

INTERNATIONAL TRADE ISSUES: CHALLENGES AND OPPORTUNITIES FOR THE BIDEN ADMINISTRATION

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ABSTRACT

The Biden Administration's highest priorities well into the second half of 2021 will be domestic matters such as dealing effectively with the coronavirus pandemic and repairing the economic devastation caused for businesses and workers by the pandemic.¹ Still, the Administration cannot safely ignore certain trade issues for American workers and businesses (including those who have been hit hard by both the recession and the China tariffs) even in these initial months of the Administration. A full "time out" on trade would be risky since U.S. adversaries such as China are energetically seeking to dominate the field, currently without effective pushback by the United States. Others, although important, are not as critical for the health of the nation. This paper divides the trade issues between the highest priorities (Part I) and those that probably can be safely addressed later (Part II). Part III is a short conclusion. I note that even the trade issues I consider to be lower priorities, including currency concerns with Vietnam and possible free trade agreements with Kenya are not being ignored by the Biden Administration's U.S. Trade Representative (USTR) Katherine Tai and her colleagues.

In all instances changing the tone of U.S. trade diplomacy may be almost as important as the substantive results. The Biden Administration's USTR Katherine Tai,² and the rest of the administration's trade bureaucracy, recognize that effective trade policies for the United States require the support not only of members of Congress but also the public. Finally, considering trade policy as well as other Administration endeavors, it is important for the Biden

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¹ Others include racial equality and climate change. See THE WHITE HOUSE, THE BIDEN-HARRIS ADMINISTRATION IMMEDIATE PRIORITIES (Nov. 2020), <https://buildbackbetter.gov/priorities/> [https://perma.cc/ATM9-94A7].

² Gavin Bade, Tyler Pager & Sabrina Rodriguez, *Biden to Name Top Hill Staffer Katherine Tai for Top Trade Job*, POLITICO (Dec. 9, 2020), <https://www.politico.com/news/2020/12/09/biden-katherine-tai-trade-representative-444001> [https://perma.cc/9RKJ-D95U].

Administration to encourage its allies and adversaries alike to understand that the United States is prepared to deal multilaterally as well as unilaterally when it makes sense to do so, and remains committed to the rule of law in trade matters as well as otherwise.³

I. IMMEDIATE CHALLENGES

A. China

Along with climate change, competition with China is in my view America's existential challenge now and for the next three or four decades. Aspects include the ongoing U.S. trade war with China continuing under the "Phase One" agreement of January 2020,⁴ and friction with regard to Chinese policies relating to suppressing accurate information about the coronavirus, spying in the United States, treatment of Hong Kong and the Uighurs, and bogus assertions of sovereignty over major areas of the South China Sea among others.⁵ Under such circumstances the Biden Administration must continue its abandonment of the "America Alone" policies of the Trump Administration. It can be expected to work in concert with U.S. allies (particularly the European Union (EU), UK, Canada, Japan, South Korea and Australia) to address China's rampant IP theft and forced technology transfer, overproduction of steel, aluminum and other commodities, and unlawful subsidies.⁶ The Trump Administration's focus on tariffs, tariffs and more tariffs, and on the trade deficit has been ineffective in forcing China to change its policies.⁷

However, the importance of keeping pressure on China is strongly supported by Democrats as well as Republicans.⁸ This is reflected in the confrontational tone of the meeting of top U.S. and Chinese officials in mid-March, where U.S. officials were blunt in their criticism of Chinese policies relating to Hong Kong, Taiwan and Xinjiang as well as cyberattacks on the

³ Whether this can be said about Republican members of the House and Senate remains to be seen.

⁴ See USTR, *Establishing an Historic, Enforceable Agreement*, (Jan. 15, 2020), <https://ustr.gov/phase-one#:~:text=The%20United%20States%20and%20China%20signed%20an%20historic%20and%20enforceable,Chapters%20with%20Key%20Achievements%20include%3A&text=Expanding%20Trade> [<https://perma.cc/33QQ-KNUV>] (setting out the principal aspects of the agreement from the Trump Administration's point of view).

⁵ Barbara Plett Usher, *Why US-China Relations are at Their Lowest Point in Decades*, BBC NEWS (July 24, 2020), <https://www.bbc.com/news/world-us-canada-53517439> [<https://perma.cc/3HMB-9BGS>].

⁶ See, e.g., White House Fact Sheet, *President Donald Trump is Confronting China's Unfair Trade Policies*, (May 29, 2018), <https://china.usembassy-china.org.cn/president-trump-is-confronting-chinas-unfair-trade-policies/> [<https://perma.cc/EF7F-DRNC>].

⁷ See Stuart Anderson, *Trump Trade Policy Gets Failing Grades*, FORBES (Oct. 29, 2020), <https://www.forbes.com/sites/stuartanderson/2020/10/29/trump-trade-policy-gets-failing-grades/?sh=7453f7765513> [<https://perma.cc/QV4Y-DZ3R>].

⁸ See Steven Overly, *Why Biden's Team is Holding Back on What China Wants Most*, POLITICO (Mar. 18, 2021), <https://www.politico.com/news/2021/03/18/biden-trade-relief-china-477055> [<https://perma.cc/4Q3U-F6EQ>] (discussing efforts to pressure China to address various U.S. concerns).

United States and coercion of U.S. allies such as Australia.⁹ Under such circumstances, it would be unacceptable politically for the Biden Administration to rescind the approximately \$370 billion in penalty import duties,¹⁰ unless Xi is willing to offer major concessions in return, which in my view is highly unlikely given the premier and Communist Party's commitment to broad control of the Chinese economy, including the continuing massive subsidies to key industries. In addition, the decoupling process favored by the Trump Administration, particularly in sensitive areas such as high-tech/national security products, medicines and PPE should continue despite the many challenges, but it must be managed carefully to avoid major long-term harm to the U.S. economy,¹¹ and should take advantage of Mexico as a locus for labor intensive production or coproduction where manufacturing is shifted away from China (see below).

Pursuing such policies will not be easy. It seems evident from recent developments¹² that Chairman Xi will challenge the Biden Administration at every opportunity and seek to divide the United States from its allies, particularly from the EU, as by its successful efforts to conclude an investment agreement with the EU at the end of 2020.¹³ EU enthusiasm for the agreement despite China's terrible treatment of Muslim minorities and the citizens of Hong Kong has been dampened by strong and very publicly expressed opposition by the incoming Biden Administration and is apparently being delayed by those in the EU who hope to improve EU-US relations, including coordination of China policies, after the change in U.S. presidents.¹⁴

In my view, the Trump Administration China policy was largely reactive; if the United States is to compete effectively against China in the medium- and longer-term proactive policies must also be implemented. These policies include improved support for public education at all levels, repairing essential infrastructure, and increasing publicly funded research and development, all of

⁹ Joanna Tan, *Here Are the Highlights from the Heated Exchange Between the U.S. and China in Alaska*, CNBC (Mar. 19, 2021), <https://www.cnbc.com/2021/03/19/here-are-the-highlights-from-the-heated-us-china-exchange-in-alaska.html> [<https://perma.cc/W3MD-WDBY>]; see Gerry Shih, *China Sharply Ramps up Trade Conflict with Australia over Political Grievances*, MSN NEWS (Nov. 27, 2020), <https://www.msn.com/en-us/news/world/china-sharply-ramps-up-trade-conflict-with-australia-over-political-grievances/ar-BB1bpDfd> [<https://perma.cc/FMN6-7RCX>].

