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### **U.S. Trade Policy – from Trump to Biden**

Speech given at the occasion of her visit at the Europa Institut at the University of Zurich on 8 December 2021

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#### **I. Speech by Prof. Kathleen Claussen**

The last time I was here was right before the pandemic. It was a little less snowy and there was also a little more pessimism: pessimism about US-European relations and pessimism about the future direction of the multilateral trading system. This was October 2019 and most of the world at that time was talking about the tweets of our commander-in-chief, not so much about vaccines or the letters of the Greek alphabet that we all need to know now. Both moments I think can be characterized as difficult ones for the world for different reasons. I had the privilege back then in October of 2019 of giving a talk also to members of the law faculty here and my chosen topic then was the so-called trade war, because it had really taken off in that moment. We had tariffs flying in all directions and we really came to the peak of this so-called trade war. We were in the thick of it. The tariffs of course, seemed in many ways contrary to our trading partners, to the rules to which we had committed. We also at that time seemed to have the World Trade Organization hanging by a thread: we had a blockage of the Appellate Body, and a step away from the work of the organization in many respects – a step away and abandoning of trade agreements more generally, while at the same

time trying to remake trade agreements in different ways. It was a tumultuous time, needless to say, for trade law. It was an uncertain time above all. What has changed?

Now, two years later, I am here in December. A little bit of snow has fallen. Am I here to bring joy and good tidings consistent with the season? Unfortunately, I have no ho-ho-ho to share. But if you ask most commentators what has changed, they, I think, would say: “Not much.” We still have tariffs, we still do not have an Appellate Body and to a large degree, we are not liberalizing trade through a push toward more trade agreements. So, to the title of the talk US Trade Policy – Trump to Biden. What has changed? We could say: Very little. Here ends the talk – thank you and goodbye. Just kidding – I will go on. I will go on because I think there *are* some key changes that are worth investigating and acknowledging to understand what is happening at this moment, a very different moment from October 2019. I want to focus on three aspects in particular – troubles, tools, and tone.

The troubles are very much the same. This administration is facing many of the same troubles that the last administration faced. In part because the last administration was not necessarily able to solve those troubles, or maybe did not make as much progress as had been hoped in dealing with them. So what are these troubles? Well, first and foremost, it is clear to say the problem in the eyes of most government officials is China. A problem with a capital “P”. It is China’s behavior writ large, its treatment of US and other international companies and rising dominance as a result of this bad behavior. Then there are “sub troubles” – overcapacity in steel and aluminum; there is forced technology transfer and IP theft; there is a WTO seemingly having failed in disciplining the China problem; and, perhaps little serious cooperation from allies trying to take on this problem, not seeing it as deeply as US officials did. That is the first big trouble.

A second “trouble”, which was seen by the last administration and also by this one, is a perception to which many Americans and perhaps many abroad as well subscribe that trade agreements and trade liberalization more generally, particularly in the North American context, have had a negative impact on US workers and on domestic economies. I think this is perhaps aligned with what many have described, of course in more expert terms and in more popular terms, as a dissatisfaction with the international order more generally.

These are troubles – the troubles both administrations have been concerned about. They have not changed very much and remain front and center in the minds of the different White Houses. What I might also add is that this

administration would put climate change as a further trouble on its list. Whether trade tools can deal with that remains to be seen, of course. There is a lot of work happening in that space in many countries today.

But the Biden administration, in contrast with the prior administration, has a very different starting point in addressing these troubles. That brings me to the tools. So, let us go from the troubles that are largely the same, to the tools, where we have seen a little bit of a shift.

When the Biden administration came into office earlier this year, it was facing the implementation of the tools of the last administration. What were those? Firstly, the tariffs in place not just on products from China but also on products coming from many other parts of the world, including here, under a security justification, a concept of economic security that we discussed at length in my last visit, plus a deal that had been negotiated with China that tried to deal with some of this. Secondly, a paralyzed WTO Appellate Body. Thirdly, a new North American free trade agreement, the United States-Mexico-Canada Agreement (USMCA) was negotiated. You may know, one of the great achievements of the last administration was to conclude this agreement to replace the 1990s North American Free Trade Agreement (NAFTA). The new administration is coming in facing this landscape, a very different one from what they last faced in 2016/17 and all under the shadow of a pandemic, which of course has its own difficulties.

What tools has the Biden administration used? What are the shifts to which I am referring? First: The Biden Administration has kept many of these tariffs on but there have been efforts to remove those with allies. The ones with China remain on but those on products coming from allied countries have been removed or are in a process of being removed. They have also removed the threat of putting on still more tariffs. Second, with respect to the Appellate Body: Well, we still have no Appellate Body at the World Trade Organization but we do have greater engagement in other areas of WTO work, it is fair to say. Indeed the US Trade Representative (USTR), the lead official in the US government on trade policy went to Geneva already in her first six months in her new role to talk about the importance of the WTO. That was a trip that her predecessor never made in his four years. Third: Looking at this new North American agreement that was negotiated by the last administration, this administration is advancing that further by enforcing the rules under that agreement. Again, some continuity in tools, some change, some new development coming out of that space.

