, 'Is TPP Trade Deal a Massive Giveaway to Major Corporations? An Exchange between Obama and Sherrod Brown' *The Washington Post* (27 April 2015) <<http://www.washingtonpost.com/blogs/plum-line/wp/2015/04/27/is-tpp-trade-deal-a-massive-giveaway-to-major-corporations-an-exchange-between-obama-and-sherrod-brown/>> accessed 28 April 2015.

²⁶ Kenneth W Abbott and others, 'The Concept of Legalization' (2000) 54 *International Organization* 401.

²⁷ For more on these debates, see Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004); Eric A Posner, *The Perils of Global Legalism* (University of Chicago Press 2009); and Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002).



today's Democratic Party (the Jeffersonian anti-Federalists) were concerned that judges would “be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people.” They feared constitutional interpretation would “commonly take place in cases which arise between individuals, with which the public will not be generally acquainted. One adjudication will form a precedent to the next, and this to a following one [even though] these cases will immediately affect individuals only.”²⁸ Alexander Hamilton—the grandfather to today's Republican Party—did not contest the point, but argued only that the legislature's purse and executive's sword would rein in any danger from the judiciary: “It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”²⁹

Some of these problems are amplified in global courts. While the periodic gatherings of trade negotiators form a weak parallel at best to executive and legislative branches in the domestic context, the WTO's Appellate Body and ISDS tribunals can be convened more frequently and perform a role in generating norms and rules that strongly parallels the role of the domestic judicial branches.³⁰ Moreover, adjudicators in global courts are not typically required to follow precedent, although some choose to, which means there is uncertainty as to whether past cases will be a reliable guide to future decisions.³¹ This is yet another way that global “rules” are not reliably “rule-like.”

Table 1 describes just a few examples of how a combination of imprecision and delegation to third-party adjudicators has shaped the rules of global economic governance in ways that have affected progressive priorities. For instance, forcing corporations to be more transparent by labeling practices, banning harmful products, and challenging sweetheart deals in the context of elections is a normal feature of domestic politics. But, in the name of creating *Chorzow*-esque stability for cross-border traders and investors, adjudicators have ruled against such regulations. While they lack the ability to (per Hamilton) force their will on countries, the case-by-case evolution of rules has pitted domestic prerogatives against international compliance in ways that are unsustainable for both.

Table 1: How Imprecision and Delegation Led to Mission Creep

Institution or Agreement	Original Rule	How Adjudicators Expanded It	Impact on Progressive Priorities
WTO's Technical Barriers to Trade	Technical regulations and consumer labels shouldn't favor domestic goods.	U.S. country of origin labels, ³² dolphin-safe tuna labels, ³³ and anti-teen smoking measures ³⁴ found to violate WTO rules. U.S. advised to create redundant and costly regulatory schemes so as to minimize even perception of discrimination.	Countries must ensure that even-handed consumer protection policies (and reaction to them by consumers and supply chains) does not inadvertently burden foreign goods - even when this would drive up costs and difficulty of administration. ³⁵

²⁸ Brutus, ‘The Power of the Judiciary, Part IV (Antifederalist Paper No. 82)’ New York Journal (New York, 6 March 1788) <<http://www.thisnation.com/library/antifederalist/82.html>> accessed 18 October 2016.

²⁹ Alexander Hamilton, The Federalist: A Commentary on the Constitution of the United States (J and A McLean 1788).

³⁰ Steve Charnovitz, ‘A Post-Montesquieu Analysis of the WTO’ in Thomas Cottier and Manfred Elsig (eds), *Governing the World Trade Organization: Past, Present and Beyond Doha* (Cambridge University Press 2011).

³¹ The WTO and international law generally don't operate obey stare decisis (case law as binding precedent), but routinely use case law as persuasive precedent that many adjudicators prefer to follow. Gilbert Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 *Journal of International Dispute Settlement* 5.

³² United States – Certain Country of Origin Labeling (COOL) Requirements (Appellate Body Report) [2012] WTO WT/DS384/AB/R.

³³ United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (‘Tuna II’) (Recourse to Article 215 of the DSU by Mexico) [2015] WTO Appellate Body WT/DS381/AB/RW.

³⁴ United States - Measures Affecting the Production and Sale of Clove Cigarettes [2012] Appellate Body WT/DS406/AB/R.

³⁵ Todd Tucker, ‘The WTO Ruling on the United States’ Flavoured Cigarettes Ban’ in Tania S Voon and Andrew D Mitchell (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar Publishing 2014).



WTO's GATT and General Agreement on Trade in Services	Countries shouldn't put quotas on or discriminate against imported goods and services.	U.S. bans on illicit gambling are interpreted as quotas, ³⁶ Argentine sanctions against tax havens are interpreted as discrimination, ³⁷ and Colombia's trade invoicing requirements to combat money laundering ³⁸ deemed WTO violations.	Regulatory bans—and many measures short of them intended to protect the public—now possible WTO violations. ³⁹
NAFTA's Investment Chapter - Investor-State Dispute Settlement	Countries should treat investors fairly and equitably.	The U.S. executive branch is responsible for keeping the judicial branch and juries from awarding large punitive damage awards. ⁴⁰	Countries in other ISDS cases routinely presented with a choice between compliance with commitments to foreign investors and provoking constitutional crises. ⁴¹
US-Argentina Bilateral Investment Treaty - Investor-State Dispute Settlement	Countries should treat investors fairly and equitably.	Argentina shouldn't change regulatory framework put in place by previous governments without compensating investors. ⁴²	Countries in financial crises must provide stability and regulatory forbearance to foreign investors— even when domestic investors must comply. ⁴³

As noted above, it is not inherently objectionable to have imprecision in international rules. Leaving some text ambiguous is an efficient response to uncertainty about future needs and the changing state of the world. But, if there are three precise rules in a treaty, and one imprecise one, the imprecise one is a good indicator of the values that treaty negotiators were aiming to foster with the precise rules. For instance, investment treaties have fairly specific rules prohibiting expropriation, capital controls, and localization requirements. These were specific acts that the negotiators could think of that interfered with business. But there are plenty of actions that might annoy businesses that negotiators cannot think to list; for that reason, they added a grab-bag imprecise rule: Investors should be treated fairly and equitably. This essentially empowers adjudicators to be policemen that stick up for the purpose of the treaty, which is to protect business. As I explore in the final section of this paper, the distribution of precise and imprecise rules could be flipped to favor a different set of values, such as labor, environment, or consumer justice.

But uncertainty about rules can also fuel rent-seeking by lawyers and corporations. In ISDS, for instance, investor claimants are rarely successful on their most adventurous claims. Even though their success rate has decreased over time, their filings have increased sharply. While an efficient legal system encourages settlement, political scientist Krzysztof Pelc finds that claims over less precise rules "are 52% more likely to persist to the ruling stage, in a manner consistent with the belief that investors bringing such cases may be more interested in the benefits of litigation itself than in securing a favorable early settlement."⁴⁴ For the companies, there is an inherent benefit in the case generating negative publicity for the regulating government. For the lawyers, arbitrators, and other specialists, the total average fees per case

³⁶ United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - AB-2005-1 (Report of the Appellate Body) [2005] WTO Appellate Body AB-2005-1.

³⁷ Argentina - Measures Relating to Trade in Goods and Services (Report of the Appellate Body) [2016] WTO Appellate Body WT/DS453/AB/R.

³⁸ Colombia - Measures Relating to the Importation of Textiles, Apparel and Footwear (Report of the Appellate Body) [2016] WTO Appellate Body AB-2016-1.

³⁹ Todd Tucker, 'The Looming GATS Conflict with Capital Controls' in Kevin P Gallagher and Leonardo Stanley (eds), Capital Account Regulations and the Trading System: A Compatibility Review (Boston University 2013).

⁴⁰ Loewen Group, Inc and Raymond L Loewen v United States of America (Award) [2003] ICSID ARB(AF)/98/3.

⁴¹ Todd Tucker, 'Investment Agreements versus the Rule of Law?' (UN Conference on Trade and Development 2013) Discussion Paper 9

<<http://investmentpolicyhub.unctad.org/Views/Public/FeaturedDiscussionDetails.aspx?fdid=25>> accessed 12 October 2013.

⁴² Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic (Decision on Liability) [2010] ICSID ARB/03/17.

⁴³ Todd Tucker, 'The Concept of the State in Investor-State Arbitration: A Social Science Perspective' in Shaheez Lalani and Rodrigo Polanco (eds), The Role of the State in Investor-State Arbitration (Brill | Nijhoff 2014).

⁴⁴ Krzysztof J Pelc, 'Does the International Investment Regime Induce Frivolous Litigation?' (2016) <<http://politics.as.nyu.edu/docs/IO/42486/frivolity.pdf>> accessed 8 April 2016, at 32.



are \$10 million, while median fees are \$6 million.⁴⁵ My own calculations for the 122 ISDS cases from 1990 to 2015 for which complete data is available suggest that investor claimants have only attained 4.5 percent (or \$5.5 billion) of the \$122.5 billion they have claimed in damages. Yet, in comparison with their investment in legal costs (\$744 million), they've achieved a return of nearly 750 percent. This is despite the fact that investors lost (i.e. got \$0 in damages) in 55 percent of these cases.⁴⁶ Such returns—even when the average outcome is an investor loss—help explain the emergence of a third-party ISDS and litigation funding industry, which finances some portion of legal costs and expects a return of 200 percent.⁴⁷ This rent-seeking has poisoned the public's appetite for trade agreements. Polling by Greenberg Quinlan Rosner found that while Democratic voters favor trade agreements by a 25-point margin when these deals are described in generic terms, they rapidly shift 39 points to a 14-point margin of opposition when learning about ISDS.⁴⁸

The political economy of litigation at the WTO is different, as it involves states bringing cases against other states in a public international law setting. Yet the cases mentioned in the top two rows of Table 1 above involved entrepreneurial claims driven largely by narrow industrial concerns in Canada, Mexico, Antigua, Indonesia, and Panama—claims that would not likely have risen to the top of the countries' diplomatic agenda absent a lower-cost, siloed, judicialized forum. The results were mixed: The countries succeeded in getting an expansion of the trading rules in ways that negotiators alone would probably not have agreed to. But—except for the claim brought against the U.S. by Canada—the U.S. made little if any change to the challenged policies. Remedies at the WTO are limited to countervailing trade sanctions, which poorer countries cannot credibly wield (because of their lower trade volumes) against richer countries. In short, the WTO's rule development is troubling, as it creates precedents in relatively low-stakes settings (like U.S. regulation of gambling) that can ripen and be eventually used in higher-stakes settings (like U.S. regulation of banks). So too is the lack of compliance, as it erodes a sense of justice and fairness.

