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Reauthorizing Trade Promotion Authority: The first trade test for the Biden administration

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Summary

The Biden administration has so far been deliberately ambiguous about its trade policy, preferring broad statements ("a worker-centric" trade policy) to specific proposals. The expiration of Trade Promotion Authority (TPA) on July 1 provides an opportunity to clarify whether pursuing new agreements, including joining the now renamed Trans-Pacific Partnership (TPP), will be part of the new administration's approach to trade. If the administration does decide to take a more aggressive approach to trade, polling data suggest it will find a public that has grown much more supportive of trade over the past four years.

I. Introduction

Poll data suggest that the political landscape in the US has become much more trade friendly.

A Lincoln Park Strategies poll taken after the recent US presidential election showed that for nearly half of all voters, trade was either the "most important" or "one of the most important" issues to them when selecting a candidate for president. At the same time, 92% of respondents to the same poll thought that negotiating new trade agreements was at least "somewhat important" over the next four years.[1] This pro-trade sentiment actually predates the election. For example, a poll taken by the Gallup organization in February of 2020 found similar support, with 79% of respondents agreeing that trade is "an opportunity for economic growth."[2] Curiously enough, although former Republican President Donald Trump profited politically by criticizing free trade agreements during his successful 2016 campaign, the Gallup poll showed near equal support for trade among both Democrats (82%) and Republicans (78%). This does not necessarily discount the impact of trade on the 2016 election. Gallup had asked the same question in 2016 and found that only 50% of Republicans and 63% of Democrats held pro-trade views. The poll data suggest, however, that the political landscape in the US has become much more trade friendly.

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What does this portend for US trade policy under the Biden administration? Within a few months, we will have the opportunity to begin finding an answer to this question. On July 1, 2021, US President Joe Biden is due to lose Trade Promotion Authority (TPA): Legislation that provides guidelines and timelines for free trade negotiations which, if followed by the president, allows the implementing legislation for any resulting trade agreement to enjoy expedited review ("fast-track") without amendment on the floor of both houses of Congress. Because only one trade agreement in the past 40 years has been successfully pushed through Congress without TPA, it is assumed that TPA is a prerequisite to any future deals.[3] Will the Biden administration fight for the reauthorization of TPA? Given the changing political landscape, is this a fight the administration can win?

II. A brief history of Trade Promotion Authority (TPA)

The US Constitution gives the power to regulate commerce and hence trade to the legislative branch.

The US Constitution gives the power to regulate commerce and hence trade to the legislative branch. From the time the Constitution was ratified in 1789 until the early 1930s, Congress took it upon itself to set tariff levels, passing detailed tariff schedules that were sometimes hundreds of pages in length. The famous (or infamous) Smoot-Hawley Tariff (the Tariff Act of 1930), for example, credited with worsening the global depression in the 1930s, was just shy of 200 pages and, acknowledging the preeminence of Congress, was aptly named for the chairs of the Senate Finance Committee (Reed Smoot) and House Ways and Means Committee (Willis Hawley).

With the Reciprocal Trade Agreements Act of 1934 (RTAA), Congress began to delegate its trade authority to the executive branch, allowing presidents to raise

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or lower tariff rates by proclamation, without the need for any action by the legislature. Why did this happen? Congress, in the aftermath of the Smoot-Hawley tariffs, did not trust itself to set tariff rates. On the whole, Congress worried that individual members in districts negatively affected by international trade competition would push to raise tariffs, setting off a domino effect in the Congress damaging the US and world economy. Presidents were better insulated from these concerns and so more likely able to lower tariffs to stimulate trade. As the economist and historian Douglas Irwin succinctly explained, "the RTAA [Reciprocal Trade Agreements Act of 1934] diverted...political pressure away from a relatively sympathetic Congress toward a less sympathetic executive branch."[4]

Because the Congress was hesitant to give away power on a permanent basis, the delegation was temporary, initially lasting only three years. Nevertheless, from 1934 through the Trade Expansion Act of 1962, Congress would regularly reauthorize this delegation, allowing presidents to continue to unilaterally reduce tariffs.