We go now to tone. Troubles: a little bit the same; tools: a little bit of both; tone: a great deal of change. There has been a great deal of change in tone from the last administration to this one. Here are the differences: more cooperation, a greater cooperative approach, more engagement on issues of trade policy rather than a sort of going it alone approach, a commitment at least in some steps in word and in some places in deed on a commitment to the rules-based order, rearticulating the importance of the rules. And last in tone: a naming of a constituency. I will say a little bit more about what I mean by that. In the last administration there was at least a perception among many, that the administration was working in the furtherance of the steel industry primarily but there were a few other industries that were favored in their policies as well. This administration by contrast, from the beginning, has put forward a more inclusive – at least more inclusive sounding – trade policy, we will get into the details in a moment, what it calls the “worker centered trade policy” (WCTP). WCTP is the catchphrase for this administration, something that it uses in all its statements and press releases, everything you see coming out of the USTR’s office talks about this. Putting workers at the center of the conversation, naming that group more than the last administration did.

The goals are similar. It is to address those troubles. Both administrations have been and are trying to resolve those troubles, both dealing with the question what they think the US economy should look like in five to ten years. What is the vision? What does that look like in a global context? Both wanting to effectuate a paradigm shift. Ambassador Lighthizer, the former USTR in the last administration, made this point very expressively: he talked about a redesign of the rules. Something that I think made many people very nervous: “What does that mean? Are we abandoning the multilateral system, what are we going to do?” Something that I argued back then and still think now: it was not a full turn away from the rules. This administration all the more is thinking that a redesign is still consistent with the principles. So, both of them are thinking about these issues somewhat through a security lens but the tone is different.

When I was here in 2019, I also talked a little bit about how the tariffs were the tool specific to Ambassador Lighthizer. He really wanted to use this tariff tool, something called Section 301 of our 1974 Trade Act. That was something he thought could be used to correct for the troubles, seeing the WTO as insufficient in addressing the China threat. This administration shares some of that view with respect to tools, continuing some tariffs, using this paralysis of the WTO to advance some other goals and in lieu of negotiations. The last administration negotiated a number of new deals to try and reorient them

more towards US interests. This administration is enforcing those rules. So, less negotiation, more enforcement. Actually, if you come hang out on Capitol Hill with members of Congress, you will hear “enforcement” is the buzzword – everyone wants more enforcement of trade rules – one of the key words in trade policy floating around in the relationship between Congress and the executive today: “What are you doing to enforce our trade rules? To keep us on track?” Enforcement, enforcement, enforcement. You also hear a lot of: “Let us create some new tools, as well as resilience in supply chains.” The latter of course is very much related to the pandemic.

Let us talk about enforcement in the context of this WCTP. I want to spend a majority of the time here talking about what that means, because it really is such a centerpiece of this policy and we need to understand it to understand what might happen going forward. WCTP, I mentioned, is everywhere. In addition to enforcement being a buzzword, this is the catchphrase that all the cool cats and kittens who want to blend in with the trade community have to say but it requires some unpacking, so let us do that. What or who is the worker? What does it mean to have that individual centered in trade policy and more specifically what does that mean for a future in five to ten years? What kind of economy are we talking about? While some may think it is a phrase without meaning – a gimmick – something that is used by the administration to appeal to its party. I do not share that view. I think it is at the forefront of the thinking of our trade officials. When I spent some time with Ambassador Tai, the USTR, a year ago preparing her for her role, she expressed that already then. I have the sense that in every trade policy decision that is being made, they are thinking about it through this lens: “What would be the impact on workers if we make this decision?”

I think there are three buckets of workers, three different types of workers that are now coming through as we understand this policy a bit better: workers at home, workers abroad and workers under duress.

By “workers at home” I refer to not just those individuals who are working within the United States but also how they are treated in the trade policy-making apparatus. What are the procedural or administrative features of our trade policy that engage with workers in the US?

Workers abroad: Here we are going to talk about our trade agreements and what they have to say about workers abroad. We have tools in our agreements for enforcing labor standards. This sometimes surprises folks who are not in this trade space all the time but we and other countries have these commitments in our trade agreements where each government promises to

meet a certain standard in its labor laws, to adopt and maintain particular labor laws and then to enforce them progressively after the signing of the agreement. These are trade tools. They are labor commitments in trade agreements. The US has very much been at the front end of that movement to put more labor commitments in trade agreements.

By mentioning “workers under duress” I am referring to forced labor. I will talk a little bit about why I split that out into its own category, because of course these are also workers abroad but I think it deserves a special mention.

I want to talk about these manifestations of the WCTP and a bit about the scorecard or how they are being received. These three areas, I might stop to say, have been – prior to the Biden administration – reasonably separate in US trade policy for different reasons. There are statutes that say that issues of workers at home are going to be handled by the Department of Labor and issues of workers abroad or forced labor are handled by different agencies. So, before we got to this WCTP, these were relatively siloed. You had different bureaucrats working on each one. One effect of the WCTP has been thinking about this holistically and having these government officials start to talk to one another about what this could mean, how they could see trade policy as interacting across these three zones. It has forced additional conversation across these agencies.

