

# A Blueprint for a New American Trade Policy

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THE  
GREAT  
DEMOCRACY  
INITIATIVE

# THE GREAT DEMOCRACY INITIATIVE

## ABOUT THE GREAT DEMOCRACY INITIATIVE

The Great Democracy Initiative develops policy blueprints that offer solutions to the most pressing problems of our time. From taming the concentration of power in our economy to fundamentally reforming our broken government, GDI aims to generate policy ideas that confront the forces that have rigged our society in favor of the powerful and connected.

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**“The American public does not wish to see the tariff so arranged as to benefit primarily a few wealthy men.”** Theodore Roosevelt

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# Executive Summary

In this paper, we offer ten recommendations on how to reform American trade policy. These reforms respond to three fundamental challenges: (1) our trade bureaucracy is poorly designed to craft and execute a trade policy that pursues multiple important ends, including economic and national security; (2) the domestic process through which the United States makes trade agreements provides preferential access to certain interest groups (capital and corporations) but not others; and (3) U.S. trade policy has failed to grapple with the distributional consequences of trade liberalization. The first set of reforms addresses the domestic trade policymaking process. These include restructuring the Department of Commerce, the United States Trade Representative (USTR), and other agencies into a new Department of Economic Growth and Security; increasing transparency and participation in the trade policymaking process; conducting geographic impact assessments; and reforming the President's powers to initiate trade wars. The second set of reforms seeks to rebalance international trade regimes by both conditioning U.S. trade on addressing tax havens and reforming the investor-state dispute system. The final set of recommendations addresses the domestic distributional consequences of trade head on, and include expanding enforcement of labor and environmental issues, enabling domestic economic development projects particularly for areas adversely-impacted by trade liberalization, and taxing the winners of trade.

# Introduction

In recent years, it has become clear that American trade policy needs to change. For decades, U.S. policy has reflected the implicit assumption that trade liberalization is beneficial for everyone, with few distributional downsides over time. But this assumption hasn't been borne out. Instead, decades of trade liberalization have led to a backlash that resulted in both 2016 presidential nominees opposing the Obama Administration's proposed Trans Pacific Partnership (TPP). And since 2017, President Donald Trump has begun a trade war with China; raised tariffs on the grounds of protecting national security; renegotiated NAFTA, though on terms that do not obviously help working class Americans; and broadly called for increased protectionism. The response to these actions has been varied—from excitement to confusion to outright opposition.

Trade policymaking today suffers from three fundamental challenges that any reform agenda must grapple with head on. First, trade policymakers have not adequately addressed the distributional consequences of liberalizing trade rules over the last few decades. Not only has trade liberalization disproportionately impacted some communities, but these communities have not bounced back from the shocks to their local economies. Internationally, trade agreements have meant the freer flow of capital across borders, but without the simultaneous updating of tax rules. The result has been the creation of tax havens around the world—tax havens that deepen the distributional consequences of liberalization because they allow corporations and wealthy individuals to avoid paying the full measure of their tax obligations.

Second, the process by which trade policy is made has largely been stacked to favor organized and powerful economic interests—capital and corporations. To a degree not found in either the legislative process or even the regulatory process, the domestic process associated with negotiating trade agreements disproportionately gives access to some interest groups while disfavoring the general public and even elected representatives. It is no surprise, then, that trade deals tend to favor these interest groups. Internationally, investor-state dispute settlement (ISDS) procedures are open only to investors, with no comparable procedures open to labor and civil society more generally. Critics have also argued that ISDS procedures are biased in favor of corporate interests, a perception that hurts ISDS's legitimacy. ISDS cases, for example, are not

decided by a standing court staffed by full-time judges, but instead by arbitrators who can also actively represent parties in other disputes.

**The process by which trade policy is made has largely been stacked to favor organized and powerful economic interests.**

Third, international trade does intersect in important ways with national security policy and domestic economic policy—but our trade bureaucracy is designed extremely poorly to address these linkages. Instead of having a single department that handles trade liberalization, trade promotion, economic security, and mitigation of distributional consequences, our government splits these functions across a variety of agencies. This means that there is no single entity responsible for developing a strategy that addresses both the promises and perils of economic engagement. This fragmented organization also works to the advantage of well-funded interest groups (and correspondingly to the disadvantage of less well-resourced groups and the general public) by offering multiple entry points through which such groups can capture public policy. This system makes little sense. In a global context in which some countries use their economic power for geopolitical purposes, international trade and economic security need to be considered in a unified system.

**There is no single entity responsible for developing a strategy that addresses both the promises and perils of economic engagement.**

In this paper, we offer ten recommendations on how to reform American trade policy. The first set of reforms addresses the domestic trade policymaking process. We focus on reforms to U.S. domestic trade laws and U.S. free trade agreements, largely putting aside much needed reforms to the World Trade Organization. These include restructuring the Department of Commerce, the United States Trade Representative (USTR), and other agencies into a new Department of Economic Growth and Security; increasing transparency and participation in the trade policymaking process; conducting geographic impact assessments; and reforming the President's powers to initiate trade wars. The second set of reforms seeks to rebalance international trade regimes by both

conditioning U.S. trade on addressing tax havens and reforming the investor-state dispute system. The final set of recommendations addresses the domestic distributional consequences of trade head on, and include expanding enforcement of labor and environmental issues, enabling domestic economic development projects particularly for areas adversely-impacted by trade liberalization, and taxing the winners of trade.

“The American public,” Teddy Roosevelt once said, “does not wish to see the tariff so arranged as to benefit primarily a few wealthy men.” Trade policy must work for all Americans, not just the wealthy and well-connected. Our reforms seek to do just that.

# PART I: UNRIGGING TRADE POLICYMAKING AT HOME

## RECOMMENDATION 1

### **Restructure the Department of Commerce, USTR, and other Agencies into a new Department of Economic Growth and Security**

In recent years, it has become clear that the United States' international economic policy is critical to domestic politics, economics, and national security. First, the go-go era of trade liberalization has reached a breaking point. A country without a strong, large middle class is at risk of economic backlashes to international trade that destabilize the domestic and global economy—making everyone worse off. And this is precisely what has happened. For many years, the benefits of trade liberalization were believed either to be a rising tide that lifted all boats or to be accompanied by transitional measures that compensated “the losers” from trade. Neither happened. Instead, as David Autor, David Dorn, and Gordon Hanson have shown with respect to the “China Shock,” trade liberalization hit some communities hard—and those communities had not recovered from trade liberalization policies even after a decade.<sup>1</sup> This dislocation led to a backlash that manifested itself in the 2016 election, with candidates Trump, Clinton, and Sanders objecting to the Trans-Pacific Partnership. Under the Trump Administration, the result has been erratic. The Trump Administration has started trade conflicts with allies and rivals alike, often with no apparent strategy for what the Administration hopes to achieve and little to show for it to date—all the while creating uncertainty and economic pain for domestic constituencies of all kinds.

Second, international economic policy faces a serious threat in the form of state and crony capitalism. Around the world, an increasing number of regimes blur economic

and political power, using their domestic laws to advance their economies at the expense of foreign companies, while deploying their economic power abroad for political purposes. China's form of state capitalism is perhaps the most notable. China engages in an aggressive form of industrial policy in which banks affiliated with the government offer massive subsidies to Chinese businesses. Chinese rules require foreign companies hoping to access the Chinese market to partner with and transfer their technology to Chinese companies. And China is investing expansively in countries around the world—including along the Pacific Rim and within the United States—while simultaneously protecting its domestic technological base from dependence on foreign producers.<sup>2</sup> As economic interdependence increases, the potential for economic malfeasance also increases. The vectors for economic cooperation can also be vectors for hackers and spies, or can be used as leverage points during high-stakes negotiations.

