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The Trade Agenda for the 46th U.S. President –

Advancing Global Economic Order?

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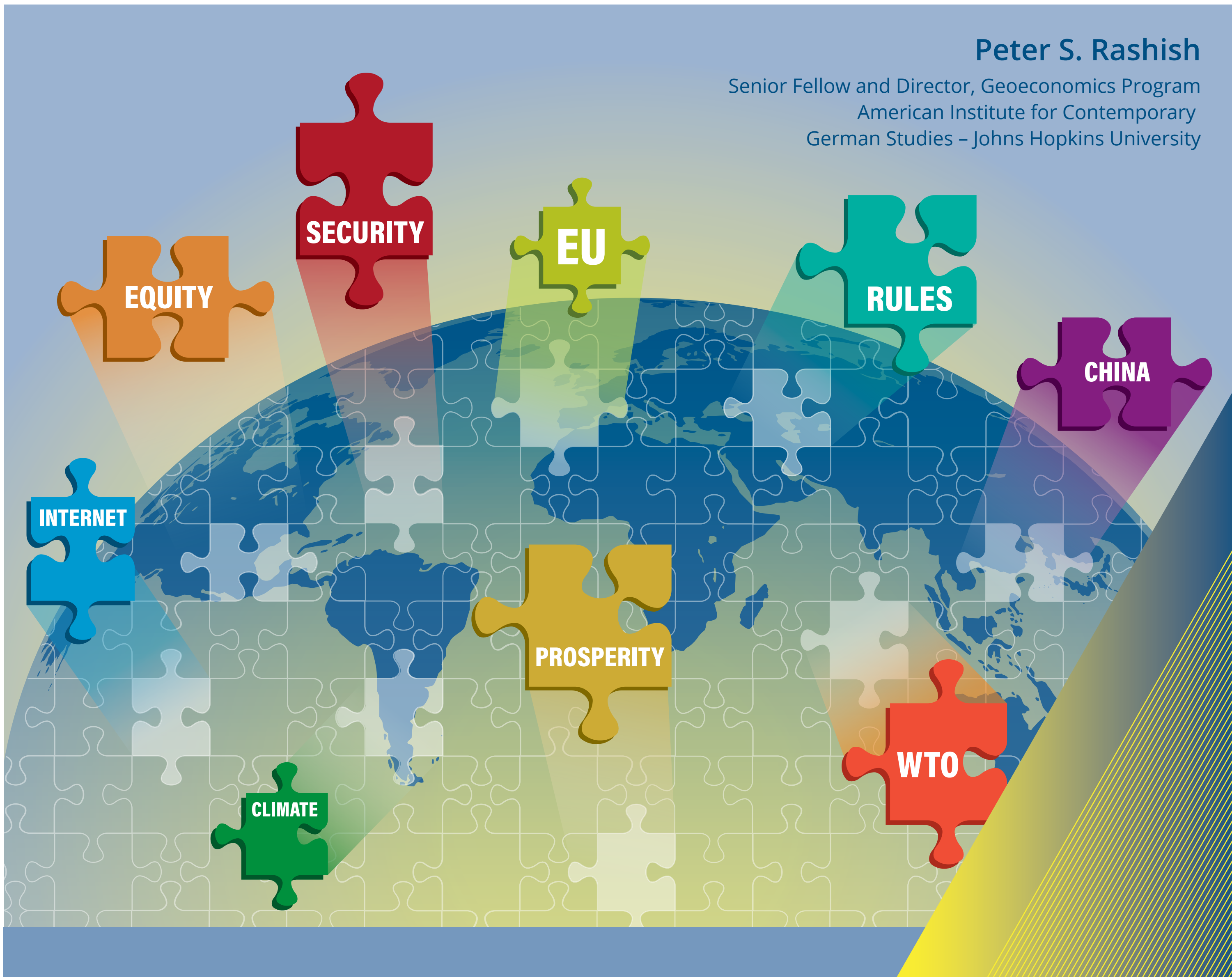

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Executive Summary

The Trade Agenda for the 46th U.S. President – Advancing Global Economic Order?

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As Joe Biden takes office as the 46th President of the United States the country is at a turning point in its trade policy, one where rules are likely to move to the forefront. A key question is whether in response to the weakening of the nearly 75-year old multilateral trading system the United States will lead a concerted effort with like-minded economies to create high-standard rules that will help prevent the deconstruction of the trading system into competing blocs of laws, standards, and norms.

Since the end of the Cold War, U.S. trade policy has been characterized by periods of considerable activism whose record includes enacting NAFTA and establishing the World Trade Organization under Presidents George H.W. Bush and Bill Clinton, securing multiple bilateral trade agreements under George W. Bush, and the simultaneous pursuit of mega-regional agreements focused on Asia and Europe under Barack Obama. But during this period trade policy also became increasingly contentious in Congress, with concerns about its impact on workers and the environment at home and abroad. Yet over the last decade trade has also become more popular among Americans as a way to improve economic growth, especially among Democratic voters.

The Trump administration's nationalist, go-it-alone trade policies – which departed radically from previous practice – did not only weaken the rules-based trading system. They were also ineffective in convincing China to change its economic behavior and at the same time alienated traditional allies. Yet the Trump administration's approach to trade policy is more likely a symptom of increasingly anarchic conditions in the global economy than a harbinger of a new era of U.S. protectionism.

President Biden can be expected to face seven key trade policy questions upon taking office:

- What will the confrontation with China over its unfair trade policies and practices look like?
- Will the U.S.-Mexico-Canada Agreement be seen as a benchmark for future trade agreements?
- What are the implications of the U.S.-Japan trade agreements for U.S.-EU trade relations?
- What are U.S. ambitions to reform the WTO?
- What is the future of the digital services tax and what challenge could it present to the world trade order?
- Will the 117th U.S. Congress take action to curtail executive power over Section 232 on national security of the 1962 trade act?
- How likely is the next U.S. administration to pursue new trade agreements and who are the most likely candidates – the EU, the UK, Kenya?

The Trump administration's approach to trade policy is more likely a symptom of increasingly anarchic conditions in the global economy than a harbinger of a new era of U.S. protectionism

Several of these challenges can be the springboard for the new administration to reposition trade relations with like-minded countries after the Trump administration's neglect or undermining of them. And many provide the Biden administration with avenues for economic diplomacy with allies to forge new trade rules and to reform the multilateral trading system.

