The U.S.-Japan Relationship and American Trade Policy

Observations of a Former Trade Negotiator[1]

Alan Wm. Wolff
Dentons US LLP

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Trade policy is a subject that has occupied me for nearly a half-century. The twelve years that I spent in government marked my first intensive involvement in U.S.-Japan relations. The first two chapters of my career consisted of the six years that I worked on international economic matters at the U.S. Treasury and six years on trade at what is now called the Office of the U.S. Trade Representative (USTR). During this period in the 1970s and for about a decade and a half thereafter, trade friction characterized the U.S.-Japan bilateral relationship. I have watched and participated in a small way in the evolution of the bilateral trade relationship as it moved from one of contentiousness to one of shared vision, a working partnership. A senior Japanese negotiator once said to me that our two countries were "sleeping in the same bed, but dreaming different dreams." That changed. We became allies not only in matters of security but also in trade policy. By the end of 2016, to a large extent our two countries were finally dreaming the same dream.

What I want to do today is briefly review the nature of the bilateral relationship over the decades from the Nixon shock in 1971 to the conclusion of the Trans Pacific Partnership (TPP) negotiations in 2015, then assess where matters stand as the Trump administration enters the picture, and close with some suggestions as to where the relationship might do well to go next.

I. The U.S.-Japan Trade Relationship 1971-1999

a. The 1970s

The decade of the 1970s did not open propitiously for international economic harmony. While the U.S. global trade balance was positive even under a regime of fixed exchange rates, the view from Washington was that the U.S. dollar was too strong and the U.S. balance of

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[1] I serve as Senior Counsel at Dentons in Washington, D.C., and chair the board of the National Foreign Trade Council (NFTC). The views expressed here are personal and are not necessarily the views of any organization with which I am affiliated. Many of my current articles on trade can be found by searching: alan.wolff + fortune.com. For inquiries, I can be contacted at alan.wolff@dentons.com.

payments surplus too small for America to carry out its defense and foreign aid responsibilities. At Treasury, we drafted a 10 percent import surcharge and on August 15, 1971, it was put into effect. Treasury's purpose, under then-Undersecretary for Monetary Affairs Paul Volcker and Secretary John Connally, was to force America's trading partners to acquiesce in a depreciation of the U.S. dollar. I did not learn until much later that President Nixon had another purpose, one specifically related to U.S.-Japan trade, to obtain "voluntary" textile export restraints from Japan.

The settlement at the Smithsonian on December 18, 1971, an accord on currency values, was accompanied by a U.S. demand that its major trading partners—Japan, the European Communities and Canada—unilaterally reduce nontariff barriers to U.S. exports.[2] America's three key trading partners refused to grant concessions in the ensuing bilateral talks. But the talks did ultimately lead to a mutual agreement to commence multilateral negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT). This became the Tokyo Round of Trade Negotiations, initiated on September 14, 1973.

Some U.S. concerns with international trade that were in evidence in the 1970s find echoes today. The U.S. government is concerned once again with trade balances. It once again has an agenda with respect to particular product sectors—in 1971, cotton, wool and manmade textiles, and in 2017, steel and aluminum. It once again is headed toward bilateral negotiations in which it clearly intends to seek unilateral concessions from its trading partners. In 1981, Japan accounted for nearly half of the U.S. trade in goods deficit ($18 billion out of $39.7 billion). Today, Japan's place is taken by China ($347 billion out of a total U.S. trade in goods deficit of $750 billion). In both instances, the United States saw serious trade problems due to the rise of a major Asian trading partner.

By the late 1970s, the United States pressed Japan to stimulate domestic growth, and among other objectives, to agree to binding limits on color television exports to the U.S. market and to grant greater access to the Japanese market for U.S. beef and citrus.[3] It was during this period that I met Hugh Patrick, a designated member of the Wiseman's Group[4], who sought with Japanese and American colleagues, including Nobuhiko Ushiba, to calm the waters of the U.S.-Japan trade conflict.

As Deputy USTR, I chaired the interagency committee to oversee U.S.-Japan trade relations. The State Department was represented by Richard Holbrooke, Assistant Secretary for East Asia, and Jules Katz, Assistant Secretary for Economic and Business Affairs; Treasury by Fred Bergsten, Assistant Secretary for International Affairs; Labor by Under Secretary Howard Samuel; Commerce by Under Secretary Sidney Harmon and Assistant Secretary Frank Weil,

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[2] http://www.cvce.eu/content/publication/1999/1/1/641c04eb-2900-4ac3-b07d-1a0467477cdc/publishable_en.pdf.

[3] https://www.washingtonpost.com/archive/politics/1978/12/05/japan-accepts-boost-in-imported-american-beef-citrus-products/d8e198bd-6ade-4e8e-a50f-1d543ae1cc1f/?utm_term=.f53b4c2a054f.

[4] https://books.google.com/books?id=BM4SDAAAQBAJ&pg=PA30&lpg=PA30&dq=hugh+patrick+wise+man&source=bl&ots=8mcWdwI75s&sig=ZnQtPnzOeIfF7stuXfE_6ZrmgYg&hl=en&sa=X&ved=0ahUKEwjPj8TRxOPTAhVGPCYKHbylDw8Q6AEIIjAA#v=onepage&q=hugh%20patrick%20wise%20man&f=false.

and Agriculture by Under Secretary Dale Hathaway and Deputy Assistant Secretary Howard Worthington. For a short time there was a unified and coherent U.S. approach with respect to America's economic policy toward Japan and its implementation. In early 1978, I stated that the United States should recommend to the government of Japan that Japan "publicly set a timetable for balancing its trade account."[5] That effort culminated in the Strauss-Ushiba agreement in October 1978. Under that agreement, there were three levels of commitments on the part of Japan—to take fiscal measures designed to achieve a seven percent annual growth rate, to make all reasonable efforts to reach equilibrium in balance of payments, and to provide enhanced market access for a list of specific products in which the U.S. had commercial interest. Not all the goals could be reached, but it was important for our bilateral relations and for our two economies that the attempt be made.