**A country without a strong, large middle class is at risk of economic backlashes to international trade that destabilize the domestic and global economy – making everyone worse off.**

The answer to both of these challenges is not to turn inward with some kind of neo-protectionist approach to trade and international economics. The answer is to develop a coherent strategy that coordinates trade, domestic economic development, and economic security. Unfortunately, our government is currently not designed either to develop or execute a coherent, coordinated strategy that includes these three issues. First, the central programs in these areas are split across different parts of the government. The United States Trade Representative (USTR), charged with negotiating trade agreements and representing the United States in international trade disputes, has primarily pursued trade liberalization and is located within the Executive Office of the President. A variety of trade promotion agencies are independent, including the Export-Import Bank (Ex-Im Bank), U.S. Trade and Development Agency (USTDA), and the Overseas Private Investment Corporation (OPIC), which under the terms of the recently passed BUILD Act will be replaced by the International Development Finance Corporation (IDFC). Domestic economic development offices—the Economic Development Administration, Small Business Administration, and Minority Business Development Agency, among others—are split across the Department of Commerce or are independent. Economic security efforts—particularly related to export controls—are split across the State, Defense, Energy, Commerce, Justice, Treasury, and

Homeland Security Departments. Each of these departments and agencies, of course, has a different culture and different set of incentives. This makes coordination difficult, especially if some priorities have to take a backseat to others.

## **We need a coherent strategy that coordinates trade, domestic economic development, and economic security.**

The fracturing of these offices makes it difficult for the government to develop a coherent long-term strategy. The Departments of Defense and State, for example, produce quadrennial reviews of defense, and diplomacy and development. The process leading to these documents allows the agencies not only to assess the current posture of the United States but also to look forward to emerging threats and challenges. In the economic growth and security sector, however, there are no such strategic efforts.<sup>3</sup> Nor is it clear what agency would be able to undertake such a task. With the intersection of domestic and international economic issues rising in importance, it is essential that the government become better able to assess threats, develop a strategy, and coordinate efforts to execute on that strategy.<sup>4</sup>

A better approach would be to restructure the Department of Commerce, the United States Trade Representative, and a variety of other agencies and offices into a single Department of Economic Growth and Security (DEGS). The Department of Economic Growth and Security would have five primary cones, each headed by an undersecretary: International Trade, Trade Promotion, Economic Development and Industrial Policy, Statistics, and Economic Security.<sup>5</sup> The International Trade cone would include the USTR, which would be moved into the Department but whose head would retain ambassadorial status, and the International Trade Administration (ITA). At the same time, the Secretary and Deputy Secretary of DEGS would become the United States' chief economic diplomats, a role currently played by the U.S. Trade Representative. The Trade Promotion cone would unite all of the government's efforts to promote American businesses abroad: the Ex-Im Bank, the U.S. Trade and Development Agency, and the newly-created International Development Finance Corporation.

The Economic Development and Industrial Policy cone would include government's efforts to promote economic development at home, particularly its efforts to help domestic businesses. These efforts are a critical part of any trade policy. Domestic development efforts should work hand in glove with international trade policy. This

cone would therefore include the Economic Development Administration, Small Business Administration, and Minority Business Development Agency, among other entities. The Economic Development Administration, in particular, would have principal responsibility for administering the entire Trade Adjustment Assistance program, administration of which is currently scattered across the Economic Development Administration, as well as the Labor and Agriculture Departments. In addition, some commentators have called for the creation of a U.S. Office for Industrial Policy that would engage in targeted geographic and technological investments; such an office or policies would be included in this cone.<sup>6</sup> The fourth cone would be Statistics, which would include the Department of Commerce's various statistical agencies, including the Census Bureau and National Institute for Standards and Technology.

The Economic Security cone would consist of a new Economic Security Agency (ESA), which would combine the government's fractured efforts at export controls, technology transfer, investment controls, and other economic security policies. The ESA would build on a 2010 proposal from then-Secretary of Defense Robert Gates to create a single licensing agency for export controls, a single list of controlled items, a single coordinator for enforcement, and a single technology system and portal for businesses.<sup>7</sup> In addition, the coordinator for the Committee on Foreign Investment in the United States (CFIUS) would move from the Treasury Department to ESA, as would the State Department's Directorate of Defense Trade Controls. The Department of Commerce's Bureau of Industry and Security would also be folded into the ESA.

A Department of Economic Growth and Security would have significant benefits. First, the Department would be able to develop a strategy to advance international trade while simultaneously addressing domestic economic dislocations and economic security issues that arise from increased global economic interconnectedness, particularly with countries like Russia and China. The Department would have a Policy Planning staff, reporting directly to the Secretary, that should be headed by a senior economic policy official, akin to the State Department's Policy Planning staff. The Policy Planning staff should be required to produce a Quadrennial Economic Growth and Security Review, akin to the quadrennial defense, diplomacy, and development reviews.

Second, the Department would have increased status and authority within the federal government. Combining these critical economic domains and having the authority to both produce a strategy and execute upon it, the Department would be elevated in policymaking, akin to the elevation of the Department of Homeland Security, vis-à-

vis its component parts, after its creation. Third, the Department would also play an important informational function. Because it includes international trade policy, trade promotion, economic development, economic security, and statistical elements, the Department will be better situated to warn Congress and the country of emerging economic dangers, globally or domestically, than is a fragmented system of offices that work on these issues. This reorganization thus furthers the information-sharing goal Congress has already pursued in the intelligence and homeland security contexts, with the creation of the Director of National Intelligence and DHS, respectively. Further, it should afford Congress the opportunity to allocate resources more efficiently than under our current fragmented system.

Fourth, the creation of a single Department would reduce the influence of well-connected industry interest groups over international economic policymaking. A fractured policymaking structure offers multiple avenues for such interest groups to capture public policy.<sup>8</sup> If an interest group loses a policy fight within one agency, it can shift the fight to another agency. Prevailing within the second (or third, or fourth) agency gives the interest group a champion within the interagency process and a potential veto on changes to public policy. Critically, though, not all interest groups will be able to take advantage of this fractured environment. Fragmentation favors well-connected interest groups that can afford multiple expensive lobbying campaigns, and often disadvantages public interest groups and the general public. Members of the general public are already at a disadvantage when it comes to having influence in government; when industry can lobby multiple agencies, it becomes more difficult to develop a whole-of-government policy that is in the broad public interest, rather than one that favors those particular groups. A single Department would include a greater variety of interests, reducing the likelihood that any single one would capture the Department's policymaking agenda—and the ability of industry to play different agencies against each other in the interagency process.

