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Trade Policy under a Biden Administration

An Overview of the Issues and Some Practical Suggestions

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The past several years have been tumultuous ones for U.S. trade policy. After strident rhetoric from Donald Trump during his presidential campaign, his administration followed up with a wide range of aggressive actions. Congress, U.S. trading partners, businesses, and consumers have all been pushed to their limits by an administration that has taken U.S. policy in a protectionist and unilateral direction.

If Democratic presidential candidate Joe Biden wins the 2020 election, he will face the challenge of developing a coherent U.S. trade policy that provides stability and certainty. This paper presents an overview of the trade issues a President Joe Biden would likely face, with some suggestions on possible approaches his administration might take. It covers seven major topics, with some overlap among them:

1. **Trade agreements:** What should U.S. trade agreements say, and with whom should the United States negotiate them?
2. **The World Trade Organization (WTO):** How should a Biden administration deal with the many challenges faced by the multilateral trade institution that is the foundation of the trading system?
3. **China:** How should a Biden administration approach China's controversial and difficult integration into the trading system?
4. **The United States-Mexico-Canada Agreement**

(USMCA): Can some of the USMCA's flaws be fixed during implementation?

5. **Executive trade actions:** How should a Biden administration use executive branch discretion over trade policy?
6. **The role of Congress:** Is it time to recalibrate the legislative/executive balance of power over trade?
7. **Personnel:** Who should be in charge of U.S. trade policy?

TRADE AGREEMENTS: WHAT AND WITH WHOM?

When it comes to trade agreements, trade officials must address two big questions: What should those agreements say? And with whom should they be negotiated?

In terms of what issues trade agreements should cover, the modern version of trade agreements emerged in the 1930s, and these agreements have always been about more than just tariffs. Early trade agreements recognized that domestic taxes and regulations could also be used as a means of protectionism, and they established obligations to address this problem. But since the early 1990s, when the North American Free Trade Agreement (NAFTA) and the WTO were established, the scope of trade agreements has expanded considerably. The question for trade officials today is, what is the proper scope of these agreements? In other words, what policy areas should be included?

Of the wide range of options, each potential issue has appeal for one interest group or another and generates opposition from other interest groups. The main substantive policy areas that have been included in trade agreements are tariff liberalization (the scope of which is affected by rules of origin); the liberalization of trade in services; opening government procurement to foreign competition; regulatory trade barriers, including the regulatory process; digital trade; intellectual property; investment protection (and investor-state dispute settlement); labor; environment (including climate change); competition policy; corruption; currency practices; gender rights; and the rights of indigenous peoples. Sometimes drawing the line as to what belongs in a trade agreement and what does not is difficult, but strong arguments exist for a traditional focus on protectionist measures, with other issues addressed by specialized treaties and international organizations.¹

Beyond substantive policy, issues also arise related to governance in trade agreements. Examples include the enforceability of the dispute settlement process (e.g., whether panels can be blocked); the role of monitoring and oversight, through regular committees or occasional review under a “sunset clause”; and the process for withdrawal by a party.

With all these issues in the conversation, designing an agreement that the negotiating governments can support and that can also secure domestic ratification is a challenge. The balance needs to be crafted carefully, and it may change over time, depending on the political balance at a given moment (such as which parties have control over the different branches of the U.S. government).

A Democratic president is likely to push for rules that certain nongovernmental organizations on the left prefer (e.g., the environment and labor) rather than for those sought by business groups (e.g., intellectual property and investor-state dispute settlement). If the Republicans keep control of the Senate after the 2020 election, the balance a Biden administration tries to draw may need to shift a bit toward the business side. If the Democrats take over the Senate, the calculation will be different.