I think those interconnections themselves are very interesting but we will take them one by one today. One big question that I would pose to you before we go through these in greater detail is whether this is a trade policy at all or whether it is a labor policy. Is this a worker-centered trade policy or a trade-centered worker policy? Or is it just a worker policy that has implications for trade? There are different views on this and I will let you make up your own mind.

Let us start with workers at home. We start with workers at home because it is the most challenging to discern. As we heard from the dean at the outset, in this tradition, this norm of trade liberalization over the last 60 years, more exports have been the focus, more market access has been the focus, and the free movement of goods and services. The thinking has been that to help workers at home, we will create more opportunity if we lower these barriers to trade. We will create jobs. We will create prosperity for workers at home through this liberalization activity. This message has clearly lost its charm among the US population. There is, I think, a distrust of how successful it could be. It is seen by some as benefitting big corporations and the domestic strategies that the government had put in place to deal with

what perhaps might be some of the fallout, those messaging strategies seem to have failed. So here, to now address what we can do for workers at home, the administration has been looking for new ways to make sure our trade policies serve workers' interests.

One difficulty that we can easily see is that not all workers' interests align. Everyone is theoretically a worker – save for the very young or perhaps the very old. The language used by the administration is that it wants workers – the whole community of workers – to have a seat at the table. What do they really mean when saying that? We see that it might mean talking to underrepresented groups, marginalized voices, even those that have been represented in trade discussions but whose voices have not been given significant attention and not received significant weight in shaping trade policy. The administration has tried to reach out to some of these groups, it has called up some of these representatives of these different groups that I have mentioned and asked: “What do you think? We want to bring you into this conversation about trade.”

Although it has done this outreach there has still been some criticism that the administration's view of the “worker” is overly limited. Why do they think that? If you look at where Ambassador Tai, the USTR, has gone apart from Geneva, she has gone to Michigan, she has gone to Wisconsin and she has gone to Pennsylvania. These are places that are traditionally associated with white male manufacturing workers, which was also the focus of the last administration. These are places that of course are hot political areas for votes in close elections and I should pause to say that these were similar trips to those that were made at the beginning of the Obama administration. If you look back more than ten years the USTR at that time also went to Michigan. His first trip went to Michigan, where much of our auto industry is based. He went there as well but the messages were very different. If you compare what USTR Ambassador Kirk said in 2009 with what Ambassador Tai said earlier this year, the messages differ in the following way. Ambassador Kirk said: “We want to help workers to create markets for you. How can we help you build better exports?” Ambassador Tai's remarks are much more about: “How do we support your work here at home? How do we keep you here at home and how what can we do for you here on the ground in Michigan?”

There has also been talk about digital trade. What does helping the digital worker look like? What about migrant workers? In fact, migrant workers, that is a group that other governments have raised concern about, about what is happening to migrant workers in the US. If this administration is seeking

to ameliorate those issues it is not doing it very publicly or very mildly. So, it seems the administration does not disaggregate in its “workers at home approach” and that makes many people think that the message is hollow. They feel that their voices are not necessarily heard, even among those that are being reached. The administration seeks to be setting up mechanisms to have voices heard but it is not very transparent about that. It set up studies. It has asked the International Trade Commission, which is an independent agency in the US government, to do a study on how trade impacts have occurred and affected different groups around the country.

Then you have the lawyers asking: “Where are we going with this? What sort of policy does this look like?” If you look what the policies we have so far are, we have things like something called “Buy America” with an emphasis on encouraging companies that work with the federal government to buy only American-made goods, to bring more American-made goods at the top of the list and encourage US manufacturing. There is more to come, I think, in that area. We also have more talk about “reshoring”: bringing companies back home from abroad; or nearshoring: bringing companies back to the region of North America or the Caribbean; co-shoring. There are different pieces of the policy that say: “We want to do more for workers at home because we want these industries to return”. On the other hand, many trade analysts look at this and say: “This is protectionism at best. This is not liberalization. So this workers at home policy seems very much in contrast”, they would say, “to the rules of our international trading system.” So, these are policies that may help workers at home or they may not, that remain to be seen. But there is a great deal of concern over whether they are consistent with the rules, whether this administration seeks to change those rules to favor them, or will just live in violation of the rules and we have to go forward.

In this first piece, this first bucket of workers at home, I think there is a lot yet to come. This is the least developed of the Biden administration’s WCTP. We have to see how much of it gets implemented and what it will look like in the coming months. But I should pause to say that Ambassador Tai herself has made it clear that to help workers at home, that is not something where trade policy, as we traditionally know it, is necessarily going to be the top of the list. That is something that requires domestic investment. That requires the type of initiative that we have seen major legislation moving through Congress as of late to increase US competitiveness, to help research and development and the list goes on. So, it is not all about trade policy to help workers at home, something that I think is difficult for the trade community to accept.