¹⁰ Reuters Staff, *What's in the U.S.-China Phase 1 Trade Deal*, REUTERS (Jan. 15, 2020), <https://www.reuters.com/article/us-usa-trade-china-details-factbox-idUSKBN1ZE2IF> [<https://perma.cc/XGL3-65NT>].

¹¹ Christine Loh & Christopher Tang, *It's Time to Plan for a Messy U.S.-China Divorce*, BARRON'S (June 15, 2020), <https://www.barrons.com/articles/the-u-s-is-headed-for-a-messy-china-divorce-without-a-plan-51591807403> [<https://perma.cc/W5AY-98HN>].

¹² See James Griffiths, *Alaska Dispute Between US and Chinese Officials an Inauspicious Stare to a New Era of Relations*, CNN (Mar. 19, 2021), <https://www.cnn.com/2021/03/19/asia/us-china-alaska-blinken-intl-hnk/index.html> [<https://perma.cc/GAY9-XMVP>].

¹³ *EU-China Comprehensive Agreement on Investment: Milestones and Documents*, EUROPEAN COMM'N (Jan. 22, 2021), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115> [<https://perma.cc/WV84-DSYQ>].

¹⁴ See Eleanor Mears & Giorgio Leau, *EU-China Investment Deal Hits a Snag as US Exerts Pressure*, POLITICO (Dec. 22, 2020), <https://www.politico.eu/article/eu-china-investment-deal-no-show-us-forced-labor/> [<https://perma.cc/4XJ6-HEWG>] (quoting national security adviser designate Jake Sullivan).

which had been neglected for at least several decades before Mr. Trump became president as well as in the past four years.¹⁵

B. USMCA

The United States-Mexico Canada Agreement,¹⁶ which garnered overwhelming support from Congressional Democrats as well as Republicans,¹⁷ will prove most beneficial to American workers and businesses if the Biden Administration undertakes reasoned but firm efforts to assure compliance by Mexico with investment and labor provisions (the latter vital politically to Democrats in Congress) in particular. USTR Katherine Tai has already indicated her strong support for implementation of the USMCA, noting that “‘The challenge for us going forward is to make sure that we continue to tend to this agreement, to nurture what is working and to correct course when parties alter and stray from old and new commitments.’”¹⁸

While Tai’s focus may well be on the labor provisions, it makes good sense for the United States to support the improved state-to-state dispute settlement mechanism and the Commission on Environmental Cooperation,¹⁹ neither of which have been priorities for U.S. administrations during the 26 years the North American Free Trade Agreement (NAFTA) was in force.²⁰ It is recommended as well that the Biden Administration resist domestic pressures to further restrict

¹⁵ See Michael E. Porter & Jan W. Rivkin, *The Looming Challenge to U.S. Competitiveness*, HARVARD BUS. REV. (Mar. 2012), <https://hbr.org/2012/03/the-looming-challenge-to-us-competitiveness> [<https://perma.cc/6QGZ-33PC>] (discussing recommended changes in laws and policies necessary to improve U.S. competitiveness).

¹⁶ Agreement Between the United States of America, the United Mexican States, and Canada, OFF. OF THE U.S. TRADE REPRESENTATIVE (Nov. 30, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/NT3Q-GJYE>] [hereinafter USMCA].

¹⁷ The USMCA was approved by a vote of 385-41 in the House and 89-10 in the Senate. Ellyn Ferguson, *Senate Passes USMCA Bill, Giving Trump a Win on Trade*, ROLL CALL (Jan. 16, 2020), <https://www.rollcall.com/2020/01/16/senate-passes-usmca-bill-giving-trump-a-win-on-trade/> [<https://perma.cc/NDW3-27ND>].

¹⁸ *Tai Calls for More Trade Collaboration ‘Across the Entire Spectrum’*, WORLD TRADE ONLINE (Jan. 12, 2021), <https://insidetrade.com/daily-news/tai-calls-more-trade-collaboration-%E2%80%9998across-entire-spectrum%E2%80%99> [<https://perma.cc/6PCA-5SH2>].

¹⁹ USMCA, *supra* note 16, ch. 31 (dispute settlement); see *2018 Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada*, (Dec. 18, 2018), <https://www.epa.gov/international-cooperation/2018-agreement-environmental-cooperation-among-governments-united-states> [<https://perma.cc/HP2K-FNWT>] (which most importantly continues the existence of the Commission Environmental Cooperation).

²⁰ Only three cases were brought under NAFTA’s Chapter 20 in the twenty-six years that NAFTA was in force; see *In the Matter of Cross-Border Trucking Services*, File No. USA-MEX-98-2008-01, (Feb. 6, 2001), <http://www.sice.oas.org/DISPUTE/nafta/english/U98081de.asp> [<https://perma.cc/6Y45-8QNA>]; *U.S. Safeguard Action Taken on Broom Corn Broom from Mexico*, File no. USA-97-2008-01, (Jan. 30, 1998), <http://www.sice.oas.org/DISPUTE/nafta/english/us97801a.asp> [<https://perma.cc/FW2M-PQ66>]; *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Producers*, File no. CDA-95-2008-1, (Dec. 1, 1996), <https://www.worldtradelaw.net/document.php?id=nafta20/agtarriffs.pdf> [<https://perma.cc/8JPB-5CF8>]. None were ever brought under the environmental side agreement, the North American Agreement on Environmental Cooperation.

imports of Mexican produce, including tomatoes, blueberries, avocados, strawberries and green peppers, since retaliation by Mexico will surely follow.²¹ The decision of the U.S. International Trade Commission (USITC) finding that imports of blueberries from Mexico were not injuring American farmers²² greatly facilitates the avoidance of such protection, at least for now.

While the Biden Administration may find it difficult to establish cordial relations with the Lopez Obrador regime in Mexico given that president's strong support of Trump,²³ relations which are correct and free from serious disputes will be helpful in encouraging Mexico to avoid further anti-business populism. Steps taken, inter alia, by the Mexican administration threatening foreign investment in alternative power production are among those that have spooked investors.²⁴ While it is probable that some factory production that leaves China will come to the United States, for many enterprises that must meet international competition it will be important to use co-production techniques whereby labor-intensive parts of the production process are accomplished nearby in Mexico. An effective USMCA thus becomes a key element in furthering U.S. China policies.²⁵

C. *European Union-United States Trade Relations*

Because of historically large transatlantic trade volumes,²⁶ but also as a result of the need for joint actions to protect both economies from China, it can be expected that the Biden Administration will work to resolve outstanding trade disputes as promptly as is possible consistent with U.S. interests and to pursue "a new forward-looking transatlantic agenda" as the EU Commission has recently suggested.²⁷ The settlement of the long-running Airbus/Boeing disputes

²¹ See *U.S. Outlines Plans to Tackle 'Threat' of Seasonal Produce Imports from Mexico*, FRESHFRUITPORTAL.COM (Sep. 2, 2020), <https://www.freshfruitportal.com/news/2020/09/02/u-s-outlines-plans-to-tackle-threat-of-season-produce-imports-from-mexico/> [<https://perma.cc/YG7R-HEM3>] (discussing several pending trade actions initiated by the Trump Administration due to pressure from the southeast (e.g., Florida) and other congressional delegations).

