John D. Greenwald Memorial Lecture

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Georgetown University Law School

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INTRODUCTION

Thank you very much Matt for that kind introduction.

It is an honor for me to give the 2023 John D. Greenwald Memorial Lecture. Although I never had the pleasure of meeting John, as someone who has been involved in American trade policy for the last 15 years I feel his legacy. In government, John was instrumental in developing international trade rules through his role at USTR and then as the first head of Import Administration at Commerce in the 1980s. In private practice he developed a reputation as one of Washington's great trade lawyers. I suspect that if John were still with us he would have a lot to say about the state of American trade policy. Unfortunately for you my remarks will be neither as insightful nor as witty as his would have been, but you're stuck with me this morning and I'll do my best.

When I was at the White House in 2021 and 2022, I saw the Biden-Harris Administration's trade policy from the trenches. We spent time talking about U.S. tariffs on China, though I bet some of you have noticed the Administration has yet to make any final decisions on that. We put together agendas for the U.S.-E.U. Trade and Technology Council. I battled the Europeans over aspects of Europe's Digital Markets Act and Digital Services Act. And towards the end of my time in government, I took plenty of incoming from America's allies about the industrial policy provisions of the Inflation Reduction Act.

One of the luxuries of being back in the private sector is the freedom to think about trade not just from the trenches, but at a strategic level. So, I will use my time with you this morning to offer a set of broader thoughts about the state of American trade policy today. And then I'll offer some recommendations for where U.S. trade policy might go from here.

A BIT OF HISTORY

In the decades since the Second World War, the U.S. has seen major developments in trade policy principally during periods when there has been both a clear geopolitical and a clear economic logic to trade deals. For example, in the immediate aftermath of WWII, the period that created the GATT, there was a geopolitical imperative to rebuild the West and strengthen allied economic ties for the looming Cold War. And there was an economic imperative to prevent a return to the protectionism widely seen as an exacerbating factor in the Great Depression.

Similarly, in the 1990s, following the collapse of the Berlin Wall, Democrats and Republicans alike bought into a geopolitical view that establishing a global trading regime would help bring former adversaries like Russia and China into the fold, potentially even promoting political liberalization. The prevailing economic consensus here in Washington, meanwhile, held that greater trade liberalization would benefit U.S. consumers by driving down costs, benefit innovation by forcing companies to be disciplined by the global market, and benefit workers by opening foreign markets to high value goods and services. And thus we saw a decade that produced NAFTA, the WTO, and China's entry into the global trading order.

In the years following 9/11, geopolitical logic drove deals that had little economic significance, because they were with small economies, but which were important to American diplomacy, particularly in the Middle East—FTAs with Bahrain, Jordan, Morocco, and Oman. A desire to shore up American relations with democratic states in Latin America combined with an economic desire to open markets to U.S. products, meanwhile, drove trade dealmaking in Latin America. At the same time, during this era, from an economic perspective the U.S. used trade deals to continue pursuing the economic goals that had risen to influence domestically in the 1980s and 1990s—open markets, opposition to subsidies, and light touch regulations.

Now, to say that these were productive periods for U.S. trade policy is not to say that trade was politically easy: I remember Ross Perot's 1992 campaign diatribe about NAFTA triggering a "giant sucking sound" of U.S. jobs fleeing to Mexico. The final House vote to grant China PNTR status in was 237-197, a comfortable but hardly overwhelming majority. But across the 1940s, the 1990s, and the 2000s, there was a comparatively broad consensus in the U.S. foreign policy establishment about the geopolitical logic of trade *and* a comparatively broad consensus among the economic policy establishment about the economic logic of trade.

THE CHALLENGES FACING TRADE POLICY TODAY

I suspect that few of you in this room think that we are in a similarly productive period for American trade policy today. Since the domestic political collapse of the Trans-Pacific Partnership in 2016 and 2017, and the collapse in both the U.S. and Brussels for the mooted U.S.-E.U. "Trans-Atlantic Trade and Investment Partnership" agreement, Washington has turned sharply against trade deals and in certain respects against trade liberalization at all.

It is easy to attribute the current challenges in U.S. trade policy to politics on both sides of the partisan aisle. But while politics is important, I think that changing political views are fundamentally driven by deeper underlying shifts in substantive ideas of both geopolitics and economics that need to be unpacked and incorporated into American and international trade policy.