In addition to decisions about what should be in trade agreements, there is also the question of whom to negotiate with. A Biden administration would have many options. Rejoining the Trans-Pacific Partnership (TPP), now in a slightly different form after some revisions by the other parties, is an obvious possibility that many people, including Biden himself, have suggested.² Doing so would require some degree of renegotiation, but the other TPP parties would likely welcome the United States back in. Reviving negotiations with the European Union, which the Obama

administration undertook as the Transatlantic Trade and Investment Partnership (TTIP), could also make sense. But these large-scale negotiations are challenging and could run into hurdles, which they did the first time around. Perhaps a one-on-one negotiation with an eager United Kingdom would be easier. This type of smaller-scale negotiation could also work with New Zealand, which is looking to ensure that it does not become too dependent on China. And Japan presents an interesting case because the Trump administration has negotiated a partial deal already; that deal could be expanded (or folded back into the TPP). The Trump administration has mentioned several other governments as trade-negotiating candidates as well, including India, Kenya (where free trade agreement negotiations are just starting up), and Switzerland. (Of course, China is the big trading partner out there and is addressed separately later in this paper.)

For the Trump administration, a key consideration has been a preference for bilateral deals over those with multiple partners. But that approach has always been more of an idiosyncratic preference than an evidence-based view, and a Biden administration should be more practical about this issue. It should evaluate all its options and focus on the negotiations that offer the most value in terms of economic benefits and mending relations with allies.

THE WTO: FACING BIG CHALLENGES

The overarching trade agreement that loosely governs the world trading system is the WTO Agreement, which is overseen by the WTO, the leading multilateral trade institution. Since taking office, the Trump administration has challenged the WTO in a number of fundamental ways.

First, it rightly complains about the failure of the WTO to achieve new liberalization. Of course, some of the blame for that failure falls on the United States, which has not been eager to liberalize in recent years. Nevertheless, it is true that, if the WTO cannot facilitate new liberalization, governments must look elsewhere. Some possible areas to focus on are fisheries subsidies, e-commerce, and environmental goods, where progress has been made in recent years. A Biden administration could emphasize moving things forward in these areas, but it would need to keep in mind that it would have to give something in return.

The Trump administration has also raised concerns about the limited commitments made by some of the more advanced developing countries,³ the failure of certain countries to notify trade measures properly,⁴ the need for new rules

on subsidies, and more generally the issue of how the WTO deals with countries, such as China, that have significant nonmarket aspects to their systems.⁵ A Biden administration should pursue these issues but should of course be willing to listen to the many concerns other WTO members have expressed about U.S. protectionism.

Finally, on the WTO, the Trump administration has blocked appointments to the Appellate Body, the highest tribunal in the WTO's dispute settlement system, over concerns about its behavior, including judicial overreach and failure to follow its stated rules.⁶ The Trump administration raises some legitimate issues here, and previous administrations also expressed their disagreement with the Appellate Body. Absent from the Trump administration's approach, however, is an explicit statement of what changes would alleviate the concerns. There are certainly plenty of options here, and a Biden administration should put together a detailed proposal and make the case for it. A revived Appellate Body is important to maintain the proper functioning of the system. Right now, the European Union is leading an effort to put together a temporary alternative appeals mechanism.⁷ For the United States to remain on the sidelines during negotiations of fundamental aspects of the WTO is bad for the United States and for the system.

CHINA: CAN IT BE INTEGRATED INTO THE TRADING SYSTEM?

China's accession to the WTO in 2001 was a momentous event. Unfortunately, although China's entry into the WTO was an important first step in its integration into the world economy, a proper follow-through did not occur. The Bush administration was distracted by 9/11 and then the financial crisis; the Obama administration argued that it was pushing for liberalization with other major trading countries as a way to write the rules rather than letting China do so, but its major initiatives failed. Then the Trump administration came along and started a trade war with China, with a goal of pressuring China to liberalize; but that administration has also started trade wars with many other countries, undermining its China strategy in the process.⁸ A Biden administration will inherit a difficult situation.

Trade with China poses real concerns: subsidies and overcapacity, the behavior of state-owned enterprises, national security threats related to tech products and data, and dependence on China for medical supplies, among others. In general terms, a Biden administration would need to search for a reasonable balance on these issues while taking

into account competing concerns. Short-term economic benefits have to be balanced with longer-term security concerns. To illustrate the point, the United States could ban Huawei from using Android as its operating system in smartphones. This policy might slow Huawei's growth in the short term, but the long-term implications may be negative if the policy leads Huawei to develop its own operating system. As the U.S. government continues its refinement of the investment reviews carried out by the Committee on Foreign Investment in the United States and of various export control regulations, it needs to think carefully about how to draw the right balance.

