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Getting the “Message” on Free Trade: Globalization, Jobs and the World According to Trump

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ABSTRACT

During the presidential campaign of 2016, Donald Trump successfully marshaled years of repressed popular anger over job losses and the erosion of the middle class, caused in part by a globalizing economy and the movement of the American manufacturing base to other parts of the world. Although a great deal of job loss in the American “heartland” was caused by automation, there is little doubt that many factories were closed and moved abroad with no regard for the devastated middle-class workers left behind. This outsourcing of the American workforce was the result of free trade laws devised in the 1990s, resistance to which mainstream politicians and scholars had largely failed to take seriously. Trump articulated and channeled this populist anger, while ignoring the opportunistic role played by American corporations in taking advantage of free trade rules to move their operations abroad in pursuit of greater profitability. Trump also distorted public understanding of the problem by emphasizing the idea that other countries had “taken advantage of” and “ripped off” the United States. In this, he relied on an untapped well of resentment among American workers, seducing voters with the promise that he could renegotiate these deals and restore a lost economic world in which they had felt more secure.

This article argues that global free trade and the laws that support it have complex purposes, and mixed economic effects. While job losses have occurred, globalization has also brought about benefits in terms of peace and international understanding. This article also explores the important legal question of whether and how one president is capable of bringing down the entire world trading system, built up over several decades. In addition, the reasons behind the obvious failure of trade law specialists to confront the contradictions posed by free trade doctrine, and the extent to which they failed to prescribe remedies for its adverse fallout are also analyzed in depth. Finally, this article suggests possible remedies to protect American workers against the ill effects of labor outsourcing, but notes that few if any American politicians have seriously pursued such remedies, for instance by drafting statutes to that end. Empowering workers in corporate decision making and imposing serious penalties on corporations when jobs are lost through outsourcing are methods that have scarcely been tried.

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I. INTRODUCTION

The 2016 presidential campaign in the United States upended decades of mainstream rhetoric on the subject of free trade and international trade agreements. Long regarded as both inevitable and benign by most scholars and commentators, the Trump campaign came out swinging against what it called “bad trade deals,” and threatened to pull the United States out of major trade commitments made over the past fifty years. This Article presents the view that Trump was able to capitalize on scholarly and political neglect of the issue of free trade and job loss over many years, while claiming to be the savior of the American worker from the ravages of the free trade consensus. There has long been valid concern over the implications for labor rights in the United States and elsewhere, as free trade agreements inevitably pitted American workers against much lower cost workers in countries such as China, a competition made possible by the fact that goods that can flow freely around the world can also be manufactured virtually anywhere as well.

This Article explores the manner in which Trump seized upon a neglected issue—the quiet rage of workers in the American heartland because of factory closures over many years—and manipulatively turned this into a problem of “bad deals for America” with foreign governments. In his presentation, bad foreign actors were the problem, and he alone would know how to confront these wily governments. As the Article explains, the major free trade agreements of our day are based on a set of broad principles believed to lead to peace and prosperity through economic integration. While free trade has undoubtedly not led to prosperity for all, it is certainly the case that global peace and stability rely in part on the predictability global trade law helps to create.

The Article explores the manner in which Trump provided a false analysis to a real problem, and it suggests the kind of labor-protective solution that could preserve our post-World War II ethos of free and fair trade, while responding to the legitimate pain and anger at trade-induced job loss and inequality. This Article also analyzes what one President has the power to do in terms of removing the United States from the world trading order, and where those powers must give way to Congress. The Article provides useful perspective as stakeholders in the United States grapple with the implications of Trump’s threats against a free trade system that, while problematic from the point of view of many workers, can only be torn down at the cost of much chaos and upheaval worldwide.

Section I of this Article looks at the manner in which Trump framed the free trade problem for American voters, and it compares this to how global trade rules really operate. Section II explores the increasingly strident role of populists on the world stage, and how their promises, if able to be tested, are unlikely to prove effective against the problems of unemployment, underemployment and social dislocation. Section III describes the author’s long-standing sense that experts in the trade law field were ignoring the job loss and dislocation phenomena at the nation’s peril, and it explores how the newly enforceable trade laws of the 1990s guaranteed a backlash against the effects of those laws over time. Section IV explains advice the author tried to convey to the Clinton campaign, to encourage them to seize and repackage the trade and job loss issue. The section suggests statutory remedies for the outsourcing problem that would be far more effective than anything advocated by Trump, either before or after the election. Section V looks more broadly at the theoretical basis for free trade, and how this theoretical justification tends to break down in the practical economic realm. The argument is presented that, despite flaws in economic effects, the trade regime ushered in by the World Trade Organization in 1995 is an important pillar of world stability and a model for enforceable international law. Section VI goes on to inquire into what trade laws Trump could actually destroy, and to what extent he is willing or capable of pulling down a trade regime that has been decades in the making. It may be, as this Article points out, that his ambitions will prove far more modest than his rhetoric on the campaign trail. In this regard, the final section, Section VII, explores what Trump is specifically proposing to date in terms of alteration to existing free trade agreements.

II. INTRODUCTION: COULD ONE PRESIDENT ACTUALLY OVERTURN THE WORLD TRADING SYSTEM?

As of this writing, Donald Trump has revived the one issue that worked best for him during the long campaign of 2015-2016: “fixing” America’s trade deals.¹ This inartfully expressed ambition seemed to go quiet to some extent after the

¹ See Chris Riotta, *Trump Warns of Ending Global Trade Deals Minutes Before Taking Off for Second World Trip*, NEWSWEEK (July 5, 2017, 9:55 AM), <http://www.newsweek.com/donald-trump-tweets-world-trade-deals-g20-summit-germany-what-will-happen-632000> (noting that Trump tweeted “The United States made some of the worst Trade Deals in world history. Why should we continue these deals with countries that do not help us?”).

election, but he has reprised the anti-trade rhetoric in recent months, renewing calls to get out of “disastrous” trade deals that have supposedly allowed the US to be taken advantage of by “countries that do not help us,” whatever that might mean at any given time.²

Of course, the post-World War II trading system is based on regional and global trade agreements in addition to particular and specific bilateral ones, but the broad outlines of international trade are based on common and well-established global rules.³ Global trade agreements operate more like a general playbook than detailed contracts; they represent voluntarily accepted commitments on the part of participating countries (which is more or less everyone) and are meant to achieve a certain vision of the world as integrated, with a complex, interconnected set of economic benefits and, in one sense, mutual dependencies.⁴ Specific issues are often dealt with under the negotiating umbrellas provided by these larger agreements, but the agreements themselves cannot accurately be described as “deals” in the true sense. The goals of modern trade agreements are consciously both economic and political.⁵

As will be discussed below, the then new and more comprehensive (as well as enforceable) trade agreements of the 1990s had dramatic effects within wealthy, developed countries, and in newly industrialized countries.⁶ It is fairly obvious that

² See Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 5, 2017, 4:14 AM), <https://twitter.com/realdonaldtrump/status/882558219285131265?lang=en>; see also Vicki Needham, *Trump Says He Will Renegotiate or Withdraw From NAFTA*, THE HILL (June 28, 2016, 2:53 PM), <http://thehill.com/policy/finance/285189-trump-says-he-will-renegotiate-or-withdraw-from-nafta-without-changes> (describing Trump’s declaration that NAFTA has been disastrous for America and that he would promptly fix it or leave it if elected president);

³ See, e.g., Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT’L L.J. 421, 425-35 (1998) (setting out the basic structures of the multilateral GATT system, which developed into the WTO). While all multilateral and regional trade agreements have country-specific and bilateral aspects, the animating concept is found in a set of common principles and goals.

⁴ See Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT’L. L. & FOREIGN AFF. 209, 213-40 (2011) (describing the development of international trade law from a narrower concern with tariff reduction through to a far broader role in global governance).

⁵ See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 544-49 (2000) (setting out a grand theory of how the WTO’s goals can be seen as transcendently “constitutional”).

⁶ See Lori Wallach, *Questions the Democratic Presidential Candidates Need to Answer on Trade & Globalization*, HUFFINGTON POST (May 25, 2011), <http://www.huffingtonpost.com/lori-wallach/questions-the-democratic->

with greater mobility of manufacturing, large corporations would follow cheap labor in the knowledge that the goods produced could flow freely and without impediment.⁷ The American worker, *qua* American worker, became less valuable under such a scenario. This is not a polemical statement, but rather a logical fact. The more choices corporations have in terms of global labor pools, the less any one such pool of workers can demand of corporations.⁸

To an extraordinary degree, mainstream American politics ignored this reality, and ignored the anger and resentment of those whose communities, identities and ways of life were subverted by global economic changes.⁹ While displaced workers could be told that they would ultimately have better jobs and higher skills as a result of free trade, or that they were being displaced by automation every bit as much as by globalization, the subterranean unhappiness at this state of affairs created the potential for explosive political capture.¹⁰ At least part of the Trump phenomenon was directly linked to this overlooked reality.¹¹

_b_88040.html (last updated May 25, 2011), (stating that Democratic presidential candidates should address the problem of how trade agreements incentivize the offshoring of American jobs).

⁷ See generally JEFF FAUX, *THE GLOBAL CLASS WAR: HOW AMERICA’S BIPARTISAN ELITE LOST OUR FUTURE- AND WHAT IT WILL TAKE TO WIN IT BACK* 59 (2006) (explaining NAFTA created to give corporate investors access to cheap labor in Mexico).

⁸ See Katherine Peralta, *Outsourcing to China Cost U.S. 3.2 Million Jobs Since 2001*, US NEWS (Dec. 11, 2014, 4:57 PM), <https://www.usnews.com/news/blogs/data-mine/2014/12/11/outsourcing-to-china-cost-us-32-million-jobs-since-2001> (noting that recent research supports the perception that wage competition and other “bottom line” issues caused US manufacturers to move to China in large numbers from the time of China’s accession to the WTO).

⁹ See Tom Hamburger, Carol D. Leonnig & Zachary A. Goldfarb, *Obama’s Record on Outsourcing Draws Criticism From the Left*, WASH. POST (July 9, 2012), https://www.washingtonpost.com/business/economy/obamas-record-on-outsourcing-draws-criticism-from-the-left/2012/07/09/gJQAljJCZW_story.html?utm_term=.b97f2a4fa260 (noting that President Obama was widely perceived not to have lived up to promises that he would stem the flow of jobs out of the United States).

¹⁰ See Pankaj Ghemawat, *People Are Angry About Globalization. Here’s What to Do About It*, HARV. BUS. REV. (Nov. 4, 2016), <https://hbr.org/2016/11/people-are-angry-about-globalization-heres-what-to-do-about-it> (arguing for higher levels of information being presented to the general public on this topic).

¹¹ See Beverly Gage, *Who Is the Forgotten Man?*, N.Y. TIMES: WHAT HAPPENED ON ELECTION DAY (Nov. 9, 2016), <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016>

The Trump campaign's best and most attention-getting issue was the anti-free trade position taken by the candidate. This was successful because Trump seemed to be saying what almost no one else across the political spectrum would say: That free trade had harmed large swaths of American workers in a profound way, and that free trade rules needed to be changed. (Bernie Sanders, of course, also made a similar argument with substantial success.)

The subject of this article, though, is the manner in which Trump employed his anti-trade-deal argument in a twisted manner, making it seem as if other *countries* had tricked and out-negotiated the United States—whereas the real story is two-fold: The way large US corporations betrayed American workers through outsourcing production to locations abroad; and the fact that no US labor or tax laws protected American workers against this phenomenon. Trump used the understandable resentment and mistrust of US workers in affected areas, but turned it to his special advantage by aiming his wrath at foreign governments.¹² He also ignored the central role of US corporations, who relentlessly used the free trade agreements of the 1990s to search the world for cheaper and less regulated jurisdictions in which to make their products, while still maintaining full access to the American consumer market.

Thus, Trump was able to take advantage of untapped rage and confusion (how could our government let this happen to our way of life and former prosperity?), while shielding from blame the corporate class of which he is himself a charter member. It was also easier and more convenient to blame foreign “deal makers,” setting himself up as the only possible savior, a perception assisted by his tabloid reputation as a supposed deal maker *extraordinaire*.¹³

(attributing Trump's victory to his advocacy on behalf of the “forgotten” working-class white man).

¹² These foreign governments are supposedly better able to make good “deals” on behalf of their people.