Let us turn then to workers abroad. “Workers abroad” is a very big umbrella. As I mentioned earlier, the United States has these labor provisions in its trade agreements and that is where we will focus our attention in my brief remarks today. Again, these are commitments by governments to have a certain labor standard and to enforce those labor standards in their own territories. They make those commitments in trade agreements. Every US free trade agreement since 1994 has something like this and over the last 30 years, they have grown in scope. There are more of them. They do more about different aspects of labor, substantively. Procedurally, there is more in these labor chapters and there is also more enforcement – going back to that keyword. There are more enforcement opportunities in these agreements and they have evolved from a relatively narrow set, back in the original NAFTA where it provides that if Canada fails to meet its labor obligations, the United States could ask for an arbitration panel to review that activity and decide whether it is a breach of the agreement. So, what we are talking about here is a potential arbitration, a state-to-state dispute settlement mechanism like you see in other areas of international law that will be set up where one government thinks the other government has failed on its labor commitments. I will not go through the whole history of how these have evolved but take my word for it, they have come a long way from their original position and indeed, other governments have followed suit, putting them in their own trade agreements around the world.

As we came into the last two administrations, there was a lot of review of these labor chapters. We were asking the question of whether they had succeeded. Are we actually improving labor standards and is this good for workers all over the world? There are at least three different ways to measure this. One is to ask: Are we achieving labor reforms in places where we thought their labor laws were substandard? And the answer – looking at the experience – was: Yes. In fact, these negotiations that we are having around trade agreements are actually helping many trade partners raise their standards to get to the point where they reach International Labor Organization Convention standards and are making necessary reforms to do that prior to signing the agreement. So that was a big success.

Second: Are we creating dialogue to deal with labor problems as they arrive? There again: Yes. These trade agreements signed have means by which the trade and labor officials can be in dialogue about different labor problems under the laws that have been agreed. So there we have, again, success and cooperative labor dialogue.

Where we have not had success in the last 30 years is on that enforcement piece. And that, I think, has precipitated a greater emphasis on enforcement as of late. There has only been one full deployment of that mechanism that I described a moment ago where one government sues the other government for violation of a labor chapter. This was the case the United States brought against the government of Guatemala. The government of Guatemala was accused of failing to effectively enforce its labor laws. So to prove this before an arbitration panel, the United States collected dozens and dozens of workers' statements from Guatemalan workers all over the country, different industries in Guatemala, where the workers were saying: "We do not have acceptable conditions of work. We have raised this with the government. We have tried to unionize and we have not been allowed to do so and the government has not come to our aid." This collection of evidence was presented to the panel and the U.S. argued that Guatemala was in breach of this Central America-U.S. Free Trade Agreement. The panel agreed – to a degree. The panel said: "Yes, we do think Guatemala has failed to effectively enforce its laws. But, it is not a breach of the trade agreement because this failure was not 'in a manner affecting trade.'" The language of the Central America-U.S. Free Trade Agreement requires the complaining government, the United States in this instance, to prove that these failures were done in a manner affecting trade and there the panel said that had not been shown. So this was, from the US perspective, a big loss. Guatemala was found not to have violated the trade agreement. It did not have to change its ways. There was no penalty. And this was in a country that seemed to have the biggest, most concerning problems of many governments around the world. We could not get the job done with these trade agreements.

That led to the need for great change. And the change came in this most recent USMCA, which adds a new mechanism created between the Democrats in Congress and the last administration. It is a big political compromise and now this administration is using it and it is using it very actively. What does this tool do? It is called the Rapid Response Mechanism (RRM). What does that actually mean? It is intended to be a quick way to address a labor problem at an individual worksite in one of these three countries: the US, Mexico and Canada. What could happen is the following: If the government of one country, let us just take an example and say Canada, if Canada thinks that there is a worksite in Mexico where the business is interfering with labor rights – not allowing the workers to unionize for example – it can then stop, at the Canadian border, any goods that are coming from that factory until that problem is resolved. So, it is instantaneous. When Canada says: "There is a

problem. These people are not being allowed to unionize.” At that moment, any shoes, T-shirts, whatever is coming from that factory, get stopped at the border and are not allowed to enter. That is the idea behind the RRM.

There have been two uses so far, both of which involved Mexican work sites with concerns being identified by the US government. The first one involves pickup trucks: the centerpiece of Americana. You do not see many of these pickup trucks around here. Of course, I have only been here this week, but I have not seen many. Where I live in Virginia, they are everywhere. Well, these pickup trucks are put together in the middle of Mexico at a General Motors (GM) – a big US auto company – facility. It is an assembly line manufacturing facility, where they finish off these trucks that are called Sierra trucks. The US government received an anonymous tip from a hotline – there is a hotline set up for this RRM – saying: “The workers who are making these Sierra trucks, they are not being allowed to unionize at this worksite. That is a violation of this USMCA.” So, the US government took this tip, talked to the Mexican government about it and the government agreed the evidence suggested that the workers of the GM factory were not being allowed to unionize and something needed to be done. The Mexican government and the US government developed a plan. That plan was implemented and was a big success. Earlier this year, the governments announced that the problems have been ameliorated. International Labor Organization observers came in to monitor the vote and all is well now at the GM factory. Remember, in that intervening period, those Sierra trucks were not being allowed to enter into the United States until this was resolved. I should hasten to say that we are actually owners of the Sierra truck in my household and upon hearing about this situation, we discovered that the Sierra truck that is sitting in my very garage came from this factory. If that was a sign that I should be studying this, I think it is clear.