²² *Increased Imports of Fresh, Chilled, or Frozen Blueberries do not Seriously Injure U.S. Industry*, USITC DETERMINES, USITC NEWS RELEASE (Feb. 11, 2021), https://www.usitc.gov/press_room/news_release/2021/er0211111722.htm [<https://perma.cc/R7XE-QN9D>].

²³ See Arturo Sarukhan, *Lopez Obrador's Washington Visit Played Straight into Trump's Hands*, BROOKINGS (July 10, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/07/10/lopez-obradores-washington-visit-played-straight-into-trumps-hands/> [<https://perma.cc/NR2J-DK7N>] (criticizing Lopez Obrador for "bending the knee and appeasing" Trump).

²⁴ Kirk Semple & Oscar Lopez, *Mexico Set to Reshape Power Sector to Favor the States*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/world/americas/mexico-energy-sector-privatization.html> [<https://perma.cc/6G3M-NEX3>].

²⁵ See David A. Gantz, *North America's Shifting Supply Chains*, BAKER INST. FOR PUB. POL 'Y 15–19 (Nov. 18, 2020), <https://www.bakerinstitute.org/media/files/files/6ed66d98/usmx-pub-supplychains-111120.pdf> [<https://perma.cc/UPM2-RHQY>].

²⁶ In 2020, total trade between the EU and the United States amounted to \$758 billion. *Trade in Goods with the European Union*, UNITED STATES CENSUS (Feb. 2021), <https://www.census.gov/foreign-trade/balance/c0003.html> [<https://perma.cc/S6YM-NZA9>].

²⁷ *EU-US: A New Transatlantic Agenda for Global Change*, EUROPEAN COMM'N (Dec. 2, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2279 [<https://perma.cc/2EYE-AF9D>].

and termination of penalty tariffs on both sides and issues relating to digital goods taxation should be and were a top priority;²⁸ The recent five-year truce is welcome.²⁹ (As indicated earlier, the risk to progress raised by the prospect of a China-EU investment treaty has disappeared at least for now with the conclusion of the agreement.) A U.S. focus on technology and regulatory assessments, as well as efforts (with other allies) to develop common elements of a China trade policy to combat intellectual property theft and illegal government subsidies, would both appear to be avenues for fruitful collaboration. Efforts to reopen the Transatlantic Trade and Investment Partnership (TTIP) negotiations pursued under the Obama Administration³⁰ would likely be fruitless. However, more specific understandings on technology, regulatory assessments and China policies, all more economically significant than the reduction of lobster tariffs in 2020³¹ should be far less politically difficult than establishing broader regulatory coherence, with most such measures not requiring Congressional approval.³²

Improving relations with the EU will not be easy. Among the complexities will be the strong commitment of many EU Members to digital services taxes that are applicable to major internet providers such as Google and Facebook, most of which are U.S. enterprises.³³ The negotiations of an investment protection agreement between the United States and China is not only annoying to the United States for the reasons earlier stated, but because negotiations of a U.S. investment treaty with China have languished for years.³⁴ The EU seemed willing to conclude its negotiations by simply ignoring China's many human rights violations including the persecution of the Muslim minorities and the elimination of democracy for the citizens of Hong Kong,³⁵ although opposition

²⁸ See Robin Emmott & Philip Blenkinsop, *U.S., EU Must End trade Conflict, Brussels Says in Biden Wish-List*, REUTERS (Dec. 2, 2020), <https://www.reuters.com/article/us-eu-usa/u-s-eu-must-end-trade-conflict-brussels-says-in-biden-wish-list-idUSKBN28C1PR> [<https://perma.cc/6HNC-RESG>] (noting inter alia disputes over aircraft and digital taxes).

²⁹ See Silvia Amaro and Leslie Josephs, *U.S. and EU Resolve 17-Year Boeing-Airbus Dispute*, CNBC (June 14, 2021), <https://www.cnbc.com/2021/06/15/us-and-eu-truce-boeing-airbus-dispute.html> [<https://perma.cc/5RQC-D2WA>] (reporting on the settlement).

³⁰ Transatlantic Trade and Investment Partnership, OFF. OF THE U.S. TRADE REPRESENTATIVE (2013–2015), <https://ustr.gov/ttip> [<https://perma.cc/8AAS-9VBR>].

³¹ Chris Chase, *EU Agrees to Eliminate Tariffs on US Lobster*, SEAFOOD SOURCE (Dec. 1, 2020), <https://www.seafoodsource.com/news/supply-trade/eu-agrees-to-eliminate-tariffs-on-us-lobster> [<https://perma.cc/Y63T-KW84>].

³² Since none of these would be formal international agreements, they, like the Trump Administration accord on reducing lobster tariffs and the limited 2019 agreement with Japan on mutual tariff reductions, are not with the areas generally believed to require Congressional assent.

³³ Emmott & Blenkinsop, *supra* note 28; see also Elke Asken, *What European OECD Countries are Doing about Digital Services Taxes*, TAX FOUNDATION (June 22, 2020), <https://taxfoundation.org/digital-tax-europe-2020/> [<https://perma.cc/44Z7-9YKB>] (discussing the varying tax proposals of individual EU member countries).

³⁴ See C. Fred Bergsten, Cathleen Cimino-Isaacs, Gary Clyde Hufbauer, J. Bradford Jensen, Sean Miner, Theodore H. Moran & Jeffrey J. Schott, *Toward a US-China Investment Treaty*, PETERSON INST. FOR INT'L ECON. (Feb. 2015), <https://www.piie.com/publications/piie-briefings/toward-us-china-investment-treaty> [<https://perma.cc/K2WZ-GMR3>].

³⁵ Mears & Leau, *supra* note 14.

to the agreement has grown among some member states and in the EU Parliament.³⁶ Nor did the EU originally seem particularly concerned about China's threats against Taiwan or efforts to take over the South China sea by force, against valid claims by Vietnam and the Philippines among others.³⁷ The Airbus/Boeing dispute had been pending in the WTO for nearly two decades and some believed (erroneously) would not be susceptible to prompt solution even with greater good faith on both sides.³⁸ Still, the Biden Administration's decision to suspend punitive tariffs based on this dispute in March 2021³⁹ likely helped both parties to reach a settlement.