¹³ See Heather Digby Parton, *Donald Trump's Myth is Coming Unglued*, SALON (June 29, 2017), <http://www.salon.com/2017/06/29/donald-trumps-myth-is-coming-unglued-how-did-the-supposed-master-dealmaker-become-a-spectacularly-incompetent-president/> (observing distinction between Trump's media persona and his effectiveness as a president); Chris Cillizza, *Donald Trump Played a Game of Chicken with House Republicans*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/24/donald-trump-played-a-game-of-chicken-with-house-republicans-then-he-blinked/?utm_term=.c34c11f1a63b (reporting on failure of Congress to pass healthcare reform bill, even though Trump campaigned

While acknowledging the depth of worker resentment over this state of affairs, and noting my former attempts to point out this unaddressed problem, there is danger in the Trump approach that shifts blame where it does not belong, and threatens to undermine the political dimension of global free trade, which is of course international peace and cooperation. At a more practical level, it is completely undetermined at the time of this writing how far Trump will try to go in fulfilling his campaign’s trade-related promises, and what he could actually accomplish if he decided to carry through on these.¹⁴ What follows is both an explanation, as well as some speculation, on where we are and where we are likely to go, legally and politically, on the fraught subject of global free trade agreements and their effects within the United States.

III. FALSE SAVIORS: TRADE, JOB LOSS AND NEO-POPULISTS

Conventional wisdom is that “populism” is on the rise worldwide. While rarely explained adequately, the term refers to a political technique that relies on stirring up popular feelings of nationalism, cultural self-regard and resentment against indifferent “elites” or other outsiders.¹⁵ Generally speaking, a populist will celebrate the “common man” and assure him that, though others have ignored his needs, the populist leader will protect the interests of the “real” people.¹⁶ The populist tends to

as a “dealmaker extraordinaire” that could solve the county’s major problems).

¹⁴ See Michael Birnbaum & Damian Paletta, *At G-20, World Aligns Against Trump Policies*, WASH. POST (July 7, 2017), https://www.washingtonpost.com/world/at-g-20-eu-warns-of-trade-war-if-trump-imposes-restrictions-on-steel/2017/07/07/0ffae390-62f4-11e7-a6c7-f769fa1d5691_story.html?utm_term=.e35111ff525b (reporting Trump has revived a threat to place high tariffs on foreign steel). EU leaders attending the G20 summit in Germany in July 2017 stated that there would be clear and immediate retaliation if Trump imposes new restrictions on steel imports. *See id.*

¹⁵ See *The Economist Explains: What Is Populism?*, ECONOMIST (Dec. 19, 2016), <http://www.economist.com/blogs/economist-explains/2016/12/economist-explains-18> (explaining that populism can take many ideological forms, and citing to the theory that “populists are defined by their claim that they alone represent the people, and that all others are illegitimate.”).

¹⁶ See Uri Friedman, *What Is a Populist? And Is Donald Trump One*, ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/international/archive/2017/02/what-is-populist-trump/516525/> (noting that populists divide society into two camps: the

traffic in the more emotional side of politics, leaving the measured logic of the Enlightenment to others.¹⁷ Grand promises are made by populists, the people are told that their time is now, and that everything that has befallen them is someone else's fault—and that that group of "others" will henceforth be identified as the common enemy of both the people and the populist.¹⁸ To make sure that logic and facts do not undermine this vision, the media is thrown in as an enemy of the people as well.

However widely used in recent times, the term "populism" does not fully capture the salient themes and techniques of contemporary global politics. One unmistakable trend has been for far-right political figures to seize on international trade agreements as contrary to the interests of the traditional working class, on the grounds that bad "deals" rob these people of job security and a reliable economic role in the life of the nation.¹⁹ Both Donald Trump and Marine Le Pen have taken this line of attack in recent months. Under this theory, the "global elites" have gone about the business of betrayal, working in concert to profiteer from the misery of the honest working men and women, plotting in the shadows to rob them of their economic and social birthright. This political trend has taken different forms in different parts of the world, but in each case, the message is one of nostalgia for an older, more localized economy, for an order that was smashed apart by the wiles and guiles of "free trade."²⁰

genuine "people" and all the others, with the populist's role to divide people into these two groups).

¹⁷ See J. Eric Oliver & Wendy M. Rahn, *Rise of the Trumpenvolk: Populism in the 2016 Election*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 189, 189-91 (Sept. 2016) (noting that "populists often employ a distinctive style, one that is simple, direct, emotional and frequently indelicate.").

¹⁸ See Michael Ure, *Trump's Gothic Populism, Comparing Trump's Inauguration Speech to Obama's*, PUB. SEMINAR, (Feb. 15, 2017), <http://www.publicseminar.org/2017/02/trumps-gothic-populism/#.WVUSx4TyuUk> (explaining how the Obama inauguration speech was based squarely on the Enlightenment and Republican ideals of the 18th century United States; as compared with Trump's dark and anti-democratic vision, according to which he would be "the voice" of a people under imminent threat).

¹⁹ See Shawn Donnan, *Free Trade v Populism: The Fight for America's Economy*, FIN. TIMES (Sept. 22, 2016), <https://www.ft.com/content/9f558874-7fe2-11e6-8e50-8ec15fb462f4> (describing the arguments being made by anti-trade, anti-globalist politicians).

²⁰ The recent election in France featured a large dose of economic and cultural nostalgia. See *France Election: Far-right's Le Pen Rails Against Globalisation*, BBC NEWS (Feb. 5, 2017), <http://www.bbc.com/news/world->

There is more than a little truth in the idea that global forces have been indifferent to the severe economic dislocation felt by the working classes in many countries, especially those clustered in the manufacturing heartlands.²¹ However, the neo-populist purveyors of this theory have not, whether intentionally or not, correctly presented the main players behind this economic betrayal. Today’s populists have mainly pointed to immigrants and foreigners as the culprits and targets of their ire. In addition, foreign governments have been portrayed as coldly determined to undermine the well-being of the virtuous “folk” in the heartland of the populist’s nation. The populist is able to rely on such arguments because over the past several decades the increasingly apparent consequences of free trade were never explained to “the people”—certainly not by the specialists in the best position to do so over since the 1990s.

It is, as mentioned above, of crucial importance to understand that it was large corporations that took advantage of enhanced “free trade in goods” rules to move abroad in search of cheap labor and other cost savings.²² The kind of relentless free trade that was pushed by politicians of all stripes from the late 1980s onward was primarily about *mobility of manufacturing*. It had little if anything to do with the 18th century doctrine of “comparative advantage”, whereby each country should produce that which it could make most efficiently and well, in order to market that product to the rest of the world.²³ Second, instead

europe-38872335 (describing Le Pen’s interpretation of globalization as “manufacturing by slaves for selling to the unemployed,” and offering a solution that is “guided by intelligent protectionism and economic patriotism.”).

²¹ Many commentators over the past 20-30 years have described in detail the way global economic elites have captured the rhetoric of free trade in order to enrich themselves to the detriment of the middle classes. See FAUX, *supra* note 7 (providing a ten-year retrospective analysis on NAFTA). A classic work of this kind, Faux explains that “NAFTA, the prototype international agreement for the dismantling of public regulation over business, was not thrust upon the governing class of the United States, Mexico or Canada. It was created by them.” See *id.* at 31.

²² See generally FAUX, *supra* note 7.

²³ See Sara Dillon, *Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO*, 54 B.C. L. REV. 1005, 1024-29 (2013) [hereinafter *Opportunism Revisited*] (criticizing the doctrine of comparative advantage, and its inadequacy to confront the problem of mass outsourcing). Previously, I argued that for modern trade agreements, “the intellectual basis for the trade rules in a ‘comparative advantage’ doctrine was flimsy, the likely outcome for certain labor interests plain to see, and yet what was glaringly important ...was completely ignored by most ‘specialists’ in the field.” *Id.* at 1010.

of calling for increased worker rights and demanding effective incentives for US and European manufacturers to remain in their home countries, neo-populists are instead using this crisis of confidence to peddle policies that will likely render the lives of the affected workers even more disadvantaged.²⁴ In that sense, cynical populism or ironic populism is characteristic of our age; genuine and progressive populism is not.²⁵

Despite official attempts to link free trade and general prosperity, at least since the mid-1990s free trade came to be associated in the public mind with job losses, and those pushing the free trade agenda paid little attention to these objections.²⁶ Despite the proliferation of law review articles on such “trade and” topics as trade and labor, trade and the environment, trade and national regulations, few academic specialists appeared daunted by the prospect of a sea change in the lives of millions of working people in the industrial zones of the United States and other advanced economies.²⁷ That manufacturers were

²⁴ See Jeet Heer, *Trump's Populism Is A Sham*, NEW REPUBLIC (Dec. 9, 2016), <https://newrepublic.com/article/139239/trumps-populism-sham> (expressing strong doubts that Trump's stated policies on outsourcing will lead to any results protective of workers).

²⁵ See Conor Lynch, *There's A Fake Populist in the White House—and Real Populism Is the Only Force That Can Defeat Him*, SALON (Feb. 4, 2017), <http://www.salon.com/2017/02/04/theres-a-fake-populist-in-the-white-house-and-real-populism-is-the-only-force-that-can-defeat-him/> (arguing that Trump has misinterpreted public opinion, which favors pro-worker policies, and does not support Trump's reactionary agenda).

²⁶ While most mainstream economists shared in the “free trade consensus,” certain did offer honest, well documented analyses demonstrating that a great deal of job loss in the US could be linked to free trade, particularly in the past 15-20 years. See David H. Autor, David Dorn & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, AM. ECON. REV., Oct. 2013, at 2121 (noting the dramatic effect on US employment levels of China's accession to the WTO in 2001); see also Peter Dizikes, *The Trade-Offs of Free Trade*, MIT TECH. REV. (Aug. 23, 2016) (describing how economist David Autor is trying to change American thinking on the issue of free trade, to explain that in the areas most affected by trade agreements, the effects have really been “a big deal”). Note that Autor does not promote protectionism, he identifies the rise in transfer payments following the shifting a manufacturing jobs to China and that transfer payments may be a means of redistributing the broader economic benefits of lowering manufacturing costs. See Autor, *supra*, at 2155-59.

²⁷ See, e.g., Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L. L.J. 203 (2007) (considering calls to integrate social standards and labor rights into free trade agreements); Jill Lynn Nissen, *Achieving a Balance Between Trade and the Environment; the Need to Amend the WTO/GATT to Include Multilateral Environmental Agreements*, 28 LAW & POL'Y. INT'L. BUS. 901 (1997) (analyzing the relationship between the WTO

transferring operations to hospitable labor sites like China and Mexico was known, but hardly registered as an “issue” worth exploring, politically or academically. Silently, and in an atmosphere of quiet resentment on the part of the workers, the factories kept closing.²⁸ No one knew when this process would come to an end, or if it would ever end. No one seemed to fully understand what the end game was, or what forces were at work beneath the surface. Week by week, the structure of national economies was changing and evolving, and most people felt less secure about the economic future. That more globalization brought about more international inequality is also unmistakable.

This failure to address the anxieties caused at least in part by “free trade”, especially considering the outlandish promises that had been made to the rank and file of workers in many countries, was an example of intellectual and political neglect that is hard to fathom.²⁹ How could the value or meaning of “free trade” laws be analyzed without taking the hard fact of job losses, job insecurity and destruction of smaller businesses into account? And yet, this state of affairs lasted almost unchanged at the level of political discourse until the earthquake of the Presidential campaign season of 2015-2016.

During that campaign, the long-buried issues of trade, jobs and a traditional economic and social identity burst into the open, with the ideological victory going to those who had first grasped hold of the issue and used it for their own political reasons. Most notable in this group, of course, was Donald Trump, whose campaign would almost certainly have been a

and multilateral environmental agreements following the Uruguay Round of GATT and suggesting amendments to GATT will be necessary); Debra M. Strauss, *The International Regulation of Genetically Modified Organisms: Importing Caution into the U.S. Food Supply*, 61 *Food & Drug L.J.* 167 (2006) (reviewing disparate food labeling regulations around the world and suggesting a uniform international regulatory regime be implemented).

²⁸ See, e.g., Paul Harris, *I’m Sick to My Stomach’: Anger Grows in Illinois at Bain’s Latest Outsourcing Plan*, *GUARDIAN* (Aug. 10, 2012), <https://www.theguardian.com/business/2012/aug/10/illinois-workers-bain-outsourcing> (describing Bain Capital’s role in an Illinois plant closure, during which the affected American workers were required to train the Chinese who would have their jobs after the outsourcing was completed).