Under TPA, Congress does not concede its authority over non-tariff items in trade agreements. The president, meanwhile, remains able to raise and lower tariffs by proclamation.

But a problem emerged during the mid-1960s. More and more, trade negotiations did not involve only tariff rates, but also non-tariff burdens on trade. During the Kennedy Round of multilateral trade negotiations (1964-67), President Lyndon Johnson made commitments on non-tariff items that Congress later refused to implement.[5] Congress was acting well within its discretion, having only delegated to the president authority to raise or lower tariffs. This did, however, create problems in trade negotiations because trading partners could not be confident that commitments made by the president would be supported by the legislature. In the end, after extensive negotiations between the White House and the Congress, the problem was addressed in the Trade Act of 1974 by the invention of "fast track," later called TPA. Under TPA, Congress does not concede its authority over non-tariff items in trade agreements but does commit itself to consider implementation legislation on an expedited basis and without amendment. The president remains able to raise and lower tariffs by proclamation, a power President Trump relied on in 2019, when bringing the US into the stage one trade deal with Japan without seeking congressional approval.

What also remains, however, is the time-limit on delegations of trade authority. Consequently, TPA must periodically be reauthorized by the Congress. Since 1974, the US has gone through significant periods, including virtually the entire Clinton presidency and most of the Obama presidency, without a reauthorization of TPA. President Obama failed to request reauthorization during his first term in office, even though TPA had lapsed in 2007. Finally, in mid-April of 2015, and with less than two years left in Obama's second term, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 was introduced in both houses of the US Congress. The legislation would reauthorize TPA, allowing the administration to conclude negotiating US participation in the Trans-Pacific Partnership (TPP).

The fight on the floor of the House of Representatives over granting President Obama TPA was brutal and at times confusing. Then Republican Speaker of the House John Boehner opted to "divide the question," allowing his party members to support TPA without also voting for Trade Adjustment Assistance (TAA), which some Republicans felt was a redundant and overgenerous public assistance program. A solid majority of Democrats, including Nancy Pelosi, opposed the bill. In the end, however, thanks mainly to Republican votes, the TPA bill passed in the House, although by only one vote. This was not an anomaly. Thirteen years earlier, the House had granted George W. Bush TPA by a similarly narrow margin, 215-212, with, again, an overwhelming majority of the votes coming from the Republicans. Under the terms of the 2015 law, TPA was set to expire in July of 2018, unless the president requested an extension through 2021. The extension would be automatically granted unless Congress objected. TPA extensions have generally not elicited the type of legislative rancor that accompanies reauthorizations, and President Trump's request for the extension met with no objections.

III. Biden administration and the changing world of trade

This brings us to the present moment. Again, the TPA extension approved in 2018 will itself expire on July 1, 2021. Unless a new TPA bill is passed by Congress, President Biden will lack a tool which most trade analysts feel is essential to concluding any future trade deals involving the US.

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It is unclear whether the Biden administration will ask Congress to reauthorize TPA. Requests to do so are usually tied to specific trade negotiations and there is evidence that new trade agreements are not at the top of Biden's agenda. Prior to being confirmed as Treasury Secretary, Janet Yellen categorically stated that "[Biden] will not sign any new free trade agreements before the US makes major investments in American workers and our infrastructure."[6] During her hearing before the Senate Finance Committee, President Biden's nominee to serve as US Trade Representative (USTR), Katherine Tai, was more ambiguous in her answers about moving forward with trade agreements. In response to questions about the US rejoining the Trans-Pacific Partnership (TPP, now the Comprehensive and Progressive Trans-Pacific Partnership, CPTPP), Tai did not reject the idea, but emphasized that the world had changed quite a bit since President Obama signed the TPP, implying that the US might not agree to the same terms today.

The "China challenge" may persuade President Biden that rejoining the now recast CPTPP is helpful to the new administration's economic and foreign policy goals.