D. World Trade Organization

Toning down the U.S. rhetoric and supporting the consensus Nigerian DG candidate, Ngozi Okonjo-Iweala, were initial conciliatory steps for the Biden Administration. Support for her to replace former director general Roberto Azevedo⁴⁰ had minimal political or economic cost to the United States. More effective U.S. support of Geneva based plurilateral negotiations in such areas as reducing tariffs on environmental goods⁴¹ and fisheries subsidies⁴² might bear fruit and would be another low cost means of showing good faith, although in my view the likelihood of success after decades of a lack of real progress, particularly in the fisheries negotiations, is minimal.⁴³

Broader reform, including of the Appellate Body, is a worthy long-term goal but in my view is not likely to result in meaningful WTO reform in the foreseeable future. The United States has sought a number of changes in the

³⁶ FinBarr Bermingham, *China-EU Investment Deal on its Last Legs as MPs Unite in Opposition*, SOUTH CHINA MORNING POST (May 8, 2021), <https://www.scmp.com/news/china/diplomacy/article/3132741/china-eu-investment-deal-its-last-legs-meps-unite-opposition> [<https://perma.cc/MJ7H-LT8A>].

³⁷ See *Territorial Disputes in the South China Sea*, COUNCIL ON FOREIGN RELS. (Dec. 22, 2020), <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea> [<https://perma.cc/9LRY-V7XS>].

³⁸ Andrea Shalal & Tim Helper, *Timeline: Highlights of the 16-Year Airbus, Boeing Trade War*, REUTERS (2020), <https://www.reuters.com/article/instant-article/idUSKBN20901R?edition-redirect=ca> [<https://perma.cc/4655-472M>].

³⁹ Doug Palmer, *Biden Smooths Tension with Europe, Pausing Tariffs in Boeing-Airbus Dispute*, POLITICO (Mar. 5, 2021), <https://www.politico.com/news/2021/03/05/us-eu-boeing-airbus-tariffs-suspended-473879> [<https://perma.cc/Q9HB-PM6T>].

⁴⁰ *Candidates for DG Selection Process 2020*, WTO (July 2020), https://www.wto.org/english/thewto_e/dg_e/dgsel20_e/dgsel20_e.htm [<https://perma.cc/JWU4-G3FC>].

⁴¹ *Environmental Goods Agreement*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/envir_e/ega_e.htm [<https://perma.cc/GB8N-CZ35>]; see also David A. Gantz, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA 78–84 (2013).

⁴² *WTO Members Delay Agreement on Fisheries Subsidies to 2021*, IISD (Dec. 16, 2020), <http://sdg.iisd.org/news/wto-members-delay-agreement-on-fisheries-subsidies-to-2021/> [<https://perma.cc/4XHL-WYME>].

⁴³ See *WTO Negotiations on Fisheries Subsidies: What's the State of Play*, GSI Policy Brief, p. 1 (July 2020), https://www.iisd.org/system/files/2020-08/wto-negotiations-fisheries-state-play_0.pdf [<https://perma.cc/RM5J-XXLG>] (indicating that the negotiations were based on the 2001 Doha Declaration supplemented at the 2005 Hong Kong Ministerial Conference).

operation of the Appellate Body. These include, inter alia, the failure of the Appellate Body to complete its appeals within the ninety-day requirement of the Dispute Settlement Understanding (DSU); permitting members to sit on cases after their terms had expired; embracing the use of precedent; deciding factual as well as legal issues on appeal, including issues of national law; opining on issues not required by the case at hand;⁴⁴ and, perhaps most important, failure to comply with the requirements of the DSU that “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements” and “shall not nullify or impair benefits accruing to any Member under those agreements.”⁴⁵ However, even if the Biden Administration has reversed the Trump Administration policy of lack of clarity and focus, objecting to Appellate Body actions without offering specific changes, reaching consensus among 164 WTO members on the proper standard of review of panel decisions (particularly with regard to review of facts), the scope of GATT Article III (national treatment), eliminating Appellate Body use of precedent, avoiding review of national laws, and broad issuance of dicta is likely much more difficult.⁴⁶

In terms of international politics, it is worthwhile to participate in good faith in the activities of the WTO and remain a member, even where discussions in Geneva are not likely to result in resolution of outstanding issues. However, with the consensus requirement,⁴⁷ reforms in such areas as self-designation of developing country status and more effective treatment of government subsidies (including but not limited to coming up with a reasonable approach to “public body” issues, regulation of state-owned enterprises and others relating to centrally planned economies) seem highly unlikely to be achieved in the short or medium term. In my view not only China but India, Russia, and Brazil will almost certainly decline to join any consensus in the substantive areas mentioned

⁴⁴ See Andrew Walker, *Trade Disputes Settlement System Facing Crisis*, BBC NEWS (Dec. 8, 2019), <https://www.bbc.com/news/business-50681431#:~:text=Perhaps%20the%20biggest%20issue%20is%20that%20the%20US,sells%20goods%20abroad%20more%20cheaply%20than%20at%20home> [<https://perma.cc/8XLP-KCRX>].

⁴⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 3.2, 3.5 Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

⁴⁶ For a fuller discussion see Dennis Shea, *US Statement by Ambassador Shea at the WTO Heads of Delegation Meeting*, (Dec. 14, 2020), <https://geneva.usmission.gov/2020/12/14/us-statement-by-ambassador-dennis-shea-at-the-wto-heads-of-delegation-meeting/> [<https://perma.cc/2HH7-HC67>]; Simon Lester, *Some Comments on the Trump Administration's Final Statement to the DSB on the Appellate Body*, INT'L ECON. L. & POL'Y BLOG (Dec. 22, 2020), https://ielp.worldtradelaw.net/2020/12/the-trump-administrations-final-statement-to-the-dsb.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielpblog+%28International+Economic+Law+and+Policy+Blog%29 [<https://perma.cc/K9TA-DNQN>]; and CLETE WILLIAMS, REVITALIZING THE WORLD TRADE ORGANIZATION, ATL. COUNCIL (2020), https://www.atlanticcouncil.org/wp-content/uploads/2020/11/Revitalizing-the-WTO-Report_Version-11.6.pdf [<https://perma.cc/V82L-K3K6>]. I don't endorse any of these well-thought-out discussions fully and am much more pessimistic than many observers including Mr. Lester on the prospects for any meaningful WTO reform in the near term.

⁴⁷ Marrakesh Agreement Establishing the World Trade Organization art. IX:1, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

above because their preferential treatment as developing country members would be ended, and the EU may disagree with the United States on some of the procedural reforms of the Appellate Body. Moreover, China may well believe (with considerable justification) that many WTO Members will follow its lead in opposition to U.S.-sponsored reforms.

Whether significant reforms in the Appellate Body without resolving these overriding substantive issues would justify acceptance by the United States of a return to normal Appellate Body proceedings is a decision that the Biden Administration must weigh, but as noted earlier I do not believe they will face such a decision because of the unlikelihood of WTO consensus even on the major procedural issues. While I and many others do not approve of the arrogant way the Trump Administration, including USTR Ambassadors Lighthizer and Shea, have approached the WTO generally,⁴⁸ it is noted that many of these same Trump Administration concerns with the Appellate Body were identified by the Obama and Bush Administrations.⁴⁹

The Biden Administration could also indicate support for the WTO by pledging not to take new trade actions that are clearly in violation of WTO legal rules, such as expansion of the bogus use of the “national security” exception (GATT, Article XXI) to justify protectionist actions such as penalty tariffs on steel and aluminum⁵⁰ and unilateral use of § 301.⁵¹ Even though they are questionable under WTO rules (because of arguably erroneous Appellate Body decisions years ago),⁵² safeguards applied under GATT Article XIX and U.S. § 201 are in my view preferable to the use of § 232 because they can be targeted, and because they do not threaten significant undermining of WTO authority when other Members abuse the “national security” provisions of GATT Article XXI.⁵³

⁴⁸ See Farah N. Jan & Megan Phansalkar, *Trump's War on the World Trade Organization*, THE DIPLOMAT (Dec. 12, 2019), <https://thediplomat.com/2019/12/trumps-war-on-the-world-trade-organization/> [<https://perma.cc/Z59U-2FU9>].