²⁹ See, e.g., Robert E. Scott, *NAFTA’s Legacy: Growing U.S. Trade Deficits Cost 682,900 Jobs*, *ECON. POL’Y. INST.* (Dec. 17, 2013), <http://www.epi.org/publication/nafta-legacy-growing-us-trade-deficits-cost-682900-jobs/> (noting that Bill Clinton promised that NAFTA would increase good-paying American jobs, but that things did not turn out as Clinton has predicted).

failure had it not been for his early grasp of the fact that voters in the “Rust Belt” constituted a large, untapped and to some extent overlooked voting bloc ripe for picking.³⁰ As implausible as it was that a New York casino mogul would seriously champion the traditional working class at the level of economic policy, the prospect of manufacturing jobs being returned to the American heartland was a seemingly irresistible siren call.³¹ Trump’s followers wanted to believe that he would represent their views to multinational manufacturers, tempting them with fabulous “deals” to remain in the United States, employing people in traditional pursuits at traditionally high wages. That belief, along with a healthy dose of resentment against immigrants, minorities and foreign governments gave the election season an unusually high degree of political heat, and an often-demagogic seduction.³²

IV. WHY WASN’T THE TRADE AND JOB SECURITY ISSUE OBVIOUS TO ALL?

As someone who wrote doggedly about trade law and the effects on labor from the mid-1990s onward, I was well aware that this explosive issue was broadly ignored. It seemed self-evidently true to me that there was a problem with using

³⁰ See Moshe Marvit, *Trump Promised to Help Workers in the Rust Belt. Here’s How He Can Show He’s Serious*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/12/08/trump-promised-to-help-workers-in-the-rust-belt-heres-how-he-can-show-hes-serious/?utm_term=.fd0274dadd97 (noting that “Donald Trump hung his winning presidential campaign on the idea that he alone could bring back American jobs.”).

³¹ See Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-nots and Cultural Backlash* 11 (Harv. Kennedy Sch. Faculty Research Working Paper Series RWP16-026, Aug. 2016), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401> (summarizing common explanation for rise in populism and why economically vulnerable populations gravitate towards authoritarian leaders when migrants and terrorism threaten their way of life, including their jobs in manufacturing); Nathan M. Jensen et al., *Pass the Bucks: Credit, Blame, and the Global Competition for Investment*, INT’L. STUD. Q., Dec. 2013, at 6-7 (discussing survey finding group more likely to vote for governor willing to provide tax incentives to manufacturer locating facility in state).

³² See Jill Abramson, *Trump’s Rise is the Return of the Demagogue*, GUARDIAN (Feb. 29, 2016), <https://www.theguardian.com/commentisfree/2016/feb/29/donald-trump-us-election-2016-demagogue> (recapping a trump event filled with an angry crowd lashing out at loss of manufacturing jobs and mass immigration and observing similarities between past demagogic and segregationist candidates like George Wallace and Ross Perot).

eighteenth century free trade doctrines as a means to allow multinational corporations to save on their labor costs.³³ David Ricardo, in an age far less technologically advanced and without the possibility of mobile manufacturing, emphasized national specialization based on national advantages in the manufacture of certain goods.³⁴ In our own age, when “free trade” would allow for global competition between different labor pools, the implications were completely different. Of course, it must be noted that many of the job losses apparently “caused” by the operation of free trade agreements were in fact the result of automation, and that free trade in and of itself is not the sole cause of economic disruption.³⁵ However, it consistently bothered me that the element of global “labor competition” took little if any part in mainstream analyses of international trade law studies. From a commonsense point of view, this aspect of the global “free movement of goods” must be of grave concern to people working in the manufacturing sector in the more advanced economies—logically, how could it not be?

It gives me no great pleasure to have been right on this issue. From the time international trade law became a “law school” subject in the mid-1990s, trade law scholars completely missed the larger “job loss” implications, having spent the greatest amount of time parsing and analyzing legal issues that

³³ See, e.g., Sara Dillon, *Opportunism and the WTO: Corporations, Academics, and Member States*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 53, 54 (Colin Picker et al. eds., 2008) [hereinafter *Opportunism and the WTO*] (emphasizing that post-1995 trade law is not based on comparative advantage, it is based on the needs of transnational businesses); see also Dillon, *Opportunism Revisited*, *supra* note 23, at 1020 (arguing instead of focusing on individual trade disputes, trade scholars should focus on opportunistic corporations and the “underpinnings of the entire global trade system”); Sara Dillon, *A Farewell to “Linkage”: International Trade Law and Global Sustainability Indicators*, 55 *Rut. L. Rev.* 87, 112 (2002) [hereinafter *A Farewell to “Linkage”*] (noting Ricardo himself knew that theory of comparative advantage only made sense if both capital and labor were immobile).

³⁴ See WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 49-50 (11th ed. 2009) (discussing Ricardo’s discovery of the principle of comparative advantage). The principle of comparative advantage, in theory, allows a country to benefit even when trading with a country that makes a product less efficiently than it because the country is able to specialize in and produce more of another product it makes even more efficiently than the product being traded. See *id.*

³⁵ See Brian Heater, *Technology Is Killing Jobs, and Only Technology Can Save Them*, *TECHCRUNCH* (Mar. 26, 2017), <https://techcrunch.com/2017/03/26/technology-is-killing-jobs-and-only-technology-can-save-them/>.

were—from the point of view of ordinary people—essentially a sideshow.³⁶ In the mid-1990s, trade law moved from economics departments to law schools, and it is easy to explain why. This was because 1990s trade agreements like those of the WTO and NAFTA created genuinely “enforceable” dispute resolution mechanisms, and legal academics feel at home studying disputes: the details of the disputes, the legal provisions being invoked, and similar comfortably “legal” issues.³⁷ While there is nothing wrong with an academic approach that centers on trade disputes *per se*, this disproportionate focus tended to mask the real “action”—political, legal and economic: that the robust elimination of most trade barriers due to the trade agreements of the 1990s opened the door to an unprecedented mobility of manufacturing.³⁸ When a product can flow freely without fiscal or regulatory impediments, it can also be manufactured in any convenient location. That is part of the indisputable logic of eliminating most barriers to trade in goods, wherever manufactured.³⁹ It wasn’t so much foreign governments that took advantage of that reality—rather, it was American multinational corporations that took the opportunity to further enrich themselves at the expense of silently frustrated American workers.

It may seem obvious, though it went surprisingly unremarked by mainstream commentators and academics, that mobility of manufacturing meant that workers in the US and elsewhere would be competing, quite literally, with workers in

³⁶ Of course, some—though not many—trade law scholars saw and analyzed the problem of trade agreements versus workers’ rights. *See, e.g.*, Chantell Taylor, *NAFTA, GATT and the Current Free Trade System: A Dangerous Double Standard for Workers’ Rights*, 28 DENV. J. INT’L. L. & POL’Y. 401 (2000) (comparing corporate rights under NAFTA and GATT and workers’ rights under the North American Agreement on Labor Cooperation).

³⁷ *See* Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251 (2006) (noting the transition for a negotiation-based to a rules-based, legal dispute oriented free trade system).

³⁸ *See* Nicholas R. Lardy, *Issues in China’s WTO Accession*, BROOKINGS (May 9, 2001), <https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/> (describing the dynamic process by which a national economy, in this case China’s, becomes embedded in free trade structures and draws in foreign manufacturers).

³⁹ *See* David M. Driesen, *What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT’L. L. 279, 312 (2001) (questioning disparate meanings of free trade and noting any tax or regulation constitutes some form of trade barrier, often intended to disadvantage foreign producers).

lower-wage countries.⁴⁰ This kind of very dramatic wage competition would lead inevitably to a significant number of job losses, and would transform the economy and even the basic tenor of life itself.

The power of labor depends in large measure on the employer not having a “choice”—if the negotiating worker can be easily replaced (in this case by workers abroad), there is little incentive for the employer to give heed to the wishes of the workforce.⁴¹ As mentioned above, there is lively debate over the number of jobs lost due to wage competition versus automation—the fact remains, though, that middle-class American workers simply could not successfully compete with workers making one tenth or one quarter of what US workers expected to earn.⁴² No number of “side agreements” on labor and environmental standards could alter this hard fact.⁴³ Asserting that American workers are “the best in the world” does not change the reality that the wage differentials in different parts of the world are striking. Manufacturers would chase cheaper labor in other parts of the world--notably in China--and the American heartland that counted on factory jobs would be hollowed out.⁴⁴ This uncomfortable truth was rarely mentioned in political speeches, yet was one of the main elements of a

⁴⁰ See Uri Dadush & William Shaw, *Is the Labor Market Global?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 3, 2012), <http://carnegieendowment.org/2012/01/03/is-labor-market-global-pub-46388> (writing that “[t]he labor market is integrated in the sense that workers are competing for the same jobs, even if the jobs move to the workers rather than the other way around.”).

⁴¹ See Kim Moody, *What to Know About the WTO: A Union Activist’s Guide*, LABOR NOTES (Feb. 1, 2000), <http://www.labornotes.org/2000/02/what-know-about-wto-union-activists-guide> (denying that the WTO was really about creating “rules based trade,” but instead about enhancing the power of multinational corporations vis a vis governments and labor unions).

⁴² See DEAN MCFARLIN & PAUL D. SWEENEY, *INTERNATIONAL MANAGEMENT: STRATEGIC OPPORTUNITIES & CULTURAL CHALLENGES* 340-43 (5th ed. 2015) (observing difficulty American workers have keeping up with hard-working and technically trained workers in China and India that work for one tenth the pay of Americans).

⁴³ See Joel Solomon, *Trading Away Rights: The Unfulfilled Promise of NAFTA’s Labor Side Agreement*, HUMAN RIGHTS WATCH (April 2001), <https://www.hrw.org/reports/2001/nafta/nafta0401.pdf> (identifying structural weaknesses and cautious use of the North American Agreement on Labor Cooperation as major impediments to its success).

⁴⁴ See Trymaine Lee, *The Heartland: Life and Loss in Steel City*, MSNBC (Sept. 2016), <https://www.nbcnews.com/specials/geographyofpoverty-heartland-1> (exploring the shocking level of deprivation caused by factory closures in the worst-affected areas of the United States).

“changed world” for workers in the manufacturing sector in the United States and elsewhere.

Thus, far from the specialized scenes of trade law conferences, workers who saw their jobs disappear were apparently, and not surprisingly, growing angrier. As I had been writing about this disconnect for years, my original view was confirmed. Indeed, the likelihood of such an eventual reaction by American labor struck me forcefully, virtually from the very moment the WTO came into being.⁴⁵ It was clear to me that the traditional trade model of exporting one’s national goods and importing the national goods of other countries and regions was breaking down as an operative concept.⁴⁶ Mobility of manufacturing became an imperative for American manufacturers, as big box stores practically ordered American companies to reduce product prices below a certain bottom line.⁴⁷

As I saw the problem from the late 1990s onward, the discipline of trade law studies had become fixated on narrow questions relevant to the WTO disputes in particular. This was troublesome not only because it was a distraction of sorts. More concerning, it fostered the illusion, or was based on the illusion, that global trade had an inherent “*nation versus nation*” dimension—whereas in fact, multinational corporations did not much care where they operated, either from a manufacturing, profit-making or tax-paying point of view.⁴⁸ The eighteenth century paradigm, as mentioned above, was one in which nations produced certain goods, goods which they then traded with other nations, for goods produced by those other nations.⁴⁹

⁴⁵ See, e.g., Dillon, *A Farewell to “Linkage”*, *supra* note 33, at 112 (calling for an empirical approach to adverse effects of international trade agreements).

⁴⁶ See *id.* at 54 (describing the inadequacy of the concept of comparative advantage in modern times).

⁴⁷ See COMMANDING HEIGHTS PBS (2002) (indicating retailers like Walmart required U.S. firms to purchase from Chinese factories to lower costs); see also Hiroko Tabuchi, *Walmart’s Imports From China Displaced 400,000 Jobs, A Study Says*, N.Y. TIMES (Dec. 9, 2015), <https://www.nytimes.com/2015/12/09/business/economy/walmart-china-imports-job-losses.html>.

⁴⁸ See Dillon, *Opportunism Revisited*, *supra* note 23, at 1020-22 (explaining one must consider wishes of powerful transnational corporations to understand trade agreements and arguing WTO should shift focus away from nation verse nation disputes).

⁴⁹ See John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521–25 (2000) (explaining, in theory, free trade benefits all countries over time).

But by 1995 and beyond, such a conception of international trade was misleading at best. Much of the “trade” the US did with China involved goods made in China by US-based corporations.⁵⁰ As with tax avoidance, US and other multinationals were heavily involved in “labor rights avoidance”, and wanted to have full access to the globe in search of the best labor at the lowest possible price.⁵¹ This was possible precisely because trade laws had, from the end of World War II, led in the direction of eliminating tariff and non-tariff trade barriers, and increasingly even regulatory barriers. If goods and services can move freely without impediment, so can manufacturers.

In short, the trade laws that were promulgated in the 1990s attempted to ensure a permanent, unendingly neoliberal approach to international commerce.⁵² The idea was that governments would come and go, but free trade rules would remain enshrined in international law, as received by virtually all trading nations of the world.⁵³ The WTO became a forum for the display of legal virtuosity by such rising nations as India and Brazil.⁵⁴ The operation of the WTO made it seem as if the world economy would inevitably remain integrated in nature, and that the future was knowable.⁵⁵

⁵⁰ See Chad P. Brown, *U.S.-China Trade Conflicts and the Future of the WTO*, 33 FLETCHER F. WORLD AFF., 27, 38-39 (Winter/Spring 2009 (highlighting factors U.S. must consider when making threats towards China, including that many Chinese exports derive from subsidiaries of U.S.-based multinational corporations)).