As a result of the ongoing and extraordinary public health and economic challenges the country faces, the Biden administration's priority focus will be the domestic front. But because an enabling international economic environment will be important for the success of domestic measures, trade policy will almost certainly play a role as well. At least initially this trade agenda may not primarily be a liberalizing one but rather be focused on working with like-minded countries to forge new high-standard rules that reflect their values and promote their interests. If so, roughly 60 percent of the global economy will have the opportunity to advance global economic order and move away from the unprecedented policies of the Trump years.

Because of the public health crisis the home front will be the Biden administration's top priority, but an enabling international economic environment will be important for the success of domestic policies

I. Introduction:

The United States Navigates a Disrupted Trade Landscape

In his panoramic history of U.S. trade policy, Clashing Over Commerce, Dartmouth College professor Douglas Irwin sets out the "three R's" that have defined successive periods of the United States' approach to its engagement in the global economy. During the first period that began with the country's founding and lasted until the Civil War, the imperative was earning *revenue* through customs duties. Next came *restriction* and the goal of using tariffs to protect nascent industrial power in the late 19th and into the early 20th century. Finally, with the arrival in 1933 of the Franklin Roosevelt administration during the Great Depression, the country shifted to *reciprocity* – reducing tariffs through bilateral agreements to boost exports and economic growth.

As Joe Biden takes office as the 46th President of the United States in January 2021, it is becoming clear that U.S. trade policy will be at a turning point. A new era characterized by a fourth "R" – *rules* – needs to move to the forefront in response to the weakening of the nearly 75-year-old international economic order governed according to high-standard, liberal principles. Without a concerted, U.S.-led effort to rally like-minded economies behind an effort to create new rules for the global trading system there is a risk that it will deconstruct and devolve into competing blocs of laws, policies, standards, and norms.

Already, the current international economic landscape is showing signs of increasing disorder. The rise of China and its state-capitalist economy, digital technologies growing faster than governments' collective ability to create rules for them, and the weaknesses in all three of the functions of the World Trade Organization (WTO) – negotiations, monitoring, and dispute settlement – are putting strains on the trading system and exposing its policy gaps. At the same time, U.S.-led efforts to remedy these weaknesses, such as the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), as well as more informal steps like the U.S.-EU-Japan trilateral initiative on WTO reform launched in 2017 have met with little success. And, two large trade agreements centered on Asia – the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP's successor) and the recently signed Regional Comprehensive Economic Partnership – do not include the United States.

The Trump administration's nationalist, go-it-alone approach has contributed significantly to the decline in the effectiveness of the rules-based trading system. It withdrew the United States from the TPP negotiated under the George W. Bush and Barack Obama administrations, did not restart the stalled TTIP talks, blocked the nomination of new appellate judges to the WTO's dispute settlement system, began a tit-for-tat tariff war with China that has failed to change Beijing's economic behavior, levied national security duties on imports of steel and aluminum from allied countries, and investigated and threatened tariffs on imports of automobiles and auto parts out of similar security concerns.

Yet it is too soon to declare that the Trump administration's unilateral and power-based approach to trade is a harbinger of a new era of U.S. protectionism. Rather, it is more likely a symptom of the increasingly anarchic conditions in the global economy.

U.S. trade policy is in flux. On the one hand, as a result of the increase in China's exports, aided by its joining the WTO in 2001, it has been estimated that the United States lost 2 to 2.4 million manufacturing jobs over the period 1999-2011 (Acemoglu et al., 2015). U.S. job losses have been more affected by technological changes than by trade. Nevertheless, this dislocation has made trade unpopular in a number of historically manufacturing-based states in the Midwest that have played an important role in determining the outcome of the last two U.S. presidential elections. At the same time, U.S. policies to help affected workers transition to new employment, such as the Trade Adjustment Assistance launched in the 1962 Trade Expansion Act, have not been as effective as originally hoped. Moreover, since at least the 1990s criticisms have been lodged that U.S. trade agreements have not done enough to protect the rights of workers and the environment.

On the other hand, since 2012 trade has been growing in popularity among Americans. In one 2019 poll, 74 percent of respondents said that trade was an "opportunity for economic growth" rather than a "threat to the economy," up from a 45-45 percent split in 2011. Democrats (79 percent) viewed trade more favorably than Republicans (70 percent) (Gallup, 2019). And while Democratic Members of Congress have become increasingly skeptical of trade agreements in recent years, a bipartisan majority in Congress supported the 2019 U.S.-Mexico-Canada Agreement updating the North American Free Trade Agreement (NAFTA) by a wide margin, owing in part to its stronger labor and environmental provisions. It is true that Democratic candidate Joe Biden's economic platform makes domestic investments to spur recovery from the Covid-19 pandemic a priority over comprehensive new trade agreements. Yet because of increasing concern about China's impact on the global trading system Biden has also pledged to work on a cooperative basis with allies to advance U.S. international economic interests, abandoning Trump's "America First" approach.

The conflicting tendencies in U.S. trade policy – ongoing concern about its domestic impact balanced by a recognition of the need for a more effective way to face up to China – can only be brought into harmony through a better understanding of its purpose. Until the early 2000s, U.S. policymakers operated on the assumption that the parameters of international trade broadly

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reflected and advanced the country's values and interests. There was domestic political strife over particular provisions of U.S. trade policy, but the beneficial functioning of the multilateral trading system centered on the WTO was taken as a given. Now, with China's economy a powerful force in the international economic arena through subsidies to its state-owned enterprises, the Belt and Road Initiative, and the Made in China 2025 and China Standards 2035 plans to dominate advanced manufacturing and technology, a benign international economic environment is no longer guaranteed. The idea that trade policy has a role to play not only in promoting domestic prosperity but also in advancing U.S. national security is moving to the forefront.

Trade policy can be part of a recovery and reform agenda, but its success will require a stronger domestic consensus for U.S. international economic engagement

Given the economic hardship created by the coronavirus pandemic it is clear that President Biden's number one issue will be to bring about a fair and lasting recovery through domestic policy measures. Success at home, however, will also depend on what happens abroad: policies to promote growth and equity in the United States will not meet their full potential if global economic rules are either absent or counter to U.S. principles. Skilled economic diplomacy – including trade policies – can be part of a broader recovery and reform agenda, but the success of such an approach will first require efforts to strengthen the domestic consensus behind the need for robust U.S. international economic engagement.