⁴⁹ For example, in May 2016 the Obama Administration took action to block reappointment of an Appellate Body member on essentially the same grounds, disagreement with a series of decisions. See Steve Charnovitz, *The Obama Administration's Attack on Appellate Body Independence Shows the Need for Reform*, INT'L ECON. L. & POL'Y BLOG (Sep. 22, 2016), <https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html> [<https://perma.cc/587C-R4HM>].

⁵⁰ See generally Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5281 (Jan. 24, 2020) (providing a history of the Section 232 tariffs).

⁵¹ See generally OFF. OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018). <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [<https://perma.cc/L95Y-J4D6>].

⁵² See, e.g., Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 92, WTO Doc. WT/AB/R, DS121 (adopted Jan. 12, 2000); Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 85, WTO Doc. WT/AB/R, DS98 (adopted Jan. 12, 2000) (both reading the concept of “unforeseen developments” into the requirements of the WTO Agreement on Safeguards).

⁵³ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S.194 (Article

E. Section 232 Steel and Aluminum Tariffs

The spurious twenty-five percent § 232 steel tariffs and ten percent aluminum tariffs⁵⁴ should in my view be rescinded across the board, or at minimum be reconsidered despite opposition to rescission from labor unions and domestic steel producers;⁵⁵ those tariffs don't affect Chinese steel exports to the United States directly because Chinese steel is restricted by U.S. antidumping and countervailing duty tariffs⁵⁶ (although third country sales of excess production of Chinese steel are a serious problem). However, they have poisoned relations with allies (EU, South Korea, Brazil and Turkey among others),⁵⁷ make manufacturing of goods in the U.S. that use steel as raw materials more expensive⁵⁸ and represent in my view a serious misuse by the former President Trump of that statute. Initiating discussions among U.S. allies of the worldwide glut of steel and aluminum (largely as a result of China's state subsidies)⁵⁹ could be a useful initial step; global production is down in 2020, by 18.2 percent in North America and 17.9 percent in the EU, but increased by 4.5 percent in China and 14.8 percent in Vietnam.⁶⁰ If full lifting is not deemed acceptable, as seems to be the Biden Administration's initial view,⁶¹ substituting safeguard action under U.S. § 201⁶²—even though it is difficult to do without

XXI provides in pertinent part that “Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations . . .”).

⁵⁴ Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. at 5281.

⁵⁵ *Mr Biden Likely to Continue with Section 232 Tariffs on Steel*, STEEL GURU BUS. NEWS (Mar. 7, 2021), <https://www.steelguru.com/steel/mr-biden-likely-to-continue-with-section-232-tariffs-on-steel> [https://perma.cc/W54R-GEKY].

⁵⁶ See David Shepardson, *U.S. Opens Anti-Dumping Probe into Steel Imports from China, Canada, Mexico*, REUTERS (Feb. 26, 2019), <https://www.reuters.com/article/us-usa-steel-investigation-idUSKCN1QF2S1> [https://perma.cc/VV7A-PUDB].

⁵⁷ *Section 232 Tariffs on Steel & Aluminum*, SANDLER, TRAVIS & ROSENBERG, P.A. (June 2018), <https://www.strtrade.com/trade-news-resources/tariff-actions-resources/section-232-tariffs-on-steel-aluminum> [https://perma.cc/MH8A-ZCHZ] (noting the tariffs apply to imports from almost all countries except Argentina, Austria, Canada and Mexico). Korea later negotiated quotas to substitute for tariffs, and restrictions on imports from Canada and Mexico were removed prior to those countries' approval of the USMCA.

⁵⁸ Nicole Viogt, Malte Schubert, Ingo Mergelkamp, Michael McAdoo, Marc Gilbert & Christian Freischlad, *Making Sense of Steel's Turbulent Trade Climate*, BCG (Mar. 15, 2019), <https://www.bcg.com/publications/2019/steel-turbulent-trade-climate> [https://perma.cc/YH2U-C8TB].

⁵⁹ Trefis Team, *The Extent of Overproduction in the Chinese Steel Industry*, FORBES (Jan. 9, 2017), <https://www.forbes.com/sites/greatspeculations/2017/01/09/the-extent-of-overproduction-in-the-chinese-steel-industry/?sh=2497ddb1446e> [https://perma.cc/94XQ-E8GC].

⁶⁰ Christopher Vivtuso, *WorldSteel: Global Crude Steel Production through Nine Months Down 3.2%*, METALMINER (Oct. 29, 2020), <https://agmetalmminer.com/2020/10/29/worldsteel-global-crude-steel-production-through-nine-months-down-3-2/> [https://perma.cc/L6Y2-FU4B].

⁶¹ See Doug Palmer, *Biden, in First Trade Move, Reimposes a Trump Tariff*, POLITICO (Feb. 1, 2021), <https://www.politico.com/news/2021/02/01/biden-aluminum-tariff-uae-464794> [https://perma.cc/N2CW-BM6V].

⁶² Trade Act of 1974, Pub. L. No. 93-616, 88 Stat. 1978 (1975).

violating the Appellate Body's interpretation of WTO rules as noted earlier—should be considered.

II. OTHER TRADE PRIORITIES

A. CPTPP/TPP

It is strongly recommended that the Biden Administration develop a plan for the United States to rejoin with some renegotiating of key provisions the Trans-Pacific Partnership/Comprehensive and Progressive TPP,⁶³ but not for immediate execution. The United States has lost any significant leadership role in creating modern rule-based trade agreements by excluding itself from the CPTPP and being excluded by others from the recent China-led Regional Economic Partnership Agreement.⁶⁴ Opposition to rejoining the Trans-Pacific Partnership among Democrats in the House likely remains very strong—it was opposed by both Donald Trump and Hilary Clinton during the 2016 presidential campaign⁶⁵—although major changes in the CPTPP labor and environmental provisions and certain other upgrades from the USMCA might be sellable to Democrats in Congress if they can be negotiated with the other eleven Parties. For example, certain (but definitely not all the) features of the “rapid response” mechanism designed to force Mexican enterprises to abide by USMCA rules on collective bargaining for unions and independent (rather than government-sponsored) unions,⁶⁶ might be sellable to other CPTPP parties.