⁵¹ See Lance A. Compa, *Free Trade, Fair Trade, and the Battle for Labor Rights*, CORNELL U. ILR SCH. (2001), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1376&context=articles>.

⁵² See FAUX, *supra* note 7, at 179-80 (describing constitutional components of NAFTA and the WTO); see also Dillon, *Opportunism Revisited*, *supra* note 23, at 1031 (remarking on immutable, constitutional aspects of WTO’s trade rules).

⁵³ See Dillon, *Opportunism Revisited*, *supra* note 23, at 1017 (pointing out Uruguay Round of WTO negotiations constitutionalized free trade ideas and placed policies out of political leaders’ reach).

⁵⁴ See Dillon, *Opportunism and the WTO*, *supra* note 33, at 66 (naming Brazil and India as countries clearly using the WTO to their strategic national advantage).

⁵⁵ The need for predictability (as opposed to the uncertain outcomes of a more politicized system) was the core rationale for the creation of the WTO’s newly enforceable system of dispute settlement. See *Introduction to the WTO Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p1_e.htm (last visited Aug. 22, 2017) (noting that “A central objective of the

V. MESSAGE TO CANDIDATE CLINTON ON THE ANTI-TRADE WAVE

When Barack Obama was first elected president in 2008, it seemed he wanted to carry out some version of a do-over of America's trade relations with the rest of the world.⁵⁶ For a time, it seemed as if he would consider rewriting NAFTA or even terminating America's involvement in the WTO.⁵⁷ None of this, of course, happened, despite his criticism of unfettered free trade.⁵⁸ Instead, quietly and persistently, the Obama administration moved to create even more ambitious free trade structures, including the now notorious TPP and TTIP.⁵⁹ It appears that over time, President Obama came to emphasize not the job-loss dimension of free trade, but rather the geopolitical aspects, through which global alliances are fostered, and global power exerted.⁶⁰

It is important to emphasize that free trade has this second, non-economic dimension in the realm of global

(WTO) dispute settlement system is to provide security and predictability to the multilateral trading system.”).

⁵⁶ See *Barack Obama on Free Trade*, ON THE ISSUES, http://www.ontheissues.org/2008/Barack_Obama_Free_Trade.htm (last visited Aug. 22, 2017) (indicating that then-candidate Obama was strongly critical of existing free trade structures and determined to fundamentally alter them—which in the end, he arguably did not seriously attempt to do).

⁵⁷ See *id.*

⁵⁸ See Jaime Fuller, *Why Almost Everyone Hates the Trade Deal Obama's Negotiating in Japan*, WASH. POST (April 23, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/04/23/why-almost-everyone-hates-the-trade-deal-obamas-negotiating-in-japan/?utm_term=.079e46f9d892 (explaining that, despite Obama's insistence that the Trans-Pacific Partnership was the new “gold standard” for trade agreements, it was meeting resistance from many different quarters, politically and geographically).

⁵⁹ See, e.g., Trevor Timm, *The TTIP and TPP Trade Deals: Enough of the Secrecy*, GUARDIAN (May 4, 2016), <https://www.theguardian.com/commentisfree/2016/may/04/ttip-tpp-trade-deals-secrecy-greenpeace-leak> (decrying the lack of transparency in the negotiating of these two major trade agreements sought by President Obama as part of his legacy).

⁶⁰ See I.M. Destler, *America's Uneasy History with Free Trade*, HARV. BUS. REV. (Apr. 28, 2016), <https://hbr.org/2016/04/americas-uneasy-history-with-free-trade> (suggesting that the “New Democrats” support for free trade is based on its ability to buttress U.S. leadership role in international economy). Although President Obama did not focus much on trade in his first term, he became an active advocate for the Trans-Pacific Partnership in his second term and argued the agreement was vital to global partnerships and the establishment of rules for the global economy. See *id.*

leadership, and Obama realized over time that the US could exert influence through expanded regional trade agreements.⁶¹ As is well known, these two ambitious, large-scale agreements that would further extend the reach of free trade laws in the direction of Asia and the EU, became toxic political subjects during the 2015-2016 presidential campaign. All major candidates of the 2016 presidential race disavowed the TPP, and the assumption is that it has died a quiet death.⁶² From the time then candidate Trump took up the issue of trade and job losses, there was no going back to the earlier status quo, and decades of failure to mention the inconvenient facts on employment effects had to be paid for.

During the 2015-2016 presidential campaign, it became obvious that Donald Trump had essentially expropriated the issue of trade and jobs.⁶³ I marveled at the fact that the Clinton campaign had not figured out a way to “own” that issue, or to confront it. After twenty years of hearing that free trade would lead to more and better jobs (in some cases it has, but in many not), the American public was tired of the pro-free trade rhetoric and required something more concrete.⁶⁴ Reflecting their long-

⁶¹ See William Finnegan, *Why Does Obama Want This Trade Deal So Badly*, THE NEW YORKER (June 11, 2015), <http://www.newyorker.com/news/daily-comment/why-does-obama-want-the-trans-pacific-partnership-so-badly> (suggesting that Obama’s chief motivation was to enhance U.S. influence in Asia and reduce China’s).

⁶² During the 2016 presidential campaign season, all major candidates were of the stated view that the TPP was flawed and should not be pursued. See *2016 Presidential Candidates on the Trans-Pacific Partnership Trade Deal*, BALLOTPEDIA, https://ballotpedia.org/2016_presidential_candidates_on_the_Trans-Pacific_Partnership_trade_deal (last visited Aug. 22, 2017); see also *Trump Signs Executive Order to Formally Withdraw the US From the Trans-Pacific Partnership Trade Deal*, CNBC (Jan. 23, 2017), <http://www.cnn.com/2017/01/23/trump-signs-executive-order-to-formally-withdraw-the-us-from-the-trans-pacific-partnership-trade-deal.html> (reporting that Trump called this act of withdrawal a “great thing for the American worker”).

⁶³ See, e.g., Cristiano Lima, *Trump Calls Trade Deal ‘A Rape of Our Country’*, POLITICO (June 28, 2016, 8:20 PM), <http://www.politico.com/story/2016/06/donald-trump-trans-pacific-partnership-224916> (noting the inflammatory rhetoric used by Trump to describe existing trade agreements and the politicians who had supported them).

⁶⁴ See Diane Stafford, *Campaign Anti-trade Rhetoric Won’t Lead to Quick Changes after Elections, Experts Say*, KAN. CITY STAR (Nov. 3, 2016, 04:37 PM), <http://www.kansascity.com/news/business/article112379237.html> (describing one expert as saying that “Great disbelief in ‘experts’ and feelings

running bafflement with the process of job loss and factory closings, many gravitated to Trump's promise that he would (somehow, through a method unspecified) force companies to remain in the United States and not move abroad to manufacture. If they did move abroad, he insisted, he would slap their imports into the United States with a "35% tariff." When he repeated that simplistic formula, to many listeners it sounded like a concrete plan; like something could be done besides lamenting the factory losses and proposing job retraining.⁶⁵

There are many legal, economic and factual difficulties surrounding Trump's by now famous assertion. However, it was indisputable that Trump had taken what should have been in general terms a progressive policy position (saving jobs through better regulation of the problems caused by outsourcing) and turned it into a personal crusade. He told his audiences time and again that he alone could save their jobs and their fading middle class lifestyles.⁶⁶ He would vindicate their disappointed expectations, their broken communities, and stop treating the effects of free trade as inevitable. It was a highly effective strategy. Indeed, this was likely the one and only issue Trump benefited from enough to push him over the top to win the Electoral College.

In the early spring of 2016, I saw this political configuration on the horizon and wrote a brief memo, intended to be shared with the Clinton campaign.⁶⁷ It is likely it never reached the campaign, or if it did, that it was not successfully channeled. The essence of the memo was this: That mainstream politicians had utterly failed to address the anger felt by formerly middle-class people who attributed their job

of being left out of prosperity are pervasive among both British and American voters").

⁶⁵ See Sahil Kapur, *Trump's 'Retribution' Tax Stirs Questions, GOP Resistance*, BLOOMBERG (Dec. 5, 2016), <https://www.bloomberg.com/news/articles/2016-12-05/trump-s-retribution-tax-stirs-legal-questions-gop-resistance> (highlighting importance of Trump's tariff threat to white voters without college degrees that made up one third of 2016 electorate and helped Trump win rustbelt states).

⁶⁶ See Michael Martinez, *Why Ford Made Trump Look Like A Jobs Savior*, AUTOMOTIVE NEWS (Nov. 18, 2016), <http://www.autonews.com/article/20161118/BLOG06/161119824/why-ford-made-trump-look-like-a-jobs-savior> (writing that "[i]f you ask Donald Trump, he just saved thousands of US jobs that big, bad Ford Motor Co. was about to move to Mexico." The writer continues, "[t]o borrow a line from his recent presidential debate performance: 'Wrong'").

⁶⁷ Memo on file with author.

losses and economic decline to the effects of free trade. Rather than coming up with actual laws that would deal directly with outsourcing (by creating clear and fairly applied penalties and disincentives for outsourcing US jobs to lower-wage countries), Trump was transforming the issue into a United States versus Country X kind of issue: i.e., US versus Mexico, US versus China.⁶⁸ In fact, it was US companies that had sought out the cheaper labor and more advantageous regulatory environments offered by these countries, but Trump decided to present the problem as if the host countries for American investment were acting to the detriment of the US.⁶⁹ Trump’s strategy had the two-fold effect of channeling working class anger against the “elites” who had allowed the factory closures, and also of channeling that same anger against foreigners and their governments.

It seemed that it would have been relatively easy at that point for Hillary Clinton to acknowledge the problem and reframe it, offering a much better, more rational and effective remedy in the form of legally-defined penalties for US companies engaging in outsourcing behavior. Needless to say, Secretary Clinton did not set out any such clearly defined solutions to the problem of jobs outsourcing.⁷⁰ Donald Trump continued to emphasize the issue of trade and jobs, occasionally berating US companies, but more particularly the countries in which they were setting up manufacturing outlets, and crucially, the politicians who had entered into supposedly “bad deals.”⁷¹ This

⁶⁸ See Jeffrey Bartash, *Trump Calls US-Mexico Trade One-sided—and Here’s the Reality*, MARKET WATCH (Jan. 27, 2017), <http://www.marketwatch.com/story/trump-calls-us-mexico-trade-one-sided-heres-the-reality-2017-01-26>; see also Joseph Stiglitz, *Trump’s Most Chilling Economic Lie*, VANITY FAIR (Feb. 17, 2017), <http://www.vanityfair.com/news/2017/02/donald-trump-china-economics-trade> (pointing out that “the very Americans who have been among the losers of globalization stand to be among the losers of a reversal of globalization—including a trade war. History cannot be put into reverse.”).

⁶⁹ See Matthew Yglesias, *Donald Trump Is Going to Bring Us Trade Wars*, *Big Time*, VOX (Jan. 20, 2017), <https://www.vox.com/policy-and-politics/2017/1/20/14323686/trummp-trade-war> (referring to Trump’s “plan to use ad hoc tariffs to initiate and ‘win’ trade wars with foreign countries.”).

⁷⁰ See Kellan Howell, *Hillary Clinton’s Outsourcing Problem With Union Workers*, CIRCA (July 25, 2016), <https://www.circa.com/story/2016/07/25/politics/hillary-clintons-outsourcing-problem-with-union-workers> (describing negative reactions to her stated idea that much of the outsourcing that has happened was “inevitable”).

⁷¹ See Vicki Needham, *Trump Vows to Overhaul “Horrible” Trade Deals*, THE HILL (July 21, 2016), <http://thehill.com/policy/finance/288812-trump-vow-to-overhaul-us-trade-policy> (quoting then-candidate Trump as stating the he

put the focus on *himself* as capable of delivering a remedy, rather than increasing the understanding of the public as to the reasons for the phenomenon, or committing to create legally appropriate incentives and penalties.⁷² In the end, of course, Trump won the presidency and has to a lesser extent continued on the same path of personal trade savior.

VI. THE THEORETICAL BASIS FOR FREE TRADE POLICIES

In order to fully appreciate the trade-based historical drama we witnessed in 2015-2016, we need to understand the post-World War II free trade ethos, the acceleration of manufacturing job losses within the United States and the faulty interpretation placed on all this by Donald Trump, while simultaneously taking credit for being the person able to “do something” about America’s trade-based economic insecurity.