There are a number of criticisms to this proposed reorganization, but in the end, they are unpersuasive given the significant benefits of this approach. Some critics might suggest that the proposal is politically unfeasible given that the Obama Administration proposed something similar in 2012.<sup>9</sup> The Obama Administration suggested merging the Department of Commerce, Small Business Administration, USTR, Ex-Im Bank, OPIC, and USTDA, while moving National Oceanic and Atmospheric Administration (NOAA) to the Department of the Interior.<sup>10</sup> First, this suggestion did not include a serious effort

to unify economic security operations, one of the five cones we propose creating within DEGS, into a single place. Second, the Administration asked Congress for legislative authorization to restructure these agencies via executive order, which created concerns about the extent of the authority given to the Executive Branch. In contrast, we propose that the creation of this new Department be done via statute, with Congress leading the way. Third, the Obama Administration recommendation was justified primarily on grounds of cost savings (they predicted \$3 billion a year over ten years) and on creating “one-stop shopping” for businesses to interface with the government. While these are important justifications that apply to our proposal as well, the reorganization we suggest is grounded in a far more pressing imperative: our domestic and international economic security is at risk from the combination of the unaddressed domestic effects of trade liberalization and international economic threats. The United States government must have a better way to address these critical challenges.

Critics might also argue that this approach will reduce the USTR’s status and effectiveness, and as a result will hamstring its mission to liberalize trade.<sup>11</sup> This concern is misplaced. First, while it is true that USTR will no longer be located in the Executive Office of the President, the new Undersecretary for International Trade would retain ambassadorial status, in order to preserve the Trade Representative’s (now the Undersecretary’s) status in international negotiations. The new Secretary of DEGS would become the most senior figure on these issues—and would be fully devoted to them at the level of strategy, leaving the Undersecretary to conduct the actual negotiations and day to day operations. This organization would actually elevate the role of trade negotiators within the government and with other countries, by placing the senior economic diplomat at the head of a full cabinet agency. At the same time, part of the problem today is that the USTR has engaged for decades in an aggressive trade liberalization agenda with insufficient regard for the domestic distributional and economic security consequences of those efforts. The USTR’s work must be balanced with other goals related to trade promotion, domestic economic development, and economic security. Placing USTR alongside these other activities will help balance USTR’s approach—and in the process lead to trade policies that have greater public support and thus resilience. Trade liberalization that leads to political backlash and either irrational protectionism or erratic trade wars are worse for everyone. In addition, this proposal has the potential elevate the status of the Department of Commerce as it turns into the Department of Economic Growth and Security. The unified, mission-oriented work of this new Department should allow it to recruit talented officials who are interested in addressing the central economic challenges of our time.

Another possible criticism is that the new Department will make its component agencies less nimble, flexible, and efficient.<sup>12</sup> In other words, it will expand bureaucracy with little benefit. We disagree. In some cases, agencies located within the Department will still be comparatively independent. For example, OPIC is a self-sustaining agency that does not require regular appropriations. Its independent funding stream will continue to keep its newly-created successor, the IFDC, comparatively independent, even as it acts in a more coordinated fashion with other agencies within the Department. Moreover, any loss in the speed of an agency's action must be compared with the gains from coordination and the benefits to the public interest of reducing the kind of agency capture that occurs with fragmentation. The fact that the Department will now be able to engage in strategic planning and align policies with that strategy far outweighs the possibility of minor delays in response time arising from the need to clear responses through a larger bureaucracy.

Finally, some might argue that shifting USTR to the new Department will require creating a new interagency coordination office at the White House, thereby adding to the White House bureaucracy.<sup>13</sup> This concern is also misplaced. First, the White House already has a Deputy Assistant to the President and Deputy National Security Advisor who covers international economic issues and is situated in both the National Economic Council and National Security Council. This team already works on these issues with USTR, from within the Executive Office of the President, and will continue to do so. If anything, the new Department might actually alleviate interagency coordination problems. By shifting these major elements into a single Department, coordination will now take place *within* the Department, rather than across disparate Departments with different hierarchies. Many decisions might therefore be resolved within the Department, without needing to be elevated to an interagency process or to the White House.

## SPECIFIC RECOMMENDATIONS

- Reorganize the Department of Commerce into a new Department of Economic Growth and Security, which would include undersecretaries for Trade, Promotion, Development, Statistics, and Security.
- The USTR and ITA would be included in a single Trade component headed by an Undersecretary for International Trade, who would retain the rank of ambassador. In addition to the existing assistant secretaries within the International Trade Administration, the three current deputy USTR roles would become assistant secretaries in the new International Trade cone, and would likewise retain ambassadorial rank.

- The Ex-Im Bank, the U.S. Trade and Development Agency, and the U.S. International Development Finance Corporation would form the Trade Promotion component, headed by an undersecretary for Trade Promotion.
- The undersecretary for Economic Development would oversee the Economic Development Administration, Small Business Administration, and Minority Business Development Agency, and other agencies currently within the Department of Commerce that cover these topics.
- Require the Department of Economic Growth and Security to engage in strategic planning and coordination across its domains, including producing a quadrennial economic growth and security review.
- Create an Economic Security Agency within the Department, headed by an undersecretary, comprising the staff of CFIUS, the State Department's Directorate of Defense Trade Controls, the Department of Commerce's Bureau of Industry and Security. The agency would also become the single licensing agency for export controls and be empowered to create a single list for controlled items, coordinate enforcement activities, and create a single interface for businesses dealing with export control issues.

## **RECOMMENDATION 2**

# **Increase Transparency and Participation in Trade Policymaking**

One of the reasons that trade policymaking has had significant distributional consequences is that the process by which trade policy is made has been secretive and exclusive. By law, the USTR creates a variety of trade advisory committees made up of people from outside the federal government. These committees exist to give the USTR and the president information and advice that might be relevant to negotiating trade agreements. Although this process appears to incorporate broad public input into the trade policymaking process, the reality is that these committees are skewed toward corporate interest groups and their lobbyists and that most of the information they provide is kept a close secret.

Start with secrecy. The trade advisory committees, unlike other federal advisory committees, are exempted from having open meetings, public notice of those meetings, public participation in the meetings, and the public availability of documents.<sup>14</sup> Draft trade agreements like the TPP are also classified during negotiations as if they included important national security or intelligence information, even though by law the final agreement must be made public before the president signs it. Indeed, virtually no one beyond the negotiators and the advisory committees can access them during negotiations, when public access could influence the shape the ultimate agreement takes. In the case of the TPP, this meant that even members of Congress, who would ultimately have been required to vote on the agreement, were only allowed to see it in a secure facility in which any notes they took had to be left in the room. Moreover, they were not allowed to have their staff, including staff who had received a security clearance, review the draft agreement.<sup>15</sup>

At the same time, the advisory committees, which do have access to the text of these agreements, are stacked in favor of corporations and their lobbyists. According to a review of the 28 trade advisory committees by *The Washington Post*, “[o]f the 566 committee members, 306 come from private industry and an additional 174 hail from trade associations.” This means that 85 percent of members are industry or industry representatives. In total, there were only 31 members from labor unions and 16 from NGOs.<sup>16</sup> In addition, these non-industry members are clustered onto specific committees: only five labor representatives, for example, serve on committees other than the advisory committee for labor issues. Fifteen committees are made up of only private sector members. The result is that the vast majority of advice and public input the administration receives comes from corporations and their lobbyists – not from workers, members of the general public, or their representatives.

The results of low transparency and a skewed advisory committee system is predictable. Trade agreements tend to work for corporate interests and undervalue the interests of workers, the environment, and the broader public good. This is not to say that there are not important reasons to have some degree of secrecy. For example, it would be very hard to negotiate if every moment of a negotiation was livestreamed on the internet. Nor is it to say that corporations should be excluded from the advisory process. Corporations play a critical role in growing the American economy, supporting jobs, and have important technical knowledge that is helpful to an administration seeking to determine what the impact of tariffs might be on a particular industry. But these benefits can be preserved even while making the trade policymaking process more transparent and participatory.