II. The Backdrop:

Ambition and Disillusion in the Multilateral Trading System

In 2020, the United States finds itself uncertain about the contribution of trade policy to the domestic economy, facing a rising China and a more unruly global economy, while simultaneously in search of the right formula to advance its prosperity and wellbeing at home and its interests abroad. Debates about the purpose of U.S. trade policy are not new. But today they are present in the context of varying degrees of disillusionment with the rules-based multilateral trading system itself, one that is supposed to serve the interests of the United States and its allies who constructed it. The recent history of U.S. trade policy can be seen as an arc of time during which successive White Houses were committed first to building a new governance system for international trade, then to reaping its benefits, and most recently to searching for ways to reinvigorate it under more challenging circumstances.

The decade of the 1990s constitutes a high point for U.S. trade policy. While trade was not free of domestic controversy and political conflict, it was given a new impetus by the end of the Cold War and the confidence it generated in the values underlying the way the United States, Europe, Japan, and other advanced democracies organized their economies. This included a belief in the value of greater economic integration through trade liberalization. One early step in this direction was taken in February 1991 during the George H.W. Bush administration when the United States, Canada, and Mexico began talks on NAFTA, which would build on and supersede the U.S.-Canada Free Trade Agreement from the 1980s.

The 1990s constituted a high point for U.S. trade policy as the end of the Cold War generated confidence in the value of greater economic integration

In 1994 the United States and the other 122 members of the General Agreement on Tariffs and Trade (GATT) signed the Marrakesh Agreement, which completed the Uruguay Round and created the new World Trade Organization. The WTO was the crowning achievement of 50 years of efforts to build a rules-based framework for the governance of international trade. Its greatest innovation was the establishment of a binding dispute settlement understanding under which WTO members gained the right to impose retaliatory measures as a means to enforce a positive finding by a dispute panel if the losing side failed to come into compliance. The WTO also extended the areas of coverage of the GATT's rules to include the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Trade-Related Investment Measures (TRIMS), and the General Agreement on Services (GATS).

Yet both NAFTA and the WTO became sources of friction. While the Clinton administration brought NAFTA to a successful conclusion in 1993 its passage was characterized by a new contentiousness compared to previous preferential trade agreements. NAFTA, unlike the U.S.-Israel or U.S.-Canada Free Trade Agreements before it, included a large emerging economy, Mexico, whose wages, worker protections, and environmental standards were not at the same level as those in the United States. As a result, labor unions, environmental NGOs, and many Democratic Members of Congress were opposed to NAFTA (Destler, 2005, p.198). NAFTA eventually passed the House of Representatives, but with only 102 Democrats voting in favor and 156 voting against. Beyond NAFTA, the demise in 1998 of the OECD negotiations on a Multilateral Agreement on Investment (MAI) reinforced an emerging discontent with globalization (Drabek, 1998). The following year, at the WTO ministerial meeting in Seattle, Washington, protesters blocked and delayed the proceedings by creating disturbances in the streets of the city.

Beginning in 2001 the George W. Bush administration embarked on a new approach to trade policy known as competitive liberalization (Evenett and Meier, 2007). It was framed around a self-reinforcing agenda of bilateral trade negotiations that eventually took the number of countries included in U.S. trade agreements from three to seventeen. The premise of this strategy was that by pursuing several simultaneous trade deals the United States could more effectively create momentum for progress, including within the new WTO Doha Round negotiations. While the Bush administration had success with bilateral agreements and the five-country Central American Free Trade Agreement (CAFTA–DR), and it brought the United States into the Trans-Pacific Partnership negotiations in early 2008, it was not able to prevent the failure of the Free Trade Area of the Americas, a 34-country negotiation begun during the Clinton administration.

When Barack Obama became President in 2009 the Democrats remained divided on trade, and the new administration took time to review the negotiations it inherited from the outgoing Bush administration – the Colombia, Korea, and Panama Free Trade Agreements, as well as the Trans-Pacific Partnership – before committing to them. Eventually, the increasing unlikelihood of breathing new life into the WTO Doha Round and intensifying concerns about a rising China contributed to the decision by the Obama administration to embark on a more strategic approach to trade policy (Rashish, 2014). By 2013, the United States was engaged in negotiations with 11 Asian and Latin American countries in TPP and in the Transatlantic Trade and Investment Partnership (TTIP) with the European Union, which together accounted for nearly two-thirds of the global economy. Together, these negotiations offered the possibility of using trade policy to promote U.S. national interests in a global economy where China's weight was growing and its economic model was a challenge to the existing rules of the multilateral trading system (Griffith, et al., 2015).

III. Major Issues for the 46th U.S. President

Looking ahead to the trade policy agenda for President-elect Joe Biden, there are seven key issues that he is likely to face upon taking office. Some of them are the result of actions taken by President Trump, some have earlier antecedents, and they all will frame the decision making of the next President.

Issue One: What will the confrontation with China over its unfair trade policies and practices look like?

From the perspective of the increasingly dual nature of U.S. trade policy's main objectives – increasing prosperity and advancing the country's global economic interests – how to deal with China's economic and trade policies will be at the top of the agenda for President-elect Biden. Since the 2000 vote by the U.S. Congress to grant China "Permanent Normal Trade Relations" or PNTR (the U.S. name for full trading rights known as "most favored nation" status in WTO law) China has grown into a high-technology economic superpower that competes across a range of increasingly sophisticated goods and services. China continues to subsidize its state-owned industries, which make up 60 percent of its economy, creating an un-level playing field for U.S. companies at home and abroad. It is not clear that China is fully reporting its subsidies to the WTO as its rules require (World Economic Forum, 2019), and at the same time some WTO rulings have put forth a narrow definition of what constitutes a state-owned enterprise, allowing Chinese subsidies to continue without penalty (Fabry and Tate, 2018).

China takes advantage of existing loopholes in the WTO allowing it to subsidize its SOEs

President Trump made China into a centerpiece of his administration's trade policy. There were two distinguishing features to its approach. First, the White House placed a priority on reducing the bilateral trade deficit with China through an aggressive use of tariffs on its exports to the United States. Taking aim at China's predatory economic behavior (e.g., subsidies, intellectual property theft, technology transfer requirements, and forced data localization) took a back seat to reducing the deficit. Second, the Trump administration preferred to act alone rather than in concert with other countries with similar interests and concerns vis-à-vis China. Even the one effort where the administration joined with others, the trilateral initiative on reforming WTO rules launched in 2017 with the EU and Japan, it did not go beyond issuing a final communiqué in January 2020.