In her opening statement to the committee, Ms. Tai stressed the importance of "rebuilding our international alliances and partnerships" to "[address] the challenges posed by China."[7] This "China challenge," alongside the growing support among US voters for trade, may conspire with several recent events to persuade President Biden that rejoining the now recast CPTPP is not only less dangerous politically than he might have thought during the campaign, but actually helpful to the new administration's economic and foreign policy goals. About a week after Americans went to the polls in November of 2020, 15 nations, including all 10 members of the Association of Southeast Asian Nations (ASEAN) along with Australia, New Zealand, South Korea, Japan, and most importantly, China, signed the Regional Cooperative Economic Partnership (RCEP). The agreement is thought to be the largest trade agreement in the world and, although much less rigorous in its standards than the CPTPP, is seen as a China-led competitor to that agreement, allowing China to write the rules for trade in Asia.

But China has not stopped with its involvement in RCEP. In early February, the *Global Times*, part of the Chinese Communist Party's state media, announced that "China [was] actively conducting a study on matters related to joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)."[8] Although it is doubtful that China would be willing to make the changes to its economic rules necessary for it to join the CPTPP, or that the current members of the CPTPP would favorably entertain an application from China, this was a "shot across the bow" of US trade policy, highlighting the US withdrawal from that agreement while indicating a willingness by China to fill the resulting vacuum in trade leadership in Asia.

If all of this were not enough to drive the Biden administration back into the CPTPP, also consider the fact that another potential major trading partner, the UK, has formally requested membership in the CPTPP. Although the Trump administration preferred bilateral agreements, the Biden administration's emphasis on working with our allies (plural) indicates a willingness to go back to participating in multilateral agreements. If this is true, then it would be much more efficient, given the US interest in reaching a trade deal with the UK while proceeding beyond the stage one agreement with Japan, to simply join the CPTPP.

President Trump, though an outspoken critique of the TPP, through his renegotiation of the US, Canada and Mexico Agreement (USMCA) and willingness to sign on to the stage one agreement with Japan already brought the US part of the way into the CPTPP. One study found that 57% of the language in the USMCA is borrowed from the TPP.[9] Similarly, the agricultural tariff levels that Japan agreed to with the US match CPTPP tariffs for the products covered. In fact, one must wonder whether the positive polling numbers on trade that we now see in the US are the product not only of a negative reaction against the Trump tariffs, but a positive reaction to the agreements that Trump did sign.

IV. Will Biden be able to secure TPA?

If rejoining the CPTPP is used to drive reauthorizing TPA, a threshold consideration is whether TPA would even be needed in order for President Biden to accomplish this task. There is precedent for a trade agreement being treated by Congress under TPA rules after the expiration of TPA, as long as negotiations began while TPA was still authorized. President George W. Bush had concluded negotiations with South Korea just before losing TPA in 2007. The Korea-US (KORUS) agreement was finally implemented by Congress under TPA procedures in October of 2011, even though TPA had never been reauthorized. At the time, the Obama administration had negotiated extensive changes to the original deal. The precedent for President Obama's action itself went back to 1993, when President Bill Clinton negotiated two side agreements to the North American Free Trade Agreement (NAFTA) several months after TPA had expired, yet had the NAFTA approved under "fast-track" procedures.

The Biden administration would have a difficult time justifying a new, "clean" multilateral agreement under expired TPA authority.

Of course, if the UK alongside the US joined (or rejoined) the CPTPP, the agreement itself would have to change. Certainly, the word "Pacific" in the title will no longer be applicable, but more importantly, it is not clear what would happen with the 22 provisions that were suspended when the US withdrew from the TPP. This might also be an opportunity to improve the CPTPP along the lines of some of the labor and environmental changes put in place in the USMCA agreement and the digital trade agreement between the US and Japan. All of this comes close to arguing for a new, "clean" multilateral agreement which the Biden administration would have a difficult time justifying under expired TPA authority.