First, the policymaking process should be made more transparent and participatory to the general public by adopting an ordinary notice-and-comment process for initiating negotiations on any new trade agreement. When an administration negotiates a trade agreement, it begins with a first draft of the agreement (or portions of an agreement) that it sends to the trading partner. Prior to transmitting this first draft agreement to a trading partner, the administration should have to publish the entire draft or portions of the draft, including an explanation for the provisions in the draft, in the Federal Register and accept comments from the general public for 60 days. At the end of 60 days, the administration would have to review the comments and publish a final draft, which would include responses to the public comments. If, during the course of negotiations, any new topics or issues emerge that diverge significantly from the draft that was noticed to the public, these new topics would have to go through the same notice-and-comment process.

While current law and practice does require a measure of transparency and public engagement, including notice of new negotiations, opportunities for public comment, and advanced publication of the agreed text, our proposed process would significantly increase public transparency and participation in trade negotiations. Instead of having little sense of what an agreement might include prior to its already being fully negotiated (at which point it is largely a take-it-or-leave-it affair), the public would have a sense of what might be in the agreement and, critically, what the administration's justifications are for those provisions. It would also be able to comment on those provisions, which could raise issues the administration had not considered and at a minimum make clear what the flashpoints are likely to be. Most importantly, the requirement that the government publicly justify its initial proposals in response to public comments would greatly enhance the legitimacy of the trade negotiating process, preventing the kind of cut-and-paste economic diplomacy that has characterized much of U.S. trade negotiations in recent decades.<sup>17</sup> At the same time, this level of transparency and participation also allows the administration to retain secrecy over the actual negotiations themselves.

Second, the advisory committee system should be reformed to ensure that DEGS hears a diverse group of viewpoints. Specifically, each committee should be required to have no more than ten percent of members from trade associations, to have at least twenty percent of members from public interest organizations, and to exclude registered lobbyists from serving. This reform would balance the need for detailed knowledge from experts on certain topics and industries during the negotiations process, while ensuring that the advisory committees aren't solely doing the bidding of corporate interests.

## SPECIFIC RECOMMENDATIONS

- Prior to the initiation of a trade negotiation, the DEGS should be required to publish the draft text of its proposal in the Federal Register, with a 60-day comment period. The DEGS would then have to respond to comments received, and would be required to add a new comment period for any significant changes to the agreement from the initial proposal.
- Section 135 of the Trade Act of 1974 should be reformed to require that all trade advisory committees have no more than ten percent members from trade associations, at least twenty percent members from public interest organizations, and prohibit service by registered lobbyists.

### RECOMMENDATION 3

## Require the International Trade Commission (ITC) to Conduct Geographic Impact Assessments

Under Section 131 of the Trade Act of 1974, the International Trade Commission is required to provide the President advice on the economic impact of changing tariffs or non-tariff barriers on both industry and consumers, and when the President or the U.S. Trade Representative requests it, to advise on the impact that trade provisions might have on workers, employment, profits, capital investment, prices, quantities, and other economic factors.<sup>18</sup> Section 105 of the Bipartisan Trade Priorities and Accountability Act of 2015—the law under which the Obama Administration negotiated the TPP and the Trump Administration is seeking approval of its renegotiated NAFTA—provides more specifically that the ITC must issue a report evaluating the impact of a completed but unratified trade agreement on the U.S. economy as a whole, as well as its impact on particular industries, consumers, and other economic factors.<sup>19</sup>

The ITC is not required, however, to consider the geographic impact that trade provisions might have. This is problematic. As we know from both trade theory and from empirical studies, trade agreements do not have a uniform impact across the country. Some communities are disproportionately harmed by trade provisions and others benefit disproportionately. The ITC should be required to conduct geographic impact

assessments of trade provisions, when feasible, in order to make clear to the President, the Secretary of Economic Growth and Security, other officials, and the general public what the impact of a trade provision might be on a specific community. This will, in turn, also allow the Department of Economic Growth and Security to allocate resources and develop programs to target those communities with economic growth and assistance programs.

## **SPECIFIC RECOMMENDATION**

Section 131(d) of the Trade Act of 1974 and subsequent bills authorizing the negotiation of trade agreements should be revised to require that the ITC conduct geographic impact assessments on trade provisions, policies, and any other related matters.

### **RECOMMENDATION 4**

## **Reform the President's Section 232 and Section 301 Authorities**

The Trump Administration's trade war has been built primarily on two statutory provisions: Section 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962. Section 301 provides that the USTR may, and in some cases must, take remedial actions if she determines that the rights of the United States under a trade agreement are being denied, if countries are acting inconsistently with agreement to the detriment of United States, or if countries actions are "unjustifiable and burden[] or restrict[] United States commerce."<sup>20</sup> It also provides an extensive procedure for notice and comment on such actions and for factors to consider in responding to these unfair trade practices.

Under Section 232, the President can impose virtually any trade barrier he likes on a product once he determines that importing the product "threaten[s] to impair the national security."<sup>21</sup> The Secretary of Commerce is required to conduct an investigation that includes consultation with the Secretary of Defense and other government officials, in addition to public notice and hearings, if feasible. The Secretary's report then goes to

the President and if the President agrees with the Secretary's finding, the President can "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article...[so that they] will not threaten to impair the national security."

Both of these provisions have been criticized in recent months for giving the president too much unchecked power to start a trade war.<sup>22</sup> In the case of section 232, courts and commentators generally believe that because the final determinations and actions are taken by the president himself, they cannot be challenged in court under the ordinary administrative law rule of "arbitrary and capricious review," which applies to agency actions generally.<sup>23</sup> Section 301 is reviewable by the Court of International Trade, but courts have found that actions taken under section 301 are committed to the agency's discretion and therefore exempted from "arbitrary and capricious" review.<sup>24</sup> The justification for expansive judicial deference is that these actions involve balancing a variety of factors and implicate foreign affairs. Given the breadth of these provisions and the lack of judicial review, the effect is that the president effectively has unchecked, unfettered power to start and sustain trade wars.

This system should be revised. While there have been a number of legislative proposals and even constitutional challenges to this regime, a simple solution would be to make clear in the statutes that the courts are capable and required to review actions taken under these provisions to determine if they are "arbitrary and capricious." This is a familiar legal standard that applies across the federal government and affords the executive branch significant deference, while still providing a meaningful check on unreasoned, irrational, or arbitrary actions. Despite judicial fears of reviewing foreign affairs questions, this approach is workable and is frequently used in cases touching on foreign affairs and national security questions.<sup>25</sup> Moreover, trade issues are often mischaracterized as purely foreign affairs questions. But they also involve core domestic economic policy questions. Indeed, the Constitution gives Congress the explicit power to regulate "commerce with foreign nations" because the Founding generation understood trade policy to be intricately tied to domestic economic affairs. While Congress can and should directly oversee the President's use of these delegated authorities, it also has the power to direct the courts to engage in judicial review on these issues.