Moving on to the second example of use of this RRM. This was at an auto parts factory – again, here we are in automobiles – about 1000 meters from the border of Texas, 1000 meters outside of the United States, there in Mexico. There, the US government said: “The workers at this worksite are being harassed and they are being terminated for attempting to organize.” This time, interestingly, the Mexican government disagreed. The Mexican government did not think this was a violation of the trade agreement. Ordinarily that should mean there should be an arbitration panel set up to investigate further. But the United States took a different approach, not set out in the agreement,

which was to negotiate with the parent company, which happens to again be a US company based in Philadelphia. They came up with a plan and that seems to be moving smoothly. We do not have a lot of additional details.

So, this new tool designed to help workers abroad has been the centerpiece of this WCTP for the summer and the fall. In terms of how it has been received, I think there is again a call from stakeholders who want to see more. They say that they want to see more of these worksites being fixed. My own view here is that this is the type of thing where you do not necessarily need to count the cases to feel successful. What we want to see, is it to have this deterrent effect such that worksites do not need to be called to the floor for this type of behavior at all. But right now the message is: “We need more and more and more of the use of this tool.”

In my short remaining time, let us go to the final bucket: “workers under duress.” Forced labor quickly has risen to the very top of the agenda for this administration but it is not just something that is new to this administration. This has been underway for the last couple of years. Efforts by US agencies to deal with forced labor, to stop forced labor, have been in place now for many months but this administration has been pushing it very strongly in multiple agendas and not just in its own unilateral conversations and efforts, but also in multilateral and plurilateral settings.

So what is happening? Well, we have a tool. This is the “inside-the-US” option. The US has a tool that allows the Customs and Border Protection Agency to again stop goods at the border where Customs believes that these goods have been made with forced labor anywhere in the supply chain. If any good produced with forced labor arrives at a port of the United States, it does not come in.

This is a statutory tool that is 90 years old but it has rarely been used until the last couple of years. Where is it being used? It is used to deal with textiles from Xinjiang, the region in China where there has been international news covering forced labor issues. Agricultural goods, also from different parts of China, have been dealt with in this way. Some individual shipping and fishing vessels on the list. So, really stepping up the efforts here has been the US government trying to do this through its own tools, and, as I said, putting it on the agenda for all governments with which it works.

Why? The U.S. government is doing this because we do not want to just stop forced labor goods from coming to the United States if they just go somewhere else. We need to be able to deal with them as a collective effort to

stop any market being available for such goods. The United States put forced labor on the agenda in the fisheries subsidies negotiations at the World Trade Organization. These fisheries negotiations are moving along slowly but they are very important to the organization and there the US said: "Let us add a forced labor commitment to it." It seems that other governments have *hooked* on to that – a little fisheries pun here to make sure everybody is still with me.

So now, despite all this goodwill and activity surrounding forced labor, there is still quite a bit of divergence among the stakeholders as to how this should work. That is a thread that actually runs through all the three buckets that I have talked about today, for workers at home, for workers abroad, for workers under duress. How should we properly do this?

This again takes us back to how the WCTP being received. The idea is good. We want to help workers who are being forced to work against their will and who could be against stopping forced labor. We want to help workers who are not getting access to internationally recognized labor rights. We want to help workers who have lost their jobs due to trade or digitization or automation related to trade. But how should we do this? This repeatedly becomes the question. How do we do this consistent with liberalization rules? Or do we need to reimagine those rules? You have businesses coming forward, both on the forced labor front as well as on this RRM, saying: "These are unworkable tools for us in your WCTP. We cannot be sure we have no forced labor all the way down. We cannot control all what is happening in the factories. We need better and clearer guidance." This is a place where this administration has had a different emphasis from the last. To help the US economy thrive, this administration says: "We must help all workers and we want to support companies at home." The last administration, by contrast, said: "We want to help US workers, we want to bring companies home." So there is a shift in tone, a shift in emphasis.

It seems premature at this point, only less than a year into this administration, to talk about success, to talk about evaluation and there is even less time for many of these officials to have been in their position. But if we run a comparison between the two administrations, we could say: Yes, there is a lot of continuity. Yes, many of us are impatient to see more but this is not an administration that has been sitting on its hands for the past year. I have mentioned many of the developments today. We will continue to have concerns about our future direction, that is clear, but it is not back to business as usual. We have to address these troubles in new ways and too much has changed to go back to the policies of 2016.

Finally, because it is easy to call almost any action worker centered, I think that message will continue to be at the cornerstone of this new administration's trade policy. The challenge will be: How do we fit many other priorities within it? Let us just take climate change for example, the environmental concerns. There is an area where we need to make developments, we need to make policies, where have many different competing workers that are very differently situated. Just take solar energy for example. Solar is one of those industries that have so many different facets with workers who have very different priorities when it comes to how trade policy should work. So trying to reconcile these interests about climate change and others together with a WCTP remains to be seen.