Trump's main weapon against China was to impose tariffs of 10 to 25 percent on $550 billion of the country's goods. The macroeconomic impact on the United States has been negative. A study by the U.S. Federal Reserve showed that as a result of the administration's tariff war U.S. companies lost $1.7 trillion and American consumers paid an extra $1.4 billion per month up to November 2019 (Amiti et al., 2020). Another study found that the U.S. lost 300,000 jobs and an estimated 0.3 percent of GDP by September of the same year (Zandi et al. 2019). And although Trump promised that his protectionist course against China would improve the situation of U.S. workers in key industrial states like Michigan and Wisconsin that he carried in the 2016 election, employment in the manufacturing sector in both states declined during Trump's time in office (Polaski et al., 2020).

Even by Trump's own calculus his trade policies towards China have fallen short. As part of a February 2020 Phase I agreement to resolve tensions, China agreed to purchase a specific amount of U.S. manufactured, agricultural, and energy products. China has not met these targets (Bown, 2020) and while the trade deficit has gone down with China, since Trump took office it has risen both overall and with Vietnam, a country that has benefited as companies have shifted their production away from China to escape the tariffs (Krugman, 2020). Besides some modest promises by China to enforce intellectual property rights, the Phase I deal has no obligations for China to reform its state-dominated economy. By opting for a bilateral, managed trade policy towards China, the Trump administration further alienated Europeans and other U.S. allies who could suffer if China reduced its imports from them in order to meet the targets for purchases from the United States.

Instead of free trade deals, the Biden administration will pursue economic diplomacy to respond to the challenge from China

President-elect Biden has declared he will work with allies to confront China but it is not clear if he will maintain the Phase I deal or keep the Trump administration's tariffs in place. At the same time, during the campaign Biden emphasized domestic investments in infrastructure, R&D, and the workforce as a way to strengthen the United States in the face of competition from China. He wants these steps to succeed before proceeding with any new trade deals. That means there will be no replay, at least at first, of the Obama administration strategy of pursuing large Asia-focused (TPP) and Europe-focused (TTIP) trade agreements to create leverage vis-à-vis China.

These factors suggest that the new administration is most likely to choose the path of economic diplomacy to respond to the challenge from China. Starting with the European Union and including Japan, Canada, Australia, the UK, and other like-minded economies, the Biden administration may decide to pursue new rules governing subsidies and state-owned enterprises – two areas where China's economic behavior has a deleterious effect on international trade – and perhaps other areas like intellectual property and artificial intelligence. Some or all of the rules developed among these countries could form the basis for one or more plurilateral agreements either inside or outside the WTO.

Issue Two:
Will the U.S.-Mexico-Canada Agreement be seen as a benchmark for future trade agreements?

The North American Free Trade Agreement negotiated during the George H.W. Bush and Bill Clinton administrations, and which came into force in 1994, was a major departure for U.S. trade policy. It was the country's first regional as opposed to bilateral trade agreement, and it was the first to include an emerging economy. Over time, this effort to eliminate trade barriers among the United States, Canada, and Mexico has led to the creation of an integrated North American production platform. Today, goods exported from Mexico to the United States contain 40 percent U.S. content while Canadian exports have 24 percent U.S. content (Koopman, et al., 2010). According to one study, NAFTA has been responsible for annual savings of $10,000 for the average American consumer (Hufbauer, et al., 2014). While there has been criticism of NAFTA's negative effect on U.S. jobs (Scott, 2011), other studies, while allowing that some jobs were lost and some workers' wages declined, see it more positively, with nearly 2 million U.S. jobs depending on trade with Mexico (Hufbauer, et al., 2014).

Less controversial is NAFTA's geoeconomic impact. When the United States began negotiating with Mexico to include it in a new, broadened version of the existing U.S.-Canada Free Trade Agreement in 1990, U.S.-Mexico relations had gone through a rocky period owing to a prolonged debt crisis in Mexico that also exacerbated immigration tensions between the two countries. With the signing of NAFTA, the United States and Mexico began not only a slow integration of their economies but also developed habits of cooperation that grew from narcotics and immigration to the environment and non-proliferation (Restrepo, 2017).

Along with Mexico's joining the GATT in 1986, NAFTA helped open Mexico's economy to the world and put it on a track to take an active role in international economic relations. It is one of the four founding members of the Pacific Alliance of outward-looking democracies and open economies, and it has joined the Organization for Economic Cooperation and Development, the advanced economies' research and policy forum. By encouraging Mexico to become a strong stakeholder in the rules-based international economic order, NAFTA made an important contribution to advancing U.S. national interests.

While Barack Obama called for changes to NAFTA during the presidential campaign of 2008, Donald Trump attacked it as "the worst trade deal ever" (Politico, 2016). During the 2016 campaign, Trump promised to renegotiate NAFTA "to get a better deal for our workers" and if Canada and Mexico didn't agree he would unilaterally withdraw the United States from the agreement (Reuters, 2016). Once in office, Trump made good on his promise and his administration launched talks aimed at an update of NAFTA in July 2017. When the U.S. Congress balked at approving the new deal at the end of December 2018, Trump once again threatened to withdraw from NAFTA, which would have set in motion a six-month deadline for approval of its successor before the three countries would revert to trading on WTO terms.

Independent of Trump's rhetoric, after nearly 25 years it was clear that NAFTA needed an overhaul. In 1994 the internet was barely in its commercial infancy and digital trade was essentially non-existent. Since NAFTA's signing, the center of political gravity on how to incorporate labor and environmental objectives into trade agreements had also shifted. In May 2007, after the Democrats took control of the House of Representatives, President George W. Bush agreed to a set of new, bipartisan principles for future trade agreements with House Speaker Nancy Pelosi (USTR, 2007). This deal unlocked the renewal of Trade Promotion Authority (TPA) and the subsequent approval of the Colombia, Panama, Peru and South Korea Free Trade Agreements. The key feature of this TPA deal was the language it included at the behest of Democrats guaranteeing the right to organize, banning child labor and forced labor, and enforcing domestic and international environmental laws.

Under pressure from the Democratic majority in the House of Representatives, in December 2019 the White House agreed to the inclusion of stronger labor and environmental provisions for NAFTA's replacement, notably the option to create panels to hear complaints about Mexico's compliance with freedom to organize and collective bargaining. Dubbed the United States-Mexico-Canada Agreement, or USMCA, it was passed overwhelmingly by both the House in December 2019 by a vote of 385 to 41 and by the Senate by 89 to 10. Among House Democrats, 193 out of 232 voted to pass the USMCA.