The area where most opposition is likely to occur among several of the eleven CPTPP Parties is in the USMCA labor rights provisions, which include strict new guarantees to protect union organizers and to assure that workers may form independent unions and engage in effective, transparent collective bargaining, achieved through new Mexican legislation⁶⁷ and a rapid response

⁶³ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Austl.-Can.-Japan-Mex.-N.Z.-Sing.-Viet., Dec. 30, 2018. The original TPP (from which the United States withdrew in January 2018) was amended with a nine-page series of changes and amendments. [hereinafter CPTPP].

⁶⁴ Regional Comprehensive Economic Partnership Agreement, Austl.-Brunei-Cambodia-China-Indon.-Japan-Laos-Malay.-Myan.-N.Z.-Phil.-Sing.-S. Kor.-Thai.-Viet., Nov. 15, 2020 (not in force) [hereinafter Regional Comprehensive Economic Partnership Agreement].

⁶⁵ Mark Abadi, *Where Hillary Clinton and Donald Trump Stand on Obama's Legacy Trade Deal*, BUS. INSIDER (Sept. 24, 2016), <https://www.businessinsider.com/what-is-tpp-2016-9> [https://perma.cc/7Y37-N7BG].

⁶⁶ See United States-Mexico-Canada Agreement, Can.-Mex.-U.S., Annex 31-A, OFF. OF THE U.S. TRADE REPRESENTATIVE (July 1, 2020), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [https://perma.cc/8CNL-T4L7] [hereinafter Annex 31-A].

⁶⁷ Eric Martin, *Mexican Congress Passes Labor Law Tied to USMCA Trade Agreement*, BLOOMBERG L. (Apr. 29, 2019), https://www.bloomberglaw.com/exp/eyJjdHh0IjoiSVROVYIsImkljoiMDAwMDAxNmEtNmIxYy1kY2RILWExZmUtZWY1ZmUyODEwMDAwIiwic2lnIjoiZm91V2lleU9ZQkt0eXNmak5GOEEvaExjbFFnPSIsInRpbWUOiOiXNTU2NjUwMzU4IiwidXVpZCI6IkZMaVNQWUhyYVB6WlpFaEFnOXFqNXc9PUVERVJhZ1gxY0RCZ2I2ZVBISHBRWGc9PSIsInYiOiXIn0=?usertype=External&bwid=0000016a-6b1c-dcde-a1fe-ef5fe2810000&qid=6511656&cti=L.SCH&uc=1320027613&et=CURATED_HIGHLIGHTS&emc=bitmw_hlt:2&c

arbitral mechanism which is designed to assure rapid arbitration against enterprises that do not allow independent unions to engage in transparent collective bargaining,⁶⁸ a process never before widely available in Mexico. While the TPP package concluded by the original twelve TPP Parties in 2015 included three U.S. bilateral agreements with Brunei, Malaysia and Vietnam providing inter alia penalties for failure to comply with a variety of labor requirements, those agreements were predictably dropped from the revised CPTPP.⁶⁹ Whether the three countries in particular would agree to reinstate them or something like the USMCA provisions is uncertain, but there would undoubtedly be pressure from Democrats in Congress to do so. Vietnam could probably be persuaded because of the huge benefits of U.S. market access, but the other two are less likely to be willing; neither has ratified the CPTPP two years after it has entered into force for seven of the others (including Vietnam).⁷⁰ The renegotiation if undertaken could take a considerable amount of time and in the process could lead to new objections among many Democrats (and others) who have opposed the TPP in the past.⁷¹ However, should the UK continue to press for admission to the CPTPP, as it has pledged to do,⁷² U.S. re-accession might become less controversial.

B. UK-U.S. FTA

Continuing negotiation of an FTA with the UK is a worthwhile objective but concluding it before Trade Promotion Authority (TPA) expired June 30, 2021, was not doable.⁷³ Many difficult issues exist, including preservation of the

ontext=email&email=0000016a-6e98-dcbf-a5fa-6ebb9a590001 [https://perma.cc/2T48-EXW3]; see also *Mexican Official: Labor Reform Legislation Slated to Pass by the End of April*, WORLD TRADE ONLINE (Feb. 19, 2019), <https://insidetrade.com/trade/mexican-official-labor-reform-legislation-slated-pass-end-april> [https://perma.cc/WAS2-UZX2].

⁶⁸ Annex 31-A, *supra* note 66, at ch. 24, ch. 31.

⁶⁹ See CPTPP, *supra* note 63. With the United States having withdrawn from the agreement in January 2017, the three bilateral agreements on labor with Brunei, Malaysia and Vietnam could not be pursued.

⁷⁰ See CPTPP, *supra* note 63. Chile and Peru are also non-ratifiers as of the end of 2020.

⁷¹ See *The Trans-Pacific Partnership Trade Deal: Opposition*, BALLOTEDIA, 2015, https://ballotpedia.org/The_Trans-Pacific_Partnership_trade_deal:_Opposition [https://perma.cc/J7JJ-Y5MC] (“Liberal Democrats led by Sen. Elizabeth Warren (Mass.) and Senate Minority Leader Harry Reid (Nev.) and labor unions formed an unlikely alliance with tea party and conservative Republicans in opposing the Trans-Pacific Partnership trade deal (TPP).”).

⁷² UK DEP’T FOR INT’L TRADE, *An Update on the UK’s Position on Accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, <https://www.gov.uk/government/publications/uk-approach-to-joining-the-cptpp-trade-agreement/an-update-on-the-uks-position-on-accession-to-the-comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp> [https://perma.cc/RWG8-MA8R].

⁷³ IAN F. FERGUSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 20 (2019), <https://fas.org/sgp/crs/misc/R43491.pdf> [https://perma.cc/LAD9-JPGM]. The TPA provides in essence that Congress will not seek to modify the agreement once it is negotiated, and to vote it up or down within ninety “legislative” days. Without TPA, most foreign governments do not wish to negotiate trade agreements with the United States for fear that the Congress will insist after the fact

Good Friday agreement between the Irish Republic and Northern Ireland (as essential precondition for the Biden Administration and many members of Congress⁷⁴), digital trade taxation and improving U.S. access to the UK agricultural market.⁷⁵ Overall, the economic benefits for the United States may be modest, at least in the near term, even though UK manufacturers have maintained tariff free, quota free access to the EU market with the December 2020 conclusion of the EU-UK Trade and Cooperation Agreement.⁷⁶ While eventually UK and European enterprises will master at least some of the complex and expensive documentation requirements that are required for UK-EU trade as of January 1, 2021, in the short and medium term the changes from open borders and common regulatory systems may give pause to investors from the United States and elsewhere. Still, given the extent of the close relationship between the United States and the United Kingdom for more than 200 years, it seems likely that the Biden Administration will eventually want to pursue and complete an FTA. Thus, while such an agreement will eventually be concluded, Biden's other trade priorities may mean it could be delayed for several years.⁷⁷

C. U.S.-Vietnam Negotiations

The Trump Administration, apparently upset by the growing U.S. trade deficit with Vietnam (largely brought about by high tariffs on Chinese exports to the U.S. and pressures on American firms to move production in China elsewhere), has sought to punish Vietnam on grounds that it is improperly manipulating its currency. After a § 301 investigation, Vietnam was formally designated by Treasury as a currency manipulator on December 16, 2020.⁷⁸ The argument is suspect; the Treasury Department, which normally deals with currency manipulation issues rather than USTR, had not found Vietnam to be a manipulator in the past.⁷⁹ USTR Tai reportedly raised the continuing U.S. concerns in a conversation with Vietnamese officials at the end of March, while

on changes in the agreement. *See generally id.* at 1–2.