There may have been a mismatch of expectations that would be bound to lead to friction between the two countries. Toyoo Gyohten, whom I have known for many years as an outstanding Japanese official, in the book that he co-authored with Paul Volcker, *Changing Fortunes*, posited a proposition about U.S.-Japan relations that I found remarkable when I first read it when the book appeared in 1992, and still do:

> When we talk about the increasing sore feelings and deterioration of this alliance, it is important to reflect upon the fundamental character of the alliance. In my view, it was built upon two pillars. One was Japan's acceptance of U.S. leadership in global affairs. The other was U.S. acquiescence to Japan's free entry to the world market and that included the U.S. market. This alliance worked beautifully. The United States could count on Japan as a faithful and obedient follower, and thus a supporter of American global strategy. Japan had a free hand, thanks to the stability imparted to the world by American power, to expand its exports while securing the stable import of oil, foodstuffs, and raw materials.[6]

I have not found an American source describing a similar view for the U.S. side of this extraordinary equation. We, as trade negotiators, never heard it, and certainly never thought it.

b. The 1980s

The 1980s were even more turbulent. Ford and the UAW brought a safeguard case against Japanese exports of cars in 1980. I was hired by Nissan to represent it before U.S. agencies. Japanese cars were flooding into the United States in the wake of the second oil crisis in 1979 when panic buying caused lines of cars to form at gas stations. The Japanese car companies proved to the satisfaction of the independent agency investigating the case that Japanese cars were not causing injury to the U.S. auto companies. It voted 3-2 that the cause of injury during this oil crisis was a shift in consumer demand to smaller cars that Japan was

[5] https://books.google.com/books?id=BM4SDAAAQBAJ&pg=PA53&lpg=PA53&dq=strauss+ushiba+agreement+1978&source=bl&ots=8mcVbvE77m&sig=HErJWWbz_LCTHltFADYduClVzwQ&hl=en&sa=X&ved=0ahUKEwj6iYKYmsDTAhXI5yYKHRdIDsAQ6AEIJTAB#v=onepage&q=strauss%20ushiba%20agreement%201978&f=false

[6] Paul A. Volcker, Toyoo Gyohten, *Changing Fortunes*, Times Books, 1992, at pp. xvii-xviii.

shipping to the U.S. in quantity, cars that Detroit largely did not make.[7] This did not mean, as a practical matter, that trade restrictions would not be required, and they were required, in the form of export restraint agreements on the part of Japan. This case may have stimulated the beginning of a change in thinking on the part of Japanese carmakers, which ultimately proceeded to produce cars in the United States through so-called transplants. These companies' investments began a process of cementing amicable trade relations between the two countries.

A second area of controversy during this period occurred in semiconductors. Japan's market was substantially closed. The chief consumers of this product were large, vertically integrated Japanese electronics firms that bought primarily from each other, relegating foreign producers to the status of residual suppliers. Japanese firms also were found to be dumping memory chips, which resulted in substantial U.S. antidumping duties being put into place. A settlement was reached in 1986 by then-USTR Clayton Yeutter, supported by then-Secretary of State George Shultz.[8] When the U.S. found a year later that the market access was not improving, the United States imposed for a time 100 percent tariffs on $300 million of Japanese exports to the United States.

During this period, there were intensive bilateral talks on a variety of market access problems. The market-oriented sector selective (MOSS) talks constituted a bilateral forum for seeking improvements in Japanese market access for various American products. The U.S. Government Accounting Office (GAO) stated that limited progress was made in opening the telecommunications sector, easing requirements for medical equipment and pharmaceutical testing, approval, and licensing, and gaining tariff reductions for several categories of wood and paper, computer parts and telecommunications equipment.[9]

c. The 1990s

The decade opened with continuing bilateral trade friction and closed with greater harmony.[10] The U.S. trade deficit and sectoral issues still dominated the early years.[11] The decade was characterized by a series of channels for bilateral discussions—the Structural Impediments Initiative (SII), the Framework Talks, and the Enhanced Initiative on Deregulation and Competition Policy. Much attention was given to trade in autos and auto parts. Tensions peaked in 1995 with a posed picture representing a *kendo* match between MITI Minister Ryutaro Hashimoto and USTR Mickey Kantor.[12] Minister Hashimoto had a sixth

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[7] U.S. International Trade Commission, TA 201-44, November 1980.

[8] Schulz and Amb. Mike Mansfield viewed the relationship between the U.S. and Japan as the most important bilateral relationship in the world. https://books.google.com/books?id=oupsPZG1S2IC&pg=PA177&lpg=PA177&dq=george+shultz+japan+most+important+relationship&source=bl&ots=mhJ908Qzyv&sig=fms7ZaRdiXc0z5UiD49YQnjt34Q&hl=en&sa=X&ved=0ahUKEwiZu_Hlg7nTAhUC6CYKHRUgCTIQ6AEIVDAJ#v=onepage&q=george%20shultz%20japan%20most%20important%20relationship&f=false.

[9] http://www.gao.gov/assets/150/146777.pdf.

[10] https://crawford.anu.edu.au/pdf/pep/pep-310.pdf.

[11] https://www.brookings.edu/research/trade-policy-in-the-1990s/.

[12] June 27, 1995.

degree black belt in *kendo*. From my uninformed place as an outside observer, I thought at the time that he had won the match.

Photographic film. My own involvement during the decade centered on two matters: photographic film and semiconductors. I represented Kodak. The Japanese market was seen by me, by my client and by the U.S. government to be substantially closed. The barriers were many: the occupation by the domestic competitor of the primary distribution channel, rules against discounting (the Premiums Law), and rules against large discount retailers. The case, which was factually very complex, went to a WTO dispute settlement panel. The U.S. did not receive a positive result in the litigation itself. But Japan moved to repeal the large-scale retail store law (*daitenho*) and enact additional reforms. In announcing the result of the WTO case, USTR called on Japan to live up to and fully implement the representations it made to the WTO dispute settlement panel regarding deregulation, transparency, nondiscrimination, an open distribution system, and vigorous enforcement of competition laws with respect to consumer photographic film and paper as well as other sectors that faced similar market access barriers. Progress was made on a number of these fronts. The results were in fact a win for both countries.