The first shift is set of changes in domestic economic policy preferences. Simply put, a growing bipartisan cohort in Washington rejects the type of economic model that served as the basis for American trade policies since at least the late 1980s. As former NEC Director Brian Deese argued last year, and as National Security Advisor Jake Sullivan argued last month, this Administration—and a growing share of Americans—is reembracing industrial policy to drive a manufacturing and middle-class employment revival here in America. And certain of the policy tools we are deploying to drive this industrial policy cut against rules we have agreed to since the 1990s.

Take the CHIPS Act and the Inflation Reduction Act. These acts channel hundreds of billions of dollars into domestic manufacturing in ways that, particularly with respect to the IRA, simply violate commitments the U.S. made in the WTO and in various FTAs. There is growing interest among both Democrats and Republicans in industrial policy measures to further support critical minerals mining and processing and, potentially, to support pharmaceutical and medical manufacturing in the U.S. I do not profess to know the end point of this embrace of American industrial policy—and candidly, while I welcome it, I also worry about overreach. But clearly if U.S. trade negotiators are going to board planes at Dulles to go haggle over new deals, we need to figure out a negotiating mandate with respect to industrial policy and subsidies different from the ones we embraced over the past few decades.

Moreover, subsidies are hardly the only policy area where domestic economic policy preferences are in flux.

Look at digital and technology issues. Since the rise of the internet in the 1990s, the U.S. had a clear domestic digital and technology agenda that we sought to multilateralize across trade agreements. We promoted a free, open, and interoperable internet and we advocated against data localization and other restrictive measures internationally. We provided liability protections for tech platforms pursuant to Section 230 of the Communications Decency Act of 1996 and, in trade deals, advocated that foreign governments adopt similar laws. We generally fought for light-touch antitrust laws and enforcement, both domestically, and internationally.

Today, our domestic views on have changed. There is a broad domestic rejection of Section 230 immunity as it stands today, even if no one seems to know quite what should replace it. Current U.S. policy towards TikTok and other Chinese apps, data security measures that the CFIUS committee frequently requires in mitigation agreements, and other tech policy developments show that the U.S. no longer adheres to longstanding views about the truly free flow of data across borders. Antitrust regulators feel a growing appetite for aggressive enforcement of antitrust law. Trade policy proposals on the digital and tech sector will have to take these shifts in domestic policy preferences into account.

I could also describe shifts I see underway in domestic preferences of other areas of economic policy. My point is not to drone on with a litany of the shifts we see in Americans' domestic economic preferences, but rather to simply suggest that trade policy will have to take these changes into account if we are going to get back into the business of comprehensive trade agreements.

The second strategic shift that trade policy needs to accommodate is the reemergence of great power geopolitics in international relations. Between China's geopolitical rise and growing global aspirations and the global revisionism of Moscow, the geopolitical unipolarity assumptions of the 1990s have been upended.

The reemergence of geopolitics poses a conceptual challenge to key aspects of the global trading order, particularly to the WTO as a global baseline for global trade. To be direct, there are few American policymakers who today would argue that the structure of U.S. tariffs on China should be substantially identical to the structure of U.S. tariffs on, say, Germany, or another allied but non-FTA country. But of course a foundational premise of the WTO is that the U.S. would treat China and Germany equally when it comes to tariffs and to certain other measures.

I don't profess to know whether Congress will revoke China's PNTR status, a topic that seems increasingly up for debate. And I don't know how the Biden Administration will eventually adjust specific tariffs on China as it finishes its required four-year review of the Section 301 tariffs that Trump first imposed in 2018. But however those debates land, I am quite confident that so long as the U.S. identifies China as our leading *geopolitical* competitor, we will not return to a world in which the U.S. puts China and its NATO allies on the same trade footing.

Admittedly, the European Union and other G7 partner countries have been wary of tariffs on China. But the G7 too has moved away from the concept of MFN trade policies when it comes to Russia, which, while formally still a member of the WTO, seems unlikely to again get accorded MFN treatment by the West for many years. And listening to friends in Europe, I wonder if the ground is shifting there as well with respect to at least some tariffs on China.

This resurrection of geopolitics has driven the third major shift, which is the securitization of trading relationships. U.S. and G7 policymakers today focus as much on the security aspects of trade as they do on economic efficiencies.

For example, we see a strong desire by both policymakers and businesses to "derisk" supply chains. We no longer trust geopolitical competitors to be reliable suppliers of essential goods. We want to see an increase in domestic production, but we also emphasize "friendshoring" as a way of building resilience and shoring up geopolitical alliances. While policymaking has yet to fully identify the policy tools that will effect friendshoring, friendshoring is going to be an ongoing priority not only in Washington, but across western capitols.