A more challenging issue will be evaluating what to do with the Trump administration's Section 301 tariffs and phase one U.S.-China trade deal. One option would be to remove all the tariffs and terminate the deal by executive order (which could be done because Congress did not formally sign off on the deal) and then start over with a new process that involves working with allies in a joint effort to put pressure on China. Alternatively, because the phase one deal includes useful provisions, and because we may have a better sense by the end of the year whether it is leading to any progress, perhaps the deal could be adapted and used to some extent. Aspects that are more about managed trade and unilateralism, such as the purchase commitments and unilateral enforcement mechanism, should be discarded; but some of the substantive provisions may represent real progress.

USMCA: IMPLEMENTATION ISSUES

A signature trade policy achievement of the Trump administration is the renegotiated NAFTA, now called the USMCA. As a matter of domestic politics, the deal is done, and President Trump can tout it as a victory. In terms of policy, however, there are still some questions to answer. Two of the most important ones relate to the rules of origin for automobile production and the new rapid-response labor mechanism.

One of the great benefits of NAFTA was its integration of auto production in Canada, Mexico, and the United States. It eliminated tariffs on most autos and auto parts, which made production more efficient. This improved efficiency allowed North American production to be more competitive and led to lower prices for consumers.

The USMCA tries to change this situation by imposing stricter conditions in order to qualify for these zero tariffs. In particular, companies in this sector will now need to include a higher percentage of North American content in the finished product to meet the rules of origin and will also have

to satisfy minimum wage requirements for a certain portion of their workforce.⁹ The Trump administration's goal seems to be to make it more difficult to trade freely and, as a result, to push companies to relocate production to the United States.

But those conditions are sketched out only vaguely in the USMCA itself, and the actual impact of the agreement is still unclear. Implementing regulations still need to be designed and put into place. The Trump administration is pushing hard to get this next step finished quickly, but it may take some time with the auto industry expressing concerns.¹⁰ A Biden administration would have to evaluate the state of the issue when it comes into office, but it may have an opportunity to apply the regulations in a more flexible manner in an effort to avoid undermining one of NAFTA's key economic achievements.

The other big USMCA implementation issue is the new labor enforcement mechanism. In response to demands from House Democrats, the Trump administration convinced Mexico to sign on to a completely new and untested rapid-response labor mechanism.¹¹ This procedure may lead to a flood of labor rights cases brought against Mexican factories. How this mechanism will play out is unclear, but a Biden administration will be faced with decisions on how actively to enforce the new rules.

DOMESTIC TRADE POLICY: EXERCISING EXECUTIVE BRANCH DISCRETION

As discussed in more detail in the next section, over many decades Congress has delegated a good deal of power over trade to the executive branch. The Trump administration has used this power to the fullest. Some of its actions have been simply a more intense exercise of the procedures that all administrations use. For example, the Trump administration has been a particularly active user of trade remedies (antidumping, countervailing duties, safeguards) and has not been shy about telling everyone about it.¹² With regard to tariff preferences for developing countries, the administration has undertaken vigorous reviews in an effort to extract new market access commitments or other concessions from trading partners.

In other areas, however, the Trump administration has gone beyond what came before. The biggest unilateral action by the Trump administration is the use of Section 232 to impose tariffs and quotas on steel and aluminum imports, purportedly on the basis of national security but with an extremely flimsy national security rationale.¹³ The next section considers general reforms to Section 232, but one of the most productive steps—for both the U.S. economy and relations with our

allies—a Biden administration could take is to repudiate the Section 232 reports put out by the Commerce Department during the Trump administration and to remove the resulting tariffs and quota arrangements for steel and aluminum.