Semiconductors. In the 1990s, there were two U.S.-Japan Semiconductor Arrangements, one in 1991 entered into to see Japan's market access pledges fulfilled, and a second one in 1996, which marked a new phase in the relationship. In 1991, the antidumping provisions of the 1986 agreement were terminated. By late 1992, there was measurable progress in market opening. In 1996, the U.S. and Japan agreed to an entirely new approach. They created two parallel organizations, a forum where government officials would meet and a separate forum for industry meetings, both to discuss market opening measures, cooperation on the environment and other matters of mutual interest. The industry would meet annually with their government officials to convey recommendations on fostering open trade. The government forum was named the Government and Authorities Meeting on Semiconductors (GAMS)[13] and the industry forum became the World Semiconductor Council[14]. I believe that the choice of this format was a Japanese initiative, formed with a view to fostering cooperation on matters of common interest. It aimed for and largely achieved tariff-free trade. The 1996 Semiconductor Agreement marked the beginning of an end to confrontation and the start of a new era of U.S.-Japan cooperation.

Autos and the aftermath. The US had threatened to impose 100 percent tariffs on $6 billion of high-end automobile imports from Japan. With hindsight, America's *gaiatsu* trade policy peaked at that moment, like the cresting of the famous Hiroshige wave. There were still problems in the bilateral relationship. There were still many instances of *monzenbarai*, a rejection of a knock at the gate—that is, problems with market access. The USTR found, however, that there was increasingly less support at home for its efforts to enter through that gate, and there followed a period of *mukanshin* (no interest), or perhaps very little interest, on the part of the United States. The fact that Japan was no longer high on the list of U.S. priorities was greeted with a mixture of relief and possibly a feeling of *oitekebori* (being left behind, i.e., Japan-passing). There was not by any means a total cessation of discussions on

[13] "Authorities" referred to officials from Taiwan and the European Commission.
[14] http://www.semiconductorcouncil.org/about-wsc/.

trade issues between the two countries, but going forward there was nothing like the intensive effort at improving the bilateral relationship that characterized earlier decades. There were enhanced deregulatory initiatives, providing for lower connection rates for Internet, and the like. Slow, incremental progress continued to be made, but with neither passion nor great drama that characterized prior history.[15]

Factors that lessened frictions included: First, the percentage of the U.S. trade deficit accounted for by Japan plummeted as its position was replaced by China. Second, U.S. unilateralism and Japanese export restraint appeared to be eliminated as permissible under the new World Trade Organization rules that came into effect on January 1, 1995. Third, and perhaps equally important, was Japan's seeking to reform its own economy in order to stimulate domestic economic growth. *Naiatsu (*internal pressure) appears to have taken the place of *gaiatsu* (foreign pressure). Fourth, the slowing of the Japanese economy was making it a less attractive option for U.S. business as compared with other markets.

One other aspect of the U.S.-Japan trade relationship in the last three decades of the 20th century deserves mention. My observation is that Japan, feeling vulnerable with respect to its protected agricultural sector and perhaps seeing no great gains to be made with respect to its exports, maintained a low-profile, defensive posture in GATT-based multilateral trade negotiations. I led the team in U.S. negotiations with Japan in the 1970s during the Tokyo Round of Multilateral Trade Negotiations (MTN), and was a close observer of Japan during the Uruguay Round negotiations. Later, outside the U.S. government, I was on-site at the Brussels session that did not wrap up the round in 1990 as USTR Carla Hills had hoped, and was again present in 1994 in Geneva for the final days of the Uruguay Round that gave birth to the WTO, when USTR Mickey Kantor represented the United States. From my vantage point, Japan resolutely avoided a leadership role in both of these rounds of negotiations.

II. The 21st Century

a. The Joint Agenda

In December 2008, Hatakeyama Noboru and I co-chaired a conference at my law firm at the time, Dewey & LeBoeuf LLP, bringing together business executives, former government officials and other experts[16] from our two countries to construct a Joint Action Agenda[17] in the form of recommendations for the incoming Obama administration and the Japanese government. The meeting focused on a broad range of areas for enhanced cooperation between Japan and the United States:

- Providing a long-term vision for strengthening the relationship
- Strengthening the security relationship
- Negotiating a modernized bilateral Treaty of Friendship, Commerce and Navigation

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[15] *The Future of United States-Japan Economic Relations.* Alan Wm. Wolff at MITI Research Institute, November 7, 2000. http://www.libertyparkusafd.org/Hamilton/speeches/Future%20of%20US%20–%20Japan%20Economic%20Relations.pdf.

[16] https://www.jef.or.jp/en_act/act_japan_us_l.asp?acd=142.

[17] https://www.jef.or.jp/PDF/A_Joint_Action_Agenda.pdf.

- Simultaneous achievement of economic growth, energy security and environmental protection
- Addressing climate change
- Improving food safety and security
- Enhancing cooperative innovation
- Creating sound, stable financial and capital markets
- Achieving a successful conclusion to the Doha Round negotiations
- Enhancing integration of the two economies
- Promoting Asia-Pacific regional integration

The report noted that the United States and Japan were ranked respectively first and second in the world in terms of size of gross domestic product (GDP), accounting for one-third of the entire world's GDP, and were linked in an extraordinary number of ways, namely:

- The continuing commitment of the United States to Japan's national security
- Japan's similar values to those of the United States, including its commitments to democracy, the rule of law, respect for freedom and a market economy
- Japan's support for international organizations
- Japan's rank as the second-largest supplier of foreign direct investment to the US, creating more than 600,000 job opportunities in the U.S., and the United States as by far the largest destination for Japan's foreign investment (31.9 percent) and also by far the largest source of direct investment in Japan (33.5 percent)
- Japan's role as a very significant investor in U.S. Treasury securities
- Japan's leading position in developing energy-conservation and alternative energy technologies, with extensive experience in operating nuclear power stations
- The U.S. accounting for the largest share of foreign holdings of Japanese securities

However, the report stated that businesses in the United States and Japan paid slight attention to the value of the US-Japan relationship.

