

# *Biden's Trade Policies—Same as Trump's? More Aggressive?\**

## INTRODUCTION

**The big question is the following: Is the Biden trade policy different from the Trump chaos?**

**My answer is “no.” I consider Biden's trade policy to be Trump's without the tweets. They both rely on unilateral measures and broaden protectionist ones. In fact, Biden not only relies upon Trump's actions but also has broadened them.<sup>1</sup>**

---

\* Distinguished Service Professor of Law and International Trade at George Mason's University's Schar School of Policy and Government. J.D. (Cornell), M.A./Ph.D. (UPenn), Diploma (The Hague Academy of International Law). Additional legal studies at Harvard Law School and Oxford University (St. Peter's College). He is the author of *Trump and Trade – Policy and Law* (HeinOnline 2020), *Global Trade and International Law* (Hein 2012), *U.S. National Security Law* (Hein 2009) and *WTO Law, Litigation & Policy* (Hein 2007). Dr. Malawer is a member of the bars of the State of New York, the Commonwealth of Virginia and of the United States Court of International Trade. He is a recent gubernatorial appointee to the new Advisory Committee on International Trade (Virginia Economic Development Partnership). He is a former Chairman of the International Practice Section of the Virginia State Bar. Social Science Research Network Id. 1073612. The author may be contacted at: [StuartMalawer@msn.com](mailto:StuartMalawer@msn.com); <http://www.GlobalTradeRelations.net>; <http://www.US-Global-Law.net/> Address: 3351 Fairfax Dr., MS 3B1, Arlington, Virginia 22201 USA. All the websites cited in this paper were last visited on January 1, 2022. The paper was completed as of that date.

<sup>1</sup> I have written several articles recently for this journal on Trumps trade policies and early trade actions by President Biden. S. Malawer, *Trump, Litigation and Threats: From Queens to the World Stage*. *China and WTO Review* 209 (No. 1) (2021). Available at [http://cwr.yiil.org/home/pdf/archives/2020v6n1/cwr\\_v6n1\\_08.pdf](http://cwr.yiil.org/home/pdf/archives/2020v6n1/cwr_v6n1_08.pdf); S. Malawer, *Biden's Trade Policies -- Recalibrated, More Focused, and a Bit Concerning*. *China and WTO Review* 391 (No. 2) (2021) Available at [http://cwr.yiil.org/home/pdf/archives/2021v7n2/cwr\\_v7n2\\_07.pdf](http://cwr.yiil.org/home/pdf/archives/2021v7n2/cwr_v7n2_07.pdf); S. Malawer. *Biden -- National Security, Law and Global Trade: Less Subterfuge and More Strategy in the New Era of Crisis*. *China and WTO Review* 185 (No. 1) (2021). Available at [http://cwr.yiil.org/home/pdf/archives/2021v7n1/cwr\\_v7n1\\_09.pdf](http://cwr.yiil.org/home/pdf/archives/2021v7n1/cwr_v7n1_09.pdf)

**Trade issues have reemerged during the past few months as high-priority domestic and foreign policy issues for the Biden administration. This is especially true for the situation regarding trade with China and how this relates to U.S. domestic economic and national security issues. Let's look at what Trump did, what Biden has done so far, and the challenges ahead.**

## **TRUMP'S TRADE POLICIES**

**First and foremost, Trump launched a bizarre global tariff war. He imposed Section 232 steel tariffs on China and U.S. allies.<sup>2</sup> He relied on a national security rationale under U.S. economic legislation in the most aggressive and weaponized way. He imposed Section 301 unilateral tariffs on a host of Chinese imports, declaring existing Chinese intellectual property rights (IPRs) as unreasonable and discriminatory.<sup>3</sup> Additionally, he imposed antidumping and safeguarding measures on other imports.<sup>4</sup> Most incredibly, he believed that foreign manufacturers paid the tariffs. Of course, in reality, U.S. consumers paid them. His Phase One agreement with China required China to increase purchases and to adjust foreign investment regulations to allow for greater investment by U.S. firms. This agreement is an unfortunate legacy of President Trump's tariff war. China's promises have not been met.**

**During his first week in office, President Trump withdrew from the Trans-Pacific Partnership (TPP). Then, he launched a ferocious war on the World Trade Organization (WTO), which was especially focused on the dispute resolution system and its appellate body. This was highly unusual because the**

---

<sup>2</sup> See generally Congressional Research Service, *Section 232 Investigations: Overview and Issues for Congress* (No. R45249) (May 18, 2021). Available at <https://crsreports.congress.gov/product/pdf/R/R45249>

<sup>3</sup> C. Brown, *More than Soybeans: Trump's Section 301 Tariffs and China's Response*. Peterson Institute for International Economics Blog (April 4, 2018). Available at [https://www.piie.com/blogs/trade-investment-policy-watch/more-soybeans-trumps-section-301-tariffs-and-chinas-response?gclid=EAIaIQobChMIoPuE-M7y9AIVgbbiCh0nEQOaEAAAYASAAEgKu6fD\\_BwE](https://www.piie.com/blogs/trade-investment-policy-watch/more-soybeans-trumps-section-301-tariffs-and-chinas-response?gclid=EAIaIQobChMIoPuE-M7y9AIVgbbiCh0nEQOaEAAAYASAAEgKu6fD_BwE)

<sup>4</sup> See generally Congressional Research Service, *U.S. Trade Policy Primer: Frequently Asked Questions* (No. R45148) (May 18, 2021). Available at <https://sgp.fas.org/crs/row/R45148.pdf>