The unusual cooperation between the White House and Congress on the USMCA and the strong bipartisan support for its passage in both the House and Senate suggest that it could become the benchmark for new U.S. trade agreements. The particular coalition in favor of the USMCA came about with a populist Republican in the White House, a Democratic House of Representatives, and a Republican Senate. An important future question will be whether the new political dynamics of unified Democratic control in the White House and both houses of Congress will place USMCA in a different light. The stronger labor and environmental provisions the Democrats advocated are likely to become permanent fixtures of any trade agreements the Biden administration pursues. One open question is how the President and Congress will approach rules of origin (ROOs) in future trade agreements. The Trump White House succeeded in having ROOs in the USMCA tightened so that instead of 62.5 percent, as in NAFTA, now 75 percent of the content of an automobile must be of U.S., Canadian, or Mexican origin in order to circulate freely within the three countries. It also requires a minimum of 70 percent of the steel and aluminum used in the production of cars to originate in North America. This shortening of global value chains under the USMCA could lead to increased jobs creation in certain sectors of the U.S. economy. But it could also raise costs for the U.S. automobile industry and even lead producers to pay the USMCA tariff if compliance with the more stringent ROOs became too burdensome (Reinsch et al., 2019).

It is also important to consider for which potential trade agreements the USMCA would serve as the inspiration. Another way the USMCA was an innovation compared to NAFTA was the inclusion of a chapter on digital trade, which drew considerably from what the United States had negotiated in TPP. The USMCA text was already the model for a mini-deal that the U.S. signed in 2019 with Japan, a country whose approach to the digital economy is generally consistent with U.S. preferences for the free flow of data. But drawing upon the USMCA's digital chapter as a starting point for negotiations with the European Union or the UK would be more problematic given the high value they place on privacy and their precautionary approach to personal data flows. In this instance, the United States may first need to consider reforming its domestic approach to data privacy (see next chapter).

Issue Three: What implications will the U.S.-Japan trade agreements have for U.S.-EU trade relations?

On one of his first days in office, President Trump withdrew the United States from the 12-nation Trans-Pacific Partnership (TPP) that had been negotiated by the Bush and Obama administrations as a way to step up U.S. engagement in the Asia region. The United States already had free trade agreements with six of the TPP members – Canada and Mexico through NAFTA, as well as Australia, Chile, Peru, and Singapore. After Japan joined the TPP negotiations in 2013 its dynamics changed in two important ways. As the fourth largest economy in the world after the U.S., China, and the EU, Japan offered important export possibilities for U.S. businesses, particularly access to its closed agricultural market. And as a key treaty ally of the United States, Japan's presence in the TPP lent it much greater strategic significance as an alternative for Asian countries to aligning its standards and economic practices with China, the regional powerhouse.

While the remaining 11 countries went on to complete the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force in December 2018 with most of TPP's provisions intact, it left open the question of what to do about U.S.-Japan trade relations. CPTPP gave Australia's farmers preferential access to Japan's market, and in February 2019 a comprehensive Economic Partnership Agreement between Japan and the EU entered into force that opened up the Japanese market to large European agricultural exporters.

The Trump administration came into office preferring bilateral to multi-country deals, believing that in one-on-one talks U.S. negotiators could take advantage of the power differential between the United States and most of its trading partners. That ignored the fact that within a plurilateral setting like the TPP the administration could have allied with other countries with similar interests, creating even more leverage than what the United States could have mustered alone. The administration decided to put into practice its bilateral approach when – in part in response to a U.S. threat to impose national security tariffs on Japan's automobile industry – in September 2018 President Trump and Japanese Prime Minister Abe announced their two countries would launch negotiations toward a trade deal, which was concluded in October 2019.

Not only because the EU had already signed a trade agreement with Japan but also because it is a similarly large, democratic, advanced industrial economy, it is worth considering the implications the U.S.-Japan agreements could have for the transatlantic economic relationship. There are several aspects that are a departure from previous U.S. trade agreements that raise questions about the purpose and obligations of U.S. trade policy.

First, given Japan's role in the Indo-Pacific region, especially as a market economy counter-example to China's state-capitalist system, it is noteworthy how few strategic goals the United States and Japan furthered. There were actually two separate agreements signed: one on tariffs and one on digital trade. While eliminating trade barriers at the border between the United States and Japan can help increase both countries' prosperity, it does little to promote a joint, alternative vision for trade in the region. The agreement on digital trade, which was drawn from the earlier TPP text, is more helpful in this regard, as it also builds on the USMCA's commitments that push back against China's top-down approach. But given then-Prime Minister Shinzo Abe's championing of the idea of "data free flow with trust" at the 2019 G20 summit chaired by Japan, it should have been possible to use the opportunity of the U.S.-Japan agreement to take a more forward-leaning approach. For example, they could have outlined common principles for artificial intelligence which later could have served as the starting point for transatlantic discussions.

Given Japan's important role in the Indo-Pacific region the two U.S.-Japan trade deals did strikingly little to promote their common strategic goals

Second, the Trump administration chose to negotiate the two agreements with Japan side by side rather than as a package. This was intended to be a first step in a sequential process that would ultimately lead to a comprehensive deal. An argument can be made that rather than risk negotiating one large deal that could later be rejected by the U.S. Congress, a piecemeal approach has the virtue of creating short-term wins that can create political momentum for long-term success. But this strategy is fraught with risks for existing U.S. international obligations. Article XXIV of the World Trade Organization requires preferential trading arrangements to cover "substantially all trade" between the parties where WTO rules apply. But the tariff agreement is narrow in its application, leaving out, for example, automobiles, which account for a considerable share of U.S.-Japan trade. It is one thing to promise to start with a comprehensive agreement on goods tariffs and then move on to non-tariff barriers and then to services, for example. It is another to begin with an incomplete tariff agreement.

Finally, the U.S.-Japan agreements do not require the approval of Congress. The one on digital trade does not involve changing any U.S. laws, while the President negotiated the tariff deal with delegated authority from Section 103(a) of the 2015 Trade Promotion Authority. But questions have been raised about whether the President overstepped the bounds of this authority given that the tariff deal also included adjustments to quotas and rules of origin (CRS, 2020).

Whether the U.S-Japan agreements can serve as a model for a new Biden administration's approach to trade with the European Union depends crucially on what comes next between Washington and Tokyo. The EU has been disinclined to conclude trade deals that are not in conformity with WTO rules. That means it is unlikely to sit down at the negotiating table to discuss a partial goods agreement. The EU may also be wary of taking a sequential approach unless there is a strong built-in commitment to go beyond individual sectors to reach a comprehensive agreement that includes chapters covering goods, services, as well as rules for labor, the environment, health, subsidies, and other areas.