The successes and failures of judicialization should inform any attempt to marshal it for progressive goals like addressing currency manipulation or taxation. While it can provide a helpful forum to resolve ambiguities in the law and name and shame persistent bad actors, it can also frustrate justice if the remedies for violations are so strong that they attract rent-seeking—or so asymmetric that only the powerful can use them.

SUMMING UP

Donald Trump's trade agenda could disrupt the contours of the extant debate within progressive circles on trade and investment policy. The debate over the last several decades has been divided thusly: On one side, Clinton and Obama relied heavily on the metaphor of trade deals as rules that are binding and good. The Clintonite columnist Thomas Friedman once described this notion as a golden straightjacket: If only countries would deregulate their economy and lock it in through mechanisms like NAFTA, this would unleash economic growth.⁴⁹ On the other side, progressive critics of NAFTA describe it as rules that are binding and bad. ISDS, for example, is seen as overturning environmental laws and shredding sovereignty. Both stories are partially true at best. As seen in the box above, what the "rules" of these pacts even mean is determined long after negotiators and legislators have moved on to other matters.

Against *both* narratives, Trump's trade team argues for advancing the national interest—rules be damned. For instance, the USTR nominee Robert Lighthizer said the following in testimony before Congress: "Trade policy discussions in the

⁴⁵ Matthew Hodgson, 'Costs in Investment Treaty Arbitration: The Case for Reform' (2014) 11 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=2088>> accessed 14 March 2016.

⁴⁶ This loss ratio would be even higher if jurisdictional losses for investors were included, although they are excluded here since the tribunals did not assess (and often do not publish) the damages claims. These numbers exclude the Yukos cases, which were outliers in the damages claimed, damages awarded, and the legal costs.

⁴⁷ Mick Smith, 'Mechanics of Third-Party Funding Agreements: A Funder's Perspective' in Victoria Shannon and Lisa B Nieuwveld (eds), *Third-Party Funding in International Arbitration* (Kluwer Law International 2012) <http://www.kluwerarbitration.com/CommonUI/book-toc.aspx?book=TOC_Nieuwveld_2012> accessed 17 February 2017.

⁴⁸ Stan Greenberg and Nancy Zdunkewicz, 'Public Anger about Corporate Power Dominant Factor in Views on Trade & TPP' (Greenberg Quinlan Rosner Research 2016) Memo <<http://www.citizen.org/documents/Greenberg-Polling-Memo-July-2016.pdf>> accessed 25 August 2016.

⁴⁹ Thomas L Friedman, *The Lexus and the Olive Tree* (Anchor Books 1999).



United States have increasingly been dominated by arcane disputations about whether various actions would be 'WTO-consistent'—treating this as a mantra of almost religious or moral significance... WTO commitments are not religious obligations, do not (and should not be construed to) impinge upon national sovereignty, and are not subject to coercion by some WTO police force."⁵⁰ In this worldview, the U.S. should abandon global leadership and try to get back jobs stolen by other countries.

Disruption presents opportunity. From Wilson through Truman, progressives made compromises that took them further away from their original vision of leagues of people across borders, united by democratic principles. These compromises fostered illusions that judicialized dispute settlement would be both more effective and legitimate than it really could be.⁵¹ Yet with the complex industrial interdependence created by decades of low tariffs, the solution is not to pull inward. Diplomats need foreign policy tools, but the existing approach to trade agreements has run out of steam. Section III begins to sketch an alternative vision that maintains low tariffs, improves the balance of international rule-making, and tackles the international cooperation problems most likely to help working people around the world—including decades-long macroeconomic imbalances, tax evasion, and concentration of wealth. But first, Section II explores the significant constraints that domestic political geography places on deeper international cooperation.

⁵⁰ Keith Bradsher, 'What Trump's Nominee for Trade Representative Has Said About China and the W.T.O.' The New York Times (13 January 2017) <<http://www.nytimes.com/interactive/2017/01/13/business/document-lighthizer-2010-china-two-trade-testimony.html>> accessed 17 January 2017.

⁵¹ That our integration strategy would have a class bias reflective of domestic power structures would be predicted by the "liberal school" of international relations, while it being embedded with distinctive disciplinary preferences of lawyers would be predicted by "constructivists" and their close colleagues. See Andrew Moravcsik, 'Liberal Theories of International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013); Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 *Annual Review of Law and Social Science* 433.



II: Political Geography of Trump's Trade Appeal

TRUMP: You've been doing this for 30 years... I will bring back jobs. You can't bring back jobs.

CLINTON: Well, actually, I have thought about this quite a bit.

TRUMP: Yeah, for 30 years.

CLINTON: And I have—well, not quite that long. I think my husband did a pretty good job in the 1990s. I think a lot about what worked and how we can make it work again...

TRUMP: Your husband signed NAFTA, which was one of the worst things that ever happened to the manufacturing industry... And now you want to approve Trans-Pacific Partnership. You were totally in favor of it. Then you heard what I was saying, how bad it is, and you said, 'I can't win that debate.' But you know that if you did win, you would approve that, and that will be almost as bad as NAFTA.⁵²

Trade was not some passing interest for candidate Trump. Trump's early forays into national political life in 2000 show an almost exclusive focus on critiquing U.S. trade policy.⁵³ Breitbart writers—noting that this dovetailed with a critique from Bernie Sanders on the left—predicted that Trump might use class politics as a tool of partisan realignment.⁵⁴

The realignment risk should make progressives nervous. For years, Democrats have "owned" the issue of workers' rights and job security, and benefited from the loyalty of the majority of the working class.⁵⁵ But these allegiances are not static. Historians cite 1860, 1896, and 1932 as the years when U.S. political parties realigned. In each case, the dominant parties of the time were failing to adequately air issues related to working class living standards. In 1860, anti-slavery sentiment that had inspired third parties was finally taken over by the Whigs-cum-Republicans. In 1896, populist agitation against monopolies and restrictive monetary policy was finally brought into the Democratic Party. This forced Republicans to compete for working-class votes by redoubling their commitment to trade protectionism as a means of supporting living standards. The Republican candidate in that race, William McKinley, prefigured Trump with his campaign slogan: Patriotism, Protection, and Prosperity. Finally, in 1932, Roosevelt made Democrats the party of the working class by dramatically expanding the social and industrial planning capacity of the federal government and ending the Great Depression.⁵⁶

Trade has been an underappreciated vulnerability for the two major parties. When elites in both parties were united in their advocacy for trade deals, voters lacked a credible exit option to express frustrations on the matter. In the past, elected officials often talked tough on trade to win elections, but reversed position once in office to cater to business or foreign policy interests. Candidate Obama's economic advisor in 2008, for instance, told the Canadian government through back channels that his boss's criticism of NAFTA was "more reflective of political

⁵² Aaron Blake, 'The First Trump-Clinton Presidential Debate Transcript, Annotated' Washington Post (26 September 2016) <<https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/the-first-trump-clinton-presidential-debate-transcript-annotated/>> accessed 20 January 2017.

⁵³ Donald J Trump, 'What I Saw at the Revolution' The New York Times (19 February 2000) <<http://www.nytimes.com/2000/02/19/opinion/what-i-saw-at-the-revolution.html>> accessed 7 January 2017.

⁵⁴ John Hayward, "'No TPP!' Chants Drown Out Democratic Convention Speakers' Breitbart (26 July 2016) <<http://www.breitbart.com/big-government/2016/07/26/tpp-delegates-drown-democratic-convention-speakers-chants/>> accessed 31 January 2017.

⁵⁵ William L Benoit and Glenn J Hansen, 'Issue Ownership in Primary and General Presidential Debates' (2004) 40 *Argumentation and Advocacy* 143.

⁵⁶ James L Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States* (Brookings Institution Press 2011).



maneuvering than policy.”⁵⁷ There was a certain surface rationality to this, as there was once limited evidence of incumbents being ousted because of their trade position.⁵⁸

But exit options have been bubbling up. Beginning in the 1990s, the Green Party and protest movements on the left agitated for changes to trade policies.⁵⁹ On the right, independent conservative Ross Perot ran on a platform critical of NAFTA, and took enough votes away from George H.W. Bush to put Bill Clinton in the White House. And, as alluded to above, Trump briefly challenged Pat Buchanan for the Reform Party nomination in 2000, arguing that he could offer a non-racist version of protectionism.⁶⁰

For at least a decade, the mainstream parties tried haltingly to harness a more trade-skeptical energy. Democrats in Congress have become overwhelmingly skeptical of trade agreements⁶¹ and even vote almost on party lines against adjustment assistance for workers, since they perceive that this paves the way to passage of trade deals.⁶² On the right, Tea Party Republicans in Congress have voiced similar criticisms.⁶³ But until the 2016 election, neither party had a credible champion for this message among those running for the top office.

Trump infiltrated the GOP and changed this calculus. Perhaps more than any issue, Trump won on trade. The issue was ripe for Trump to take, with rising salience. In just the time since the first millennials were born, the U.S. economy has nearly doubled its global exposure to goods and services. Previously, it took two generations of births—the Baby Boomers and Generation X—to attain an increase of this magnitude. For 40 years, the U.S. has run trade deficits, during which time the country has quadrupled its exposure to foreign direct investment. This greater integration has changed politics in subtle ways: It strongly motivates those who fear it and is not a decisive voting issue for those who favor it.⁶⁴ In areas hard-hit by import competition, voter turnout is higher⁶⁵ and voters replace retiring trade advocates with trade skeptics.⁶⁶

The political geography of these economic shifts mattered greatly for the new president. The electorally crucial states of Michigan, Ohio, Pennsylvania, Iowa, and Wisconsin—which voted almost entirely Democratic in presidential races from 1992 to 2012—all went for Trump in 2016. Exit polls show that the majority of voters in these states have negative views of our trade policy, compared with a more benign view nationwide.⁶⁷ Thus, it’s fair to conclude that Trump’s single-minded focus on the issue helped win him his 306 electoral votes.⁶⁸

The institutional collapse of class-coalescing organizations like unions explains much of why Trump was able to make his play. While the U.S. as a whole lost 5.1 million manufacturing jobs since 1998, these five states (which account for only 14 percent of the population) accounted for 33 percent of the job loss of unionized manufacturing workers. In 2008, unions were a bit stronger than they are today, and able to do extensive education work with

⁵⁷ Michael Luo, ‘Memo Gives Canada’s Account of Obama Campaign’s Meeting on Nafta’ The New York Times (4 March 2008)

<<http://www.nytimes.com/2008/03/04/us/politics/04nafta.html>> accessed 10 February 2017.

⁵⁸ Alexandra Guisinger, ‘Determining Trade Policy: Do Voters Hold Politicians Accountable?’ (2009) 63 *International Organization* 533.

⁵⁹ Margaret Levi and Gillian H Murphy, ‘Coalitions of Contention: The Case of the WTO Protests in Seattle’ (2006) 54 *Political Studies* 651.

⁶⁰ Trump (n 55).

⁶¹ Timothy Hellwig, ‘The Structure of Issue Voting in Postindustrial Democracies’ (2014) 55 *The Sociological Quarterly* 596.