The securitization of trading relationships, much like our domestic rethink on technology policy, will also force a re-think on the digital trade agenda. We need a set of rules that protects many of the core values we have long pursued in digital trade but also recognizes a broader range of legitimate national security concerns regarding data.

Finally, we see that the securitization of trading relationships has led to a vast increase in the use of sanctions and export controls—a development that is evident to anyone who practices international trade law today.

Sanctions and trade embargoes of course have a long history--dating to at least the Peloponnesian war in the 5^{th} century BC. But between the end of the Cold War and about 2014, sanctions, export controls, and national security tariffs were largely an afterthought in the global trading system. Sure, companies doing business with places like Iran and North Korea had to comply with embargoes and other sanctions. Companies exporting weapons and certain dual-use items had to comply with U.S. and multilateral export controls regimes. But the vast majority of trade with the vast majority of the global economy took place blissfully free from the national security regulations that can govern trade.

Today the landscape is quite different. The U.S. and our G7 partners have curtailed large swaths of trade with Russia. U.S. export controls on China have significant effects on the U.S.-China technological relationship. CFIUS scrutinizes an ever-larger number of investments in the U.S., not just from China or the Middle East, but even from countries like Japan and the Netherlands. If press accounts are accurate, the U.S. is soon to announce restrictions on outbound U.S. investments in China, a type of capital control the U.S. has not historically enacted outside the context of military conflicts or comprehensive sanctions. For U.S. trade policy to have meaning, it needs to grapple with these tools, rather than simply including blanket national security exceptions that increasingly threaten to swallow the rule.

THE PATH FROM HERE:

So, against this backdrop, what is the path for U.S. trade policy? There is no shortage of initiatives in various stages of development. The Administration has been pursuing the Indo-Pacific Economic Framework. The U.S.-E.U. Trade and Technology Council is a forum to discuss disputes and to seek alignment on regulatory approaches towards issues like AI. There are trade and investment discussions with Taiwan.

There are still occasional discussions of trade agreements with the U.K. and Kenya, though I can imagine anything is imminent. There are trade association and think tank proposals for digital trade agreements. And as Kathleen Claussen, now of this law school, showed in an important article last year, there has been a proliferation of more than 1,000 trade executive agreements that do not require congressional action, many of which are targeted to a handful of specific products or issue areas, that have been effective at facilitating U.S. trade in discrete areas.

In my view, if we want to put some points on the board—to actually develop and implement specific trade agreements and specific trade policies that serve U.S. economic and geopolitical interests—in the near term we should probably de-prioritize big initiatives and instead think small.

In a year when domestic economic preferences are in flux, views of the geopolitical order remain unsettled, and the U.S. is heading towards a 2024 election, the practical reality is that we are going to have a difficult time negotiating meaningful, binding, major trade agreements. For example, I am wholly unsurprised that the proposed digital chapter in IPEF has come in for sharp criticism both domestically and with our IPEF partners. Until we know what we want domestically with respect to tech and data policy, it is going to be a challenge to write international rules of the road.

This is why I think we should start by focusing on targeted specific initiatives and then build from there.

For example, I am bullish on the proposed critical minerals agreements that the Administration is pursuing. These are a good example of targeted agreements that have the characteristics needed for success. For the U.S. to manage the green transition, we need access to minerals and processing capacity abroad. And we want countries we buy from to adhere to high environmental and labor standards, and we want to ensure that the minerals themselves are not under Chinese control. We, the U.S., also now have something minerals exporting countries and other friendly countries in the clean energy supply chain want: access to Inflation Reduction Act subsidies. Basic negotiating theory suggests we should be able to figure out a deal here.

The recently announced U.S.-Taiwan Initiative on 21st Century Trade is also a useful milestone. Yes, if you read the text, it principally deals with customs matters and hortatory commitments regarding good regulatory practices. But it includes useful, practical steps to promote trade with a key geostrategic partner, and creates a foundation for broader negotiations over the long-term.

The U.S. E.U. Trade and Technology Council's recent focus on AI is similarly welcome. Even if U.S. policy preferences on many digital and tech issues is in flux, AI presents a rare opportunity: it is an issue that both will dramatically impact economic and domestic life across the U.S., Europe, and other G7+ partners, but which has emerged so quickly that national views on what to do have yet to harden. This presents a window to work collectively on AI regulations that, realistically, will matter more for our economies and our democracies many traditional trade agenda items.