Yet there is one way in which the U.S.-Japan deal can serve if not as a model then at least as a baseline. In their agreements with Japan both the United States and the EU negotiated high standards that offer an alternative to China's state dominated approach to the Internet. But there is one crucial difference. While the U.S. and Japan agreed to the barrier-free exchange of personal data, the EU and Japan have left out language covering personal data flows. Because of the European Union's 2018 General Data Protection Regulation (GDPR) many U.S. companies have already decided to adopt the GDPR as their worldwide privacy standard. This has resulted in a convincing demonstration of the so-called "Brussels Effect" (Bradford, 2012). It remains to be seen whether the Biden administration will shift its data privacy approach towards the European model. But without at least some compromise between Washington and Brussels it will be challenging to include all-important digital trade rules in any future bilateral trade agreement they negotiate.

Issue Four:
What are U.S. ambitions to reform the WTO?

The establishment of the World Trade Organization in 1995 was the high point of the post-war international economic order. It took the already existing GATT, founded in 1947, and brought it to a new level of commitment to a rules-based multilateral trading system with the introduction of a two-level binding dispute settlement system. While the GATT did have a process for initiating and resolving complaints about violations of its rules through Articles XXII and XXIII, a consensus was required to enforce the rulings of dispute panels. Because of the expectation that many decisions would not be accepted by at least one contracting party it is likely that many cases were not brought to a panel in the first place. Even when brought to dispute settlement, many of the decisions reflected a lowest common denominator approach to satisfy the entire membership (World Trade Organization, n.d.).

The purpose of the WTO Dispute Settlement Understanding is to serve as a kind of judicial branch that interprets the laws that the legislative branch (WTO negotiations) has established. But since the Uruguay Round that created the WTO was completed in 1994, there have been few successful efforts to update the rules. The Doha

Development Round launched in 2001 was never completed, and while a Trade Facilitation Agreement was concluded in 2017 it aims to liberalize trade rather than create rules for economic behavior that have a systemic impact on the world trading system. Particularly in areas where China's growing presence in the global economy is creating an unlevel playing field – subsidies, the role and functioning of state-owned enterprises, technology transfer requirements – it is becoming clear that the WTO's 25-year old rules are not adequate.

Concerns about the functioning of the dispute settlement system's Appellate Body were already evident during the Obama administration. In 2016, the U.S. prevented the reappointment of a judge from South Korea out of unhappiness with his legal decisions. Under the Trump administration, the United States became increasingly dissatisfied with the functioning of the WTO's dispute settlement system to the point of blocking the appointment of new judges to the Appellate Body at the end of 2019, thereby depriving it of a quorum. While the Office of the U.S. Trade Representative did not put forward its own preferred solution to the problems it sees with dispute settlement, it has outlined a long list of grievances (U.S. Mission Geneva, 2020).

Beyond taking issue with a number of procedural matters relating to time limits for service on the Appellate Body and for rendering verdicts, USTR has also expressed two more substantive concerns: that the Appellate Body has not followed WTO rules and that it has deprived members of their rights.

In the first category are the U.S. claims that the Appellate Body has ruled on issues of fact, when it is supposed to be limited to reviewing whether a dispute panel interpreted the law correctly. USTR has also objected to Appellate Body decisions that appear to encourage the reliance on precedence in dispute panel findings. Further, it claims the Appellate Body exceeded its mandate by ruling on areas that should be the domain of the WTO's member states.

In the second category of U.S. complaints are areas where the Appellate Body's decisions have stripped members of their legal rights by filling in gaps in WTO law that were left intentionally ambiguous. One of the most striking examples was its decision in a 2011 case where its interpretation of what constitutes a "public body" led it to rule that certain Chinese government subsidies to its state-owned enterprises were permissible (Fabry and Tate, 2018), thus depriving the United States and other members of the ability to use countervailing duties in response. The Trump administration leveled similar complaints against the Appellate Body because of the way its decisions have impacted its use of anti-dumping and safeguard measures.

The WTO Appellate Body will only operate as intended with new rules to account for China's economic behavior

Other WTO members have increasingly begun to share U.S. concerns about the dispute settlement system, and several have put forward ideas to remedy the situation. The chair of the WTO General Council has also offered a set of principles for reform that appear to take into account a number of the U.S. complaints (World Trade Organization, 2019a). But as one former U.S. member of the Appellate Body argued in an early 2020 critique of its functioning, a fundamental issue is "how rules designed essentially for market competition should apply to trade with WTO members having extensive government involvement in their economies, such as China" (Graham, 2020). That suggests the Appellate Body will not be able to fully operate as the United States and other market economies may wish until new rules are agreed to better account for China's economic behavior.

One important question for the new Biden administration will be whether to lift the outgoing administration's block on new appointments to the Appellate Body. There have been several proposals for reform of the Appellate Body (Hillman, 2020) (Hirsh, 2020) that could provide an avenue for the Biden administration to do so. But to be effective such a move is likely to require a parallel effort to rally like-minded economies around an initiative to update and fill in the gaps in WTO rules. This would provide the basis for future dispute settlement judgments that strike a better balance between the interests of market economies like the United States and a state-capitalist economy like China. Such a dual-track approach would also help provide strong domestic political support to the administration's economic diplomacy efforts on behalf of the multilateral trading system.

Issue Five: What is the future of digital services taxes and what challenge could they present to the world trade order?

One of the looming issues that the Biden administration will face is the plan by the European Union and several of its member states to introduce a digital services tax (DST). Large platform companies like Amazon, Facebook, and Google generate revenues in countries where they are not incorporated and do not pay corporate tax, although they can be seen to generate income from their interface with user data. The intention of a DST is to capture a share of these companies' revenues in countries where they provide services. Fourteen European countries have either already implemented or are planning the introduction of a DST. Because most large digital platform companies are U.S-based and most governments that levy digital taxes are European – and in conjunction with stepped-up EU scrutiny of possible anti-trust violations by U.S. technology companies – this issue has already created tensions within the transatlantic relationship.

In France, whose DST is the most far-reaching, the tax is legally in force but the government put off collecting taxes until December 2020. In December 2019 the Office of the U.S. Trade Representative concluded the first part of an investigation under Section 301 of the 1974 trade act of France's digital tax and found it "discriminates against U.S. digital companies" and "is inconsistent with prevailing tax principles on account of its retroactivity, its application to revenue rather than income, its extraterritorial application, and its purpose of penalizing particular U.S. technology companies" (USTR, 2019). USTR has also launched investigations of Austria, the Czech Republic, the European Union, Italy, Spain, Turkey, the UK, as well as Brazil, India, and Indonesia.