⁶² Russell Berman, ‘A Big Win for Big Labor’ [2015] *The Atlantic* <<http://www.theatlantic.com/politics/archive/2015/06/a-big-win-for-big-labor/395699/>> accessed 20 January 2017.

⁶³ Todd Tucker, ‘Election 2010: The Best Defense Was a Good Fair Trade Offense’ (Public Citizen 2010)

<http://www.citizen.org/documents/2010_Election_Trade_Report.pdf> accessed 5 December 2016.

⁶⁴ Jackie Calmes, ‘Who Hates Free Trade Treaties? Surprisingly, Not Voters’ The New York Times (21 September 2016)

<<http://www.nytimes.com/2016/09/22/us/politics/who-hates-trade-treaties-surprisingly-not-voters.html>> accessed 9 December 2016.

⁶⁵ Yi Che and others, ‘Does Trade Liberalization with China Influence U.S. Elections?’ (National Bureau of Economic Research 2016) Working Paper 22178

<<http://www.nber.org/papers/w22178>> accessed 9 December 2016.

⁶⁶ David Autor and others, ‘Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure’ (2016) 22637 NBER Working Paper

<<http://www.nber.org/papers/w22637.pdf?sy=637>> accessed 29 November 2016.

⁶⁷ Tami Luhby, ‘Voters Trust Trump to Fix the Economy’ CNNMoney (9 November 2016) <<http://money.cnn.com/2016/11/09/news/economy/trump-economy-voters/index.html>> accessed 29 November 2016.

⁶⁸ The final count was slightly different (304 to 227) because of a number of “faithless electors” that voted for candidates other than Trump or Clinton.



their white members who might have otherwise been reluctant to vote for an African-American candidate with a Muslim name.⁶⁹ Without labor organizations that connect workers to Democrats, individualistic and authoritarian strains of conservatism have prospered.⁷⁰ As shown in Table 2, Hillary Clinton lost Michigan, Pennsylvania, and Wisconsin by fewer votes (77,764) than the number of union jobs lost there in the last 15 years (392,063). If even one in five of these union members had been around to vote for Clinton, she could have achieved an electoral college victory of 274 to 264. In the five states overall, vanished union members would have gone 90 percent of the way toward making up the margin.

Table 2: Vanished Union Members Could Have Spelled a Clinton Victory

State	Electoral College Votes	Trump's Margin over Clinton	Unionized Manufacturing Jobs Lost, 1997–99 average to 2013–15 average	Times Job Losses Could Have Plugged Electoral Gap
Iowa	6	147,314	19,274	0.1
Michigan	16	10,704	219,304	20.5
Ohio	18	446,841	197,297	0.4
Pennsylvania	20	44,312	111,849	2.5
Wisconsin	10	22,748	60,910	2.7
Sum	70	671,919	608,634	0.9

Source: Author's Calculations based on Center for Economic and Policy Research Extract from the Current Population Survey

A national narrative focused mostly on the aspirations of the so-called “rising electorate” of college-educated women and non-whites⁷¹ may fail to connect with these majority-white states. While non-whites will constitute most of the working class nationwide by 2032 (and most of the young working class by the next presidential election in 2020),⁷² none of the swing Midwestern states are on track to flip to “majority-minority” by even 2060–10 election cycles away.⁷³ Today, their populations range from a low of 76 percent white in Michigan to a high of 87 percent in Iowa.⁷⁴ This is a population with certain unique problems. Bucking the general trend over the whole of recorded history, the death rates of middle-aged American whites have been on the increase since the late 1990s. This reversal—linked to increases in diabetes and addiction—has not been seen in other races or nations.⁷⁵ While whites continue to do better in absolute terms than other races,⁷⁶ the trend lines are in the wrong direction—a fact that matters greatly for politics.

⁶⁹ Timothy J Minchin, ‘A Pivotal Role? The AFL–CIO and the 2008 Presidential Election’ (2016) 57 Labor History 299.

⁷⁰ Following recent political science work, I define authoritarians as “more likely to feel threatened by, and dislike, outgroups; more likely to desire muscular responses to conflict [including economic conflict]; less politically well informed; and less likely to change their way of thinking when new information might challenge their deeply held beliefs.” In contrast, extreme non-authoritarians demonstrate outgroup preference, accuracy motivation (even if this paralyzes quick responses), and prioritization of personal autonomy (even if it frays community ties). See Marc J Hetherington and Jonathan D Weiler, *Authoritarianism and Polarization in American Politics* (Cambridge University Press 2009), at 37. As other work shows, more traditional conservatism and austerity has also found adherents. See Monica Prasad, Steve G Hoffman and Kieran Bezila, ‘Walking the Line: The White Working Class and the Economic Consequences of Morality’ (2016) 44 Politics & Society 281.

⁷¹ Stan Greenberg and Page Gardner, ‘The politics of the rising American electorate’ The Hill (5 December 2016) <<http://thehill.com/blogs/pundits-blog/presidential-campaign/308804-the-politics-of-the-rising-american-electorate>> accessed 13 December 2016.

⁷² Valerie Wilson, ‘People of Color Will Be a Majority of the American Working Class in 2032: What This Means for the Effort to Grow Wages and Reduce Inequality’ (Economic Policy Institute 2016) <<http://www.epi.org/publication/the-changing-demographics-of-americas-working-class/>> accessed 13 December 2016.

⁷³ Ruy Teixeira, William H Frey and Robert Griffin, ‘States of Change: The Demographic Evolution of the American Electorate, 1974-2060’ (Center for American Progress 2015) <<https://cdn.americanprogress.org/wp-content/uploads/2015/02/SOC-report1.pdf>> accessed 6 December 2016.

⁷⁴ Mike Maciag, ‘A State-by-State Look at Growing Minority Populations’ (Governing the States and Localities 2016) <<http://www.governing.com/topics/urban/gov-majority-minority-populations-in-states.html>> accessed 13 December 2016.

⁷⁵ Gina Kolata, ‘Death Rates Rising for Middle-Aged White Americans, Study Finds’ The New York Times (2 November 2015)

<<http://www.nytimes.com/2015/11/03/health/death-rates-rising-for-middle-aged-white-americans-study-finds.html>> accessed 14 December 2016.

⁷⁶ Thomas Shapiro, Tatjana Meschede and Sam Osoro, ‘The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide’ [2013] Institute on Assets and Social Policy 1.



Economist Albert Hirschman evoked the metaphor of a “tunnel effect” to explain the importance of relative deprivation (relative to each other, to one’s past, and to expectations). In economies on an upward development trajectory (imagine a tunnel where the traffic is moving), the unemployed celebrate when a neighbor gets a job because it is a sign of good things to come for everyone. When economies are stagnant or on a downward trajectory (tunnel traffic is stopped, or stopped in some lanes), then the same phenomenon provokes resentment.⁷⁷ Growth models in which every group does better than it did in the past are generally stable; models in which some are forced to do worse than they did in the past are generally not.⁷⁸ In the contemporary U.S. context, whites started further along in traffic than non-whites. But the former are now moving in reverse by some measures, while the latter continue to inch forward. Backward motion for working-class whites—together with a two-party system that they see as offshoring their jobs—reinforces a sense that the system has left them behind.

This political map favors Republicans. Democrats have long since conceded the Deep South, converting much of the region into a one-party machine that will vote for whichever candidate wins the Republican primary.⁷⁹ Likewise, Democrats have their own reliable voting blocs in the Northeast and West. For several decades, this has meant that whichever party wins the Midwest wins the national election.

For Democrats, there is almost no credible path to a 270-vote majority in the Electoral College that does not include these Midwestern states. Consider the following numbers: Generously assume that in 2020, Democrats claim the electoral votes of all states that they won by over 50 percent of the major party vote in 2016. Further assume that Republicans do the same for states they won by over 55 percent, plus Texas and Georgia (where they did almost that well). Finally, assume Democrats once again cede the 70 electoral votes of Ohio, Wisconsin, Michigan, Iowa, and Pennsylvania. In this scenario, the only path to victory is through Florida—plus either Arizona (which has only voted for a Democrat once since 1948) or North Carolina (which has only done so twice since 1972). If for some reason Democrats do not get the seven states where they got between 50 and 55 percent of the vote, the math becomes even trickier.⁸⁰

Even if more progressive millennials were to internally migrate *en masse* to the coasts, it would take decades before decennial censuses would trigger a sufficient reassignment of states’ electoral power from (say) Wisconsin to California to secure Democratic Party victory. Short of eliminating the electoral college (something that would almost certainly require a binding inter-state compact or constitutional amendment that the “losing” states would not agree to),⁸¹ Democrats must regain the support of the Midwest if they are to be a viable national party. For their part, Republicans must keep the Midwest in their column if they are to retain the White House.

JOBS, WAGES, DEFICITS: THE "OLD-FASHIONED" TRADE ISSUES

Since the 1990s, both proponents and opponents of trade deals—when not casting them as about setting rules—describe them in terms of their potential to create or destroy jobs.⁸² While modern trade agreements set rules on

⁷⁷ Albert O Hirschman and Michael Rothschild, ‘The Changing Tolerance for Income Inequality in the Course of Economic Development’ (1973) 87 The Quarterly Journal of Economics 544.

⁷⁸ Daron Acemoglu, ‘Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics’ (2003) 31 Journal of Comparative Economics 620.

⁷⁹ Thomas F Schaller, *Whistling Past Dixie: How Democrats Can Win Without the South* (Simon & Schuster 2006).

⁸⁰ Steve Phillips rightly raises the point that Stein voters and non-voters are equally if not more important than “Trump Democrats” in accounting for the 2016 margins in the Midwestern states. However, regaining credibility on trade and jobs could go a long way to rebuilding ties with at least two if not all three of these blocs. Steve Phillips, ‘Move Left, Democrats’ The New York Times (21 February 2017) <<https://www.nytimes.com/2017/02/21/opinion/move-left-democrats.html>> accessed 21 February 2017.

⁸¹ Amy Sherman, ‘Could States Overturn the Electoral College?’ PolitiFact Florida (17 November 2016)

<<http://www.politifact.com/florida/article/2016/nov/17/electoral-college-vs-popular-vote-could-states-a/>> accessed 20 January 2017.