The report recommended agreement on a number of building blocks consisting of pragmatic steps for enhanced cooperation leading toward creation of an economic partnership agreement. It called on both countries to join the Trans Pacific Partnership (TPP) Agreement.

At the time, neither country adopted the recommendations contained in the *Joint Action Agenda*. Neither government officials nor enough business leaders in either Japan or the United States saw a need to attain the closer economic relationship described in some detail in the report. The report, therefore, did not lead to a further effort to foster a comprehensive bilateral negotiation.

b. The Trans Pacific Partnership (TPP)

On September 22, 2008, USTR Susan Schwab announced for the George W. Bush administration that the United States had agreed to join the negotiations for TPP. The Obama administration reaffirmed this decision in November 2009. For its part, Japan joined the TPP negotiations at the 18th round of negotiations at Kota Kinabalu, Malaysia, in July 2013.

Japan's negotiating team was well-prepared, having been in intensive discussions with Deputy USTR Wendy Cutler and her team for over a year before Japan took the decision to join, and before the United States was prepared to support its participation. Given the high stakes of Japanese entry, it was important that Japan knew what would be expected of it. The U.S. negotiators would need to show Congress and its stakeholders that Japan was prepared to address the difficult issues of agriculture and autos.

The role played by Japan in the TPP negotiations was very different from the one that I saw in the Uruguay or Tokyo Rounds. It was self-confident and not defensive, although as with any participant it had defensive concerns. Japan's negotiators engaged constructively on the difficult subjects, in agriculture and autos, and asserted strong leadership on the rule-making sections of TPP. Rules in my view were the most important part of TPP, as the results in terms of trade liberalization were personally somewhat disappointing. With respect to rules, the two breakthrough areas that stand out for me were those dealing with the digital economy and the disciplines on state-owned enterprises, neither of which the decades-old WTO addresses. There was also some progress on transparency and "regulatory coherence" (a somewhat obscure term addressing the attempt to avoid promulgating conflicting regulations that could interfere with trade).

Japan played a central role in making TPP a strong agreement. With the United States, it represented over half the GDP of the participating countries. In what turned out to be the final negotiating ministerial session in Atlanta in early October 2015, Japan and the United States finally resolved the very difficult auto and agricultural market access issues. With respect to the U.S.-Japan issues, Japan made additional changes in agreed rules of origin for autos and auto parts (determining how much TPP content as compared with third-country content would be needed to qualify for eventual duty-free treatment under TPP). The two also agreed on a long period of tariff staging for Japanese imports of autos and trucks in order to bring about a final TPP result. Deputy USTR Wendy Cutler was able to make substantial progress with Japan's chief negotiator, Koji Tsuruoka, in the Japan-U.S. negotiation, creating a path for USTR Michael Froman and Japanese Minister Akira Amari to close the bilateral market access and the regional content rules part of the negotiations. This cleared the path for final conclusion of TPP with their ten ministerial colleagues.

Japan's involvement went beyond the issues in which it had a primary commercial interest. For example, at Maui, the preceding ministerial meeting held in July 2015, Japan offered a compromise proposal on the contentious intellectual property issue that divided the United States from a number of the other participants—the period that a pharmaceutical inventor would be granted exclusive use of its data for biologics (with the effect of protecting its patent position needed for the long process of invention and obtaining its patent).

On Friday, January 20, hours before the inauguration of U.S. President Donald Trump, the Japanese Government gave notice to the TPP chair, New Zealand, that it had ratified TPP. Three days later the new U.S. president withdrew the United States from the agreement.

After the successful meeting between President Trump and Prime Minister Shinzo Abe at Mar-a-Lago on February 12, and Vice President Pence's visit to Tokyo to meet with Deputy

Prime Minister Aso on April 18 for the first session of an Economic Dialogue, the following is the apparent state of play: Japan is free to meet with the other ten members of TPP and potentially forge substantially the same TPP that the U.S. signed in 2015, with as many of the original TPP members who are willing to join it, and the United States and Japan will continue discussions that may or may not eventually lead to a bilateral trade agreement between the two countries. The latter is not yet a definitive goal. What is clear is that ultimately Japan would prefer the United States to rescind its withdrawal notice and join TPP.

III. The Trump Administration's Trade Policy – Effects on Japan-U.S. Trade Relations

a. Assessing Current U.S. Policy

The first and only trade action of current consequence that President Trump took in his first 100 days was to erase the U.S. signature from TPP. This action stimulated other countries to seek alternative arrangements. One option for those in Asia is the Regional Comprehensive Economic Partnership (RCEP) agreement, which includes China and India. As noted, some are working to continue progress on a Trans Pacific deal absent the U.S. participation. The announcement that the president was considering terminating the North American Free Trade Agreement (NAFTA) spurred Canada and Mexico to join the list of countries looking for trade agreements elsewhere -- the two urgently reached out to non-TPP parties, such as the European Union, to conclude alternative trade arrangements.

With the exception of scrapping TPP, and proceeding with its intention to renegotiate NAFTA, what has emerged from the Trump administration has consisted largely of statements and presidential directives to conduct studies and investigations, all aimed at seeking to achieve redress as to what the new administration considers shortfalls in existing trade and trade agreements.