## SPECIFIC RECOMMENDATIONS

- In section 301 of the Trade Act of 1974, delete the language suggesting that the President can direct the USTR (under our proposal, the Secretary of DEGS) to take specific actions and add a provision making clear that actions taken under the provision are not committed to agency discretion by law and are thus subject to arbitrary and capricious review under 5 U.S.C. 706 (2)(A).
- Revise section 232 of the Trade Expansion Act of 1962 to remove the role of the President in making national security determinations and shaping remedies, leaving the Secretary of Commerce's decisions (under our proposal, the Secretary of DEGS) as the final agency action. Add a provision stating that these decisions are not committed to agency discretion by law and are thus subject to arbitrary and capricious review under 5 U.S.C. 706 (2)(A).

# PART II: UNRIGGING INTERNATIONAL TRADE

## RECOMMENDATION 5

### **Condition Trade Agreements on Policies to Prevent and Reform Tax Havens**

One of the central problems of trade liberalization over the last generation is that it has been lopsided. Capital has become far more mobile, allowing it to take advantage of patchworks of national regulation. In no area is this more noticeable and problematic than tax policy. In recent decades, the richest individuals and biggest companies have used tax havens as a way to engage in widespread tax avoidance. According to Gabriel Zucman, an economist at the University of California, Berkeley, the practice of reporting taxes through tax havens, instead of within home countries, costs the United States \$130 billion a year.<sup>26</sup>

This problem is not unique. In the United States, for example, the different states within the Union need a way to allocate tax burdens among their different jurisdictions. Tax scholars have applied this approach to the international context and proposed what they call “formulary apportionment,” which means that taxable income will be determined not based on where profits are reported as earned (i.e. the tax haven), but where the products are actually sold.<sup>27</sup>

As a way to achieve formulary apportionment, trade expert Todd Tucker has argued that trade negotiators should condition trade agreements on a country agreeing “to implement formulary approaches, automatically share tax information, and maintain a wealth registry of their corporations’ and citizens’ global assets.” If tax havens refuse, he argues, “their financial institutions should be blocked from conducting business in the trading bloc.” This would effectively force all tax havens into a formulary apportionment

system, because companies would not be able to access the financial system.<sup>28</sup> While sanctions could be designed in a variety of ways, this one-two punch should allow the United States to tackle the problem of tax havens effectively.

## SPECIFIC RECOMMENDATIONS

- The President should direct the Secretary of DEGS, with the assistance of the IRS and the Secretary of the Treasury, to renegotiate trade agreements to include a formulary apportionment system.
- Congress should pass laws that enable a formulary apportionment system, put in place economic sanctions that target favored trading partners that do not adopt such a system, and support a wealth registry and any other necessary components of such a regime.

### RECOMMENDATION 6

## Restructure Investor-State Dispute Settlement

Investor-state dispute settlement (ISDS) allows private investors to bring lawsuits directly against foreign governments and, if they win, obtain monetary damages that can run into the millions or hundreds of millions of dollars. Historically, ISDS provided a recourse for foreign investors to obtain redress for outright expropriations of their property in countries that lacked strong, independent courts. For this reason, ISDS tended to be limited to bilateral investment treaties between developed and developing countries. An American company that owned an oil field in another country could seek damages if the country nationalized the field. By ensuring foreign investors a judicial remedy comparable to what they would have in, for instance, a U.S. court, ISDS provisions encouraged foreign investment that proponents claim redounded to the benefit of both the foreign investors and the country receiving the investment. American companies have benefitted from ISDS provisions, obtaining millions of dollars in recovery from foreign governments.

Since the early years of ISDS, though, two things have changed. First, investment claims often challenge so-called “indirect expropriations”—similar to regulatory takings in domestic law—and violations of “fair and equitable treatment.” Unlike straightforward expropriation claims, these claims frequently challenge some exercise of governmental

regulatory authority. In perhaps the most egregious example, Phillip Morris brought ISDS claims against both Uruguay and Australia challenging so-called “plain packaging” rules for tobacco products, which aim to reduce smoking.<sup>29</sup> Although such claims are not usually successful absent a showing of discrimination or gross misconduct by the host government, defending such suits is expensive and the possibility of suits may cause regulatory chill, especially in smaller countries.

Second, ISDS (and investment provisions more generally) have been embedded in larger free trade agreements, creating potential risks to the United States and asymmetries with the broader aims of economic policy. Recent agreements often have multiple developed countries as parties, meaning that investments flow in both directions in a way they did not under older bilateral investment treaties. NAFTA 1994, with both Canada and the United States as parties, offers the perfect example. Although the United States has not yet lost an ISDS case, Canadian investors have regularly brought claims against the United States under NAFTA 1994’s ISDS provisions. These cases have led the United States to amend its model investment treaty over the years to reduce the risk that the United States will lose a case, including by limiting the availability of ISDS to challenge state and local measures.<sup>30</sup>

Embedding ISDS in trade agreements has also created an asymmetry. Only governments can initiate disputes to enforce the trade, labor, or environment provisions of free trade agreements, but investors retain the ability to initiate investment disputes. That means most groups affected by trade agreements have to persuade their government to try to vindicate their rights, an effort complicated by governments’ resource constraints and diplomatic concerns. Well-resourced private investors, though, can bring a claim any time they think they will win, or even just to pressure a government into settling.

ISDS procedures are also problematic. Under current rules, ISDS claims are usually heard by ad hoc panels of three arbitrators appointed to hear individual cases. Arbitrators are normally drawn from prominent international lawyers, professors, and former government officials. In order to obtain lucrative appointments in future ISDS disputes, many fear that arbitrators shade their decision to be either pro-investor or pro-government, since each party would normally pick one of the three arbitrators. Even worse, practicing attorneys can appear before a tribunal in one arbitration and sit as an arbitrator in another dispute. This fact has given rise to conflict of interest concerns. Critics charge that lawyers with clients in one arbitration may carry their clients’ interests into a dispute in which the lawyer is supposed to sit as a neutral arbitrator.

We can see two possible paths forward for reforming ISDS, and we present both as options that might be appealing to policymakers depending on what is politically viable. The first is to simply eliminate ISDS in all future agreements (or at least all future trade agreements with developed countries) and seek to renegotiate prior agreements to eliminate ISDS. The Trump Administration has taken a step in this direction by eliminating ISDS in its NAFTA 2018 renegotiation with Canada and with Mexico for all but a few sectors, such as extractives and telecommunications.<sup>31</sup> While some might argue that eliminating ISDS altogether serves little purpose because the United States has not lost a case so far, there are other powerful arguments for abolishing this practice. First, as currently implemented the practice is procedurally deficient. It also introduces into trade agreements a private right of action available only to capital. Labor and environmental groups are not able to bring international claims to enforce the labor and environmental chapters of agreements before a panel of arbitrators that labor and environmental groups help choose, and which can include, for instance, union lawyers. Second, ISDS can be viewed as an implicit subsidy for American companies that seek to invest in risky political environments. The U.S. government bears the diplomatic costs of securing and preserving access to ISDS for private companies—a cost that can be significant when our negotiating partners oppose ISDS, as for instance Australia and New Zealand have at various times in connection with the Trans Pacific Partnership negotiations. U.S. companies can then invest abroad, a move that can involve shifting jobs overseas, knowing that they potentially have an international remedy available.<sup>32</sup> If a country's political and legal system is too risky for capital-intensive investments, the company could either rely on political risk insurance or invest in a different country—one that has a well-functioning judiciary and a commitment to the rule of law. Indeed, one of the competitive advantages of the United States is our commitment to the rule of law.