⁸² Bob Davis, ‘Free Trade Is Headed for More Hot Debate’ Wall Street Journal (17 April 1995).



many non-trade areas,⁸³ analysts have focused on their tariff reduction rules since these are easiest to model. If trade balance and full employment are assumed, then reducing tariffs should simply shift U.S. workers out of manufacturing jobs and into services. Thus, estimates of job creation and destruction often look at “excess shedding” of jobs when trade imbalances occur. The U.S. trade deficits with Mexico and China went up after trade deals⁸⁴ were finalized with both countries. Summarizing the research that uses such deficit-based measures (and attempting to control for trade displacement he believes would have happened anyway as Mexico and China industrialized), economist Brad DeLong has estimated that NAFTA cost about 116,400 jobs, and China’s WTO accession cost around 300,000 jobs. These represent 0.1 percent and 0.22 percent of the U.S. labor force.⁸⁵ Not many jobs, although the direction (job loss) was in the opposite direction predicted by the pacts’ proponents. If one relaxes some of DeLong’s restrictive assumptions and looks more broadly at macroeconomic imbalances arguably introduced (and certainly not disciplined) by trade policy, the numbers of excess job lost can reach 5 million⁸⁶—a significant number, and geographically focused in the Midwest.

There are more compelling negative impacts of trade policy, but poor data or weak policy levers leave policymakers ill-poised to address them.

First, consider inequality. Standard trade theory predicts that, as a relatively capital-abundant, developed country like the United States lowers tariffs against goods made in relatively labor-abundant developing countries, there will be downward pressure on the wages of “unskilled” U.S. workers. As U.S. manufacturing sheds jobs, they go into competition with service-sector workers for jobs in that sector, thereby pushing down wages for all workers (not just those in manufacturing). While theory predicts that the country as a whole generates more wealth through freer trade, these gains accrue to the top of the income distribution absent policies to redistribute it. Even accounting for the benefits of low-priced imports, the Economic Policy Institute estimates that the average non-college educated worker has lost \$1,761 in income a year—over double her tax burden. For households of these workers, the amount is over \$3,000.⁸⁷ More recent estimates by economists David Autor, David Dorn, and Gordon Hanson focusing on regions hard-hit by Chinese import competition find comparable numbers.⁸⁸ Policies like trade adjustment assistance not only fall far short of compensating for that loss, they are not even intended to address wage pressure on non-manufacturing workers.

Even the data the government collects compounds uncertainty. The most oft-reported export statistics include goods that were not made in the U.S., and are merely transshipped from elsewhere. U.S. statistical agencies have concluded that there is not currently a way to systematically exclude these non-U.S.-made goods from our trade ledgers,⁸⁹ meaning our actual trade deficit could be higher. The most common statistics also fail to account for how much of nominally “U.S.-made” goods consist of imported inputs—a significant omission given the complexity of supply chains.⁹⁰ Even trade’s impact on inequality could be obscured by weaknesses in data

⁸³ Daniel J Ikenson and others, ‘Should Free Traders Support the Trans-Pacific Partnership? An Assessment of America’s Largest Preferential Trade Agreement’ (Cato Institute 2016) Working Paper 39 <<https://www.cato.org/publications/working-paper/should-free-traders-support-trans-pacific-partnership-assessment-americas>> accessed 15 December 2016.

⁸⁴ In China’s case, the “deal” was the change in U.S. statutes that paved the way for the country’s WTO accession.

⁸⁵ J Bradford DeLong, ‘NAFTA and Other Trade Deals Have Not Gutted American Manufacturing — Period’ Vox (24 January 2017)

<<http://www.vox.com/the-big-idea/2017/1/24/14363148/trade-deals-nafta-wto-china-job-loss-trump>> accessed 30 January 2017.

⁸⁶ C Fred Bergsten and Joseph E Gagnon, ‘Currency Manipulation, the US Economy, and the Global Economic Order’ (Peterson Institute for International Economics 2012) Policy Brief 12–25 <<https://piie.com/publications/policy-briefs/currency-manipulation-us-economy-and-global-economic-order>> accessed 10 February 2017.

⁸⁷ L Josh Bivens, ‘Using Standard Models to Benchmark the Costs of Globalization for American Workers without a College Degree’ (Economic Policy Institute 2013) <<http://www.epi.org/publication/standard-models-benchmark-costs-globalization/>> accessed 3 February 2017.

⁸⁸ David H Autor, David Dorn and Gordon H Hanson, ‘The China Syndrome: Local Labor Market Effects of Import Competition in the United States’ (2013) 103 *The American Economic Review* 2121.

⁸⁹ ‘A Note on U.S. Trade Statistics’ (US International Trade Commission 2014) <<https://www.usitc.gov/publications/research/tradestatsnote.pdf>> accessed 7 February 2017.

⁹⁰ Jessica R Nicholson and Ryan Noonan, ‘What Is Made in America?’ (US Department of Commerce Economics and Statistics Administration 2014) ESA Issue Brief 04-14 <http://www.esa.doc.gov/sites/default/files/whatismadeinamerica_0.pdf> accessed 7 February 2017.



collection. Economist Paul Krugman has noted that some of the negative impact on U.S. wages could be attenuated by subtleties in the actual pattern of trade. For instance, China has specialized in relatively high-end products like computers, which would not necessarily lower the wages of “unskilled” U.S. workers. Yet he notes that the U.S. government currently does not collect data at a level of detail sufficient to ascertain the true “skilled labor content” of these imports.⁹¹

Finally, consider currency. Trade agreements provide no sure means of penalizing downward currency manipulation, even though this subsidizes exports and reduces imports. U.S. law does not require the executive branch to apply countervailing duties against countries that lower the value of their currency, instead giving the president total discretion to put diplomatic concerns over economic ones. Moreover, even the guidelines the president consults to consider labeling countries “currency manipulators” would not capture China’s current behavior. The country sits on a massive stock of dollar reserves (keeping the yuan low), but—at the moment—intervenes in the flows in the opposite direction (boosting the value of the yuan at the margin). There are legitimate policy debates about the wisdom of using trade agreements to restrict the U.S. and other countries’ freedom to maneuver on currency policy. And were China to quickly dump its dollar bond holdings, this would raise yield rates and increase the U.S. government’s debt-servicing costs.⁹² But the fact that our current policy approach does not even attempt to meaningfully address the problem represents a burden that falls on U.S. factory workers.

In short, there is a pronounced class bias in our current approach to trade. It is difficult to imagine a U.S. administration contemplating a regulation on corporations that had such unquantified, uncompensated, and potentially large negative impacts on profits. It is thus unsurprising that any alternative approach—including Trump’s jawboning of Carrier— would prove immensely popular across the partisan divide.⁹³

SUMMING UP

Trump succeeded by tapping into anxiety about change—an anxiety so deep that it outweighs conservative principles of limited government and free markets and embraces state power to bring back jobs. At the same time, his governing team has contradictorily promised to weaken the state from within.⁹⁴ This presents an opening for progressives, who believe in a state strong enough to achieve both foreign and domestic policy goals. To this agenda we now turn.

⁹¹ Paul R Krugman, ‘Trade and Wages, Reconsidered’ (2008) 2008 Brookings Papers on Economic Activity 103.

⁹² Eric Platt and Joe Rennison, ‘China Makes Record Cuts to US Treasuries Holdings’ Financial Times (15 February 2017) <<https://www.ft.com/content/cbde535e-f3db-11e6-8758-6876151821a6>> accessed 17 February 2017.

⁹³ Steven Shepard, ‘Poll: Trump’s Carrier Deal Is Wildly Popular’ POLITICO (6 December 2016) <<http://politi.co/2gdCa36>> accessed 10 February 2017.

⁹⁴ Nancy LeTourneau, ‘Bannon’s Goal: A Deconstruction of the Administrative State’ Washington Monthly (24 February 2017) <<http://washingtonmonthly.com/2017/02/24/bannons-goal-a-deconstruction-of-the-administrative-state/>> accessed 28 February 2017.



III. A New Progressive Doctrine for Linking Global and Domestic Economic Policy Goals

Diplomats need foreign policy tools, regulators need domestic policy space to enact regulations, and workers need good jobs. While these are separate problems, the preceding sections of this report recount how the wide reach of contemporary trade and investment agreements have tied them together. The Sustainable Equitable Trade doctrine offers a clear way for progressives to line up their foreign and domestic policy goals and distinguish themselves from the economic authoritarianism of Trump. It has three pillars that can be used to build or evaluate policy proposals:

- I. **Flip the class bias:** While international economic cooperation agreements are essential to addressing shared global challenges, policymakers must focus intensely on ensuring their legitimacy with working-class voters. This requires flipping the class bias of international arrangements so that the working class majority is favored over elite minorities.
- II. **Promote systemic participation:** The international economic policies policymakers advocate must create and nurture their own political constituencies if they are to survive attack. This requires greater democratic participation and checks and balances in international bodies, as well as new ways of using domestic institutions. Active engagement with domestic and international institutions will allow us to accomplish more comprehensive and rapid reform than will debates over individual treaties than one-by-one treaty reforms.
- III. **Win power:** In a continent-sized country with complex electoral institutions like the United States, political geography matters greatly. If the South and the coasts remain uncompetitive, the Midwest is a critical battleground, and as the last election shows, it can be won through fear-mongering. But a progressive game plan would focus on building cross-racial class power and institutions.

These three themes are explored sequentially in the sections that follow. For each component of the doctrine, I also provide an intermediate step that that U.S. could take to bring other countries to the negotiating table, recognizing the important role that our leaders and courts play in underwriting the global economic order. Each example also features some aspect of legacy trade policy that would need to be reformed as part of the progressive housecleaning.

Actionable items include:

1. **Cooperate internationally on bigger-ticket items than tariff reductions.** (Subsection 1)
2. **Launch an Equitable Investment Act, Equitable Investment Convention, and Equitable Recognition Act to open up trade agreements and international litigation to broader societal interests.** (Subsection 2)
3. **Appoint a Special Advisor for Equitable Trade and Globalization to reorganize government and treaty-making.** (Subsection 2)
4. **Enact a Sustainable Jobs Industrial Policy.** (Subsection 3)
5. **Establish a Trade Reparations Commission.** (Subsection 3)

There are limits to how much reform any policy system—especially an international one—can bear. Progressives who over-promise can lose face with voters. That's why careful attention needs to be paid to the policy pipeline, sequencing demands so that those with the biggest impact (and/or that U.S. policymakers can most easily control) move first. And to reiterate the proviso from the executive summary, any party or movement—not just self-defined progressives—could take up this agenda.



1. Flipping the Class Bias

As explored in Section I, a major feature of the judicialization of the global governance system has been a shift in power, through imprecise treaty rules, from citizens to adjudicators. Imprecision is not inherently a bad thing, but its presence is an indication of the values the governance system is intended to advance. If the grab-bag rule is "be fair to investors," that will shift how rule development works. But a grab-bag rule like "countries can pursue industrialization goals" or "workers should be equitably treated" would shift the kinds of values that inform adjudicators' rule development.