The tone from the new administration has been variable, and not, on the whole, pro-trade. The terms that were employed in the opening days of the new administration were: "national sovereignty," "economic nationalism," "America First," and "Buy American, Hire American." Prior trade agreements to which the U.S. is a party were said by the new president to be "terrible." He said on a number of occasions: "NAFTA is the worst trade deal maybe ever signed anywhere, but certainly ever signed in this country."[18]

When the G-20 finance ministers were drafting their final communiqué in Baden Baden, the United States broke from its consistent position in prior international economic meetings. It rejected the normal anti-protectionism pro-WTO language inserted into declarations earlier this month. Uncharacteristically, it was the French and Brazilian finance ministers who were pressing for inclusion of anti-protectionist language. The U.S. had abdicated its role of supporting an open international trading system. When the new administration failed to take the stage a month earlier at Davos, Xi Jinping took on the mantle of being the leading evangelist for free trade.

[18] Trump statement, September 2016.

U.S. Secretary of the Treasury Peter Mnuchin continued this break from America's past policies in an interview on March 24, 2017, saying: "So long as we can renegotiate [trade] deals that are good for us, we won't be protectionist. Otherwise we will." This, from the ostensibly more liberal trade wing of the administration. Evidently to avoid having a dissent from the United States, the IMF meeting in April shied away from condemning protectionism[19]. More recently, in the IMF spring meeting there was no condemnation of protectionism. This omission was assumed to be in deference to the U.S. position.

In late April, the president was still threatening to withdraw the United States from trade agreements: NAFTA (if negotiations did not go well) and the Korean-U.S. Free Trade Agreement (KORUS).

The current White House tends to be graded on a curve. That which would have been shocking in earlier administrations has become commonplace. So there is relief if the rhetoric is less bellicose. Earlier, there was also an unprecedented jawboning of individual U.S. companies—Ford, Carrier, and Boeing—to bring manufacturing back onshore, reducing reliance on current global supply chains. Foreign firms and governments have gotten the message that the Trump administration welcomes inbound investment with an intensity usually characteristic of U.S. state governors. During the campaign, candidate Trump made threats of 35 percent tariffs on plants that move to Mexico and an across-the-board 45 percent tariff against Chinese imports. Those threats that made headlines earlier are no longer current. Instead, national security investigations have been initiated with respect to steel and aluminum. These are designed to protect against excessive imports or harmful lower prices due to foreign overcapacity—if action is found to be needed.

While the president's 2017 Trade Policy Agenda issued by USTR on March 1 was published very early in the administration, with a dearth of political appointees in place, and thus it would be premature to take this as anything like a complete guide to the direction the administration policy will take, it gives an indication of the administration's concerns. It is clear that a more muscular trade policy is envisaged. While the President's Agenda does not state that the U.S. will resort to unilateral measures to redress trade problems, doing so is implied.

There is also a call-out for a focus on foreign economies that do not operate on market-based principles, which no doubt means China. All available leverage is to be used to address this conduct. That tone has recently been dramatically moderated, presumably in connection with the administration's attempt to gain China's cooperation with respect to curbing North Korea's nuclear and missile programs. The two national security import investigations—for steel and aluminum—involve most heavily problems caused by Chinese overcapacity, but China is not named as a target. Selective, rather than across-the-board, measures with respect to trade with China are likely.

[19] http://www.dw.com/en/imf-members-drop-pledge-to-fight-protectionism-at-spring-meeting/a-38548677.

I viewed with some relief the first detailed official statement on the administration's trade policy contained in the Agenda. While the Agenda adopts at the outset the language of economic nationalism, when the agenda gets to specifics, under the heading "Defending National Sovereignty," it does not reject engagement in world trade. Rather, it addresses one particular and relatively narrow U.S. sore point—complaints about abuses of WTO dispute settlement panels that condemn national trade remedy measures. This will likely remain a substantial element of Trump administration policy throughout the next four years. The Agenda's conclusion was objectively sensible. It calls for more progressive policies at home through adoption of forward-leaning domestic measures (lower taxes, less regulation, spending on infrastructure) and the negotiation better trade agreements, including revising the ones that now exist, leading to expanded trade. On its face, these are not steps that would disrupt the world trading system.

The next document of consequence was the U.S. Trade Representative's draft notice to Congress for renegotiation of NAFTA. In many respects it is similar to what any American administration would issue. The draft notice and even more so the final notice sent to Congress on May 18, 2017, reinforce a preliminary assessment that trade-negotiating objectives can, under the Trump administration, follow a more traditional course.[20] There was nothing radical contained in the draft, although certain objectives on tax, government procurement, rules of origin, safeguards and trade remedies could prove to be contentious points in the negotiation and a departure from previous U.S. trade policy. The final notice confines itself to a general statement that the administration will act consistently with the trade negotiating objectives contained in U.S. law.

Nevertheless, there are significant early trade policy pronouncements that should be of continuing concern. The administration has not distanced itself from the doctrine that bilateral trade balances are to be considered the litmus test to determine whether particular trade agreements are benefitting the United States. In addition, bilateral agreements are to be the path forward, not multi-party agreements. There is currently no positive trade agenda for the United States participating in, much less leading, multi-party agreements—nothing for the WTO, nothing for the Trade in Services Agreement (TiSA), nothing on replacing the Trans Pacific Partnership Agreement and nothing with respect to continuing negotiations with the European Union through the Trans-Atlantic Trade and Investment Partnership (TTIP). It remains to be seen whether the Trump administration, with its last cabinet-level official, the U.S. Trade Representative in place, will take an active role in multi-party settings, and the tone that the administration will convey when it is in multi-party settings. The first indication came at the APEC Trade Ministers' Summit that concluded a few days ago when USTR Ambassador Robert Lighthizer confirmed as expected that the U.S. will not join the TPP, but he added that this did not mean that the United States would not be actively engaged in Asia, that in fact the opposite was the case.

While the administration is emphasizing change, a large part of the institutional and legal structure for the formation of U.S. trade policy remains constant. Under the U.S.