As the United States experiments with these new means and these new ideas by which to ensure that workers are at the center, these conversations, I think, will continue to evolve. So we need to watch this space and then take advantage of the space to work with willing partners in making it all happen. Thank you very much.

## II. Q & A

*Prof. Dr. Johannes Reich (Professor of Public Law, Environmental Law and Energy Law at the University of Zurich): Thank you so much, Kathleen, for this very insightful presentation. I have never seen such an engaging presentation delivered to [indiscernible], I must say, it has never happened before. I am the one who is standing between the presentation and the Q&A session. You did not attend this event because of me. I would like to hand it over to you for your questions to Kathleen. Please.*

*Question from the audience: Kathleen, thank you very much for the most enlightening presentation. If I may, I would like to be more legalistic and not so much policy oriented. I am very much interested in the question: To what extent do you think that the Biden administration is going to change the attitudes towards the two different security exemptions in the GATT Article 20 and the GATS Article 14bis? On the one hand, I would like to ask the question with respect to services. Do you think that the quite broad public policy and security exception could be invoked by the Biden administration, as many countries do and as the Trump administration did? And secondly, more concerning the core of your presentation: What about the GATT exemption on health and life as far as, for example, forced labor is concerned? Could it be that the Biden administration is all of a sudden invoking Article 20b on health of labor forces?*

Thank you so much, Rolf, for this very thoughtful question, and again, so delighted that you would join us. You are truly the expert on these topics. I will try to look into my crystal ball, but it is not always delivering for me on these issues. I think you mentioned first the security exception. Let us look at what generally is the future of that and possible implications of it. As you know and others may also know, the Biden administration has, of course, continued the invocation of the security exception in defending these security-related tariffs. The Section 232 tariffs related to steel and aluminum have been challenged in the World Trade Organization. In defending those tariffs the prior administration and now this one has continued to rely on a security exception in the WTO agreements. I think this came to many people's surprise, firstly, that this would actually continue to be the policy. The same thing has happened in the US courts. In the US courts there are a number of challenges to the tariffs. There again, the Biden administration continues to defend them as the way forward, which of course, it has to do so long as they are in place. So I think until we find a more general solution to the problems that you raise, I think the security exception can continue to be a valid option and one that it would not necessarily hesitate to use, although maybe that is a bit of an overstatement. There may be a greater hesitation, a greater disinclination to use it, but not going so far as to say we will not use it if we need to deploy it.

On the second question about Article 20b, and whether these exceptions that could be used to deal with forced labor, exceptions for human health and so forth: First, I know there are student experts in the audience on Article 20b, from our great moot court team here at the University of Zurich. They are working on Article 20b. I had the pleasure of getting to know their work yesterday. There too, I suppose, I would say the main focus is to try to not use that. The main focus is to try to get a collective effort among governments where that argument is not one that will be needed. That needs to be a part of this conversation and you are starting to see a bit of that conversation happening. I mentioned not only fisheries but also other areas such as at the G7 and G20. Those are trying to create that norm in such a way that we do not need to rely on exceptions to make the point heard. So, thank you again.

*Prof. Andreas Kellerhals (Director, Europa Institut at the University of Zurich): Thank you very much, it was really a great talk you gave. So it looks to me a bit that the good old days of globalization and free trade and so are somehow definitely gone, if I understand you correctly. My question is more precisely this one: What now? Where are we now with the attitude or the relationship between the US and the WTO? You know the appellate body but maybe also more*

*generally, it looks like international rules, legal rules are more here to save and protect the smaller countries and the big guys somehow do not like them so much. Can you explain a bit more what the attitude under the new administration is now?*

Sure, thank you. What is the US attitude towards the WTO? Many things to say. Let us start with the first. Last week was supposed to be this ministerial conference. Many of you may know this is this big meeting of all the WTO members to try to accomplish quite a bit. It, of course, was canceled just two days before it began because of Omicron and the Swiss travel bans involved with that. I think that caused a great deal of disappointment. It was not connected to the US but at that moment, many people said: "Oh, this is just one more issue. We already have to deal with the US disinterest. Now this is one more problem." But I want to say I do not think that is the end of the world. I think we are still making good progress on WTO issues. I mentioned Ambassador Tai went there and tried to make that point that: "We are here. We are engaged."

My impression in spending some time in Geneva a couple months ago and talking to folks there is that there is a concern about relevance. That again is not limited to the United States' involvement but there is a concern if you talk to people in capitals as well: What is the relevance of the WTO going to be going forward so long as US leadership and frankly, EU leadership has taken a step back? There is this concern. Other words that are used are disillusionment, disengagement, credibility. What you hear from the US in responding to these concerns is: "We see that we have to do more." So, I think there is this commentary that is coming out of the Biden administration that says: "We are not giving up. Other people are saying they are concerned, okay, we hear those concerns." Meanwhile, China is taking great advantage to say: "We are here and the WTO is great." So now we have to sort of deal with those comments. But I think so far we hear from the administration: "We are here. We are back. We are in the game. You can see our participation in these ways. We are making positive contributions." But would everybody else like to see a lot more? Surely, yes. Bear in mind, too, that the United States does not have an ambassador to the WTO in place yet. She has been nominated, but she has not yet been confirmed by our Senate. Until the Senate confirms her, we do not have her in Geneva, which, of course, is less than ideal.