It is obvious that “free trade” has brought economic diversity and prosperity to many societies over thousands of years.⁷³ Trade is as common to the restless human species as population movement itself. In the modern age, the eighteenth century saw an explosion in sea-borne trade, buoyed by the supporting theory of “comparative advantage.”⁷⁴ According to the concept of comparative advantage, nations would always benefit from specializing in that which they were relatively better at making.⁷⁵ They could then trade with other nations

would “never sign any trade agreement that hurts our workers, or that diminishes our freedom and independence.”). This emphasis on what the President will or will not sign gives the mistaken impression that there are no other dynamics at play, and that the issue hinges on the determination of one person not to “sign” the bad agreement.

⁷² See David Lawder & David Shepardson, *Trump Is Preparing Orders to Review Trade Deals, Procurement: Officials*, REUTERS (Mar. 23, 2017), <http://fortune.com/2017/03/24/trump-executive-order-trade-deal/>.

⁷³ See generally WILLIAM J. BERNSTEIN, *A SPLENDID EXCHANGE: HOW TRADE SHAPED THE WORLD* (2008) (providing a comprehensive look at the processes that drove virtually all civilizations to trade, and how these complex processes led to the modern world as we know it).

⁷⁴ See K.N. Chaudhuri, *The Structure of the Indian Textile Industry in the Seventeenth and Eighteenth Centuries*, INDIAN ECON. & SOC. HISTORY REV., Apr. 1974, at 127, 139-40 (discussing trading relationship between Britain and Bengal and noting shift towards sea-borne trade due to lower costs and comparative advantage in Bengal).

⁷⁵ See Murray N. Rothbard, *The Ricardian Law of Comparative Advantage*, MISES INSTITUTE (April 26, 2012), <https://mises.org/library/ricardian-law-comparative-advantage> (contrasting the earlier and simpler notion of national “absolute advantage,” with the more challenging concept of comparative advantage).

from the goods they had decided to specialize in. David Ricardo popularized this idea, which in the end boiled down to the truism that it always paid for nations to specialize and trade with one another in the products of that specialization.⁷⁶ All nations should then focus on producing those items that they were able to make *relatively* more efficiently, a process that would always lead to relatively better outcomes.⁷⁷

This doctrine of comparative advantage, an intellectual antique, is hardly suited to the modern era.⁷⁸ As mentioned above, it derives from an age when manufacturing was inherently immobile—with a static relationship to geography. In reality, the doctrine says no more than prosperity through product prioritization: prosperity in each country will be greater if each nation decides which products it is best at producing and sticks to those products. Do not try to make everything you *can* make, even if you can make a wide variety of things better than others. It pays to specialize, as more wealth will be generated. Arithmetically, it seemed an attractive proposition. But for use in the world of the early 21st century, it does not seem to amount to much.⁷⁹

This seemingly simple idea has proven very enduring, in part because of a lack of conceptual competition. Over centuries, through periods of open trade borders and relative protectionism, “comparative advantage” has propelled countries forward, often without much attention being paid to the empirical effects of trade liberalization. Especially in the 1990s, when the world turned in the direction of predictable, enforceable trade laws, the focus was almost completely on the imagined benefits of more and more free trade, and greater elimination of all kinds of trade barriers, tariff and non-tariff.⁸⁰

⁷⁶ See BAUMOL & BLINDER, *supra* note 34, at 48 (exhibiting importance of specialization to obtaining benefits of comparative advantage).

⁷⁷ See Rothbard, *supra* note 75.

⁷⁸ See Reinhard Schumacher, *Deconstructing the Theory of Comparative Advantage*, 2 WORLD SOCIAL & ECON. REV. 84 (Feb. 7, 2013), <http://wer.worldeconomicsassociation.org/files/WEA-WER2-Schumacher.pdf> (noting that for Ricardo, the immobility of labor and capital were taken for granted, an assumption that is obviously outdated today).

⁷⁹ See Vladimir A. Masch, *The Myth of Comparative Advantage*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/vladimir-a-masch/the-myth-of-comparative-a_b_581814.html (stating that the law of Comparative Advantage “is not a true ‘law’—at best, it is a rule of thumb, not often applicable).

⁸⁰ See Kyle Bagwell, Chad P. Bown & Robert W. Staiger, *Is the WTO Passé?*, 54:4 J. ECON. LITERATURE 1125 (2016),

Statements were made about the explosion of prosperity that would be generally experienced by participating countries; few bothered to question this orthodoxy, and its proponents almost always prevailed in debate.⁸¹

As regional and global trade rules became more binding, more enforceable and more generally legalistic throughout the 1990s, the effects of free trade in people's lives—including the negative effects—began to be felt. As described above, the traditional ideal of free trade is that there are “national” products and these products are traded with other national products, in a virtuous chain of events. However, it became quite apparent that one of the main motivations behind the trade agreements, which allowed products to flow without impediment across borders, was to facilitate mobility of manufacturing.⁸² The decision of companies to relocate in cheaper wage locations (and lower regulation nations) was not random or sporadic. Large retailers, and by extension consumers, demanded that the bottom line cost of products should be lower, and factories shuttered and moved to China, among other countries, to take advantage of these lower labor costs.⁸³

The logic of the terms of trade agreements could have made all this quite foreseeable. Yet, politicians and even trade law specialists rarely mentioned these possibly negative outcomes. While it is true that a great deal of manufacturing job loss is due to automation—and that this will continue—it was also starkly true that American workers were being passed over

http://www.dartmouth.edu/~rstaiger/BBS_JEL_2016.pdf (describing the process of development of modern trade laws).

⁸¹ See Dani Rodrik, *The Rush to Free Trade in the Developing World: Why So Late? Why Now? Will it Last?*, VOTING FOR REFORM: DEMOCRACY, POLITICAL LIBERALIZATION, AND ECONOMIC ADJUSTMENT 61, 62 (Stephen Haggard & Steven B. Webb eds. 1994) (describing developing countries' rushing to free trade as if it were the “Holy Grail of economic development”); Helen V. Milner, *The Political Economy of International Trade*, 2 ANN. REV. POL. SCI. 91, 92 (1999) (describing flock to free trade regimes in 1990s and scholarly coverage of the phenomenon); Denise Froning, *The Benefits of Free Trade: A Guide for Policymakers*, HERITAGE FOUND. (Aug. 25, 2000), <http://www.heritage.org/trade/report/the-benefits-free-trade-guide-policymakers> (promoting benefits free trade creates for all, including more options for consumers and the free flow of ideas as well as goods).

⁸² See Dillon, *Opportunism and the WTO*, *supra* note 33, at 54 (concluding further mobility in manufacturing sought to escape organized labor and regulatory oversight in developed nations).

⁸³ See WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 10-12 (2017) (providing charts and analysis of China's manufacturing dominance since the late 1970s).

in favor of workers who simply cost far less.⁸⁴ The power of workers *relative to the power of the corporation* was substantially rewritten in the 1990s, and a certain quiet rage began to grow beneath the surface.⁸⁵ As indicated above, trade scholars only rarely confronted this issue, preferring esoteric discussion of trade disputes, standards used by the global trade bodies, etc. It was assumed that the trade regime that had been put in place in the mid-1990s, designed to create a global marketplace—was now “constitutional” in nature, and would last essentially forever. Objections to the system were dismissed as “protectionist”.⁸⁶ When the job loss issue was alluded to, it was in general terms, such as with a clichéd acknowledgment that there are “winners and losers” in the operation of free trade rules.⁸⁷

As also described above, there is a second, somewhat more hidden, justification for free trade as a policy. This justification is more political and does not pretend to be based on some immutable laws of economics. This side of the free trade rationale is the preservation of peace, and the establishment of national influence. Almost as pervasive as the idea of comparative advantage is the idea that countries that engage in high levels of trade with one another are highly unlikely to engage in armed hostilities.⁸⁸ Thus, as trade produces a more

⁸⁴ See Robert E. Scott, *Unfair Trade Deals Lower the Wages of US Workers*, ECON. POL’Y. INST.: FACTSHEET (Mar. 13, 2015), <http://www.epi.org/publication/unfair-trade-deals-lower-the-wages-of-u-s-workers/> (noting that U.S. workers have been displaced and their bargaining power weakened through the operation of international trade agreements).

⁸⁵ See Heather Long & Patrick Gillespie, *Why Americans Are So Angry in 2016*, CNN MONEY (Mar. 9, 2016), <http://money.cnn.com/2016/03/09/news/economy/donald-trump-bernie-sanders-angry-america/index.html> (writing that “[Americans] believe the middle class is dying, trade is killing US jobs and that their kids won’t have a chance to get ahead.”).

⁸⁶ See, e.g., Jagdish Bhagwati, *How to Demolish Protectionist Myths*, GUARDIAN (July 5, 2010), <https://www.theguardian.com/commentisfree/2010/jul/05/free-trade-protectionist-myths> (writing, as one of the foremost “anti-protectionist writers,” about common protectionist arguments rejected by academics).

⁸⁷ See Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT’L. L. 797, 831-32 (analyzing effects of free trade, such as job loss and high unemployment rates, through winners to losers lens, and suggesting winners should provide “trade-related adjustment assistance” to losers).

⁸⁸ See JONATHAN SCHELL, *THE UNCONQUERABLE WORLD: POWER, NONVIOLENCE, AND THE WILL OF THE PEOPLE* 36 (2004) (“An unbroken thread of faith in free trade as an abettor of peace runs through the entire tradition

prosperous world, it is also believed to help create and preserve a more peaceful and stable one.

Even before the end of World War II, the Allies demonstrated their belief that protectionism had been a contributing factor leading to war, and sought to remove barriers to post-war trade.⁸⁹ The Bretton Woods Agreements aimed at the creation of rules to guide a calmer, more prosperous and integrated post-war order, one in which free trade would be a centerpiece.⁹⁰ Agreed-upon rules would restrain national governments and push back against the temptation to indulge in nationalistic approaches to economic behavior.⁹¹ The GATT rules were designed to prevent “back-sliding”, and the multilateral GATT system was, interestingly, open to all interested nations. Like the EEC that followed in the 1950s, the GATT had a clear political motivation. While it is perhaps satisfying to consider that “peace and prosperity” are the twin pillars holding up the house of multilateral trade, it is also the case that the often unfounded faith in comparative advantage was able to shield the effects of trade rules from empirically-based scrutiny. In other words, the articles of faith that supported the GATT/WTO system had a dangerous tendency to mask signs of dissatisfaction with the system’s adverse effects.⁹² Thus, for those in the American heartland who watched as their local factories closed down and moved abroad, the indifference of policy makers became especially galling.

The Age of Trump has been highly revealing in this sense. Even those who have been critical of the global trading system

of liberal internationalism, surviving many disappointments and continuing, if in attenuated form, to this day.”).

⁸⁹ See Jason Margolis, *The US Tried Extra-high Tariffs Before, in 1930. It Was A Disaster*, PRI (Feb. 1, 2017), <https://www.pri.org/stories/2017-02-01/us-tried-extra-high-tariffs-1930-it-was-disaster> (arguing that it was not until after World War I that “American leaders developed a new way of looking at commerce” that did not rely on high external tariffs).

⁹⁰ See ERIC HELLEINER, *FORGOTTEN FOUNDATION OF BRETTON WOODS: INTERNATIONAL DEVELOPMENT AND THE MAKING OF THE POSTWAR ORDER* (2014).

⁹¹ See Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT’L. L. 379, 385-92 (1996) (providing a detailed history of the General Agreement on Tariffs and Trade (GATT)). The GATT was the result of the Bretton Woods negotiations, the purpose of which was to establish a post-World War II global financial order, including a commitment to the elimination of trade barriers and adherence to free trade principles. See *id.*

⁹² See Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 410-26 (2002) (discussing the conflict and intersection of globalization and nationalism, and the role of free trade).

for its destructive effects on jobs must recognize that the second pillar of free trade--integration and peace--is a significant political asset. While Trump treats the trade dilemma as a simple matter of “jobs warfare”, a contentious, disruptive approach to trade agreements cannot be the correct solution, either. Demanding that factories that have gone to Mexico under NAFTA return to the US under pain of tariff punishment, or threatening war with China as a “trade enemy” is the antithesis of the actual peace that global trade rules have in fact fostered. In this sense, the “peace” pillar of free trade doctrine was more reliable than the prosperity pillar, and cannot be lightly set aside.⁹³ In addition, the rules-based system that moved us away from a unilateralist and pressure-oriented approach to trade relations is also to be applauded.⁹⁴

To that extent, the international treaties that led to the creation of the WTO, NAFTA and other free trade agreements are properly seen as part of *public* international law and of the international rule of law in the post-World War II era.⁹⁵ As objectionable as a smug economic constitutionalism might have been in the wake of the WTO’s creation, the concept of a fully integrated economic world was far from a bad idea.⁹⁶ Indeed, the fact that virtually all trading nations signed on to the WTO is telling.⁹⁷ The fact that Russia was the last of the major economic

⁹³ See Erich Weede, *The Diffusion of Prosperity and Peace By Globalization*, THE INDEPENDENT REVIEW 165 (Fall 2004), http://www.independent.org/pdf/tir/tir_09_2_1_weede.pdf (arguing that, despite its vulnerabilities, free trade is the best way of fostering peace and prosperity).