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[20] https://www.washingtonpost.com/news/wonk/wp/2017/03/30/white-house-calls-for-changing-but-not-scrapping-nafta-in-draft-letter/?utm_term=.5232f9ac5fb3. https://www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html. See: USTR website for the final notice.

Constitution, the Commerce Power is lodged in Congress and the Foreign Affairs Power in the Executive. The president can negotiate agreements, but to the extent that they require a change in U.S. law, he cannot implement what he has negotiated. The statutes governing trade, importantly Trade Promotion Authority (TPA), with its many requirements and objectives for trade negotiations, is still U.S. law and provides the necessary process for approval and implementation of trade agreements. Moreover, there was virtually no change in the leadership and make-up of the Congress. Senators Hatch and Wyden, Speaker Ryan, and Chairman Brady are all in their same positions. They are key players and they are all pretty much free traders. The skilled and experienced trade bureaucracy, referred to by presidential advisor Steven Bannon as the "deep state," is still in place up through the senior career levels. And a seasoned former U.S. trade negotiator, Robert Lighthizer, has become the U.S. Trade Representative.

None of this is a guarantee of predictability in the conduct of Trump administration trade policy, but these factors favoring policy continuity do count, and they tend toward a degree of steadiness. An estimate of what the future holds: the sum of the actions taken is not likely to be a complete break with the past.

In understanding U.S. trade policy, the key point to keep in mind is that the Trump Administration's course is set primarily with one policy direction in mind – strengthening the U.S. industrial base. Not every provision in every trade agreement it negotiates will be designed to serve this purpose, but the bottom line for each agreement, from a Trump Administration perspective, is that each will be expected to do so. This is the meaning underlying the infelicitous phrase "America First". While the policy may be most in evidence through enforcement measures, each trade agreement will be weighed by whether it enhances American manufacturing and employment.[21]

Operationally, there are foreseeable problems going forward. Trump doctrine, emphasizing bilateral trade agreements to the exclusion of broader arrangements, is impractical. It will be a hindrance to accomplishing enough of what is needed to reform the rules governing global trade. Taking this path, to the extent that it is feasible at all, is too limiting with respect to America's negotiating options. In addition, strict application of a bilateral trade balance litmus test for trade agreements will distort U.S. trade policy, creating friction with trading partners and undermining creation of a beneficial rules-based global trading system. Some flexibility will need to be introduced into American trade policy if it is to function effectively at all.

b. Looking Ahead

The notion that bilateral negotiations are easier to negotiate than multi-party agreements will be unmasked once talks begin in earnest with any of the potential negotiating partners. The prospective bilateral agreements are likely to take years to bring to a conclusion.

[21] *We will promote our economic growth by strengthening our manufacturing base and expanding exports in manufacturing, agriculture, and the service industries. We will also challenge unfair trade practices that leave American workers, farmers, and businesses competing in global markets at a disadvantage.* President Trump's Proclamation, issued on May 19, 2017, Declaring May 21-27 to be National Trade Week.

As to which countries are candidates for America's bilateral agreements, the renegotiation of NAFTA with Mexico and Canada is to be first. Canada and Mexico have already agreed. Beyond that, the administration would like to negotiate an agreement with the U.K., but the U.K.'s divorce from the European Union (EU) is not final and won't be for nearly two years, followed by what may be continued uncertainty. At this point the U.K. does not know what its external trade arrangements will be, and so U.S. discussions with the U.K. have their limits. The remaining candidates of size are clearly the EU and Japan. The EU negotiations stalled during the Obama administration. There may be an attempt to reconfigure and simplify goals toward a more realistic approach for U.S.-EU negotiations once the German elections have taken place. But a comprehensive agreement with the EU will remain difficult to achieve, both because of a mismatch of approaches and the fact that both have complex governing structures (in terms of competencies and the decentralization of decision-making on both sides of the Atlantic with respect to some important issues). There are likely to be a series of practical arrangements on particular subjects, such as mutual recognition of standards and testing arrangements in various product areas.

By process of elimination, Japan is the clearest major candidate for the United States to consider for a bilateral negotiation beyond NAFTA. That it will at least consider doing so is a logical possibility. While Japan is still hoping that TPP can be revived, and it really does not want to renegotiate agricultural market access, it has not excluded negotiating a bilateral agreement with the United States, although it has not encouraged this approach.

What has taken place so far: Prime Minister Shinzo Abe and President Donald Trump met at Mar-a-Lago in February and agreed to create an ongoing high-level dialogue. As a result, on April 18, Vice President Mike Pence visited Tokyo to hold initial discussions with Deputy Prime Minister Taro Aso pursuant to this initiative.

In moving toward a closer bilateral U.S.-Japan economic relationship, both sides will need to consider the best approach to achieve positive results readjusting to the fact that they spent over three years believing that that this would occur within the context of the Trans Pacific Partnership Agreement. Prime Minister Abe had included the TPP as an important part of his "third arrow" to stimulate Japan's renewed economic growth. A full half of TPP was, in economic terms, a free trade agreement between the United States and Japan, representing 20 percent of the world's economy. There is now a void to fill.

IV. The Future of U.S.-Japan Trade Relations

a. Options for the U.S. and Japan

The Trump administration is unpredictable, sometimes purposefully. At this point, there is no assurance as to what it will contemplate in terms of trade relations with Japan. The meeting between Vice President Pence and Deputy Prime Minister Aso was positive in tone, but the public reports revealed no specific plan for embarking on negotiations for new formal arrangements between the two countries. There are elements of current U.S. policy (such as judging the value of any bilateral trade relationship on the basis of whether the U.S. has a trade deficit with that country) that may be central to the Trump administration policy. The merchandise trade deficit with Japan stood at $69 billion last year. This could complicate any future U.S.-Japan bilateral negotiation. Part of the gap might be filled by U.S. exports of LNG to Japan.