I want to say, because I want to leave you positively here, I do not think the WTO is the battlefield anymore. In October of 2019 we said this is one of the three battlefields, this is where the last administration was doing battle. That

is not true. The US is there now. It is engaged and I think it will work. I think it will continue to use the WTO to its benefit as much as is possible and to preserve its values again to a large degree.

*Question from the audience: Thank you, Kathleen, it is great to have you back in Zurich and thank you for your inspiring talk. Now I am not a trade expert in any way. I look at your presentation from the wider field of international law more generally and I am truly intrigued by what you had to say about this new WCTP. Because you are not talking about the companies so much, you are not talking about states, but you are talking – in the end – about individuals. And there is a lot obviously to say about the tectonics of international law and how this fits into a state-based international order. I was wondering: Does the Biden administration focus at all on rights talk? Does it give it a rights framing? Because in the end, if you talk about individuals, that is what you would come down to. You mentioned labor standards, but are we talking about labor rights? That is the first question.*

*The other one is: I am very sympathetic to that approach because it opens up the debate for or it lessens the probability that international law is used as a scapegoat for things that go wrong domestically. I think we have heard a lot of talk about that trade is responsible for all the things that have gone wrong domestically. I was wondering: Is there a critical analysis about, you know, the distributive effects of things going wrong at the international law level, as opposed to things that have for a long time gone wrong on the domestic level? Do you see this effect, that international law, once you adopt this policy, can be less used as a scapegoat? Is that something that is in the mind, maybe even of the Biden administration? Thank you.*

Thank you so much for those questions. Let me start with the first, which is a little easier than the second, which is very complex to answer. The first is about rights framing. Indeed, we are seeing more of that. I would preface this by saying: I think there is a great deal of uneasiness about bringing in a rights frame into trade policy more than already is the case. And that is in part perhaps some track record of the United States in some of these areas but also because of what that might mean again for business and what that might mean in content that we can achieve or cannot achieve.

I am involved in a study looking at the language of trade policy since 1974 and how that has changed, particularly in Congress, but also in other statements of US trade officials. What we have seen in the early results of this data study? We see increased commentary about rights. In fact, if you look at the hearings

that are held with US trade officials in Congress in the last couple of years, you start to see the appearance of even the phrase “human rights,” which you do not see in earlier years. So this administration, I think, is more inclined to try to use that language, to try to use those concepts in trade policy, particularly as it relates to gender. That is one area where that has come up most of all but also, as I said, more generally human rights and indeed also in labor. The last piece of that is, I think there is still some, let us say, interagency work to be done there between the agenda of the State Department versus what the trade agencies might want to do and that is often an area where one has to find a middle ground that might be something that is happening also on that question.

The second question, I surely cannot do it justice but I have written a little bit about how, in fact, some of what we see in the US trade policy experience is a strengthening of international law commitments. And I think that has the effect that you are describing in some ways, to the extent we can find ways forward for supporting international law in our trade policy and a trade policy that we can believe has success, a trade policy that people can believe in. Therein we are supporting international law commitments and strengthening the sort of general perception of the importance of international law rather than scapegoating it. I am happy to talk with you more about that after our gathering today and send along this paper. But I do think that we are starting to see that shift to using trade to support international law more than the opposite.

*Question from the audience: What is the Biden administration's take on India [indiscernible]?*

I think the relationship with India is complicated and not one that has great clarity at this point in the administration. Most recently, one of our trade officials took a trip out to the Asia-Pacific region, talking with Indian officials in the course of that trip as well as many others, to try and work through some of those dilemmas I think they are facing with India. There is a great push within Congress to do an India deal, to get something. There was some conversation back around the turn of the administrations about a possible deal with India: what would that look like? But I think the general feeling is that such a deal is beyond reach. If there can be a deal it is going to be a very small one, something I call a trade executive agreement, something that would not go through Congress, but that would perhaps address a narrow issue on which the governments can find agreement. But I certainly think that despite these

sorts of difficulties in the general relationship, that the United States would surely view India as a key partner in dealing with the China issue and that is a relationship that it would want to preserve.