In the subsections that follow, I explore three policy areas—taxation, monopolies, and (briefly) finance—in which changing the precision or imprecision of rules would further the public interest. Notably, each examples shines a light on the way existing trade rules implicate many non-tariff areas, including regulation of services and corporations behind the border. In some cases, I note that a commitment to not use potentially anti-regulatory rules in trade deals can be a useful first step to rewriting them—without holding new regulations hostage to uncertain negotiation outcomes.⁹⁵

Taxation

Despite being the world's biggest economy, the U.S. now regularly has difficulty getting its companies to pay their taxes. Capital mobility and aggressive accounting practices have worsened the problem. Wealthy multinational companies and individuals can evade or avoid taxes by reporting their profits in tax havens that charge little to no tax. University of California-Berkley economist Gabriel Zucman estimates that such moves cost governments approximately \$200 billion a year.⁹⁶ Broader measures of illicit flows reach numbers as much as five times that.⁹⁷

The simplest and fairest answer is to move to a formulary apportionment system that imputes taxable income based on where products are sold, rather than where profits are earned.⁹⁸ Multinational corporations have much less discretion over the location of their customers than they do over the location of their profits, making this an effective and fair taxation system.

International coordination could nudge countries in the right direction. As a condition for joining new trade agreements, countries should agree to implement formulary approaches, automatically share tax information, and maintain a wealth registry of their corporations' and citizens' global assets. If tax havens from outside the trading bloc chafe at these rules or attempt to game the system, their financial institutions should be blocked from conducting business in the trading bloc. This carrot-and-stick approach will maximize the chances of best practices spreading globally.

Moving to this system will be most effective if upgrades are made to existing trade agreements, so that restrictions on capital flows for fair taxation purposes are presumptively consistent.⁹⁹ For example, "financial services" in WTO agreements should be redefined to better distinguish between flows aimed at tax avoidance (which would be blocked from market access) and other permissible flows.¹⁰⁰ The grab-bag imprecise rule would be "multinationals must pay their fair share of tax in countries where they operate, and not act to frustrate the goals of formulary apportionment;" adjudicators would be empowered to fill in what this means in specific circumstances.

⁹⁵ Indeed, NAFTA was very recently unpopular in Canada, which had lost several high-profile ISDS cases. The Trudeau administration had made reform a priority. Now that Trump has raised renegotiation, however, NAFTA's popularity has soared as the public begins focusing on losses. Sunny Freeman, 'Canadians Rally around NAFTA as Trump Threatens to Rip It Up, Poll Shows' Financial Post (13 February 2017) <<http://business.financialpost.com/news/canadians-rally-around-nafta-as-trump-threatens-to-rip-it-up-poll-shows>> accessed 22 February 2017.

⁹⁶ Gabriel Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens* (University of Chicago Press 2015).

⁹⁷ Joseph Spanjers and Dev Kar, 'Illicit Financial Flows from Developing Countries: 2004-2013' (Global Financial Integrity Project) <<http://www.gfintegrity.org/report/illicit-financial-flows-from-developing-countries-2004-2013/>> accessed 17 February 2017.

⁹⁸ Kimberly A Clausing, 'Multinational Firm Tax Avoidance and Tax Policy' (2009) 62 *National Tax Journal* 703.

⁹⁹ This would per se establish the legality of the penalties Argentina used against Panama's recent WTO case over the former's rebuttable presumptions that Argentine taxpayers' transactions with tax havens are fraudulent and thus subject to various fiscal disincentives. Argentina - Measures Relating to Trade in Goods and Services (Report of the Appellate Body) (n 39).

¹⁰⁰ Todd Tucker, 'WTaxO Lesson #5: Name It' <<https://toddtucker.com/2015/10/16/wtaxo-lesson-5-name-it/>> accessed 19 December 2016.



There are several changes the U.S. can make unilaterally to improve global tax cooperation. First, it can eliminate its own banking secrecy practices. Determining the beneficial owners of trusts in the United States is as difficult as it is in Panama, a hypocrisy that makes cooperation more difficult.¹⁰¹ Second, the U.S. can pass legislation helping to backstop countries after debt crises. While such tumult can happen for many reasons, at their core such difficulties are about not having enough tax revenue to pay obligations coming due. This need not come at any cost to the U.S. taxpayer. (Indeed, it could save money by speeding up court proceedings.) Instead, policymakers can order our national courts to give deference to sovereigns being attacked by speculators, rather than the status quo, in which U.S. federal courts provide refuge to creditors against foreign governments. One part of this approach is to protect countries that manage to get the majority of their debt holders to agree to debt forgiveness;¹⁰² another component can be to make clear through amendments to the Foreign Sovereign Immunities Act that our courts can't be used by speculators on "fishing expeditions" to find (and seize) sovereign assets.¹⁰³

These moves are much more meaningful foreign policy than the current approach, which is dominated by trade agreements. Consider that the more generous estimates of the Trans-Pacific Partnership's contribution to incomes growth for the world as a whole is \$492 billion annually (achieved by 2030).¹⁰⁴ In contrast, illicit financial flows from developing countries alone topped \$1 trillion in recent years.¹⁰⁵ By adopting financial transparency, the U.S. could immediately begin the process of redirecting resources to developing countries on a scale that would outstrip the gains from trade and foreign aid.

Monopolies

The U.S. has a long tradition of containing market power. Economic theory has long recognized the threat it poses to the wellbeing of consumers, workers, other market participants, and long-run growth, and aggressive trust-busting and the use of the federal apparatus to diffuse power throughout the supply chain were once core tenets of Democratic policy-making.¹⁰⁶ To return to such a standard, policymakers should use *per se* rules that disallow certain types of vertical and horizontal mergers, interlocking directorates, and discriminatory access to online platforms, as well as use the provisions of the Sherman Act to break up concentrations of power where individual firms and de facto cartels are already dominant. In cases of natural monopolies, including telecoms and e-commerce, there's a strong argument for erecting a public option.¹⁰⁷

But here too, globalization poses challenges. The U.S. relies heavily on litigation to make its antitrust rules effective, and Congress has expressed its intent to have anti-monopoly rules apply irrespective of whether the collusive behavior is happening at home or overseas.¹⁰⁸ Yet U.S. courts face serious practical limits in their ability to trust-bust overseas, as they cannot compel foreign governments to share their judicial interpretations or carry out break-ups. More worrisome, judges have on their own erected nearly a dozen doctrinal burdens to finding against overseas monopolies. In 2014, U.S. plaintiffs brought an antitrust case against two Chinese vitamin manufacturers. A U.S. lower court found them guilty of

¹⁰¹ Uri Friedman, 'The Geography of Financial Secrecy' [2016] The Atlantic <<http://www.theatlantic.com/international/archive/2016/04/panama-papers-tax-havens-world/477042/>> accessed 20 December 2016.

¹⁰² This would address the problem created in 2014, when U.S. courts allowed a small minority of hold-out investors led by hedge fund manager Paul Singer to hold Argentina (which had negotiated a debt reduction with the vast majority of bondholders following the country's financial crisis) hostage. Todd Tucker, 'What Is at Fault in #Griefault?' <<https://toddtucker.com/2014/08/12/what-is-at-fault-in-griefault/>> accessed 20 December 2016.

¹⁰³ This would reverse the controlling 2014 Supreme Court precedent that permitted vulture funds to use U.S. courts to demand information about Argentina's financial transactions around the globe. Todd Tucker, 'Court Ok's Argentine Fishing Expedition' <<http://toddtucker.com/2014/06/17/court-oks-argentine-fishing-expedition/>> accessed 3 March 2015.

¹⁰⁴ Peter A Petri and Michael G Plummer, 'The Economic Effects of the Trans-Pacific Partnership: New Estimates' (Peterson Institute for International Economics 2016) Working Paper 16-2 <<https://piie.com/publications/working-papers/economic-effects-trans-pacific-partnership-new-estimates>> accessed 17 February 2017.

¹⁰⁵ Spanjers and Kar (n 102).

¹⁰⁶ Matt Stoller, 'How Democrats Killed Their Populist Soul' [2016] The Atlantic <<http://www.theatlantic.com/politics/archive/2016/10/how-democrats-killed-their-populist-soul/504710/>> accessed 10 November 2016.

¹⁰⁷ Nell Abernathy, Mike Konczal and Kathryn Milani, 'Untamed: How to Check Corporate, Financial, and Monopoly Power' (Roosevelt Institute 2016) <<http://rooseveltinstitute.org/untamed-how-check-corporate-financial-and-monopoly-power/>> accessed 8 December 2016.

¹⁰⁸ Hartford Fire Insurance v California [1993] US Supreme Court 91-1111, 509 US 764.



cornering the global market and price-fixing. On appeal, the U.S. Court of Appeals for the Second District noted such behavior would have been an open-and-shut case under U.S. anti-monopoly law, where price fixing is per se illegal. Nonetheless, the court found that—because the Chinese government had ordered the price-fixing—the Chinese plaintiffs would not be able to comply with both U.S. and Chinese law simultaneously. On grounds of inter-judicial comity (i.e. respect for one another's legal systems), the court denied remedy to the U.S. plaintiffs.¹⁰⁹

The case reveals a gaping hole in our legal infrastructure. If anything, the case for breaking up trusts should be stronger when it is government-directed. Instead, judges used their discretion to come to the opposite result. There is every sign that the promotion of monopolies by governments is becoming more—not less—pervasive in emerging economic powers.¹¹⁰ The U.S. should not be passive in the face of this trend.

Our international agreements aggravate these enforcement gaps. The WTO is on track to recognize China as a market economy despite the fact that government intervention is pervasive and the new designation will make it harder to use anti-dumping rules (a type of anti-monopoly policy) to discipline that intervention. Why? Because China's WTO accession rules legally decree it so, with no room for adjudicator discretion or fact-based inquiry.¹¹¹ The proposed TPP exposes still more gaps. While containing *hortatory* language urging countries to adopt antitrust rules with private rights of action, the TPP has *binding* requirements for how and when antitrust rules can be used. While this would rightfully address instances in which antitrust rules are misused for protectionist purposes,¹¹² it creates a presumption against their use.

Instead of exempting antitrust from enforcement,¹¹³ the U.S. should insist on strong and enforceable per se rules on the degree of allowable industry concentration. Rather than relying on government lawyers and diplomats to bring the case, U.S. plaintiffs could automatically trigger international consultations. If those consultations did not yield satisfactory outcomes, the cases could go to U.S. courts, where judges would be instructed not to apply comity principles. Here, as with the subsection on taxation, precise rules on industry concentration would be supplemented with imprecise rules such as "separate companies shall not by actions other than per se combination act to limit competition."

Here too, fighting monopoly power makes sense as much for domestic policy as it does for foreign policy. While current trade policy prioritizes protection of monopolists' intellectual property, the U.S. should commit to not enforcing these provisions, and get other countries to sign on to the pledge.¹¹⁴ Introduction of the WTO's intellectual property rules increased drug prices from 50 to 400 percent.¹¹⁵ By allowing greater access to generic drugs, this move could help bring down drug prices for HIV-AIDS patients from as much as \$10,000 to as little as \$100.¹¹⁶ Even larger—and long-term—gains could be had by creating an industrial commons for technology across the planet. Much as shared community grazing land underpinned agricultural societies, industrial commons are defined as "the set of manufacturing and technical capabilities that support innovation across a broad range of industries."¹¹⁷ While in some cases it will make

¹⁰⁹ In Re Vitamin C Antitrust Litigation [2016] US Court of Appeals for the Second Circuit 13 - 4791 - cv.