Were there a negotiation between the United States and Japan, what would the U.S. negotiating position look like? There will be an effort to gain further market access for American products as well as an updating of the agreement in line with a number of TPP subjects. As one example, cited in USTR's May 18 final notice for renegotiating NAFTA, the digital economy did not exist when NAFTA was negotiated 23 years ago. Establishing rules to preserve openness for e-commerce will be a U.S. imperative. Addressing this subject, and a number of others that were contained in TPP such as regulatory coherence and disciplines on commercial transactions of state-owned enterprises, should not be a problem for America's trading partners, including Japan, which are TPP signatories.

Foreshadowing the complexities that will be involved in any bilateral negotiation is the U.S. Trade Representative's Annual National Trade Estimate Report for 2017, which devotes 14 pages to trade issues that the U.S. currently has with Japan. While it may be argued that this document was prepared largely under the auspices of the prior administration, it reflects private sector input, and while there will be issues added to this list going forward, these elements of concern will likely remain, although priorities may shift. Another source to consult on U.S. negotiating priorities consists of expressions of concern from members of Congress. Senate and House members will indicate their priorities in hearings on a U.S.-Japan agreement, if one is contemplated, and these cannot all be ignored if congressional approval of the final agreement is to be obtained[22]. At that point economic and political realities, rather than primarily the new administration's dogma, will begin to shape the negotiations.

What follows is a combination of what I believe the path forward should be, together with an acknowledgement of realities on each side that will constrain what is possible:

- *It would be in the long-term best interests of both the United States and Japan for Japan to seek agreement of as many as possible of the other ten TPP participants to proceed to enter into a TPP minus the United States.* Given that the Japanese government has already approved TPP as it now stands, a TPP agreement of eleven or fewer members could have much the same content as the current text of the TPP, and should do so if there is any hope that the U.S. might re-join some day in the future without a difficult additional negotiation. Concluding a TPP of less than twelve members may not necessarily be easy without U.S. participation, as the package of trade concessions remaining on the table is in substance a different deal but it should be attempted.

[22] A good example of what to expect is contained in the record of the May 18, 2017, confirmation hearing of Bill Hagerty to be U.S. ambassador to Japan. Senators raised concerns about automobile standards, and market access for beef and poultry. And those are just a foretaste of a long list of Congressional concerns advanced on behalf of constituents. See: https://insidetrade.com/daily-news/trump's-pick-ambassador-japan-takes-trade-tpp-questions. Inside US Trade, May 18, 2017.

- *The U.S. and Japan should build their bilateral framework, paving the way for the U.S. and Japan at some point to enter into a bilateral trade agreement.* Any bilateral agreement should have more content than past free trade agreements to which the U.S. or Japan is a party. The aligned interests of the two countries can support a broader and deeper agreement than was possible in TPP. I recognize that the negotiation poses a strong risk for some Japanese domestic interests. The United States could ask Japan to agree to provide additional market access for sensitive products, agree to exclude to a greater extent third-country components that are part of the automotive global supply chains through tighter rules of origin, and include in a trade agreement a provision addressing currency values—a matter normally dealt with exclusively by finance ministers. While the negotiation of a bilateral agreement can intensify the focus on the most difficult issues, it also can be a path to more far-reaching cooperation. I list below a number of desirable and/or likely elements.

- *Any bilateral U.S.-Japan agreement should be designed to permit the "docking" of other countries, upon the latter individually negotiating accession.* Similarly, the renegotiation of NAFTA should be designed to be compatible with TPP and any bilateral agreement so as to facilitate their linking into one free trade area (recognizing the complexity of adjusting rules of origin to combine two or more bilateral or regional agreements).

- *Any other bilateral agreements negotiated by either Japan or the United States (most importantly with the European Union and the United Kingdom) should have an equally high standard as their bilateral accord with a view to establishing future linkage.*

The sequence of negotiations is less important than attaining these objectives. The end goal is to establish higher standards in the Asia Pacific region and then, ultimately, the World Trade Organization (WTO) for global trade. Until a broader consensus can be reached in Geneva, progress on a regional and bilateral basis will be the primary course that all countries are likely to pursue. A potential exception is the possibility that groups of like-minded WTO members may be willing to pursue plurilateral agreements in Geneva with current uncertainty as to whether the U.S. would consider joining at the outset.

The course for both Japan and the United States should be set and implemented in a strategic manner with an ultimate multilateral end goal in mind if there is to be a coherent system of rules for international trade. Failing to do so would have two likely results: The first is the creation of a variety of inconsistent rules hampering current trade, which could stand in the way of reaching broader multilateral agreement. The second downside of proliferating bilateral and regional agreements is that they become underutilized and increasingly irrelevant. Businesses, to the extent they can, simply ignore sub-global deals with their plethora of different rules of origin when they become burdensome. When that happens, there is little benefit to having regional and bilateral deals.

b. Checklist of Possible Contents for a U.S.-Japan Bilateral Agreement

Here we should keep in mind that President Trump has labeled all prior trade agreements to which the U.S. is a party as "terrible." Any future agreement needs to have elements that would be regarded as “better.” That ill-defined criterion for a successful negotiation, depending on how it is applied, can be a positive, spurring a higher level of ambition.