⁷⁴ See Simon Carswell, *Joe Biden Does not Want to See Guarded Border in Ireland after Brexit*, IRISH TIMES (Nov. 24, 2020), <https://www.irishtimes.com/news/politics/joe-biden-does-not-want-to-see-guarded-border-in-ireland-after-brex-it-1.4418459> [https://perma.cc/ZRW4-8YPT] (noting that Biden has warned that a breach of the Good Friday agreement would threaten the prospect of a future trade deal).

⁷⁵ See OFF. OF THE U.S. TRADE REPRESENTATIVE, *United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives* (Feb. 2019), https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf [https://perma.cc/ZRW4-8YPT] (providing Trump Administration objectives, which are subject to modification by the Biden Administration).

⁷⁶ Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, 2020 O.J. (L 444) 63.

⁷⁷ Nick Allen, *US-UK Trade Deal 'May not Happen Until at least 2024' as Biden Prioritizes China*, YAHOO! NEWS (Mar. 12, 2021), <https://news.yahoo.com/us-uk-trade-deal-may-1616-25667.html> [https://perma.cc/2NQL-AVQE].

⁷⁸ Alan Rappoport, *Trump Administration Says Vietnam and Switzerland Manipulated Currency*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/us/politics/trump-vietnam-switzerland-currency-trade.html> [https://perma.cc/N84E-G4VV].

⁷⁹ *Id.*

confirming a mutual desire for “increased collaboration bilaterally and regionally through the Association of Southeast Asian Nations.”⁸⁰ Since the Biden Administration remains aware of the trade deficit with Vietnam, bilateral negotiations focusing on improving Vietnam’s market access for U.S. goods and services would seem to be a more productive course of action than the punishment anticipated by the Trump Administration.

If the United States had not withdrawn from TPP in January 2017 the deficit would probably be lower because the TPP would have substantially lowered or eliminated Vietnamese tariffs on U.S. exports to Vietnam. The problem could be reduced in scope by the United States’ rejoining the TPP if that eventually occurs, since the CPTPP requires Vietnam to reduce and ultimately eliminate its tariffs on most imports from other TPP parties.⁸¹

D. Trade Promotion Authority

TPA authority expired after six years on June 30, 2021.⁸² Because a trade agreement must be sent to Congress three months before it can be signed, any pending agreements—such as a UK-US FTA—would have had to be completed by March 31, 2021.⁸³ It is more important to seek TPA renewal based on a well-planned effort than to seek it immediately, given the complexities of the legislation enacted by the United States more than five years ago, and the changes in U.S. trade agreement policy that have been incorporated in the USMCA. In the past, TPA has engendered extensive and contentious Congressional debates over intellectual property issues as well as those relating to environmental protection and labor rights, as was the case with the most recent renewal in 2015.⁸⁴ It may be that the debate could be less onerous if the Biden Administration agrees to go along with the emasculation of investor-state dispute settlement in the USMCA,⁸⁵ and the inclusion of more significant environmental provisions, although the USMCA provisions on environment are in most respects similar to those in the TPP.⁸⁶

⁸⁰ *Tai Urges Vietnam to Address U.S. Currency Concerns*, WORLD TRADE ONLINE (Apr. 1, 2021), <https://insidetrade.com/daily-news/tai-urges-vietnam-address-us-currency-concerns> [<https://perma.cc/5CSY-SXJ6>].

⁸¹ See Trans-Pacific Partnership, Chapter 2, Annex 2-D, Vietnam Tariff Elimination Schedule (2015), <https://ustr.gov/sites/default/files/TPP-Final-Text-Viet-Nam-Tariff-Elimination-Schedule.pdf> [<https://perma.cc/Z94U-EVTC>].

⁸² Ferguson & Davis, *supra* note 73, at ii.

⁸³ IAN F. FERGUSON, CONG. RSCH. SERV., IF10038, TRADE PROMOTION AUTHORITY, fig. 1. (Dec. 14, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF10038> [<https://perma.cc/7SDU-HU96>].

⁸⁴ See IAN FERGUSON, CONG. RSCH. SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 17 (June 15, 2015), <https://fas.org/sgp/crs/misc/RL33743.pdf> [<https://perma.cc/MH42-9BRZ>]; FERGUSON, *supra* note 83, at 1 (noting that the 2015 version was signed by Obama “after a contentious legislative debate”).

⁸⁵ See Annex 31-A, *supra* note 66, at ch. 14 (eliminating ISDS with Canada and restricting it with Mexico).

⁸⁶ Annex 31-A, *supra* note 66, at Annex 31-A, chs. 23–24.

E. Kenya FTA

The United States and Kenya formally launched FTA negotiations in July 2020, but they do not appear to be anywhere near completion.⁸⁷ According to U.S. sources, “Kenya is a recognized leader across the continent, an important strategic partner of the United States, and there is enormous potential for us to deepen our economic and commercial ties.”⁸⁸ Kenya is probably one of the best candidates in Africa for a bilateral free trade agreement although not free from controversy.⁸⁹ In a Democratic administration it seems likely that continuing the negotiations would be supported by the Black Caucus in the House of Representatives, which was instrumental in passage of the African Growth and Opportunity Act (AGOA) more than two decades ago.⁹⁰

Still, a strong argument can be made that the United States should avoid concluding one or a few bilateral FTAs. Arguably, they could in theory serve as a model for future agreements. The risk is that they would undercut the recently concluded African Continental FTA (AfCFTA) comprising all fifty-five African nations⁹¹ The dangers of disrupting pan African integration have already been demonstrated with the UK-Kenya Economic Partnership Agreement, negotiated late in 2020. Due to complaints in both the UK and Kenyan parliaments, plans have been announced that the bilateral deal will be expanded to the other five members of the East African Community (EAC), Burundi, Uganda, Rwanda, South Sudan and Tanzania, to avoid the economic disruption that could have occurred had the UK finalized a bilateral agreement with Kenya alone.⁹²

It may thus be preferable for the United States to seek a single agreement with the EAC or, better, the AfCFTA even though the latter negotiations would be far more difficult. If successful the conclusion of a broader agreement with a significant of the AfCFTA parties would produce far greater economic benefits for Africa and for the United States, and might encourage parties to the AfCFTA who in the past have been lukewarm about the agreement, including but not

⁸⁷ Off. of the U.S. Trade Representative, *Joint Statement Between the United States and Kenya on the Launch of Negotiations Towards a Free Trade Agreement*, (July 8, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/july/joint-statement-between-united-states-and-kenya-launch-negotiations-towards-free-trade-agreement> [https://perma.cc/GN55-UDUT].

⁸⁸ *Id.*

⁸⁹ See Richard Wike, Katie Simmons Margaret Vice & Caldwell Bishop, *Kenyans Worried about Economy and Corruption, but Optimistic for the Future*, PEW RSCH. CTR. (Nov. 14, 2016), <https://www.pewresearch.org/global/2016/11/14/kenyans-worried-about-economy-and-corruption-but-optimistic-for-the-future/> [https://perma.cc/QVS3-P3A5].