¹¹⁰ Robert D Blackwill and Jennifer M Harris, *War by Other Means: Geoeconomics and Statecraft* (Belknap Press 2016).

¹¹¹ Editorial Board, 'China's Push for Status as a Market Economy' *Financial Times* (13 December 2016) <<https://www.ft.com/content/5b5cd5d0-c14d-11e6-9bca-2b93a6856354>> accessed 20 December 2016. Francis Snyder, 'The Origins of the "Nonmarket Economy": Ideas, Pluralism & Power in EC Anti-Dumping Law about China' (2001) 7 *European Law Journal* 369.

¹¹² Charles Clover, 'China Warns of Anti-Monopoly Penalty for US Carmaker' *Financial Times* (14 December 2016) <<https://www.ft.com/content/ee55f4d8-c1c1-11e6-9bca-2b93a6856354>> accessed 20 December 2016. This example is illustrative, as China was not slated to be in the TPP.

¹¹³ 'Trans-Pacific Partnership: Chapter 16: Competition Policy' <<https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf>> accessed 20 December 2016.

¹¹⁴ This would be a stronger move than the Clinton administration's Executive Order 13155, which (circularly) made U.S. voluntary non-enforcement of intellectual property rights contingent on countries being compliant with the WTO rules. Suzanne Zhou, 'Challenging the Use of Special 301 against Measures Promoting Access to Medicines: Options Under the WTO Agreements' (2016) 19 *Journal of International Economic Law* 51.

¹¹⁵ Joseph E Stiglitz and Giovanni Dosi, 'Introduction' in Mario Cimoli and others (eds), *Intellectual property rights: Legal and economic challenges for development* (Oxford University Press 2014) <<https://books.google.co.uk/books?hl=en&lr=&id=OS4UDAAQBAJ&oi=fnd&pg=PA1&ots=RhH3J1XMi5&sig=D5LNh6LrSuZ2tl96fqMzRqyc-0>> accessed 21 February 2017.

¹¹⁶ Tim Fernholz, 'Under the TPP, America's Insanely High Drug Prices Will Be an Unappreciated Export' <<https://qz.com/543385/under-the-tpp-americas-insanely-high-drug-prices-will-be-an-unappreciated-export/>> accessed 17 February 2017.

¹¹⁷ Gary P Pisano and Willy C Shih, *Producing Prosperity: Why America Needs a Manufacturing Renaissance* (Harvard Business Review Press 2012).



sense to build these capacities in certain countries (or regions within countries), in other cases global and costless diffusion - support by public support for basic and applied research - could increase productivity and lower prices for consumers around the world. This could benefit U.S. innovators, as well as correct over-broad patent rules that have stymied innovation and growth in developing countries.¹¹⁸

Finance

In 2008, Wall Street speculation brought the economy to its knees. Democrats' response was Dodd-Frank, which took steps to limit the concentration of risks and possibilities of contagion. Although the legislation was never fully implemented, the Trump administration has pledged to roll it back.¹¹⁹

While this action poses serious risks, it gives progressives an opportunity to rethink which aspects of the law they would retain. Legal scholar and Roosevelt Institute Fellow K. Sabeel Rahman, for instance, has called for a third way between technocratic elitism and deregulation that would involve greater direct participation with communities across the country. For example, hard caps on bank size would be more comprehensible to everyday citizens and make it easier for them to organize collectively to hold both regulators and banks accountable.¹²⁰ Elsewhere, Roosevelt scholars have recommended a battery of other changes to financial regulation, including expansion of capital controls and creation of an infrastructure bank to fund pro-middle class investments.¹²¹ Unfortunately, the trade rules explored in Table 1 above could be used to restrain capital controls, or label size limitations as impermissible market access "quotas of zero."¹²² While countries have crafted rules to inoculate prudential financial regulations from trade pact challenge, there is substantial ambiguity about how protective these defense clauses are—especially when countries are regulating in novel ways. Indeed, Obama's U.S. Trade Representative sought to keep the WTO from clarifying the matter¹²³—which could be smart litigator strategy (sometimes it is better to not know when you're breaking the rules) but makes for poor public-facing legitimacy of the trading system. The U.S. should formally commit to not enforce these rules, and ask other countries to do the same, until bank regulators can agree on appropriate and enforceable new international norms.

Getting our financial regulatory house in order is great foreign policy: The financial crisis cost other countries over \$8 trillion,¹²⁴ an amount that dwarfs even the most optimistic projections from the TPP.

2. Promoting Systemic Participation

Policies and policy frameworks are at their most stable when they create and sustain communities and experts that will defend them.¹²⁵ While contemporary global economic governance creates rents that elites have an interest in defending,¹²⁶ it rates poorly with a broader and more popular base. For instance, labor standards in trade deals are rarely enforceable, and when they are, the agency of workers is sidelined in favor of highly judicialized proceedings.¹²⁷ If labor and environmental standards are too weak, investor-state dispute settlement is too strong. ISDS, as currently designed, allows investors to launch billion-dollar claims against governments for sometimes little more than making good on

¹¹⁸ Mila Kashcheeva, 'The Role of Foreign Direct Investment in the Relation between Intellectual Property Rights and Growth' (2013) 65 Oxford Economic Papers 699.

¹¹⁹ Glenn Thrush, 'Trump Vows to Dismantle Dodd-Frank "Disaster"' The New York Times (30 January 2017) <<https://www.nytimes.com/2017/01/30/us/politics/trump-dodd-frank-regulations.html>> accessed 31 January 2017.

¹²⁰ K Sabeel Rahman, *Democracy against Domination* (1 edition, Oxford University Press 2016).

¹²¹ Abernathy, Konczal and Milani (n 112).

¹²² Todd Tucker, 'How to Reform WTO and FTA Rules to Confront Too-Big-To-Fail Banks' (Public Citizen 2011) <<https://www.citizen.org/documents/memo-gats-conflict-with-bank-size-limits-may-10-2011.pdf>> accessed 31 January 2017.

¹²³ Todd Tucker, 'WTaxO Lesson #4: Use Your Defenses' <<https://toddtucker.com/2015/10/07/wtaxo-lesson-4-use-your-defenses/>> accessed 31 January 2017.

¹²⁴ David Luttrell, Tyler Atkinson and Harvey Rosenblum, 'Assessing the Costs and Consequences of the 2007–09 Financial Crisis and Its Aftermath' (2013) 8 Economic Letter <<https://ideas.repec.org/a/fip/feddel/y2013isepnv.8no.7.html>> accessed 24 February 2017.

¹²⁵ Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press 2004).

¹²⁶ Dezalay and Madsen (n 52).

¹²⁷ Jeffrey S Vogt, 'The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership' (2015) 18 Journal of International Economic Law 827.



campaign pledges to their citizens. From Egypt to El Salvador, BuzzFeed's Chris Hamby reports, investors have invoked ISDS threats to obtain sweetheart settlements from governments.¹²⁸ Some of those deals have put severe strain on national budgets. *Shadow Courts*, a book by *Time* magazine's Haley Edwards, shows how ISDS threats have strained support for free trade around the world.¹²⁹

Fixing ISDS would require just a few sentences of legislation to rein in the worst abuses of the system while upholding a rightsized amount of investor rights. In 1990, now-TPP advocates Sen. Chuck Grassley (R-Iowa) and Rep. Dan Glickman (D-Kan.) helped enact the Administrative Dispute Resolution Act. This legislation allowed would-be legal disputes between American citizens and U.S. government agencies to be routed into binding arbitration. To address constitutionality concerns, a vital safeguard was built into the mix: Third parties could appeal to U.S. courts to overturn an arbitration award if broader social interests were at risk.¹³⁰

That legislation provided a template for reform, leveraging a little-appreciated aspect of the investment rules. Unlike weaker areas of international law, ISDS awards are enforced ultimately in national courts. Under current Supreme Court precedent, U.S. judges are instructed to defer to arbitral decisions.¹³¹ In other words, if a country loses a case in arbitration, it cannot appeal to national judges to overturn that decision because it was wrong or shortsighted. Under new rules, this would not have to be the case. An **Equitable Investment Act**—just a few sentences long—would give third parties a new right to petition U.S. courts to vacate arbitration awards that affect broader social interests.

Here's how it would work: Say a French bank sues Argentina under a bilateral Franco-Argentine treaty, alleging that a new Argentine administration's signature financial regulation plan cut into profits more than under a previous lighter-touch regime. Under the current ISDS system, the bank could sue Argentina under the ISDS system and benefit from the possibility—however remote—that arbitrators would side with it and order cash payment. And under current federal arbitration laws, the bank would enjoy the near certainty that national courts would help enforce the award—with no review of the policy merits of the underlying claim.

Under the Equitable Investment Act, in contrast, a U.S. court would be empowered to set aside the arbitrators' award if Argentine consumer groups showed it would harm their interests in a stable financial system back home. The legislation would presume that the U.S. has jurisdiction to review the award. Congress could order courts to allow standing in such cases, much as they already do for citizen suits on the environment.¹³² While innovative, the proposal builds on existing practice. Already, U.S. courts can be asked to help attach Argentina's U.S. assets in such a dispute with French investors. The reform would simply expand their mandate and move up the timing of their involvement. Even if Argentine activists never used these rights, the possibility that they could would deter investors from challenging popular public interest policies.

In the long term, this Act will not be enough. New treaty rules are needed to put global governance on a more sustainable footing. Among other things, investors will be eager to move toward a system in which treaty outcomes are more certain. As part of a one-two punch with the changes to domestic arbitration law, the next administration should propose a global **Equitable Investment Convention** and call on other countries to sign up.

¹²⁸ Chris Hanby, 'Secrets of a Global Super Court' [2016] BuzzFeed <<https://www.buzzfeed.com/globalsupercourt>> accessed 5 September 2016.

¹²⁹ Haley Sweetland Edwards, *Shadow Courts: The Tribunals That Rule Global Trade* (Columbia Global Reports 2016).

¹³⁰ Harold H Bruff, 'Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs' (1988) 67 *Texas Law Review* 441, at 445, 487.

¹³¹ *BG Group PLC v Republic of Argentina* [2014] US Supreme Court 12–138.

¹³² See Seth W Greenfest, 'The Politics of Judicial Supremacy: Congress, the Supreme Court, and Standing to Sue' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2300510 <<https://papers.ssrn.com/abstract=2300510>> accessed 28 November 2016. See Hope M Babcock, 'The Problem With Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm And Standing Jurisprudence' (2009) 25 *Journal of Land Use & Environmental Law* 1.