⁹⁴ See Krzysztof J. Pelc, *Will Trump’s Unilateral Trade Approach Work? History Says No*, WASH. POST (Mar. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/07/will-trumps-unilateral-trade-approach-work-history-says-no/?utm_term=.d4244a91e396 (arguing that options available for exerting unilateral trade pressure under US law did not prove to be successful in the years before the creation of the WTO).

⁹⁵ See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003) (describing the manner in which global trade law is now embedded in the larger framework of public international law).

⁹⁶ See Philip M. Nichols, *Trade Without Values*, 90 NW. U.L. REV. 658 (1996) (criticizing modern trade law but pointing out the enduring benefits, economic and political, of free trade).

⁹⁷ Nearly all important trading nations are now WTO members. One notable exception, however, is Iran. See *Members and Observers of the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm (last visited Aug. 22, 2017) (providing map indicating member and non-member countries).

powers to enter the WTO is also instructive.⁹⁸ The global free trade regime cuts in several directions; generally negative from the point of view of labor rights, generally positive when seen in terms of international peace and technological advancement. More than anything, it was a failure to acknowledge the depth and severity of the socio-economic disruption accompanying NAFTA and the WTO that opened the door to Candidate Trump's misrepresentations as to exactly what was wrong with modern trade agreements--or "deals" as he inaccurately called them. Also noteworthy to date is the degree to which he has failed to act on his promises to reject all of the "bad deals" and restore the earlier rights and protections of American workers.⁹⁹

VII. TRUMP AND THE WTO'S DSU—HOW MUCH WOULD HE LIKE TO DESTROY?

During the "GATT" period, from 1947 through 1994—the United States and other nations navigated a trading system that was part rules of conduct, part sovereigntist power politics. Although there was a dispute resolution system within GATT, it was not accompanied by any credible enforcement mechanism, and states would often decide not to comply with adverse rulings handed down by panels.¹⁰⁰ For instance, in the state-to-state dispute resolution process, if a decision of the panel was too burdensome in political terms for the losing party to comply with, that government would simply block the GATT panel decision, and ignore it.¹⁰¹ If a GATT nation was willing to endure criticism and international political pressure, there was

⁹⁸ See WTO: 2012 Press Release, *WTO Membership Rises to 157 With the Entry of Russia and Vanuatu*, WORLD TRADE ORG., (Aug. 22, 2012), https://www.wto.org/english/news_e/pres12_e/pr671_e.htm (noting Russia's 2012 entry into the WTO).

⁹⁹ See Bryce Covert, *Trump's Terrible Deals*, NEW REPUBLIC (Aug. 10, 2017), <https://newrepublic.com/article/144273/trumps-terrible-deals> (reviewing deals Trump has made with manufacturers so far and highlighting cost to government, based on tax benefits, per theoretical job, and fact that few factories are guaranteed or have been built yet).

¹⁰⁰ See Petko D. Kantchevski, *The Difference Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels In Trade Dispute Settlement*, 3 B.Y.U. INT'L. L. & MGMT. REV. 79, 80-91 (2006) (discussing the nature of the old GATT panel system and the innovations brought into trade law dispute resolution).

¹⁰¹ There are many such examples, including the Tuna-Dolphin dispute. See, e.g., WTO: Environment: Disputes 4, *Mexico etc vs US: 'tuna-dolphin'*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (noting that "the panel report was never adopted even though some of the 'intermediary' countries pressed for its adoption").

no particular “real world” price to be paid for ignoring the ruling.

The “Uruguay Round” period, from 1986-1994, roughly coincided with the EU’s “Single Market” negotiations, a time of hope and confidence in the expansion of free trade and the enforceable legal rules to go with it. Nothing less than true (thus coercive) enforceability would suffice, it was believed at the time. International characters like Peter Sutherland were busily expounding on the bountiful effects of free trade and the evils of protectionism.¹⁰² The willingness of national governments to cooperate with this massive project of judicializing trade rules can be put down to the lobbying of corporate interests, the determination of multinational companies to enforce neoliberal economics and unlimited access to cheaper and less regulated sites for investment.¹⁰³ The assumption was that international capital could continue its ever-outward expansion, and that the wisdom of this overarching policy would manifest itself, although not much attention was given to what the measurements of success would be.

For better or worse, the WTO, along with NAFTA and the Single Market program in Europe, worked as intended. Economic integration accelerated, and the mobility of the multinational corporation was enhanced. There were few if any labor-based protections enacted to deal with the “losers” in international trade—and it was always acknowledged, even by the greatest cheer-leaders of free trade, that there would be

¹⁰² See Charles Pretzlik, *View From the Top: Peter Sutherland, Chairman of BP*, FIN. TIMES (Dec. 14, 2007), <http://royaldutchshellplc.com/2007/12/14/financial-times-view-from-the-top-peter-sutherland-chairman-of-bp/> (noting that “Peter Sutherland...is described by some as the father of globalisation. He ran the General Agreement on Tariffs and Trade and became the head of its successor body, the World Trade Organization.”). Sutherland is notorious for his pro-globalist advocacy.

¹⁰³ See, e.g., Bernhard Zangl, *Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO*, 52 INT’L. STUD. Q. 825 (2008) (comparing dispute resolution models and interests that influenced them); Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L. L. 9 (analyzing the agendas at work in the operation of the WTO’s dispute resolution system); Helena Paul & Ricarda Steinbrecher, *Corporate Influence on International Regulatory Bodies*, in HUNGRY CORPORATIONS: TRANSNATIONAL BIOTECH COMPANIES COLONISE THE FOOD CHAIN, ECONEXUS (Nov. 2003), <http://www.econexus.info/publication/hungry-corporations> (discussing corporate influence over the creation of the WTO).

“winners” and “losers.”¹⁰⁴ Commentators usually said that the “losers” from free trade could be compensated by mechanisms created by national governments; the international system itself did not have to be concerned with this aspect of free trade. The logic of the newly enforceable rules—rules that had to be taken seriously—was that there were clear effects on labor markets, product supply chains and investment decisions.¹⁰⁵ This broad transformation did not occur overnight, but as a process of accretion. Free trade became entrenched in the minds of corporate decision-makers and left its mark on all aspects of the buying and selling of goods and services.¹⁰⁶ The time period from 1995 to the present is long in global economic terms. As with Brexit, one does not wave a wand and undo that much evolution without a great deal of disruption.¹⁰⁷

It is clear that the Trump campaign focused on the most traumatic symbol of the free trade drama: the devastated community when the local factory shuts down, its parts sold off, and moves away to China, Mexico, Vietnam or some other lower cost jurisdiction.¹⁰⁸ He channeled the resentment and confusion caused by those key events, painfully alive in the memories of many Americans, and articulated a sense of angry resistance. Whereas the so-called “elites” talked the language of economic

¹⁰⁴ See Dani Rodrik, *Too Late to Compensate Free Trade's Losers*, PROJECT SYNDICATE (Apr. 11, 2017), <https://www.project-syndicate.org/commentary/free-trade-losers-compensation-too-late-by-dani-rodrik-2017-04?barrier=accessreg> (analyzing the “free trade winners and losers” issue).

¹⁰⁵ See, e.g., Yunling Zhang, *The Impact of Free Trade Agreements on Business Activity: A Survey of Firms in the People's Republic of China*, ASIAN DEV. BANK INST. (Oct. 2010), <https://www.adb.org/sites/default/files/publication/156106/adbi-wp251.pdf>

¹⁰⁶ See *How Businesses Use FTAs*, AUSTL. GOV'T.: DEPT. FOREIGN AFF. & TRADE, <http://dfat.gov.au/trade/agreements/Pages/how-to-use-ftas.aspx> (last visited Aug. 23, 2017) (listing the variety of ways free trade agreements influence corporate decision-making).

¹⁰⁷ See *A Textbook Lesson on Disruption: The Game-changing Brexit Referendum*, DELOITTE, <https://www2.deloitte.com/us/en/pages/audit/articles/flip-side-brex-it-disruption.html> (last visited Aug. 23, 2017) (describing how businesses can be completely surprised by geo-political changes like Brexit, having to alter strategies they believed to be fixed and certain).

¹⁰⁸ See David Jackson, *Donald Trump Targets Globalization and Free Trade as Job-killers*, USA TODAY (June 28, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/06/28/donald-trump-globalization-trade-pennsylvania-ohio/86431376/> (summarizing Trump's campaign speech in Pennsylvania and his focus on free trade, claiming globalization has left workers with nothing but “poverty and heartache” and made elites wealthier).

rationalism, orderly acceptance of this kind of natural evolution, Trump raged against the outsourcing phenomenon.¹⁰⁹ However, his actual plans for ameliorating the outsourcing phenomenon itself remained extremely unclear, perhaps purposely so.¹¹⁰ In the American heartland, factories had been closing and moving away for well over twenty years; could this be fixed now, and could it be stopped abruptly? As explained above, while Trump occasionally criticized American corporations, his loudest wrath was reserved for the governments of China and Mexico, whom he accused of treating the US badly, under the terms of “bad deals” that successive American governments had allegedly allowed to be signed.¹¹¹

It is certainly possible for any national government to respond with determination to outsourcing, even taking into account debates over the labor market effects of automation (unrelated to outsourcing) and the open question of whether the jobs leaving the US can be profitably performed in the US anymore.¹¹² But in order not to jeopardize the peace and stability dimension of free global trade, such a change should

¹⁰⁹ See Clarence Page, *Economic Anxiety Fuels the GOP’s New “Trumpism”*, CHICAGO TRIBUNE (Mar. 25, 2016), <http://www.chicagotribune.com/news/opinion/page/ct-donald-trump-working-class-page-perspec-0327-jm-20160325-story.html>; see also Jeffrey Rothfeder, *Why Donald Trump Is Wrong About Manufacturing Jobs and China*, NEW YORKER (Mar. 14, 2016), <http://www.newyorker.com/business/currency/why-donald-trump-is-wrong-about-manufacturing-jobs-and-china> (arguing that the great slide of US jobs to China has slowed and is now reversing, as firms return manufacturing jobs to the US, a process known as onshoring).

¹¹⁰ See *Donald Trump Warns US Companies Will Face ‘Consequences’ For Outsourcing Jobs Overseas*, ABC NEWS (Dec. 1, 2016), <http://www.abc.net.au/news/2016-12-02/trump-warns-of-consequences-for-us-companies-sending-jobs-abroad/8086536>.

¹¹¹ See, e.g., Grace Donnelly, *As Donald Trump Flirts with Trade Wars, These Are the Deals to Watch*, FORTUNE (Feb. 28, 2018), <http://fortune.com/2018/02/28/trump-trade-nafta-china-eu/>; Don Lee, *Trump Wants to Cut Bilateral Trade Deals, But What If Nobody Comes to the Table?*, LA TIMES (May 26, 2017), <http://www.latimes.com/business/la-fi-trump-trade-strategy-20170526-story.html> (indicating that Trump believed he could replace multilateral trade agreements with supposedly preferable bilateral deals, though few other nations seemed interested in that prospect); Needham, *supra* note 71; see also Donald J. Trump (@realdonaldtrump), TWITTER (Mar. 5, 2018, 3:47 AM), <https://twitter.com/realdonaldtrump/status/970626966004162560?lang=en>.

¹¹² See Alex Lach, *5 Facts About Overseas Outsourcing: Trend Continues to Grow as American Workers Suffer*, CTR. AM. PROGRESS (July 9, 2012), <https://www.americanprogress.org/issues/economy/news/2012/07/09/11898/5-facts-about-overseas-outsourcing/> (outlining the scope and scale of the outsourcing problem in America).

certainly not be brought about piecemeal or abruptly. That pro-union progressives did not long ago establish a legislatively based message on the outsourcing issue is striking.¹¹³ As the political events of 2015-2016 demonstrated, silence in the face of the factory closure “drama” is extremely dangerous.¹¹⁴ The mobility of manufacturing was not simply an annoying sideshow, bound to right itself in the end. It has long been an open wound, causing fear and pain across swaths of the United States since global trade rules made this logically inevitable.