The actual list of specific issues to be resolved will be developed after consultation with each country’s stakeholders.[23] An agreement could include the following (the first two are not optional):

1) Duty-free trade with sufficient coverage to qualify as a free trade agreement under the WTO rules (a low bar)
2) Some selective product-specific rules of origin meeting the political and commercial needs of both parties and compatible with NAFTA (potentially for auto parts)
3) Liberalization of services on a negative list basis (that which is not excepted is covered)
4) Incorporating liberalization in agriculture as required by TPP, while exploring where further liberalization would be possible over time, including:
    a. setting high standards for sanitary and phyto-sanitary standards to expand trade on a sound basis
    b. developing a common approach to trade with third parties (e.g., resisting unwarranted expansion of geographical indications).
5) Adoption of the rules sections of TPP with necessary upgrades, including:
    a. Enhanced rules to foster digital trade (drawing on TPP with a core element being the free flow of data across borders without exceptions for any sector)
    b. Stronger disciplines for state-influenced or controlled enterprises that engage in commercial competition; the two sides should evaluate the TPP provisions to create broader coverage and stronger disciplines
    c. Enhanced intellectual property protection (including data protection for biologic pharmaceuticals)
    d. Higher standards to foster environmental goals
6) Deeper cooperation on setting standards, with mutual recognition, including an ongoing process for cooperation
7) Deeper bilateral regulatory cooperation with a view to reducing the burden of regulation while serving common objectives for health, safety and security
8) Joint efforts to advance R&D for environmental goods
9) Consultation and coordination of approaches for third-country issues such as:

[23] Examples of U.S. specific product objectives by country can be found in the U.S. Trade Representatives 2017 National Trade Estimate. As noted, this collection of largely private-sector complaints is some guide to issues to be negotiated, even if largely prepared before appointment of the new administration’s top officials.

a. Dealing with overcapacity due to national industrial policies, market access where there are substantial nonmarket aspects of any country

b. Labor standards

c. The content of bilateral agreements (such as with the U.K. and the EU of 27, but others as well) to achieve harmonization at a high standard

d. Regional agreements such as TPP and the Regional Comprehensive Economic Partnership (RCEP);

e. The appropriate scope for WTO dispute settlement

f. Plurilateral and WTO initiatives, such as for the digital economy (for potential adoption at the WTO Ministerial meeting in Buenos Aires in December), services trade liberalization, duty-free treatment for environmental goods, and keeping the Information Technology Agreement's product coverage current

g. The content of bilateral investment treaties

10) Cooperation on cybersecurity threats

11) Joint efforts to promote food safety, including the technologies supporting this objective

12) Joint efforts to promote new technologies such as for intelligent cars and infrastructure

13) Joint efforts for environmental objectives; e.g., for cleaner coal use or renewables

14) Joint efforts to promote sound, stable financial and capital markets, including actions against currency manipulation (e.g., the Bergsten countervailing currency intervention approach) and giving meaning to GATT Article XV and IMF Art.IV.1 (iii)

15) Promoting Asia Pacific regional integration

16) Fostering temporary entry of high-skilled workers

17) A high standard investor state dispute settlement mechanism to provide a model for other agreements

18) Institutional arrangements to oversee and enhance the cooperative endeavors listed above and those that may be added

This list is written in large part from the perspective of a former U.S. trade negotiator and a lifelong participant in one form or another in various aspects of trade policy. A current or former Japanese trade negotiator would likely have a somewhat different list – potentially just looking to have the U.S. and Japan apply TPP to each other as is. I very much doubt that the Trump administration will take that approach. Realities as seen from Washington, D.C., and Tokyo will shape the menu that I have set out. The list that I have generated is designed with a view to gaining support of the current U.S. administration and Congress. Japanese negotiators would, of course, have to judge what would be acceptable to the National Diet and to major constituencies.

There are many additional areas that might enhance both integration of the two economies and cooperation to the mutual benefit of their peoples. Broad areas for cooperation can be handled in the bilateral economic dialogue and in its subgroups. These can include cooperation on fiscal and monetary matters, measures to foster bilateral investment flows, and cooperation with respect to competition policy. There may in addition be specific additional areas for cooperation, for example on improvements in infrastructure (such as for high-speed rail, in which Japan has advanced technology and experience), a joint project on launching and sharing earth satellites, on sharing knowledge and approaches to worker training for rapidly changing needs, and joint research on other areas of common concern such as a cure for cancer. Each of these subjects can be covered in a bilateral dialogue but might not be included in an enhanced trade agreement if and when one becomes feasible.

V. Conclusion

TPP was actually a good agreement for the United States and the eleven other signatories. It stands as a remarkable accomplishment. It was state-of-the-art in terms of substance, given the diversity of interests and economic development levels of its 12 participants. Unfortunately, it had a few elements that needed attention in order to gain approval by the U.S. Congress.

There is no evidence that TPP would have led to any significant dislocations within the U.S. economy, but in the presidential election campaign it became caught up in a global wave of anti-trade, populist sentiment. Not one of the leading U.S. candidates for president in 2016 was willing to endorse it. In fact, all were critical of it. TPP had the misfortune of becoming the scapegoat for the very real problems of income inequality and stagnation of wages[24]. Globalization and open markets became the object of political calumny, as technological change could not be usefully or practically challenged. Automation is now and will even more in the future be disruptive of employment (e.g., with the introduction of driverless trucks), but it should not and will not be successfully resisted. Very few candidates will run for elective office on a platform of doing away with future products even when these devices promise to be highly disruptive of a range of existing industries.

Governments need to address the underlying causes of dissatisfaction with trade. They cannot fully address the dislocations caused by technological change, but the challenges presented need to be taken into account, and appropriate domestic policies adopted. Going forward, trade agreements will be given greater scrutiny as to whether they are sufficiently trade-creating and whether they are likely to result in trade that is fairer. A compelling case will need to be made that the benefits of current and future agreements more than offset any consequent adjustments borne by communities, firms and workers.

It is too early to predict whether later United States adherence to the TPP in this or the next administration will be possible. The outlook at present is very dim. Nor is there any certainty that a U.S.-Japan bilateral agreement will be entered into or what shape a “better” bilateral trade or economic partnership agreement might ultimately take. But I believe that there will be an agreement. I have advanced a menu of suggestions, some of which would ultimately be included. Few countries have a better opportunity to create a very high standard

[24] For interesting data on income inequality and wage stagnation in Japan, the United States, and a number of European countries, see *Too Much Stuff, Capitalism in Crisis, by* Kozo Yamamura, Policy Press, 2017.

for regulating a closer economic relationship than the United States and Japan. They should make every effort to begin improving the global trading system by finding areas for their own broader and deeper cooperation.