The Convention proposal would separate investor gripes into two tracks, which would better mirror our national laws' balance of property rights and democratic decision-making. First, states that expropriate property would have to compensate investors promptly and fairly. Instead of ISDS legal proceedings that take years to resolve and often deliver only pennies on investors' claims,¹³³ teams of accountants would work to precisely tally the value of what investors sunk into their projects. This would limit the damages owed to a number that is less speculative than the *Chorzow* standard explored in Section I. States would then get a bill, which they could pay or challenge in a fast-tracked arbitration. Alternatively, if a state harmed an investor in less severe ways, arbitrators could still rule on whether and how the government fell short of its obligations. But unlike the current system, arbitrators would not award damages and would produce an advisory decision in six months. This document would not only establish any international law problem posed by the government action, but recommend specific reforms governments could make to come into compliance. States could accept or reject the advice, but they would be required to explain their choice and make all of the correspondence public. Removing the high-stake remedies from the system would lessen third-party speculation on litigation and allow lawyers to develop norms that could inform but not paralyze government operations.

Most important, the Convention would fix ISDS's double standard vis-à-vis labor and environmental interests. Instead of foreign investors enjoying rights that domestic investors, unions, and environmental groups don't, the pact would level the playing field. Just as an investor can now ask a tribunal to determine whether capital controls violate a state's obligations, a union would be able to request a second opinion on collective bargaining rights. An environmental NGO could shine a spotlight on weak carbon emissions plans. And domestic investors could complain about preferential treatment received by wealthy foreign companies. As with the previous subsections, labor and environmental interests should benefit from both precise rules (to target known bright lines) and imprecise rules (to make sure the intent of those bright lines is also captured). These more inclusive proceedings would allow citizens to name and shame bad governments without compromising sovereignty. These proceedings should involve extensive consultations with affected communities, and negotiators should explore ways to implement jury-like proceedings with citizens from member countries.

The Convention would also create openings for new blood to be brought into the arbitral pool and get experience that would build their reputations. Say a progressive NGO advocate has expertise in labor law. In the current institutional set-up, they can play no formal role in ISDS or government-to-government dispute. However, if labor disputes were arbitrated, there would be a new demand for their skill. Over time, as the pool of international adjudicators became more diverse, this would bubble up into the global economic governance system itself, as a pool of talent is credentialed and ready to enter public service. (This is also why a more open and porous system is preferred to an institutional bench of five or nine judges, as some countries have proposed.¹³⁴)

This proposal would accomplish what neither side of the TPP debate has promised: a path toward systemic reform of the more than 3,000 ISDS pacts that already exist. Countries that joined the Convention would spare their investors from being dragged into U.S. courts under the Act. For any two countries that joined the Convention, their past deals would be automatically superseded without time-consuming country-by-country negotiations.¹³⁵

My proposal incorporates several features to make it more politically viable. To gain the support of other countries' governments, the Convention is limited to expanding access and does not prescribe specific substantive standards for, say, labor rights. Pairs of states are the best positioned to determine which labor rules are appropriate to their preferences

¹³³ Pieter Bekker and Akiko Ogawa, 'The Impact of Bilateral Investment Treaty (BIT) Proliferation on Demand for Investment Insurance: Reassessing Political Risk Insurance After the "BIT Bang"' (2013) 28 ICSID Review 314.

¹³⁴ Philip Hainbach, 'The EU's Approach to Investor-State Arbitration in the Comprehensive Economic and Trade Agreement (CETA)' (2016) 13 Transnational Dispute Management (TDM) <<http://www.transnational-dispute-management.com/article.asp?key=2315>> accessed 29 March 2016.

¹³⁵ For detailed legislative and treaty language for the Act and Convention, see Todd Tucker, 'Accountability in a Regime Complex: Charting Policy Reforms for Investor-State Dispute Settlement' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2840217 <<https://papers.ssrn.com/abstract=2840217>> accessed 20 December 2016.



and developmental level: one-size is unlikely to fit all. There has historically been resistance on the part of developing countries to include labor and environmental standards in trade agreements, for fear that doing so would compromise their sovereignty or comparative advantage.¹³⁶ Developed country observers, for their part, have questioned whether linking "core labor standards" to trade deals could even help in theory to narrow international wage disparities sufficiently quickly to limit offshoring.¹³⁷ If policymakers were designing the system from scratch with an eye to limiting domestic inequality increases,¹³⁸ they would have chosen to forego exposing developed country workers to competition with much lower-paid workers overseas *or* they would have designed compensation at scale. The horse has left the barn on the first option, and is unlikely to be reversed without major economic disruption. However, as I argue in Section III, it is not too late to begin making amends through reparations. Likewise, for policy issues like climate change, the U.S. can directly adopt policies like carbon tariffs unilaterally where necessary, and through negotiations where possible.

The Convention proposal would advance the cause of highlighting wrongdoing by governments, but not by corporations. Arguably, this is a worse concern for many communities. Today, as Roosevelt Institute chief economist Joseph Stiglitz has noted, investors can pollute a local environment or abuse workers, and then strategically declare bankruptcy in a given jurisdiction in order to avoid paying out tort claims there.¹³⁹ This should not—and need not—be a hindrance to justice. Under current law, a Peruvian community group could litigate and win its case against the Peruvian operations of a U.S. multinational in Peruvian courts. Then, the community group could take the claim to a U.S. court, where, under current law, the judgment could be recognized and enforced against the U.S. assets of the wrongdoing company. The main barrier to enforcement at present is that the recognition standards vary by U.S. state. If the U.S. were to federalize and streamline this system through an **Equitable Recognition Act**,¹⁴⁰ it could offer greater predictability to our trading partners and advance the cause of justice around the world.¹⁴¹

Changes to the U.S. government structure around trade would also help. If legislators rely on the U.S. Trade Representative's office to implement the changes to legacy trade policy, career staff could sabotage the effort. This can be sidestepped by creating an Office of the **Special Advisor for Equitable Trade and Globalization**. The office would be tasked with privileging first and foremost economic health and workers' interests (not corporate interests) and ensuring that trade is seen as a means to a broader end (not an end in itself). The Special Advisor would re-examine our existing trade laws and agreements in light of 21st century security and economic realities and be forced to consult with a broad range of non-corporate interests, who would be formally represented through an advisory structure. The Special Advisor would be responsible for making concrete proposals for how past trade agreements could be changed to meet equitable growth goals, determining what bureaucratic structure could best meet these goals, setting the parameters of any trade negotiations that are conducted, and ensuring that any resulting agreement was within those parameters.

For this new office to be able to adequately coordinate this rethink across the many agencies with a say in global economic policy, the Special Advisor's office must be within the White House. On at least an interim basis, the USTR must directly report to this Special Advisor, pending a review as to whether folding its functions into State, Commerce, or some other body is the best long-term solution. And, at least for this interim period, the Special Advisor would set the parameters of any trade negotiations conducted by the USTR, participate in those negotiations, mandate direct participation by civil society, ensure that any agreement was within those parameters, and initiate and conclude major trade negotiations.

¹³⁶ Naila Kabeer, 'Globalization, Labor Standards, and Women's Rights: Dilemmas of Collective (In)action in an Interdependent World' (2004) 10 *Feminist Economics* 3, at 9.

¹³⁷ Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link Note' (2001) 101 *Columbia Law Review* 1410, at 1444.

¹³⁸ This was not the reason they did so. Depending on one's perspective, producing inequality may have been not a bug, but a feature. More generously, one could make an argument that this pattern of market opening was motivated by foreign policy reasons (although the asymmetry of which class designed the policy and which made the sacrifice would still beg many questions).

¹³⁹ Joseph E Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities' (2008) 23 *American University International Law Review* 451.

¹⁴⁰ Behrooz Moghaddam, 'Recognition of Foreign Country Judgments--A Case for Federalization Note' (1987) 22 *Texas International Law Journal* 331.

¹⁴¹ This is particularly needed with the lacunae left by the Supreme Court's dismantling of the Alien Tort Claims Statute. See Tonya L Putnam, *Courts without Borders: Law, Politics, and U.S. Extraterritoriality* (Cambridge University Press 2016).



Such overhauls have precedent and pedigree. In 1934, Roosevelt created an Office of Special Adviser to the President on Foreign Trade to help coordinate the inter-agency process and to work with specific companies and individuals to promote their overseas interests.¹⁴² When the Cold War began to rage, President Truman created the National Security Council to coordinate a new international focus. When he needed a way out of the early-1990s recession, President Clinton created the National Economic Council. Even President Obama supported moving the USTR out of the White House.¹⁴³ And President Trump has created a National Trade Council in the White House, although it appears to be focused primarily on industrial policy questions rather than a broader range of global economic governance issues.¹⁴⁴

3. Winning Power

The party that wins the Midwest wins the White House, thus trade policy decisions should be made and messaged with this in mind.

This means embracing industrial policy. While Trump has threatened tariffs, this could cause disruption to the international supply chains that a generation of policy has built up.¹⁴⁵ These are blunt instruments and no guarantee that the right industries or good jobs will be targeted. Moreover, absent strong redistribution mechanisms, tariffs will just generate economic rents that manufacturing companies could capture.

A Sustainable Jobs Industrial Policy would focus public sector R&D, infrastructure, and training resources on industry niches that utilize production processes that require close consultation between line workers and engineers.¹⁴⁶ Dynamic sectors like robotics that will grow in importance should be prioritized. It could make sense to focus supports even for some sectors that do not seem particularly dynamic. As industrial policy specialists Susan Helper, Timothy Krueger, and Howard Wial document, the U.S. has wanted to cultivate the renewable battery and solar panel sectors, only to find that those sectors rely for inputs on the proximity of less-sophisticated electronics.¹⁴⁷ Identifying such constellations of industries with downstream and upstream complementarities is vital.

Financing such an industrial policy will require significant increases in taxes on the wealthy, and implementing it will require a professional and competent administrative state. With China anticipated to spend more than \$100 billion on attracting high-end semiconductors¹⁴⁸ and \$360 billion on green energy sectors in the coming years,¹⁴⁹ the U.S. needs to be prepared to spend similar amounts if it hopes to compete. Currently, the U.S. is nowhere near this scale, and austerity is making it worse. After the 2016 Flint, Michigan water crisis, Senate Democrats had to concede a \$300 million advanced vehicle grant as the political price for a similar amount of pipe repair money.¹⁵⁰ Such regressive trade-offs showcase a gridlock that will hold the U.S. back.

To ensure that the jobs created will be good jobs, industrial and procurement policy could favor firms with unions and good labor practices. For instance, the U.S. would only make contracts with or purchase products from firms where the

¹⁴² Franklin D Roosevelt, 'Executive Order 6651 Creating The Office of Special Adviser to the President on Foreign Trade.' (23 March 1934) <<http://www.presidency.ucsb.edu/ws/index.php?pid=14834>> accessed 11 January 2017. The office was phased out when the Supreme Court ruled against the National Recovery Administration.