So what might genuinely effective legislation contain? The objective would have to be to slow the outflow of manufacturing jobs, while not causing disruption and panic across the national and global economies. In that sense, there are really two main devices possible: first, tax or other financial incentives and disincentives regarding factory closure/outsourcing, and second, legally enhanced labor protections, perhaps in the form of mandatory involvement of labor in decision-making on factory location.¹¹⁵ The first would

¹¹³ *But see* Nadia Prupis, *Cornering Trump on Jobs, Sanders Announces Anti-Outsourcing Bill*, COMMON DREAMS (Nov. 29, 2016), <https://www.commondreams.org/news/2016/11/28/cornering-trump-jobs-sanders-announces-anti-outsourcing-bill> (reporting Bernie Sanders’s introduction of legislation, aptly named the Outsourcing Prevention Act, aimed at keeping jobs in the US, in particular by placing a special tax on profits earned through US companies as a result of their outsourcing of jobs, and denying US loans and other benefits to companies engaged in outsourcing). Senator Sanders compared his own proposed legislation to the approach being taken by President Trump, which was reliant on exhortation and promises of tax breaks, rather than firm legislatively-imposed conditions. *See* Bernie Sanders, *Carrier Just Showed Corporations How to Beat Donald Trump*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/posteverything/wp/2016/12/01/bernie-sanders-carrier-just-showed-corporations-how-to-beat-donald-trump/?utm_term=.165c3e0b4510.

¹¹⁴ *See* Annie Karni, *Clinton Rolls Out a New Message for Sanders—and Trump*, POLITICO (Mar. 4, 2016), <http://www.politico.com/story/2016/03/hillary-clinton-speech-message-bernie-sanders-donald-trump-220287> (reporting on Clinton’s attempt to put forward a new message on the issue of trade and job losses, but that the message tended to be lost in the pressure coming from both Donald Trump and Bernie Sanders, each demanding a more strident approach to the problem).

¹¹⁵ *See* Annie Ropeik, *Flanked by Workers, Sen. Donnelly Previews Anti-Outsourcing Bill*, NPR (Jan. 13, 2017), <http://wbaa.org/post/flanked-workers-sen-donnelly-previews-anti-outsourcing-bill#stream/0> (reporting legislation that has been introduced so far focuses on penalties for firms that choose to outsource jobs). Proposed legislation does not, however, provide workers the right to be involved in decision-making. It is also important to note that Trump has not expressed support for the draft legislation making the rounds, and instead has focused on blaming other countries, and—to the extent that

help to offset the obvious economic incentives created by NAFTA and the WTO, leading large corporations to move their production facilities to places of abundant cheap labor and lax environmental regulation. Such tax or financial counter measures would also have to be to some degree coercive: moving a factory out of the US, without finding alternative jobs for displaced workers, would lead to some form of a fine, imposed by the nation on behalf of workers.

The other approach would be to directly grant workers legal rights to weigh in on such decisions, and to make the location of factories and the protection of jobs a central aspect of their negotiations with management, even in the absence of a union.¹¹⁶ That is, management would no longer have an unfettered, unilateral right to close and move factories, leaving communities devastated. For those who consider such legal innovations to be “unrealistic,” the only response is that we will then have to live with the existing situation. We cannot have it both ways. Undoing 25 years or more of free trade rules has other, and far more serious, negative effects in the form of trade wars and global political instability.

The contrast between the approach taken by Candidate Trump during the presidential campaign and a robust legislative scheme designed to alter corporate behavior is stark. The former approach places the strongman in the position of “making deals” with foreign governments and US corporations, although it was never explained what the content of those deals would be.¹¹⁷ It is also not clear, in a world where trade rules have eliminated barriers to the free movement of goods, what

he blames corporations—states that he will put special tariffs on products coming from factories that have been on the receiving end of outsourcing. In fact, Democrats in Congress have tried for years to pass anti-outsourcing legislation. See Lori Montgomery, *Anti-outsourcing Bill Fails in Senate*, WASH. POST (Sept. 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/28/AR2010092806143.html> (noting that a solid bloc of Republicans, four Democrats, and Joe Lieberman, voted against the bill).

¹¹⁶ See Theodore J. St. Antoine, *Offshore Outsourcing and Worker Rights*, 48:3 L. QUADRANGLE 69 (2006), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1698&context=articles> (observing the lack of worker protection in the outsourcing context and noting that unions have little control over decisions by corporations to outsource jobs).

¹¹⁷ See Ben Casselman, *Why Trump’s Carrier Deal Isn’t the Way to Save US Jobs, In Real Terms*, FIVETHIRTYEIGHT (Dec. 5, 2016), <https://fivethirtyeight.com/features/why-trumps-carrier-deal-isnt-the-way-to-save-u-s-jobs/>.

exactly would stop the flow of goods, and thus the continued relocation of factories to other countries. It was not an act of “China” that led US firms to move to China. It was the operation of global trade rules fostered, supported and accepted by the US, as well as most other trading nations.¹¹⁸ While angry rhetoric might be appealing to the audience at a political rally, it is highly misleading as to cause and effect.¹¹⁹ Trump’s continued threat to unilaterally impose high tariffs on certain goods would lead inevitably to retaliation by other nations.¹²⁰

In its time, the 1990s free trade “dream” was not an entirely unworthy one. It was certainly manipulated by corporate interests, and the general public was hardly consulted as to issues of global “job sharing” and the real effects of creative destruction in the economy. Nevertheless, the other, positive side of the free trade equation concerned an integrated world, with fewer violent conflicts and more equitably distributed development. The logic of NAFTA, the WTO and other regional agreements guaranteed that corporations would be freed from any geographical loyalty, and many workers would be left to fend for themselves. Whether that could have been foreseen or not (and I believe that it could have been), the fact that most mainstream politicians have still failed to confront free trade’s discontents as late as 2016 is difficult to comprehend. And despite the fulminations of Candidate Trump, it is doubtful that this type of “populist” would have the knowledge, skill or will to confront and attempt to address the many problems left behind in the free trade wake. It is worth noting that at the time of this writing, the Democratic Party, gearing up for the 2018 mid-term elections, have released a policy on free trade agreements as

¹¹⁸ See Jeff Faux, *NAFTA’s Impact on U.S. Workers*, Econ. Policy Inst. (Dec. 9, 2013), <http://www.epi.org/blog/naftas-impact-workers/> (describing four ways NAFTA affected U.S.). Faux explains that as a result of NAFTA: 1) 700,000 American jobs were lost to Mexico; 2) U.S. workers were forced to accept lower wages; 3) Mexican farmers and their families migrated north and entered the U.S. labor market, often illegally; 4) rules for a global economy were established that benefited capital and labor costs. *See id.*

¹¹⁹ In the EU, the so-called “Acquired Rights” Directive (Transfer of Undertakings) does offer some protection to employees affected by outsourcing of jobs. *See* Charles Wynn-Evans, *Does TUPE Apply to Offshoring?*, *EMPL. L.J.*, (Mar. 2008), <https://www.dechert.com/knowledge/publication/2008/3/does-tupe-apply-to-offshoring.html>.

¹²⁰ *See* Patrick Gillespie, *Mexico Warns Trump on Tariffs: We’ll Respond Immediately*, *CNNMONEY* (Jan. 14, 2017), <http://money.cnn.com/2017/01/14/news/economy/donald-trump-mexico-tariffs-response/index.html>.

part of their new “better deal” strategy. It remains to be seen whether it will meet the challenge of better protecting workers while preserving the geopolitical gains derived from modern trade relations.¹²¹

It seems that, with the rejection of the TPP and TTIP, and the discrediting of the WTO by the new US administration, we may have left behind one phase of the postwar multilateral ideal, and returned to a more sovereigntist, bilaterally focused age.¹²² While Brexit has been accepted as a reality, we do not know, and will not know for several years, whether and in what manner Brexit will “happen.”¹²³ Middle class and working class voters may have the impression that they have pushed back against the “global elites,” but it is doubtful that the plutocrats and oligarchs of our time are that easily vanquished.¹²⁴

VIII. WHAT NEW AND BETTER “DEALS” SO FAR?

Since the possibility of rejecting standard free trade policy came to light in a major way during the 2015-2016 presidential campaign, it is worth considering what steps have been taken, or threatened, by the Trump administration on the subject of international trade rules since January 2017. International

¹²¹ See David Weigel, *Senate Democrats Unveil ‘Better Deal’ on Trade with new Restrictions on Outsourcing and Foreign Deals*, Wash. Post (Aug. 2, 2017),

https://www.washingtonpost.com/news/powerpost/wp/2017/08/02/senate-democrats-unveil-better-deal-on-trade-with-new-restrictions-on-outsourcing-and-foreign-deals/?utm_term=.402025151770 (summarizing key trade components of Democrats “Better Deal” agenda). The Democrats new trade outline includes seven core ideas, including a new “independent trade prosecutor” to supplement to the work of the U.S. Trade Representative, the creation of an “American Jobs Council” with the authority to block foreign investment that would cost U.S. jobs, and considering a federal contractors record on outsourcing before awarding them a federal contract. *See id.*

¹²² See Nicky Woolf, Justin McCurry & Benjamin Haas, *Trump to Withdraw From Trans-Pacific Partnership on First Day in Office*, GUARDIAN (Nov. 22, 2017), <https://www.theguardian.com/us-news/2016/nov/21/donald-trump-100-days-plans-video-trans-pacific-partnership-withdraw> (noting that Trump would turn his attention to bilateral trade agreements in the future).

¹²³ See Silvia Amaro, *Soros Suggests that Brexit Might Never Actually Happen*, CNBC (June 1, 2017), <http://www.cnbc.com/2017/06/01/soros-suggests-that-brexit-might-never-actually-happen.html> (suggesting that political developments might make continued membership in the EU desirable for Britain).

¹²⁴ See Peter Pham, *Wealth Inequality Boosts Power of Oligarchs*, FORBES (Dec. 4, 2015), <https://www.forbes.com/sites/peterpham/2015/12/04/oligarchs-plutocrats-and-technocrats-oh-my/#7237e2bf45e6> (noting that power and wealth are now extraordinarily concentrated in a few hands).

trade is a shared responsibility and competence of the executive and legislative branches of government under the US Constitution; the president is not unfettered in how he can respond to what he considers to be “unfair” trade deals based on international agreements previously entered into by the United States.¹²⁵ The American President unquestionably has a great deal of discretion in the realm of foreign affairs, but the Constitution specifically grants Congress competence in the management of commercial relations with foreign nations.¹²⁶ Over time, Congress has delegated a great deal of power to the President to negotiate free trade agreements, with Congress generally having cast an up or down vote under the so-called “fast track” process.¹²⁷ While Congress sets tariffs, the President has been granted the statutory authority to raise tariffs in times of economic or political emergency, including threats to national security.¹²⁸ What is more, the major free trade agreements of the 1990s were adopted by the United States in the form of federal statutes—thus creating a greater role for Congress than would be the case if these had been put through the Article III treaty ratification process.¹²⁹

In this regard, Trump’s first threat was that he would begin to slap 35% tariffs on products entering the United States, in situations where the product had previously been

¹²⁵ See George Will, *Congress, Not the President, Should Raise Tariffs*, WASH. POST WRITERS GROUP (Feb. 16, 2017), <http://newsok.com/article/5538138> (noting Congress’s constitutional role in setting tariff rates, but also statutory delegation of such powers to the President under certain conditions).

¹²⁶ See Jonathan Masters, *US Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN REL. (Mar. 2, 2017), <https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president>.

¹²⁷ See Caitlain Devereaux Lewis, *Presidential Authority Over Trade: Imposing Tariffs and Duties*, CONG. RES. SERV. (Dec. 9, 2016), <https://fas.org/sgp/crs/misc/R44707.pdf>.

¹²⁸ See *infra* note 136 and accompanying text (citing and discussing statute providing President authority to raise tariffs in emergency situations).

¹²⁹ See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 801 (1995) (pointing out that both NAFTA and the WTO Agreements were not ratified through a process of advice and consent by the U.S. Senate, but rather as “congressional-executive” agreements, brought into force in the US through simple majority votes of both houses of Congress). In this seminal article on the constitutionality of NAFTA, the authors question the constitutionality of this method of adopting international agreements.

manufactured in a United States facility.¹³⁰ (More recently, he has focused on placing tariffs on certain selected products under a national security rationale, which would have more targeted, and thus limited, implications.¹³¹) Whether the president enjoys the power to walk the US back from treaty obligations in the trade realm is a difficult question.¹³² To the extent that both NAFTA and the WTO agreements were entered into via federal statutes and not the usual treaty ratification process, as mentioned above, it is especially uncertain as to whether Trump has such unilateral powers.¹³³

It seems likely that Trump was quickly informed that if he were to slap tariffs on products coming to the US from abroad, without any rationale that would hold up under WTO law, the US would soon find itself and its products treated in a similar manner.¹³⁴ Not only would this potentially lead to an unraveling of international trade relations and a rapid eruption of trade wars, US exporters and US workers would experience economic shock.¹³⁵ Again, while this sounded appealing to some during the campaign season, the very idea of imposing large, legally unjustified tariffs on imported goods could not be sustained. It is worth noting that this particular threat seems to have disappeared from Trump's most recent political discourse. Again, the newer rationale seems to be based on a relatively

¹³⁰ See Mahita Gajanan, *Donald Trump Warns of 35% Tariff for Companies that Move Abroad*, FORTUNE (Dec. 4, 2016), <http://fortune.com/2016/12/04/donald-trump-tariff-company-regulations/>.