At the recommendation of the G20, the Organization for Economic Cooperation and Development (OECD) has been conducting negotiations since 2019 on a two-pillar approach to international taxation with the aim of identifying a consensus on how to address an increasingly digitalized economy. After becoming unhappy with the direction the talks were taking, and arguing that the coronavirus pandemic made negotiating difficult, the United States withdrew from the negotiations in June 2020, effectively suspending them.

How and whether to reenter the OECD deliberations will be an early consideration for the Biden administration. As a candidate for President Joe Biden had complained that Amazon was not paying enough taxes (CNBC, 2020), while at the same time there has been bipartisan expression of concern in the United States about the imposition of unilateral digital services taxes abroad (Grassley and Wyden, 2020). As part of a broad move to rejoin multilateral negotiations and institutions like the Paris climate accords or the World Health Organization, it is possible that the new administration will also choose to return to the OECD negotiating table on digital services taxes.

There are implications of digital services taxes for U.S. trade policy. If countries agreed to follow DST rules that are in a binding, multilateral framework like the one offered by the OECD, it would presumably create a level playing field for the provision and trade of digital services. If not, DSTs could be seen as discriminating against U.S. service providers vis-à-vis their national competitors because of their differences in size.

Most current DST regimes set thresholds for liability for the tax. For example, the one imposed by France that was the subject of the U.S. Section 301 investigation sets a 3 percent tax on firms with more than €750 million in revenues globally and €25 million in France. Because it is mostly U.S. firms that exceed these revenue floors the United States may be able to claim that DSTs are designed to unfairly target these firms and that they thus violate the national treatment provisions of the General Agreement on Trade in Services (GATS), which is part of the body of WTO law (Forsgren et al., 2020). The United States could also conceivably try to claim that DSTs are counter to the WTO's moratorium on e-commerce duties agreed in 1998 (Bauer, 2019). However, that would require a highly novel interpretation that asserted that DSTs were the equivalent of a tariff, but one imposed behind the border.

Issue Six:
Will the 117th U.S. Congress take action to curtail executive power over Section 232 on national security of the 1962 trade act?

The 1962 Trade Expansion Act includes language in Section 232 that grants the President the authority to launch investigations of imported products for the purpose of "safeguarding national security." Given that the bill was passed on October 11, 1962, a week before the outbreak of the Cuban missile crisis that marked the height of Cold War tensions, it seems clear that the Kennedy administration and Congress were concerned about threats from the Soviet Union when drafting Section 232.

As amended, under Section 232 it is the Department of Commerce that leads investigations of potential security threats from imports at the behest of the President. Since the passage of the 1962 act there have been 31 Section 232 investigations. Most 232 investigations before 2017 dealt with energy imports, and on several occasions the President took action, for example with oil embargoes on Iran (1979) and Libya (1982). The Trump administration launched eight investigations, the vast majority of which were concerned with sectors of the economy that do not have *prima facie* ramifications for U.S. national security.

In March 2018 President Trump decided to impose national security tariffs of 25 percent on imported steel and 10 percent on imported aluminum. Globally, the steel industry has been characterized by considerable overcapacity, largely owing to growing Chinese production. At the request of the G20, the OECD created a "Global Forum on Steel and Excess Capacity" in 2017, which China joined but then left two years later.

Yet the administration did not limit its action to imports of steel from China. Instead, it opted for across the board tariffs, including on imports from friendly and allied countries like the members of the European Union. Commerce Secretary Wilbur

Ross justified that approach by saying that "economic security is essential to national security" (Ross, 2019) and "economic security is military security" (CNBC, 2019). By economic security the administration appears not to mean (or not only to mean) a stable macroeconomic framework or economic wellbeing (a social safety net, access to health care, education, and a pension) but rather or additionally a minimum amount of domestic production in particular sectors of the economy like steel manufacturing.

In addition to steel and aluminum, the Trump administration launched investigations into imports of uranium, titanium sponge (where it took no action), and mobile cranes, vanadium, and transformers (which are still pending). From the perspective of the U.S.-German and the broader transatlantic relationship, the most politically fraught and economically consequential investigation concerned imported automobiles and auto parts. The Commerce Department recommended imposing tariffs in a February 2019 report that has not been published, and since the statutory December 2019 deadline for taking a decision President Trump avoided any action. U.S. producers are important purchasers of car parts made in Germany and other European countries and their cars use American-made parts. Because of these economic interconnections, it has been projected that Trump's proposed automobile tariffs would have raised the average price of American-made vehicles by $2,270, and up to 750,000 autoworkers would have lost their jobs (Schultz, et al., 2018).

The Trump administration's imposition of tariffs on allies for national security reasons – and the potential for such actions in the future – has led to Congressional efforts to repatriate to the legislative branch some of the powers extended to the executive branch under Section 232. There are two bipartisan bills that have been introduced in the Senate: S. 287, the Bicameral Congressional Trade Authority Act spearheaded by Senator Pat Toomey (R-PA) and S. 365, Trade Security Act of 2019 led by Senator Rob Portman (R-OH). Both have bipartisan companion bills in the House of Representatives.

The Toomey bill defines national security more narrowly, and is stricter about when that notion can be used to restrict imports. It would require the approval of Congress before the President can levy import duties based on Section 232. The Portman bill has a broader definition of national security and would require Congressional disapproval to remove section 232 tariffs after the President has imposed them, but would not block his authority *ex ante* to do so. Both bills would shift authority for conducting Section 232 investigations from the Department of Commerce to the Department of Defense, which could be expected to create a higher hurdle for reaching a positive finding of a national security threat from imports.

A key question is to what extent the Toomey and Portman bills have been an effort by relatively pro-free trade Republican Senators to express their displeasure with a President of their own party whose policy priorities they did not share, or rather are reflective of a broader, longer-term concern about the extent of the authority that the Congress has delegated to the executive in trade policy.

First, given the priority that President-elect Biden places on cooperative relationships to advance U.S. interests, it is highly unlikely that his administration will consider new Section 232 investigations against treaty allies or otherwise like-minded countries. It could conceivably use that tool for certain exports from China but in such cases the new administration may find common ground with Members of Congress of both parties.

Overuse of Section 232 of the 1962 Trade Expansion Act presents clear risks to the functioning and legitimacy of the WTO's dispute settlement system

Furthermore, overuse of Section 232 presents clear risks to the functioning of the WTO. China, the EU, and several other countries have lodged cases in the WTO against the United States for its Section 232 tariffs, claiming they were in fact safeguard actions to curb a surge in imports. They have also imposed tit-for-tat tariffs against the United States, which they consider legal because under WTO rules countries have the right to retaliate against safeguards. Unless the Biden administration removed these measures, and if the WTO's Appellate Body were reconstituted, these cases could be adjudicated.