Even if the Biden administration felt there were ample precedents for proceeding under the 2015 TPA authorization, it would not be politically wise to move forward without going back to Congress. Specific negotiating objectives are a key part of legislation authorizing TPA. Because Congress never implemented the original TPP agreement, joining the CPTPP would in the end require congressional approval. Formally involving Congress at the beginning of the process would improve the prospects for the agreement at the end of the process. As already noted, although President Obama began negotiating with the TPP countries in late 2009, he did not request TPA legislation until he was six months into his second term and did not really push for the legislation until early 2015. Although the administration followed TPA guidelines for notifying Congress when it decided to enter the TPP negotiations back in 2009, the trade objectives detailed in the 2015 TPA were approved after the negotiations were basically over. That is why Congress refused to even bring implementing legislation for the TPP to a vote in 2016. If President Biden concludes that it is important to his overall China policy to pursue CPTPP, there is a lesson to be learned from President Obama's failed "cart before the horse" approach to TPA.

If Biden were to pursue reauthorization of TPA, USTR nominee Tai would surely be a card up his sleeve. She has a wealth of experience dealing with Congress as a former chief trade counsel for the House Ways and Means Committee.[10] It should not go unnoticed that among those testifying on Ms. Tai's behalf before the Senate Finance Committee were both the Democratic and Republican leaders of the House Ways and Means Committee, the committee for which she worked, and through which any TPA legislation must pass before being considered by the full House. Ms. Tai's testimony in favor of TPA before that committee would likely be very effective with both Republicans who might be hesitant to give a president from the opposite party a "win," and Democrats who distrust international trade in general.

President Biden could also gain leverage for reauthorizing TPA from the expiration of TAA. When TPA was authorized back in 2015, it was eventually joined together with TAA. This is not uncommon because TAA is explicitly intended to provide benefits to those negatively affected by international trade. It means, however, that when TPA expires, so does TAA. Historically, bundling together TPP with TAA, in addition to being logical, was a way to gain support from both Republicans (pro-TPA) and Democrats (pro-TAA). The expiration of TAA gives the Biden administration another card to play, especially with trade suspicious progressives, if it turns out that approving TPA is once again the only way to reauthorize TAA.

V. TPA, CPTPP, and the politics of trade

US voters, particularly those in the Upper Midwest, blame international trade for destroying their jobs and their communities.

Trade policy is as much about politics as it is about economics. Trade is always a difficult issue, particularly in the Upper Midwest of the US, where voters blame international trade for destroying their jobs and their communities. Indeed, it is these voters that Biden is addressing most directly with his "worker-centric" trade policy and about whom the administration most worries when it comes to reauthorizing TPA or rejoining the CPTPP. The poll numbers cited earlier are national and, unfortunately, we do not have very good current data broken down by state. This is significant. While national exit poll data in 2016 indicated that 42% of voters thought international trade "takes away US jobs" versus 38% who thought it created jobs, this gap of only 4% widened to nearly 20% in Michigan and Pennsylvania. [11]

Voters will be more receptive to an agreement that is sold as a way to control unfair trade with China, rather than as promoting trade with other countries.

This is why tying US trade policy to US foreign policy in Asia may be so important. Upper Midwest voters will be more receptive to an agreement that is sold as a way to control unfair trade with China, rather than as promoting trade with other countries. The Obama administration tried this approach, linking the TPP to the "Asia pivot," but ultimately failed to get this message out to voters. As evidence for this, a Politico/Harvard T.H. Chan School of Public Health poll taken just before the 2016 election, found that a plurality of all respondents, and nearly two-thirds of Republican respondents, supported the idea that trade with China hurts Americans. Less than one-third of respondents, however, had even heard about TPP. Incredibly, of those who had heard about the TPP, more than two-thirds opposed it, but nearly the same number of those "informed" respondents either did not know if the TPP included China or mistakenly thought that it did include China![12] If the Biden administration is going to use combatting unfair trade competition with China as a way to sell TPA for the purposes of joining the CPTPP, it will have to a much better job than the Obama administration of educating Americans about the details of the agreement.

VI. Conclusion

History indicates any vote in the US Congress involving US trade policy will be heated and will require skillful political maneuvering not only with the legislature, but with voters. For better or worse, the Biden administration will have to at least begin to decide on whether it wants to take on this fight when TPA expires in July. Because any attempt to rejoin the CPTPP will, at least politically, require a new TPA, Biden's "tough on China" foreign policy may push him take on this battle. If he does, he will benefit from an electorate that increasingly sees free trade as a net positive for the US.

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Notes

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