ROLE OF CONGRESS: RECALIBRATING POWER OVER TRADE

The Trump administration has pushed the boundaries of executive authority over trade. Article I, Section 8, of the Constitution gives Congress power over tariff duties and regulating commerce with foreign nations (although the president does have authority over foreign affairs), but Congress has delegated a fair amount of this power over the years. The Trump administration has made use of these delegations, interpreting various statutes in a creative and flexible way so as to give itself more discretion. A Biden administration could take a look at the state of congressional-executive power over trade and push for a rebalancing. Several areas merit consideration.

First, the conventional way that the U.S. government negotiates trade agreements is through a time-limited congressional delegation of negotiating power to the executive branch, with a wide range of conditions attached, known as Trade Promotion Authority (TPA). The USMCA renegotiation called into question whether those conditions could actually be enforced, and the Trump administration has not seemed to feel very constrained by congressional guidance. TPA, or something like it, as a means to negotiate comprehensive trade agreements has been the norm for decades. It may be time to consider whether this process needs to be rethought, with congressional oversight more clearly defined.

Whereas TPA delegates the power to liberalize trade, other statutes delegate the power to impose tariffs. Two statutes in particular have caused trouble under the Trump administration: Section 232 of the Trade Expansion Act of 1962 and the International Emergency Economic Powers Act. The Trump administration has repeatedly used them to threaten and to impose tariffs. A number of legislative proposals under consideration could reassert some congressional power over the use of tariffs under these statutes.¹⁴ Although presidents are naturally reluctant to rein in their own power, Biden has plenty of experience as a legislator and recognizes the importance of the congressional role on these issues. Members of Congress from both parties have been frustrated by the Trump administration's abuse of its executive authority, but congressional Republicans have been reluctant to go against a president from their own party. A Biden administration might

present a unique opportunity for Congress and the president to work together in reforming these statutes.

Finally, President Trump has frequently threatened to withdraw from various trade agreements, although it is not clear if a president has such authority.¹⁵ The varying texts of the implementation statutes for each agreement add a layer of complexity to the issue. A Biden administration should think about how it wants withdrawal to operate and in this regard could consider putting forward a statement of its understanding on the matter. In terms of the appropriate policy here, it seems clear that Congress should have an important role. If Congress signs off on trade agreements in the first place, shouldn't it also have a say in the decision to withdraw? This goes for provisions such as the USMCA sunset clause as well. If trade agreements are to terminate after a set period unless the parties agree to extend (which is a bad idea to begin with because it guarantees uncertainty, but USMCA has such a provision nonetheless), Congress should have to affirmatively agree in order for termination to take place.¹⁶

Making changes here depends, of course, on the makeup of the next Congress. The Republican-Democrat breakdown is important, but the trade supporter–trade skeptic balance is also relevant because each party now has a mix of protectionists and trade liberalizers.

PERSONNEL: WHO SHOULD RUN U.S. TRADE POLICY?

U.S. trade policy has been formally led at times by someone from outside the field. In some cases, that may have been just what was needed because specialists can get lost in the weeds and miss the bigger picture. But sometimes effective trade policy leadership requires someone with experience and insider knowledge—someone who can navigate complex substantive disagreements and make all the key players happy.

When choosing a U.S. trade representative, a Biden

administration should consider candidates with specialized trade policy backgrounds. Having such an individual in place would allow his administration to get moving right away and would increase the chances of succeeding on these complex and contentious issues. Of course, sometimes administrations assign positions on the basis of political considerations; if that happens with trade policy, a Biden administration should put in place a strong deputy to manage the process from one step below.

SOME SUGGESTIONS FOR A BIDEN ADMINISTRATION

With all this in mind, I suggest the following concrete steps for a Biden administration to take on trade policy:

1. Pick a trading partner or two and start negotiating. The United States is falling behind the rest of the world in terms of liberalization. It's time to catch up. To get the most out of the negotiations, start with deals that have a high value (the TPP, the European Union, and the United Kingdom are good candidates).
2. Reengage with the WTO. Make a concrete proposal on reform of the Appellate Body, and push for some new liberalization.
3. Work with allies on a new plan for China. Determining how China and other economies with heavy state intervention fit into the trading system requires some deep thinking.
4. Develop (or revise, if they are already in place) implementing rules for the USMCA auto rules of origin in an effort to limit the damage of those provisions.
5. Repeal the Section 232 tariffs. They hurt Americans and aggravate relations with allies.
6. Talk to Congress about recalibrating the legislative–executive balance of power over trade.
7. Start the search for U.S. trade representative candidates now.