*Question from the audience: Thank you very much for your very comprehensive presentation. I would have a further question regarding the implementation of the US WCTP, because as you mentioned, the case of Guatemala has shown how difficult it still is to make this link between labor and trade. Then we have the USMCA with very strong provisions, of course, and with minimal wages for the auto sector. And yes, for me, the question is: How do we have to expect to see us implementing the US WCTP vis-à-vis other partners? Because we could see it with the EU, it was the Trade and Technology Council and with the visit of US [indiscernible] to Asia a few weeks ago, it was about recalling a bilateral dialogue with Japan or recalling the trilateral dialogue with Japan and the EU. It is still unclear how to capture the US WCTP and I would be very interested in hearing your view on what other partners could expect from the US in this respect?*

Great, thank you so much. So, the first thing you said, I think is very much on point, was about the emphasis on Mexico in what we have seen so far in talking about workers abroad specifically. That is a criticism of the way that the administration is dealing with that “workers abroad” bucket, if I can use my own reference. There is a sort of a myopic concentration on Mexican labor problems, perhaps to the detriment of other countries making progress on labor issues. So, just on that issue alone we see a lot of dollars and cents. We have money from Congress that has been forwarded to the Mexican labor effort when perhaps there are other labor issues in the world that we want to be dealing with as well as funding and supporting more. That is one thing that I think this overconcentration of Mexico has created. But your question then went on to do something I think even more important about how we might work together with others on addressing these same concerns that they might also have.

I am sure you as an expert and others in the room may know that other countries have similar agreements. They have made similar commitments. The EU, for example, has sustainable development chapters that often follow the US agreement language. But if they follow it too closely, they might also fall into the same difficulties as the United States did in the Guatemala case. So, I actually think that the US experience, particularly the USMCA rapid response progress, has precipitated interest from other governments to look at this more closely, to ask what other tools they have in their own tool kits to start to work on these same issues. That is most true in forced labor, where I have

think the EU can learn from the US experience on forced labor such as with respect to that tool I mentioned about stopping goods at the border and so forth. The European model has largely been much more about due diligence, about asking companies to follow certain requirements that many of you may know. So, how do we actually use a border measure of something of the sort that the US has, to deal with these issues? There seems to be interest from partners in learning about how these experiences have gone. What have been the best practices? What have been the lessons learned? You hear that coming out, maybe in less public ways, but I think that certainly is occurring and even in the public settings that you mentioned, whether it is the trilateral or the Technology Council and so forth, all of those statements. I think the US is pushing for commitments that draw attention to labor issues, whether it is on the forced labor piece more strongly and perhaps more easily, but also on asking those partners to think about what does this mean for each of our workforces and how can it benefit those people on the ground.

*Question from the audience: Thank you for your presentation. The last decade, we had a lot of development in automation and A.I., for instance in companies like Amazon and Tesla. So let us focus on the trade policies in the US for homeworkers workers: What is the impact of this development for the next few decades? Is this a job the current Biden administration has to deal with or is that the job of the future administrations?*

A very important question, thank you for that. I think this administration very much thinks it is something that it wants to do – that it needs to deal with. It is something that should be front and center in our mind because I mentioned only very briefly the digital workforce and the idea of digital trade deals are now front and center as well in many conversations. In fact, although the Biden administration has said it is not going to conclude any free trade agreements anytime soon (that has been its commitment) but it might entertain – so it seems, there is a rumor out there – a sort of digital deal that would support the industries that you mentioned. It is also doing that through these other domestic initiatives that I mentioned earlier: through these research and development provisions in recent legislation, and on the trade side, again, trying to deal with hindrances to those industries whether – this is a little bit beyond what you suggested – but say the digital services taxes was something that was discussed a great deal in the last couple of years, particularly on this continent.

There was an initiative to put taxes on some of these digital companies or digitally focused companies, Amazon and others, and then an effort to try and

bring that down and come with a new solution to that controversy. There is a threat that could end up with more tariffs on countries here and elsewhere. That means the digital services were worrying about these taxes' future.

Let me just stop by saying, I think it is very much on the minds of the administration. It is true on the domestic agenda, it is true on the trade agenda and that is part of what I think you mentioned earlier, this tech council with Europe that is saying: "Hey, we care about this. We think it is important. We are going to begin this dialogue to see how we can address common issues." Last I mentioned Pittsburgh, Pennsylvania, as a place where the USTR went. Often we associate Pittsburgh with steel but when she went, she was looking at digital futures and she was talking about what that might look like. What are the different technological innovations that we should be thinking about that are going to affect our lives? So, she was herself there saying: "This is important to me. This is important to our economy. Let us do what we can to support it."

*Prof. Dr. Johannes Reich: Thank you Kathleen for these remarks and giving us insights into troubles, tools and tone shifts or lack thereof in the US trade policy. Of course, we here in Switzerland are not only watching these developments closely as other WTO members do, but we are affected, of course, directly by these so-called trade wars. While we are surely differing in what we can do or would like or others to choose to do, there is also much we have in common. You have given us some grounds for optimism in what is still to come and provide us with useful insights for understanding the nuances that informed the choices behind the scenes. Between the tariffs, the worker, the supply chain's demands and more there is undoubtedly a great deal to think about for this possible new concept of not just US trade policy, but also international trade law. Investments of the international community into a peaceful global trading regime hang in the balance. Against this backdrop again, thank you so much for coming here to Zurich. Thank you, Prof. Dr. Thomas Gächter, for joining us here this afternoon. Thank you to you, Prof. Dr. Andreas Kellerhals as the director of the Europa Institut and to your staff for organizing this event. Thank you all for coming and have a very good afternoon. Thank you so much.*