The second approach is to reform the current ISDS system. Efforts to do so are already under way,<sup>33</sup> with many American allies favoring the creation of a standing global investment court to replace the ad hoc tribunals that currently exist.<sup>34</sup> Such a court, modeled on the WTO's Dispute Settlement Body, would regularize ISDS and remove conflicts of interest by arbitrators. Although negotiations are ongoing, such a court could contain both a trial level (or tribunal of first instance) and an appellate level, allowing it to correct errors of law—a marked improvement on the current system. The court would also be a standing body, comprised of highly qualified judges, selected by governments, who would be strictly bound by ethical rules that would, most notably, forbid them from acting as counsel in cases. Such a court could also include a robust

mechanism for dismissing cases at an early stage, allowing governments to avoid harassment through the filing of frivolous claim.

On this course of action, the United States should engage with this ongoing reform process with an eye to influencing its outcomes. The United States' objectives in these negotiations should be three-fold. First, the United States should aggressively pursue procedural reforms aimed at eliminating the perception of bias by arbitrators. A standing investment court in which judges are chosen entirely by governments and are forbidden from serving as advocates is one feasible way, although not the only way, to achieve this objective. Imposing procedural predicates to arbitration—such as exhaustion of local (i.e., domestic) remedies,<sup>35</sup> or some form of international mediation as Todd Tucker as proposed—may also make sense.<sup>36</sup> Any future investment court should also have limited jurisdiction, only able to hear cases under treaties that otherwise contain a right to ISDS. In this way, the United States could control its exposure to ISDS through its individual treaty negotiations, thereby vindicating the interest its businesses have in ensuring widespread access to adequate judicial remedies abroad, while at the same time protecting itself (and other governments) from frivolous claims by private investors.

Second, in future trade agreements the United States should restrict ISDS to businesses that make country-specific investments that face particularly high and unavoidable political and legal risks. This can be done in several ways. Both the Obama and Trump Administrations have pursued a policy of sector-specific ISDS.<sup>37</sup> Critics dislike these sector-specific policies because they have an ad hoc feel and may appear to be choosing winners and losers among industries. But certain industries, such as the extractive sector, are constrained by geography in terms of the countries in which they can invest. When large country-specific investments in physical and technological infrastructure are made, these sectors face a higher risk of expropriation. ISDS might make sense for these sectors because of the nature of the investments made and the heightened risks involved in making them. Many other sectors, however, are neither constrained in terms of where they invest, nor do they face unreasonable risks when they make an investment. If an industry makes a product that has health effects, for instance, that industry assumes the risk when it makes an investment that its product will be regulated on the basis of its health effects. Excluding such a sector, like tobacco, from ISDS represents an administrable way to protect the right to regulate in sensitive areas. Reforms to substantive investment law—such as limiting what counts as an investment or continuing to make clearer the narrow scope for successful indirect expropriation or

fair and equitable treatment claims—offer another avenue to achieve the same end. The United States also should consider whether ISDS is necessary at all in treaties between countries with strong, independent domestic court systems. Historically, the benefit of ISDS has been to provide a remedy for investors in countries that lack such a court system. In treaties in which domestic courts provide an adequate remedy, given foreign investors a second bite at the apple may be unwise.

Third, the United States should address the asymmetry that ISDS creates between capital and labor and environmental concerns. We can imagine a number of resolutions to this problem. On the one hand, a standing international court (whether an investment court or a new court altogether) could be given jurisdiction to hear claims under the labor and environment chapters of trade agreements brought by injured civil society groups. The investment chapter is the only chapter in trade agreements with private remedies because of investment law's unique history, but that history need not limit the imagination of future treaty negotiators. A more targeted alternative would be incorporating into investment chapters themselves substantive labor and environmental obligations that investors are expected to observe. Just as the labor and environment chapters of trade agreements draw on nations' international labor and environmental obligations, these obligations on investors could draw on instruments like the OECD's Guidelines for Multinational Enterprises or anticorruption norms like those reflected in the OECD and UN anticorruption conventions. Failure to comply with these rules would allow the government and third party intervenors to raise a counterclaim against the investor that could result in damages against the investor.<sup>38</sup>

## SPECIFIC RECOMMENDATIONS

- **Option 1:** Do not include ISDS provisions in future trade and investment agreements and renegotiate existing agreements to eliminate ISDS.
- **Option 2:** Engage with the multilateral investment reform project, with the aim of 1) reforming the procedures under which ISDS occurs to address the perception of bias in favor of corporate interests, 2) limiting the availability of ISDS to businesses that make country-specific investments that are at particularly high and unavoidable risk of expropriation, and 3) leveling the playing field between private investors and other civil society groups that currently lack any ability directly to protect their own interests in trade agreements.

# PART III: REDISTRIBUTION WITHIN TRADE

## RECOMMENDATION 7

### Redesign Trade Remedies Laws

Trade remedies laws, primarily antidumping and countervailing duty laws, essentially allow the government to impose extra tariffs on certain imported goods. Trade remedies have been an especially important tool in protecting the American economy from unfairly subsidized goods from China. Significant subsidies that are sometimes hard to prove, along with the lack of an aggressive enforcement strategy, have allowed Chinese businesses to sell manufactured goods into the U.S. market at deep discounts. While these cheap products have benefitted the American consumer, they have come at the expense of American producers. For products like solar panels, the result has been Chinese dominance of the global marketplace.

For all the good they can do, though, trade remedies laws suffer from a number of shortcomings. Chief among these is the problem of limited access and the resulting uneven application of trade remedies in practice. Petitioning and persuading the Department of Commerce and the International Trade Commission to impose trade remedies is an expensive task, and thus not one open to small or even medium size businesses or unions. Under current law, the Commerce Department has authority to self-initiate investigations, but this authority is rarely used. The first proposal is thus to create a central office, the Fair Trade Task Force, in the International Trade Administration charged with monitoring the dumping and subsidization of all imported products. The Fair Trade Task Force would collect and analyze data, and on the basis of its research would recommend trade investigations that the government would self-initiate. This proposal would be similar to a bipartisan bill introduced in the Senate, the Self-Initiation Trade Enforcement Act. The Act could be strengthened in two ways. First,

the government should only self-initiate investigations when the investigation is in the national interest. The Task Force's recommendation should therefore explain why the costs of imposing trade remedies flowing from a self-initiated investigation would not outweigh the benefits to the protected companies. Second, the Act could constrain the government's discretion not to initiate a recommended investigation, such as by requiring the government to initiate an investigation upon certain findings or requiring an explanation for its decision to not initiate a recommended investigation.

## **SPECIFIC RECOMMENDATION**

Create a Fair Trade Task Force within the International Trade Administration tasked with independently monitoring imports for evidence of dumping and subsidization that cause or threaten to cause material injury to a domestic industry. Provide that the Task Force shall recommend that the government self-initiate trade remedy investigations that it determines are in the national interest upon finding evidence of dumping or subsidization that does cause such injury.