NOTES

1. Simon Lester, “The Role of the International Trade Regime in Global Governance,” *UCLA Journal of International Law & Foreign Affairs* 16 (2011): 209.
2. Biden has explained his thinking on the TPP as follows: “I would not rejoin the TPP as it was initially put forward. I would insist that we renegotiate pieces of that with the Pacific nations that we had in South America and North America, so that we could bring them together to hold China accountable for the rules of us setting the rules of the road as to how trade should be conducted.” See Fix staff, “Transcript: Night 2 of the second Democratic debate,” *Washington Post*, July 31, 2019.
3. World Trade Organization, Communication from the United States, “An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance,” WT/GC/W/757/Rev. 1, February 14, 2019.
4. Simon Lester, “U.S. Proposal on WTO Notifications,” *International Economic Law and Policy Blog*, October 31, 2017; Inu Manak, “The U.S. Pushes for Penalties on Failure to Notify at the WTO,” *International Economic Law and Policy Blog*, November 14, 2017.
5. World Trade Organization, Communication from the United States, “The Importance of Market-Oriented Conditions to the World Trading System—Draft General Council Decision,” WT/GC/W/796, February 20, 2020.
6. United States Trade Representative, “Report on the Appellate Body of the World Trade Organization,” February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.
7. European Commission, “Trade: EU and 16 WTO Members Agree to Work Together on an Interim Appeal Arbitration Arrangement,” January 24, 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113.
8. Simon Lester and Huan Zhu, “The U.S.-China Trade War: Is There an End in Sight?,” *Cato Journal* 40, no. 1 (Winter 2020).
9. Congressional Research Service, “USMCA: Motor Vehicle Provisions and Issues,” updated December 19, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF11387>.
10. “Business Groups, Wyden Roiled by Administration’s June 1 USMCA Goal,” *Inside U.S. Trade*, March 16, 2020. Mexico has concerns as well, and developing a common understanding will be challenging. See “Seade: Uniform Regulations for USMCA Auto Rules Under Development,” *Inside U.S. Trade*, January 13, 2020.
11. Kathleen Claussen, “A First Look at the New Labor Provisions in the USMCA Protocol of Amendment,” *International Economic Law and Policy Blog*, December 12, 2019.
12. See, e.g., Department of Commerce, “U.S. Department of Commerce Issues Affirmative Preliminary Antidumping Duty Determinations on Rubber Bands from China and Thailand,” press release, August 30, 2018. (“The strict enforcement of U.S. trade law is a primary focus of the Trump Administration. Since the beginning of the current Administration, Commerce has initiated 122 new antidumping and countervailing duty investigations—this is a 221 percent increase from the comparable period in the previous administration.”)
13. Dan Ikenson, “Trump’s National Security Protectionism Will Open Pandora’s Box,” *Forbes*, March 1, 2018; Phil Levy, “The Commerce Department Makes a Feeble National Security Plea for Steel Protection,” *Forbes*, February 16, 2018.
14. See, e.g., Peter Harrell, “Reforming National Security Tariff Tools: Issues and Recommendations for Policymakers,” Center for a New American Security, June 27, 2019; Tori Smith and Riley Walters, “Fixing America’s Broken Trade Laws: Section 232 of the Trade Expansion Act of 1962,” Heritage Foundation, May 22, 2019.
15. Joel Trachtman, “Trump Can’t Withdraw from NAFTA without a ‘Yes’ from Congress,” *The Hill*, August 16, 2017; Trachtman, “Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause versus an Historical Gloss Half Empty,” October 15, 2017, <https://ssrn.com/abstract=3015981> or <http://dx.doi.org/10.2139/ssrn.3015981>.
16. Simon Lester, “The U.S.-Mexico-Canada (AKA the New NAFTA) Trade Deal: The Sunset Clause,” *International Economic Law and Policy Blog*, October 1, 2018.