⁹⁰ See *About Agoa*, AGOA.INFO, <https://agoa.info/about-agoa.html> [https://perma.cc/NS42-F9VJ] (noting that AGOA was first enacted in 2000 and under current legislation is active until 2025).

⁹¹ AfCFTA, TRALAC, Mar. 17–21 2018; entered into force for twenty-two countries (May 30, 2019), <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> [https://perma.cc/H48A-FYZS].

⁹² Michiel Williams, *New UK-Kenya Trade Deal to be Extended to All of East Africa After Threats Not to Ratify*, CITYA.M. (Mar. 1, 2021), <https://www.cityam.com/uk-kenya-trade-deal-to-be-extended-to-all-of-east-africa-following-threats-not-to-ratify/> [https://perma.cc/Y64V-6AD5].

limited to Nigeria and South Africa, to embrace it more fully.⁹³

Such negotiations would also be supported by many in Congress who feel that the United States neglects trade and economic development in Africa as well as those who are concerned about China's increasing economic and political influence there as well, as by U.S. interests who favor a greater level of reciprocity. If the Biden Administration reverts to past U.S. policies, I believe they may consider supporting broad African regional integration rather than potentially contributing to further fragmentation.

Admittedly, such a broad effort runs considerable risks of failure. The unhappy history of the Free Trade Agreement of the Americas negotiations from 1994 to 2002 suggests that caution is wise.⁹⁴ There, after more than eight years of negotiations the effort fell apart largely because Brazil could not accept the idea of reinforcing U.S. hegemony in the hemisphere.⁹⁵ That failure was followed over the next several years with the negotiation of separate U.S. trade agreements with Chile;⁹⁶ the Central American countries and the Dominican Republic;⁹⁷ Colombia;⁹⁸ Panama;⁹⁹ and Peru.¹⁰⁰ The larger nations in South America, including Brazil and Argentina, remained elusive then and now, although a framework agreement with very limited scope that might lead in the future to an FTA with Ecuador was concluded in December 2020 by the Trump Administration.¹⁰¹

With an effort to negotiate with the AfCFTA as a group the risk of another

⁹³ See Julius Alagbe, *11 Countries Validate African Continental Free Trade Agreement*, MARKET FORCES AFRICA (Mar. 18, 2021), <https://dmarketforces.com/11-countries-validate-african-continental-free-trade-agreement/> [<https://perma.cc/YH92-GFGZ>] (indicating that as of mid-March 2021, only 11 African countries had validated the AfCFTA. Those countries, and the seven others who were in the drafting phase, did not include the two largest economies, South Africa and Nigeria.).

⁹⁴ See Kevin C. Kennedy, *The FTAA Negotiations: A Melodrama in Five Acts*, 1 INT'L L. REV. 121 (2003).

⁹⁵ See *id.* at 125.

⁹⁶ United States-Chile Free Trade Agreement, OFF. OF THE U.S. TRADE REPRESENTATIVE (June 6, 2003), <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> [<https://perma.cc/R5M5-CZPQ>].

⁹⁷ Central America-Dominican Republic Free Trade Agreement, OFF. OF THE U.S. TRADE REPRESENTATIVE (Aug. 5, 2004), <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [<https://perma.cc/Y3VJ-TUUB>].

⁹⁸ United States-Colombia Trade Promotion Agreement, OFF. OF THE U.S. TRADE REPRESENTATIVE (Nov. 22, 2006), <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/final-text> [<https://perma.cc/G82H-XCBE>].

⁹⁹ United States-Panama Trade Promotion Agreement, OFF. OF THE U.S. TRADE REPRESENTATIVE (June 28, 2007), <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text> [<https://perma.cc/JG8C-3DXA>].

¹⁰⁰ United States-Peru Free Trade Promotion Agreement, OFF. OF THE U.S. TRADE REPRESENTATIVE (Apr. 12, 2006), <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> [<https://perma.cc/88AN-F9VC>].

¹⁰¹ See OFF. OF THE U.S. TRADE REPRESENTATIVE, *United States and Ecuador Update Trade and Investment Council Agreement with New Protocol on Trade Rules and Transparency* (Dec. 8, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/december/united-states-and-ecuador-update-trade-and-investment-council-agreement-new-protocol-trade-rules-and> [<https://perma.cc/25YY-2C4Q>].

of the BRICS members (Brazil, Russia, India, China and South Africa), most likely South Africa acting as a spoiler, is in my view a serious one. At the same time, it is worth recalling that in 2002, when the FTAA negotiations finally were discontinued, the WTO was a vibrant organization that had just admitted China and had a well-functioning dispute settlement system.¹⁰² Even South African officials today might have difficulty convincing themselves that putting their faith in a WTO without effective dispute settlement provides a better alternative to a broad free trade agreement with the United States. Moreover, South Africa is not the dominant economic power in Africa as Brazil has been in South America.¹⁰³ In any event, in my view it would be unwise for the Biden Administration to focus its trade capital initially on an African FTA, whether bilateral or multilateral.

III. CONCLUSION

The Biden Administration has many urgent domestic priorities, including addressing the Covid-19 crisis (mostly ignored or worsened by the actions of its predecessor) and the terrible economic situations of millions of businesses and workers. However, even though trade issues in general are not considered urgent matters, certain ones, such as economic relations with China, faithfully implementing the USMCA and mending trade as well as other relations with U.S. allies, can only be ignored at our peril. It can be hoped that the new administration, now that the Secretaries of the Treasury, State and Commerce as well as the U.S. Trade Representative are in place, will promptly seek to address the United States' most immediate challenges in the trade area.

¹⁰² WTO Secretariat, *Annual Report 2002*, https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep02_e.pdf [<https://perma.cc/22JC-7CLT>].

¹⁰³ See Caleb Silver, *The Top 25 Economies in the World*, INVESTOPEDIA (Dec. 24, 2020), <https://www.investopedia.com/insights/worlds-top-economies/> [<https://perma.cc/2PYV-ZH27>] (Brazil, at number nine, is the only South American economy in the top twenty-five. Nigeria, the largest economy in Africa, is number twenty-five in the world rankings).

APPENDIX

Table of Abbreviations

AfCFTA	Africa Continental Free Trade Agreement
AGOA	African Growth and Opportunity Act
BRICS	Brazil, Russia, India, China, and South Africa
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
DSB	WTO Dispute Settlement Body
DSU	WTO Dispute Settlement Understanding
EAC	East African Community
EU	European Union
FTA	Free Trade Agreement
FTAA	Free Trade Agreement of the Americas
GATT	General Agreement on Tariffs and Trade
NAFTA	North American Free Trade Agreement
RCEP	Regional Comprehensive Economic Partnership
TPA	Trade Promotion Authority
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom of Great Britain and Northern Ireland
USITC	United States International Trade Commission
USMCA	United States-Mexico-Canada Agreement
USTR	Office of the United States Trade Representative
WTO	World Trade Organization