¹³¹ See Alan Rappeport, *US Trade Partners Watch Warily as Trump Considers Steel Tariffs*, N.Y. TIMES (July 7, 2017), <https://www.nytimes.com/2017/07/07/us/politics/trump-steel-tariff.html>.

¹³² See Matt Ford, *How Easily Could Trump Withdraw the US from NAFTA*, ATLANTIC (Apr. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trump-nafta-withdrawal-order/524463/> (noting the difficulties raised by the fact that NAFTA was adopted by the US in the form of a federal statute, leaving it unclear whether the President could, without the agreement of Congress, withdraw from the agreement).

¹³³ See *id.*

¹³⁴ See Nick Carey & Ginger Gibson, *Trump's Tough Talk Makes U.S. Firms Fear China Retribution*, REUTERS (Dec. 12, 2016), <http://www.reuters.com/article/us-usa-trump-china-companies-idUSKBN1412Q7>.

¹³⁵ See David Nakamura, *The Effect of Trump's Trade Policies? Trade Wars with China, Mexico that Could Cost US 4 million Jobs, Report Says*, WASH. POST (Sept. 19, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/19/the-effect-of-trumps-trade-policies-trade-wars-with-china-mexico-that-could-cost-u-s-4-million-jobs-report-says/?utm_term=.12fe1429893f (writing that Trump's trade policies could overturn many years of rules-based international trade relationships).

obscure statute that allows the president to take action to reduce imports when national security is at stake.¹³⁶

Instead of taking on free trade agreements wholesale, or with the intention to rewrite them root and branch, it seems that the Trump administration will instead focus on discrete, symbolic issues, acting in a somewhat more unilateral fashion, but without the broad-brushed audacity promised on the campaign trail. For instance, the Trump USTR has moved against Canadian lumber and foreign steel, in particular from China, but without suggesting that these actions are prelude to broader trade wars.¹³⁷ As of this writing, the situation is fluid and uncertain. US trade and political allies appear to be working together on trade agreements while excluding the US, the effects of which will not be apparent for some time.¹³⁸ Trump occasionally raises the issue of unfair trade and his wish to retaliate against countries behaving “unfairly”, but there is little consistency with regard to his expressed intentions.¹³⁹

Perhaps with an eye to political support in key states like Pennsylvania, the Trump administration is investigating whether steel imports constitute a threat to “national security.”¹⁴⁰ It may seem safer to the administration to rely on this rarely-used provision of law, under a rationale of national security as a basis for imposing tariffs on steel imported from

¹³⁶ See Trade Expansion Act of 1962 §§ 201, 231, 19 U.S.C. §§ 1821, 1862, 1864 (2012) (allowing the President to impose import restrictions when such restriction is deemed necessary to promote national security). The Trade Expansion Act was passed in 1962 in an effort to stimulate the U.S. economy and to prevent “Communist economic penetration.” *Id.* at § 1801; see also Shawn Donnan, *Donald Trump Moves Towards Imposing Tariffs on Steel Imports*, FIN. TIMES (Apr. 20, 2017), <https://www.ft.com/content/d8413fe8-25e6-11e7-8691-d5f7e0cd0a16?mhq5j=e2> (noting that Trump’s rationale will be a 1962 law that allows for the imposition of tariffs on foreign products when the imports in question “threaten American security readiness”).

¹³⁷ See Ian Austen & Peter Baker, *Lumber Tariff Adds Wrinkle to NAFTA Talks with Canada*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/business/trump-trudeau-canada-trade-lumber-dairy.html> (making the point that the U.S. government is now using such language as, “NAFTA has not worked as well as it should,” rather than the wholesale denunciations that became familiar during the campaign).

¹³⁸ See, e.g., Eur. Comm’n Press Release, *EU and Japan Reach Agreement in Principle on Economic Partnership Agreement* (July 6, 2017) (announcing that the EU and Japan agreed to enter into a trade partnership).

¹³⁹ See Nouriel Roubini, *Opinion: 6 Reasons Trump’s Erratic, Destructive Policies Could Tank the Markets*, MARKETWATCH (Feb. 2, 2017), <http://www.marketwatch.com/story/6-reasons-trumps-erratic-destructive-policies-could-tank-the-markets-2017-02-02>.

¹⁴⁰ See Donnan, *supra* note 136.

China.¹⁴¹ Although China is not a major supplier of steel to the US, this seems to be a kind of trial balloon, launched to show some force behind Trump’s anti-trade rhetoric, and to shore up support in the Trump heartland. Although the administration made headlines in April 2017 by placing tariffs on Canadian lumber, this was in the context of a more conventional anti-subsidies rationale, which by its nature does not threaten the foundation of international trade relations.¹⁴² Besides the more or less unsurprising nature of the rationale for this action, it should also be noted that the US and Canada have argued about trade in lumber products for decades.¹⁴³ The real question outstanding is whether Trump will follow through in taking action of a kind designed to more clearly subvert what has been the common understanding of global trade rules and relationships since World War II, and certainly since 1995.¹⁴⁴

¹⁴¹ See Jacob M. Schlesinger & William Mauldin, *Trump to Revive 1962 Law to Explore New Barriers on Steel Imports*, WALL STREET J. (Apr. 20, 2017), <https://www.wsj.com/articles/trump-to-revive-1962-law-to-explore-new-barriers-on-steel-imports-1492661339> (describing Trump’s intended reliance on the Trade Expansion Act).

¹⁴² See Frances Coppola, *President’s Trump’s Tariff on Canadian Softwood Lumber Imports Will Hurt America Most*, FORBES (Apr. 25, 2017), <https://www.forbes.com/sites/francescoppola/2017/04/25/president-trumps-tariff-on-canadian-softwood-lumber-imports-will-hurt-america-most/#44034d322232> (assuming the Trump administration’s imposition of a 20% tariff on Canadian softwood lumber was spurred by complaints from American lumber producers, “who have long complained that Canada’s system of ‘stumpage’ (charges for logging on Canada’s government-owned lands) amounts to an unfair subsidy.”).

¹⁴³ See Drew Hasselback, *Softwood Lumber Dispute Rears Its Head Again as U.S. Prepares to Levy Tariffs*, FIN. POST (Apr. 24, 2017), <http://business.financialpost.com/news/softwood-lumber-dispute-rears-its-head-again-as-u-s-prepares-to-levy-tariffs-of-up-to-40/wcm/c8743d94-a0fb-41e2-90ea-e2ac108d4bcf> (making clear that the US and Canada have argued about trade practices in lumber products for many years).

¹⁴⁴ See Shawn Donnan, *Donald Trump Revives Threat to Pull US Out of Nafta*, FIN. TIMES (Aug. 23, 2017), <https://www.ft.com/content/cfdcec24-87c2-11e7-bf50-e1c239b45787> (reporting Trump stated at recent campaign rally, held three years before next election, that he does not believe a deal will be reached by officials currently renegotiating NAFTA, and that U.S. will likely terminate the agreement). Republicans in Congress, however, appear to be distancing themselves from Trump’s anti-trade position. See *As Legislative Deadlines Loom, Trump Creates Rifts with GOP Leaders*, CBS NEWS (Aug. 25, 2017), <https://www.cbsnews.com/news/trump-attacks-gop-lawmakers-twitter-creates-rifts-ahead-of-deadlines/> (reporting Congress has twelve working days in September to resolve rifts between itself and the President that may cause government shutdown). Senate Majority Leader Mitch McConnell also questioned Trump’s anti-free trade position, saying “the

What will ensue if he does take more radical and unilateral action is completely unknown at this time.

Finally, as of this writing, the current USTR has just held public hearings with a view to “modernizing” and renegotiating the NAFTA Agreement.¹⁴⁵ While the implications of this process are potentially profound, it is more likely that there will be tweaks to the system, including the removal of a special NAFTA panel process to consider disagreements relating to dumping and subsidies. In other words, it is likely that the Trump administration will attempt to make it easier for the parties to the agreement to impose protective measures under an anti-dumping rationale. While far from “pro-free-trade,” such a change is also far from radically nationalistic; importantly, it leaves in place the very thing Trump said he and he alone could deal with: the freedom of U.S. companies to move factories to Mexico, with consequent loss of American jobs.¹⁴⁶ It seems increasingly unlikely that any political regime in the United States will deal comprehensively with the interaction of “trade and labor,” including of course the apparently inevitable loss of American jobs. Even some of the strongest critics of the free trade system and its effects on American jobs support robust assistance to displaced workers, as opposed to a return to protectionism.¹⁴⁷ However, just as public awareness of the free trade issue underwent dramatic change over the past two years, it is not inconceivable that the global public will make greater demands on the world trading system, leading to enhanced emphasis on labor rights and job security.¹⁴⁸ All we can say for

assumption that every free-trade agreement is a loser for America is largely untrue.” *See id.*

¹⁴⁵ *See* Press Release, U.S. Trade Representative, Public Hearings on the Renegotiation of NAFTA (June 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/public-hearing-nafta-renegotiation>.

¹⁴⁶ *See President Trump Tells CEOs He’s Going to Bring Millions of Jobs Back to America*, REUTERS (Feb. 23, 2017), <http://fortune.com/2017/02/23/donald-trump-jobs-america-ceos/>.

¹⁴⁷ *See* Autor, *supra* note 26, at 2156-59 (observing ability of government benefit programs to mitigate negative effects of loss of manufacturing jobs); *see also* David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON., 2016, at 205, 229-31 (observing responsiveness of transfer payments to import exposure, but also the limited “redistribution of trade gains from winners to losers”).

¹⁴⁸ *See generally* Paulette L. Stenzel, *The Pursuit of Equilibrium as the Eagle Meets the Condor: Supporting Sustainable Development Through Fair Trade*, 49 AM. BUS. L.J. 557, 559 (arguing that the public in various countries have

sure is that “free trade” and trade agreements will likely remain at the center of political debate for a long time to come.

IX. CONCLUDING OBSERVATIONS

Many themes in international law and domestic politics come together in the Trump “free trade” story. On the one hand, writers and commentators on the burgeoning structures of global free trade failed to address the severe problem of job loss, factory closure and cultural dislocation. The alienation caused at least in part through the rigors of contemporary free trade agreements is real, and the silence of the “elites” opened them to the valid charge that they were indifferent to the economic and social suffering of the former manufacturing class. Even during the emotionally charged political season of 2015-2016, mainstream politicians and the media did not perceive the potency of this issue and the depth of popular resentment ripe for manipulation.

As this article has stressed, there are at least two distinct aspects to international free trade: one is the ostensible—though often questionable—argument that free trade raises all boats, leads to prosperity through exchange of goods, etc; the other is that integrated economies lead to more global stability and peace. While calling out the modern system of free trade, Trump managed to expose a contradiction at the heart of this modern paradigm, and yet undercut US leadership to the extent that much of this leadership has been trade based.

More strikingly, the Trump critique, while tapping into anger and resentment of the supposedly forgotten working class, misidentified the source of distress by blaming foreign governments for all American woes, and set himself up as a kind of deal-making savior, in a manner that also misrepresents how free trade agreements are created and sustained. He did not promise to promote federal laws that would penalize corporations engaging in outsourcing. Instead, he presented himself as capable of coercing private companies into employing more Americans, and, as mentioned above, capable of making “better deals”—something that has little to do with the actual free trade conundrum.

It is completely possible that a future US government could address the problems of job insecurity and social dislocation that have been caused at least in part by global

become disillusioned with the operation of what we have known as “free trade,” and that more emphasis on fair trade is now required).

manufacturing mobility. This would require legislation protective of worker rights—making it more difficult for corporations to outsource and making it easier for workers to find new jobs, especially comparable jobs with benefits and reasonable middle-class wages. Blaming China, Germany and Mexico, and railing against “bad deals”, is a form of demagoguery that will solve nothing. I have argued in this Article that failure to act will exacerbate already inflamed feelings of resentment and victimization on the part of the working class and former working class. However, reacting in the wrong way—precipitating trade wars, selectively slapping on high tariffs to protect certain industries in a disorganized fashion, and whipping up animosity towards friendly countries—all of these policies are profoundly dangerous. As of this writing, we cannot be sure what the Trump administration will do, beyond continuing to inveigh against “bad trade deals.” We do not know how the issue of globalization and job loss will play out in future political campaigns or voter behavior.

What is certain is that the failure to foresee the problems caused by unfettered free trade, and the inability to make trade work for ordinary people, has been a very serious failure, one that now threatens the stability of the Western alliance itself. With the rise of illiberal, anti-constitutional and corrupt forces in a variety of hitherto solidly democratic countries, the issue of labor rights and economic stability have presented themselves as issues surprisingly easy to manipulate. Academic lawyers have again shown a fatal tendency to overlook the social and political dimension lurking within legal structures, in this case in a very dramatic, even world-changing manner.