### **RECOMMENDATION 8**

## **Institute Social Dumping Rules**

One of the major concerns with trade agreements is that they allow businesses to offshore their operations to countries that have poor labor and environmental practices. These poor practices reduce business costs, giving countries an incentive not to raise their standards in order to attract foreign companies. Trade agreements attempt to solve this problem by requiring countries to live up to international labor and environmental standards, as established by international treaties. But those standards turn out to be very difficult to enforce. They require the United States to initiate a formal dispute against another country, and even then they are difficult to win because the United States must show both the existence of poor labor or environmental practices and that the practices adversely affect trade. Indeed, to date the United States has only brought a single formal dispute under these labor and environment chapters. During that case, it encountered substantial difficulties producing evidence, because witnesses in Guatemala, the

respondent country, feared retaliation if their identities became public. And the United States eventually lost because it could not demonstrate that Guatemala's failure to enforce labor rules adversely impacted trade.<sup>40</sup>

To be sure, amendments to the labor and environmental chapters of trade agreements can address some of these concerns, such as by making anonymous evidence easier to introduce to show labor violations, or by eliminating the requirement that governments demonstrate that labor violations affect trade. But the surest way to respond to these concerns is through anti-dumping laws. Such laws already provide a mechanism under both domestic U.S. law and international trade agreements to impose additional duties on products that are unfairly priced. Moreover, they do not require international dispute resolution before being imposed. Instead, U.S. persons can petition the Commerce Department (now the DEGS under our proposal) to impose duties. The imposition of duties follows determinations that the Commerce Department and the International Trade Commission are required to make by law, and which are reviewable in federal court.

Expanding anti-dumping laws to respond to so-called "social dumping" ensures that foreign products produced through poor labor and environmental practices cannot, by virtue of those practices, undercut U.S. producers in the U.S. market. By negating the cost advantages of poor labor and environmental practices, social dumping rules can protect the United States' commitment to only having products available in its markets that are produced in accordance with global labor and environmental norms. Social dumping rules would also provide labor and environmental groups a private right of action that would compel the U.S. government to take action enforcing the existing labor and environmental provisions in U.S. trade agreements.

Here's how social dumping rules would work. Any affected party—importers, exporters, domestic producers, labor unions, consumer or environmental groups, or other civil society organizations—would be able to file a petition with DEGS to initiate a social dumping investigation. If the resulting investigation determined that imports were 1) produced in violation of labor or environmental norms, and 2) and that those imports caused "material injury" to a domestic industry, the government would be authorized to impose additional duties on the import of the product. As Professor Gregory Shaffer, who has put forward the most comprehensive social dumping proposal, has argued, this kind of regime builds on the current architecture and procedures for anti-dumping laws, and is therefore easily workable.<sup>41</sup>

More specifically, a social dumping regime would have to specify the kinds of activity subject to social dumping duties. The labor and environment chapters of U.S. trade agreements already provide a list of such activities, however. The list of activities qualifying for social dumping duties should include any conduct in violation of these international norms. After a showing of material injury, or the threat thereof, to a domestic industry as a result of a violation of those domestic rules, the government could impose tariffs on the imported products “up to the amount that would offset the injury that the increased imports from the country in question cause or threaten to cause.”<sup>42</sup> As Shaffer notes, such a regime would both avoid the cumbersome process of winning an international dispute before imposing duties, and would also avoid the evidentiary burden of proving a causal link between a violation of labor and environmental rules and trade effects. Instead, it would be sufficient to show a correlation between a violation of the rules and an increase in cheap imports that threatens or causes material injury to a domestic industry.

## SPECIFIC RECOMMENDATIONS

- Amend U.S. anti-dumping laws to permit claims for social dumping. Specifically, antidumping laws should be amended to allow any affected party to petition the DEGS to impose social dumping duties when the violation of international labor and environmental norms (at a minimum, those already protected by U.S. trade agreements) corresponds with “material injury” or the threat thereof to a domestic industry.
- Renegotiate the WTO’s Antidumping Agreement, and anti-dumping rules in U.S. trade agreements, to permit social dumping duties consistent with the amendments to U.S. antidumping rules.

### RECOMMENDATION 9

## Create Development Chapters for Developed Countries

Historically, trade agreements have been used primarily to regulate tariff rates among countries. After the Second World War, the early GATT negotiating rounds focused primarily on tariff reductions. By the 1970s, however, tariffs had already been reduced

among developed countries to such extent that nations began looking to liberalize so-called “non-tariff” barriers to trade. The result, embodied in the many WTO agreements that came into force in 1995 as well as modern free trade agreements, is that trade agreements now do far more than regulate tariffs. They 1) establish rules for trade in services, which for covered sectors include matters as mundane as professional licensing; 2) require minimum levels of intellectual property protection that allow IP-rich companies to both capture monopoly profits in overseas markets and also outsource the production of their products without fear of losing their proprietary technology; 3) create presumptive international standards for food safety regulation; 4) limit the kinds of labeling rules governments can apply; 5) protect private investment through ISDS; 6) require countries to adhere to international labor and environmental standards, and so much more. In other words, trade agreements are no longer limited to regulating only, or even primarily, government action about trade. As Chief Justice John Marshall recognized about the Constitution’s Commerce Clause nearly 200 years ago, the regulation of commerce cannot be limited “to buying and selling, or the interchange of commodities.” Rather, “[i]t describes the commercial intercourse between nations, and parts of nations, in all its branches”.<sup>43</sup>

In an era in which the United States’ trade agreements have traveled the path of federal regulation of interstate commerce, sweeping in ever-broader subjects, it might seem strange indeed to hear pundits or policymakers argue that a certain subject is too far removed from trade to be included in a trade agreement. Yet neoliberalism’s defenders often make exactly this claim. They argue that trade agreements should be limited to “trade” concerns, often understood to mean obligations that advance the interests of U.S. businesses exclusively.

This distinction can no longer stand. Trade agreements are not confined only to “trade” objectives, and these agreements have significant impacts on a variety domestic economic and social welfare objectives. Indeed, voters have made absolutely clear that they no longer view the market as an appropriate means of allocating the gains from trade liberalization. And why should they? The idea of trickle-down economics—that the market fairly allocates the benefits from tax cuts to the wealthy—has been discredited in most circles. Why then would we adhere to an outdated notion that the market fairly allocates the gains from trade, and hence trade agreements should not themselves attempt to do so? Labor and environmental chapters in trade agreements were an early attempt to address these distributional issues by negating any comparative advantage other countries might gain from circumventing international labor and environmental rules.

But these rules have not succeeded, both because they are difficult to enforce and because they do not directly address distributional issues within the massive U.S. economy.<sup>44</sup>

International trade agreements should include rules requiring governments, including developed countries, to take steps to monitor and address domestic inequality arising from trade liberalization. These obligations should be embodied in a Development Chapter in future trade agreements, and they should include two sets of obligations. First, governments should be required to monitor the regional, local, and sectoral effects of trade liberalization. Collecting such data, which would not noticeably increase the burden on the U.S. government, would provide a more accurate picture of which communities are winning from trade liberalization and which are losing. Governments should then be required to report to a treaty monitoring body the measures they are taking to redistribute the gains from trade to those adversely impacted by trade. This kind of monitoring and reporting mechanism is already found in the WTO's Trade Policy Review Mechanism, and is also common in human rights agreements. Expanding such mechanisms to include distributional effects and programs to address those effects should be an easy step.

**International trade agreements should include rules requiring governments, including developed countries, to take steps to monitor and address domestic inequality arising from trade liberalization.**

Second, a Development Chapter should include obligations on governments to affirmatively spend money in support of programs that redistribute to those harmed by trade liberalization. These obligations should be flexible. Governments should be free to adapt their spending programs to their particular national and regional circumstances. Programs that would qualify would include traditional trade adjustment assistance programs, as well as broader infrastructure, education, and social welfare spending that creates economic opportunities for those displaced by trade liberalization. Moreover, the obligation should be tied to the amount of dislocation governments find pursuant to their monitoring and reporting obligations. If it is really true that trade liberalization lifts all boats, then governments would not be required to spend. More likely, if trade liberalization does harm particular communities, governments would have to implement programs to assist those communities.