In the sole instance of a WTO ruling on national security, Russia won a case in 2019 against Ukraine that centered on whether Moscow had the right to invoke national security to limit Ukrainian rail transit through Russian territory. The ruling stated that hostilities in eastern Ukraine at the time constituted "an emergency in international relations" that justified the Russian measures in conformity with the national security exception in WTO article XXVI (World Trade Organization, 2019b). But Article XXVI is probably best viewed as something to be tested in exceptional circumstances. If the United States were to resort to a national security rationale on a frequent basis there is a risk that such cases could proliferate. Not only global economic giants like the United States are unlikely to welcome an international body like the WTO deciding what is, and what is not, a matter of their national security.

To the extent that House and Senate members are concerned about maintaining popular support for U.S. membership in the WTO they may decide at some point in the future to move forward with some form of the Toomey or Portman bills, to make it more difficult for the President to invoke national security as a justification for imposing tariffs. While the Trump administration may be a one-time phenomenon, it cannot be excluded that the United States will elect another populist President who would be incautious about resorting to national security tariffs. If so, it is conceivable that the Biden administration would work with the Congress to reform the language in Section 232.

Issue Seven: How likely is the next U.S. administration to pursue new trade agreements and who are the most likely candidates – the EU, the UK, Kenya?

The recent history of U.S. trade agreements is mixed. Under President Obama, the U.S. was negotiating two large, mega-regional trade agreements, the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). By the end of Obama's second term TPP had not come up for a vote and TTIP was at an impasse. During the Trump administration the United States withdrew from TPP, did not revive TTIP, and threatened to pull out of NAFTA and the U.S.-Korea Free Trade Agreement (KORUS). Ultimately, the United States and Korea made small changes to their trade agreement, while the United States and Japan agreed separate tariff and digital trade deals. The three NAFTA partners engaged in a renegotiation of the 25-year old accord that led to the signing of the U.S.-Mexico-Canada Agreement. The administration also launched trade negotiations with the European Union in July 2018, with the United Kingdom in May 2020, and with Kenya in July 2020.

As for President-elect Biden, he campaigned on a platform of "Build Back Better" (Biden for President, 2020) that prioritizes domestic investments in the workforce, infrastructure, social services, education, and the environment rather than comprehensive new trade agreements. In November Biden confirmed this approach, saying "one, we're going to invest in American workers and make them more competitive. Number two, we're going to make sure labor is at the table, and environmentalists are at the table in trade deals we make" (BBC, 2020). Assuming, however, that the Biden administration makes progress on its domestic agenda it could then move at some point towards consideration of the three pending trade agreements from the Trump administration and perhaps others. As part of such a policy shift it would have to decide whether and when to seek renewal from the Congress of Trade Promotion Authority, which expires in July 2021.

Almost certainly, it is a U.S.-EU trade negotiation that would move to the top of the list. There are several compelling reasons for this. First, President-elect Biden is a self-proclaimed Atlanticist, as he made clear at the Munich Security Conference in 2013 where he said, "Europe remains America's indispensable partner of first resort" (Biden, 2013). He will naturally turn to Europe for a partner in developing his trade strategy. Second, the new administration – and Democrats more generally – will wish to pursue policies that do not risk alienating former Trump supporters who moved into Biden's column in swing states like Wisconsin and Michigan, and that have experienced economic dislocation that can at least partly be attributed to competition from lowwage countries like China. A trade deal with the European Union, an economy with high labor and environmental standards, poses few if any such risks. Third, there would be strategic leverage from a transatlantic trade deal when it comes to moving forward new rules that can one day govern the global economy. The United States and the European Union together account for over 40 percent of world GDP and their combined technology, regulatory, and market power would set an example for other countries to follow.

A U.S.-UK trade agreement presents a more complex picture. On the one hand, the UK is a long-standing ally of the United States, two-way trade and investment relations are broad and deep, and it is in the U.S. interest to find ways to maintain strong bilateral ties beyond the military dimension of NATO. On the other hand, the Biden administration may choose to wait to relaunch talks until the post-Brexit EU-UK relationship is clarified to avoid negotiating with a moving target. In certain sectors like agriculture there may be commercial incentives for the United States to try to align the UK with U.S. standards. From a strategic perspective, however, there are reasons to encourage the UK to remain close to the EU.

The negotiations with Kenya are a new departure for U.S. trade policy, as the United States has no trade agreements with a country in sub-Saharan Africa. Kenya is a key ally of the United States in the region, and with the planned expiration of the trade benefits of the African Growth and Opportunity Act (AGOA) it is in Kenya's interest to look for ways to preserve preferential trading arrangements. But Kenya is a member of the East African Community (EAC), a customs union that maintains a common external tariff among its members. It is also part of the African Continental Free Trade Area (AfCTFA) that obliges its members to apply tariff rates agreed in bilateral trade agreements to AfCTFA signatories. While a U.S.-Kenya preferential agreement would have considerable merit as a sign of U.S. economic engagement in Africa, it could also disrupt Kenya's commitments within Africa, and if so, this may not further broader U.S. objectives in the region.

IV. Conclusion

It is understandable that the incoming Biden administration's priority will be to respond to the dual public health and economic crisis unleashed by the coronavirus. Domestic policies will be the main focus, although international coordination with allies and within the G7 and the G20 will help ensure that U.S. stimulus and investment measures meet their full potential. It will also be important for the United States to consult with partners about devising best practices to insure against future pandemics, including how to strike the right balance among government stockpiling, promoting production at home of critical medical supplies, and building reliable international supplier networks for the considerable quantity of public health related goods that will continue to be manufactured abroad.

Trade policy will need to play a role as well, because without an enabling international economic environment, domestic measures that emerge from the ongoing crisis will not reach their full effectiveness. The next administration's trade policy may not initially be cast in the traditional form of negotiations to reduce barriers to the flow of goods and services. Rather, it is likely that international economic engagement under the 46th U.S. President will focus on working with friends and allies to forge new high-standard rules that reflect their values, principles, and norms. China will be the key focus of such an effort, but so will reconciling trade and climate goals, balancing data sharing and data privacy, and advancing an ethical, human-centered approach to artificial intelligence.

This is not to say that the Trump administration's go-it-alone, zero sum approach to trade policy will forever be a thing of the past. But it does suggest that the roughly 60 percent of the global economy constituted by the United States and its like-minded trading partners will have the opportunity to advance global economic order and move away from the unprecedented and disruptive policies of the Trump years.

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