¹⁴³ Shayerah Ilias, 'Trade Reorganization: Overview and Issues for Congress' (Congressional Research Service 2012) R42555 <<https://fas.org/sgp/crs/misc/R42555.pdf>> accessed 13 June 2016.

¹⁴⁴ Megan Cassella, 'Trump to Create a Manufacturing-Focused White House Trade Office' POLITICO (22 December 2016) <<http://politi.co/2hv9gcS>> accessed 16 February 2017.

¹⁴⁵ The precise magnitude of the barrier posed by supply chains is unclear. See Nicholson and Noonan (n 92).

¹⁴⁶ Pisano and Shih (n 122).

¹⁴⁷ Susan Helper, Timothy Krueger and Howard Wial, 'Why Does Manufacturing Matter? Which Manufacturing Matters? A Policy Framework' (Brookings Institution 2012) <http://didict.com/uploads/documents/O222_manufacturing_helper_krueger_wial.pdf> accessed 7 February 2017.

¹⁴⁸ Paul Mozur, 'Plan for \$10 Billion Chip Plant Shows China's Growing Pull' The New York Times (10 February 2017) <<https://www.nytimes.com/2017/02/10/business/china-computer-chips-globalfoundries-investment.html>> accessed 13 February 2017.

¹⁴⁹ Michael Forsythe, 'China Aims to Spend at Least \$360 Billion on Renewable Energy by 2020' The New York Times (5 January 2017) <<https://www.nytimes.com/2017/01/05/world/asia/china-renewable-energy-investment.html>> accessed 22 February 2017.

¹⁵⁰ Coral Davenport, 'Senate Approves Funding for Flint Water Crisis' The New York Times (15 September 2016) <<https://www.nytimes.com/2016/09/16/us/politics/flint-michigan-water-senate-aid.html>> accessed 27 February 2017.



workers are represented by democratic unions. This will require new federal legislation, as the case law has not smiled on attempts to impose pro-union requirements in contracting through executive orders or state-level policy changes.¹⁵¹ Policies that favor unions would disproportionately benefit the Midwest. The share of union workers among total manufacturing workers tops 15 percent in Wisconsin, Ohio, Iowa, and Michigan. This puts them more in line with solid blue states like Washington and Hawaii (20 percent unionized manufacturing workforce) than red states like Tennessee, Arkansas, or South Carolina (all under 7 percent unionized).¹⁵²

We must also go exponentially beyond the meager "trade adjustment assistance" that fails to adequately serve even the small numbers of people who qualify for it. Reparations are necessary for a generation of opening up labor markets to competition without adjustment mechanisms in place. To reset trust between the public and elites, a new **Trade Reparations Commission** could be assigned to assess the net impact that the U.S.'s integration strategy (including trade agreements, currency policy, and unilateral trade opening) has had on the average family in recent decades. Families could then be paid out an annual "trade reparation," serving as a necessary admission (and partial material and symbolic amends) for a failed past approach, and an implicit promise that it will not happen again in such a fashion. This will be a needed down payment on building good will for future integration initiatives. The commission would be tasked with putting an amount and duration on this transfer, and whether to establish geographic eligibility criteria. (Following the work of David Autor and colleagues, the benefit could be pegged to districts most exposed to import competition.) The reparation would be paid for by an increase on taxes on the very rich, and the Commission would also evaluate other weaknesses in our data collection related to trade and economic integration.¹⁵³

Such a payment would be in good company as U.S. policymakers consider how to address inequality in era of rising temperatures and declining jobs. For instance, the Climate Leadership Council has advocated taxing carbon and erecting carbon tariffs, with the revenue distributed annually as a \$2,000 check to every American family.¹⁵⁴ Technology companies and others are also advocating a universal basic income of at least \$1,000 to be paid out to citizens, as robots increasingly replace workers.¹⁵⁵ Together, trade reparations and climate/automation dividends could provide a lifeline to struggling families and rebuild the credibility of international integration.

International policy should sync up with these goals. Global governance should be upgraded to ensure that trade balance and full employment can be achieved in ways that are enforceable. The original ITO proposal discussed in Section I specified: "Each Member shall take action designed to achieve and maintain full and productive employment and large and steadily growing demand within its own territory through measures appropriate to its political, economic and social institutions... [and] Members shall seek to avoid measures which would have the effect of creating balance-of-payments difficulties for other countries." This could be dusted off the shelf and reintroduced to Congress for approval, with additional rules that set a schedule for China and other surplus countries to reduce their excess dollar stocks without causing turmoil in financial markets or U.S. debt servicing. New economic cooperation agreements should also commit to common carbon taxes and tariffs.

Adjudication can also help. Countries at low levels of development—including the U.S. early in its history¹⁵⁶—often use restrictions on competition to incentivize the development of infant industries.¹⁵⁷ In contrast to WTO rules that

¹⁵¹ See *ABC of Southeast Texas et al v Rung et al* [2016] US District Court Eastern District of Texas Civil Action No. 1:16-CV-425.

¹⁵² Union density statistics are averages for 2013-15, based on 'CPS Uniform Data Extracts – CEPRdata' (Center for Economic and Policy Research 2016) <<http://ceprdata.org/cps-uniform-data-extracts/>> accessed 28 February 2017.

¹⁵³ An additional benefit of calling this new transfer "reparation" could be to build wider support for longer standing racial reparation. See Andrea Flynn and others, 'Rewrite the Racial Rules: Building an Inclusive American Economy' (Roosevelt Institute 2016) <<http://rooseveltinstitute.org/rewrite-racial-rules-building-inclusive-american-economy/>> accessed 13 December 2016, at 72.

¹⁵⁴ 'The Conservative Case for Carbon Dividends' (Climate Leadership Council 2017) <<https://www.clcouncil.org/wp-content/uploads/2017/02/TheConservativeCaseforCarbonDividends.pdf>> accessed 10 February 2017.

¹⁵⁵ David E Thigpen, 'Universal Income: What Is It, and Is It Right for the U.S.?' (Roosevelt Institute 2016) <http://rooseveltinstitute.org/wp-content/uploads/2016/10/UBI-Explainer_Designed.pdf> accessed 22 February 2017.

¹⁵⁶ Morton J Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press 1979).

¹⁵⁷ Alice H Amsden and Ajit Singh, 'The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea' (1994) 38 *European Economic*



categorically rule out such tactics, trade agreements could be a tool for making them more effective. Under this new approach, countries would pick sectors they have determined to constitute a dynamic comparative advantage, but where market failures would limit their ability to jumpstart the sector. Countries would lay out in advance why they needed to use the tools, and how they planned on using them. So long as their interventions in markets were either on a specified list of allowable tools (precise rules) or supported those long-term goals in another way (imprecise rules), adjudicators would permit them. Since these measures will take time to negotiate, it's vital that the industrial policy moves happen now. If they invite trade litigation, this will help focus public attention on the need for reform.

Finally, U.S. manufacturers that create good jobs at home should be given privilege of place in our international trade diplomacy and governance. The U.S. State Department, Export-Import Bank, Overseas Private Investment Corporation, and other agencies have only so much bandwidth to advocate for U.S. multinationals' interests in foreign markets. Rather than expending it on companies that pay little U.S. tax and have few U.S. employees,¹⁵⁸ resources should be allocated on a sliding scale to companies that locate production in depressed areas in the United States. Policymakers should require that companies radically improve the depth of the data they provide to statistical agencies on transshipped goods, the country of origin of intermediate inputs, and labor content of imports and exports.

Review 941.

¹⁵⁸ Saleha Mohsin, 'U.S. Treasury Steps Up Pressure on EU Over Apple Tax Dispute' Bloomberg.com (24 August 2016)

<<https://www.bloomberg.com/news/articles/2016-08-24/u-s-treasury-steps-up-pressure-on-eu-over-apple-tax-dispute>> accessed 20 December 2016.



Conclusion

International commercial agreements can be sensible foreign policy tools. However, to be sustainable over the long run, they also need to make sense as a matter of domestic politics.

The Sustainable Equitable Trade doctrine gives us intellectual tools to measure proposals coming out of the Trump administration, such as NAFTA renegotiation. Do they correct class bias in existing deals, make it worse, or ignore it altogether? Do they create platforms for direct participation by workers and other interests, simply paternalistically “deliver bacon,” or neither? Do they target an electorally sufficient majority across regions? Do they do as much work as possible through non-gameable domestic law and multilateral rules, or spend a lot of time in costly bilateral renegotiations?

In the early days of the administration, much of the substance of policy is unknown and changing by the moment. Trump may be dangling hints of protectionism in order to expand trade policy in a regressive direction. Section I recounted how Nixon used tariffs and GATT litigation to get leverage to expanding trade rules. It is not implausible that Trump could attempt something similar. He has threatened tariffs and WTO lawsuits, and some of his nominees have complained that current global trading rules do not go far enough in knocking down health and environmental regulations.¹⁵⁹ While complaining about the costs of pharmaceuticals at home, Trump’s current approach appears to be to get other countries to pay more—a rent allocation strategy perfectly consistent with the status quo.¹⁶⁰ It is possible that the seemingly protectionist Trump may actually save “globalism,” as one advisor recently commented.¹⁶¹ If this Nixon-cum-Trump scenario happens, progressives have a relatively easy task of pointing out the regressive nature of the reform. However, matters are more difficult if Trump makes a convincing play to lure Midwestern working class voters on a more permanent basis.

The SET doctrine gives progressives their own long game by changing the nature of delegation to semi-judicial actors, rescuing international cooperation from regressive distortions, and opening up space for selective industrial policy to address persistent worker-harming imbalances. Some aspects are achievable unilaterally, while others provide foreign policy tools so that our diplomats can stay engaged in the world. Compared with economic authoritarianism, it changes the axis of conflict from one based on race and nationality to one based on class. At the same time, SET recognizes that much of the global economic architecture is decades old and challenging to disentangle. Rather than promise voters this can be wished away, SET offers a pathway toward debiasing and systemic reform from the present starting point. Future work will continue to develop the detail on the proposals offered above.

¹⁵⁹ Matt Egan, ‘The Sneaky Ways Countries Cheat the U.S. on Trade’ CNNMoney (19 January 2017) <<http://money.cnn.com/2017/01/19/investing/wilbur-ross-china-cheating-trade/index.html>> accessed 19 January 2017.

¹⁶⁰ Nolan D McCaskill, ‘Trump Promises to Speed up Drug Approvals’ POLITICO (31 January 2017) <<http://politi.co/2jR4LLc>> accessed 31 January 2017.

¹⁶¹ Gillian Tett, ‘Donald Trump Is Committed to Globalisation, Davos Told’ Financial Times (17 January 2017) <<https://www.ft.com/content/0a15c89c-dcb6-11e6-9d7c-be108f1c1dce>> accessed 19 January 2017.