Although new, this proposal would build on a Development Chapter included in the Trans Pacific Partnership. That chapter contained no binding obligations, but established institutions that could be a model for the treaty monitoring bodies established by a new Development Chapter. It also contained hortatory obligations to invest in things like infrastructure and education. Those obligations would be elaborated and made more stringent, a significant step forward towards making trade agreements work for all Americans in the 21st century. And by doing so, a Development Chapter could ensure that all American have an interest in seeing a new, fair trade regime thrive.

## SPECIFIC RECOMMENDATIONS

- Include a Development Chapter in future trade agreements that requires countries to monitor the impact of trade agreements on a regional, local, and sectoral level, and report on the measures the government is taking to address any harm or economic dislocation caused within regions, localities, and sectors.
- Include in the Development Chapter positive obligations on governments to expend government revenue on programs to assist any region, locality, or employees within a sector harmed by trade liberalization. The obligation should be flexible, allowing governments to fulfill it through a wide range of programs, including spending on education, infrastructure, or classic trade adjustment assistance programs. The obligation should also be tied to the findings of the monitoring process, such that a country that finds greater localized harms from trade liberalization would be required to take greater steps to address those harms.

### RECOMMENDATION 10

## Tax the Winners of Trade

Trade agreements are usually justified on the grounds that they create broad-based economic growth from which all gain. But even when the growth is not evenly distributed, the argument is that the growth will be so significant that the winners from trade could compensate the losers and there would still be net benefits for the country. The trouble is that while trade liberalization creates disproportionate gains for some, trade agreements have not been tied to policies that compensate the losers of trade. For

the wealth generated from trade to really benefit everyone, governments will have to take more aggressive steps to ensure that it is shared among a broad base of citizens. International trade agreements provide an ideal vehicle for coordinating governments' efforts on taxing the gains from trade to ensure an equitable distribution and thus, ultimately, the security of the trading system as a whole.

There are many ways to link taxes and trade. We offer two possible options for policymakers. The first is to couple trade agreements with a winners-tax. The International Trade Commission already conducts studies on which sectors will benefit and which will be harmed from particular trade agreements. Based on this information, the winning sectors should have to pay a tax, the proceeds of which would be automatically put into a Trade Adjustment Fund that would be allocated to trade adjustment assistance, economic development and industrial policy, or other redistributive programs that seek to mitigate the harm to the losers from the agreement. This could be implemented as a sector-specific excise tax, or as Thomas Streinz has suggested, by "condition[ing] certain benefits transnational business actors receive from [free trade agreements] on obtaining a 'free trade passport' in exchange for a fee."<sup>45</sup>

Of course, taxes need not be directly tied to the agreements themselves. For example, one of us has called for imposing a financial transaction tax (FTT) throughout the area covered by a free trade agreement.<sup>46</sup> FTTs are enormously successful at raising revenue and feasible as a policy option. The congressional Joint Committee on Taxation estimated that a proposed FTT in the United States would have raised \$180 billion between 2015 and 2023.<sup>47</sup> A number of large financial centers, such as Hong Kong, Mumbai and Seoul, currently have FTTs in place, collectively raising over \$15 billion per year.<sup>48</sup> Moreover, in Europe, ten EU member countries (Germany, France, Italy, Spain, Austria, Belgium, Greece, Portugal, Slovakia, and Slovenia) have announced plans to implement an FTT to help states recoup some of the losses from the many bailouts within Europe.<sup>49</sup> These taxes are also so small—usually somewhere between .01% and .1% of different kinds of financial transactions—that they do not distort market behavior. An FTT should be designed to tax wholesale capital market transactions (stocks, bonds, derivatives and currency trades) between major financial institutions such as banks, investment firms, insurance companies, pension funds, and hedge funds. The FTAA would not apply to "retail" transactions, such as home mortgages and business loans. So targeted, an FTT raises revenue from the kinds of financial transactions—such as the sale or purchase of securities or bonds—that reflect much of the underlying value created

by trade liberalization. An FTT thus would allow countries to tax the capital that benefits most from trade liberalization, without interfering with the considerably larger number of businesses that buy and sell goods and services within a free trade area.

## SPECIFIC RECOMMENDATIONS

- **Option 1:** Future trade agreements, or renegotiated trade agreements, should include a provision imposing a tax on sectors that the ITC estimates will be the winners from trade agreements, and that tax should go into a Trade Adjustment Fund that would be allocated to trade adjustment assistance, economic development and industrial policy programs, or other redistributive measures.
- **Option 2:** Future trade agreements, or renegotiated trade agreements, should include a provision imposing a financial transaction tax within all the member states, with the revenue raised in each jurisdiction earmarked to fund programs addressing the harms caused by trade liberalization. The tax should be no more than .1% of the value of covered financial transactions—including the sale of securities, bonds, and currency – within the free trade area. The tax should apply to any transaction by a covered entity, meaning a major financial institution located in at least one of the member states of the free trade area.

# Endnotes

- 1 David H. Autor, David Dorn, and Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 Annual Review of Economics 205 (2016).
- 2 See Adam Segal, When China Rules the Web, *Foreign Affairs*, Sept/Oct 2018.
- 3 The President is required to submit an annual national trade policy agenda and accompanying report, but that document's scope is considerably narrower and less forward-looking than the longer-term strategic documents produced in other areas of foreign affairs. See Trade Act of 1974, section 163.
- 4 Cf. John Podesta, Sarah Rosen Wartell & Jitinder Kohli, A Focus on Competitiveness: Restructuring Policymaking For Results, Center for American Progress, Dec. 2010, <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/competitiveness.pdf>.
- 5 The National Oceanic and Atmospheric Administration (NOAA) would move to the Department of the Interior.
- 6 Noah Smith, How to Fill the Gaps in the U.S. Economy, Bloomberg, Sept. 27, 2018 <https://www.bloomberg.com/view/articles/2018-09-27/how-to-fill-the-gaps-in-the-u-s-economy>.
- 7 Overview at Ian F. Ferguson & Paul K. Kerr, The U.S. Export Control System and the Export Control Reform Initiative, CRS, Aug. 9, 2018, <https://fas.org/sqp/crs/natsec/R41916.pdf>; see also Robert M. Gates, Speech to Business Executives for National Security, April 20, 2010, <http://archive.defense.gov/Speeches/Speech.aspx?SpeechID=1453>.
- 8 The classic work in economics is Mancur Olson, *The Logic of Collective Action* (1965); in public law, Bruce Ackerman, *Beyond Carolene Products*, 98 Harvard Law Review 713 (1985).
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- 10 In October 2018, Congress passed the Better Utilization of Investment Leading to Development (BUILD) Act, which creates the U.S. International Development Finance Corporation (IDFC). IDFC combines OPIC and the certain development financing elements of the U.S. Agency for International Development to create a new development finance corporation. While a step in the right direction, and one that shows that Congress can indeed lead, the BUILD Act's reorganization does not address the need for an overarching international economic policy. See Daniel F. Runde & Romina Bandura, *The BUILD Act Has Passed: What's Next?*, Center for Strategic & International Studies (Oct. 12, 2018).
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