I also think the U.S. should pursue agreements with allies and partners to increase transparency regarding industrial policy. We are not the only jurisdiction to re-embrace industrial policy—many of our G7 partners are embracing it as well. I worry that absent close coordination, this risks an uneconomical subsidy race that pays off well for companies but will be inefficient at achieving economic and supply chain resilience goals. Developing an information sharing mechanism with public accountability can help head off a subsidy race to the bottom.

Let me now turn to a question that I know is on many of your minds: what should the U.S. do with its tariffs on China?

For many years the U.S. took the strategic approach that economic engagement with Beijing could serve as a tool to foster economic and potentially even political liberalization in China. Between the 1990s and the mid 2010s, Presidents from Bill Clinton to Barack Obama tried to use the inducement of economic engagement to persuade China to adopt a set of economic reforms. When inducement didn't work, the Trump Administration tried to use the threat of cutting off economic ties to cudgel China into making changes.

Today, this the strategic approach of using economic inducements and threats to promote change in China has reached the end of the road. China isn't going to change. And our economic engagement needs to reflect that China is going to be China.

I do not know what the Administration plans to do at the end of its current four-year review of the Section 301 tariffs. But my recommendation is that the Administration rebalance the tariffs so that individual tariff lines are in the U.S. interest. We should hike tariffs where we continue to have strategic dependencies on China in order to reduce our dependencies for critical goods. And we should reduce tariffs on products that are non-strategic, and on certain intermediate goods where the tariffs have actually undercut U.S. competitiveness in the global market. In a world where China is not going to change, we should actively manage the trading relationship to ensure that it is in our interest.

Now let me turn to some recommendations for the mid-term.

Here, I'd actually start by developing a set of supply chain focused agreements that would go well beyond the "talk-and-coordinate" commitments that appear to be the core of the IPEF's supply chain chapter.

As has been widely noted, much of the trade we are trying to get out of China is not actually going to come back to the U.S.— it is going to migrate to other partners. We're already seeing this with Vietnam, a country that has no trade agreement with the U.S. but which exported the equivalent of about a quarter of its GDP to the United States last year. At a policy level the United States has generally welcomed cooperative work on critical supply chains.

There is much we could do in a critical supply chain agreement that focused on a set of mutually agreed critical sectors. We could certainly start with a commitment not to hike tariffs on goods in these sectors, and move, with Congressional authorization, to cutting them. By focusing on a handful of discrete critical sectors we can sidestep the domestic policy and political debates that, as I discussed earlier, will pose significant headwinds to comprehensive deals over the next few years. We could commit to making certain domestic incentives available on a mutually beneficial basis.

Targeted regulatory actions are another area ripe for a supply chain agreement. In sectors like semiconductors, or the green energy transition, we could jointly commit to expedited, though still high standard, permitting processes for major projects.

From a U.S. perspective, we should also think creatively about bringing to bear tools not traditionally integrated into trade talks. For example, assuming we want Congress to chop on a supply chain deal, we could incentivize the U.S. Development Finance Corporation to provide trade infrastructure financing to create better trade infrastructure among trade country partners. Certain projects abroad could be made eligible for DPA Title III funding, which is currently available only in the U.S. and Canada, but which Congress is considering extending to a handful of other allies. We could create a CFIUS white list of companies based in critical sectors and either eliminate or expedite CFIUS screening for cross-border investments in these sectors.

I also recommend a mid-term focus on digital trade issues. I have been skeptical of digital trade agreements before the end of 2024, despite supporting the concept, because I don’t think we have enough domestic clarity on a negotiating mandate for a deal to be both meaningful and successful. But I also think that given the importance of digital issues, over the mid-term we just going to have to figure out what we want and go out to build the rules. Industry and civil society should come together this year and next to develop a set of recommendations to government on how to think about cross border data flows in a geopolitically diverse world where trade is more securitized, and then build support for that across the G7. We will likely already have the Japanese on board as long as we call it Data Free Flow with Trust.

Finally, the mid-term agenda should include an aggressive push both on carbon border adjustment mechanisms and on green subsidies. CBAMs are coming. Politically, back in 2020, the President committed to a CBAM on his campaign. Even some Republicans are eyeing CBAMs as a way putting global pressure on China, which is today by far the world’s largest emitter. Europe is moving forward with a CBAM and will feel increasing domestic pressure to subsidize the green transition in

Europe lest is lose vital manufacturing to lower energy cost and high carbon-intensity regions. Economically, if we don't embrace CBAMs we will not succeed in our global goal of reducing emissions and we will risk undercutting our own manufacturing investments. I am hardly the expert on CBAMs and understand their complexity. But I think they have to be a major focus of U.S. trade policy over the next several years.

If I look out over a longer time horizon, what do I think the future looks like? I'll readily admit that my track record of long-term prognostication is poor. But I want to highlight two areas that clearly need attention.

First, the WTO. On the current trajectory the WTO is heading towards a future where it becomes somewhat irrelevant to global trade. If we want to reverse this trend, we are going to need to get beyond the current discussion regarding tactical problems, like re-starting a functioning appellate body, important as those issues are. Instead, we need a candid and direct discussion of what we want the future to hold for the WTO. As I said earlier, it is my view that the United States is simply not going to accept WTO rules that require us to treat China and Germany on the same footing when it comes to trade. It is also my view that the U.S. is unlikely to accept a set of rules would fundamentally constrain our shift back towards a period of industrial policy. How do we reconcile these shifts in U.S. views with the rules we agreed to in the 1990s?

I see two potential outcomes. One the one hand, we could reach some kind of global détente where the U.S. and China, or perhaps G7 on one side and China on the other, mutually agree that WTO rules won't actually govern trade between us, but that the WTO system will govern trade with third countries. Or on the other hand, perhaps we will return to more of a GATT-style arrangement where we have separate but still quite broad trading blocks. Either way, absent some fundamental reassessment, I see a long, slow sunset for the WTO.

With respect to FTAs, we similarly need to have a discussion about what they should look like. In particular, we need domestic soul searching about what we want out of trade agreements beyond geopolitical alliances. We need an economic theory of the case. For example, do we want to encourage our allies and partners to increase their own domestic industrial policy subsidies, and would we be willing to give partner country companies access to ours? In his recent speech at Brookings, National Security Advisor Sullivan talked about the need to allocate capital in ways that focus on the quality of growth, not just the quantity of growth and to drive a new international economic policy agenda. I agree entirely with the thrust of Sullivan's argument. But we are going to need time to turn his call into proposed trade rules, and then go out and negotiate them.

Moreover, for a trade agreement to work, it can't just be about what the U.S. wants. One of the perennial complaints I hear from U.S. allies and partners about IPEF is that without greater access to the U.S. market countries have no incentive to make policy concessions to us. This is, I think, a fair criticism. If we aren't going to include much traditional market access measures in a trade deal, and we want our partners to make tough policy choices of their own, we need to think up some other benefits to put on the table.

A few ideas for consideration. As I mentioned earlier, we could link certain kinds of development assistance more directly to trade deals, at least with respect to developing country partners. A few foreign countries have taken steps to begin to include visa and immigration-related measures in trade agreements, an idea that the U.S. could explore. If we are wary of providing market access to countries that are unlikely to meet our overall standards for the environment and labor, perhaps we could figure out ways to offer lower tariffs on imports from specific factories or trade zones that are verified to meet such standards.

We should also start to develop disciplines for national security tools that would limit their use against trade partner countries—something that I expect is of increasing value to our allies. Beyond some sort of trade partner CFIUS white list, we could make commitments to refrain from using sanctions and export controls against a trade deal partner absent prior consultations to seek a negotiated resolution to whatever potential national security concern would trigger their imposition. This might be particularly valuable to partner countries worried about the long-term direction of U.S. politics and foreign policy. For those who are skeptical that the U.S. would ever consider disciplining its list of national security tools, I note that last year, in an Annex to the G7 Leaders Statement, the G7 articulated a set of commitments about its use of sanctions and export controls against Russia that could form the basis for international discussions among close allies and partners.

CONCLUSION

I realize that I have now covered a lot of ground and likely exceeded your patience for my remarks. I'll dispense with a lengthy conclusion and offer just a brief close before turning to questions.

I am actually quite optimistic about American trade policy. If I look back at previous productive eras in trade policy, such as the late 1940s, the 1960s, or the 1990s, they typically followed times when U.S. went through an intense period of domestic economic reflection and global geopolitical change. I think that today we are in a similar period of domestic economic reflection and global geopolitical change. Certainly, the geopolitical environment is right for another period of productive trade policymaking. What we need now is to have a set of quiet conversations and to get organized about what we want the economic substance of a trade agenda to be. After we do that, I'm confident that our trade negotiators will do what they have long done—go out and write a new set of rules for the world.

Thank you very much. And with that, I'd welcome a couple of questions.