**U.S. was the principal architect of the rules-based system. The U.S.'s position at Uruguay reflected the DNA of the American legal system: freely negotiated rules and a judiciary to litigate and resolve disputes. This would prevent trade disputes from spinning out of control.**

**Trump's assault on the WTO and its dispute resolution system is particularly bizarre because during Trump's tenure, the U.S. won two significant cases: one that China brought concerning Section 201 safeguarding duties on solar panels imported from China,<sup>5</sup> and another that the U.S. brought against China with regard to tariff rate quotas on American agricultural imports to China.<sup>6</sup> China won its case concerning Section 301 tariffs regarding IPRs.<sup>7</sup> China's case against the U.S. concerning Section 232 national security tariffs remains pending.<sup>8</sup>**

**President Trump engaged in a host of nontariff trade actions of significant concern. For example, he placed Huawei and ZTE, Chinese telecommunications firms, on the U.S. Department of Commerce's Entity List, thus restricting their abilities to purchase U.S. products and technology. He also applied a multitude of restrictions to trade with Iran and tightened controls on trade with Cuba. He imposed a few sanctions on China, proclaiming that they were intended to counter human rights abuses. The Trump administration heightened the review of inward foreign investments in the U.S. under the Committee on Foreign Investment in the U.S. (CFIUS).**

**Most significantly, President Trump broadly relied upon a national security rationale under various legislations that delegated congressional authority to presidents to unilaterally impose trade sanctions. Those actions currently continue to generate legislative proposals and federal legislation to address**

---

<sup>5</sup> DS 562 *United States – Safeguard Measures on Imports of Crystalline Silicon Photovoltaic Products* (2021). Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds517\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds517_e.htm)

<sup>6</sup> DS 517 *China – Tariff Rate Quotas for Certain Agricultural Products* (2019). Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds517\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds517_e.htm)

<sup>7</sup> DS 543 *United States -- Tariff Measures on Certain Goods from China* (2020). Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds543\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds543_e.htm)

<sup>8</sup> DS 544 *United State – Certain Measures on Steel and Aluminum Products* (2018). Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds544\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm)

President Trump's overreach in this area. Various statutory enactments contain foreign policy or national security as grounds for presidents to impose trade sanctions. They include export control legislation,<sup>9</sup> the Trade Expansion Act of 1962,<sup>10</sup> and the International Emergency Economic Powers Act, among others.<sup>11</sup>

## BIDEN'S TRADE POLICIES

After one year, President Biden has barely changed any of President Trump's trade policies.<sup>12</sup> In fact, he kept the Trump policies in place and expanded upon them with an even greater protectionist fervor. These efforts have been accompanied by a Congressional push for a litany of measures promoting domestic manufacturing. President Biden has been more active than Trump was in utilizing sanctions to address corruption and human rights abuses.

The recently completed Democracy Conference highlights a new emphasis on international corruption as well as an increased focus on human rights as a basis for U.S. trade and foreign policy.<sup>13</sup> Specifically, the recently announced Export Controls and Human Rights Initiative calls for countries to align their policies on exports to confront human rights violations. As a means of restricting money laundering, Biden has also offered to tighten U.S. law concerning the use of offshore corporations and foreign investment in U.S. real estate.<sup>14</sup>

---

<sup>9</sup> See generally *Export Controls and Regulations*. (Cornell) Available at <https://researchservices.cornell.edu/policies/export-controls-regulations-and-overview>

<sup>10</sup> Available at <https://www.law.cornell.edu/uscode/text/19/1862>

<sup>11</sup> Available at <https://www.law.cornell.edu/uscode/text/50/chapter-35>

<sup>12</sup> T. Kaplan and A. Rappeport, *Business Push Biden to Develop China Trade Policy*. New York Times (Nov. 3, 2021). Available at <https://www.nytimes.com/2021/09/01/business/economy/biden-china-trade-policy.html>

<sup>13</sup> A. Swanson, *US and Others Pledge Export Controls Tied to Human Rights*. New York Times (December 10, 2021). Available at <https://www.nytimes.com/2021/12/10/business/economy/human-rights-export-controls.html>

<sup>14</sup> Editorial, *The US is Getting Serious about Tackling Corruption*. Financial Times (December 13, 2021). Available at <https://www.ft.com/content/cc7aa2f7-2c3e-468a-bd0b-7c9f1709b0b6>

New human rights sanctions have been imposed on China (for its violation of Uyghurs' human rights),<sup>15</sup> Myanmar, the Russian Federation, Cuba, and Cambodia. These sanctions were often imposed on a range of individuals under the Global Magnitsky Act. Indeed, Congress is on the verge of passing legislation toughening the importation standard for products from China's Xinjiang region, which produces the cotton yarn that is included in 1/5 of all globally sold cotton garments.<sup>16</sup>

Biden accepted proposals from the Organisation for Economic Co-operation and Development (OECD) addressing multinational corporate taxation issues.<sup>17</sup> This acceptance was, in fact, a broadening of existing international tax policy. However, in part, it was a clear response and a corollary of Biden's renewed focus on domestic tax reform and on ensuring funding for his domestic agenda. Of course, this is one of a few examples of reaching out to multilateral institutions to implement a gentler foreign policy.

The Biden administration has kept almost all of the Section 232 steel tariffs in place. Indeed, the administration reinstated duties that were previously offered tariff relief. Trade tensions continue with Canada and Mexico under the new United States–Mexico–Canada Agreement.<sup>18</sup> President Biden initiated the cooling of tensions with the European Union (EU) when he somewhat settled the Airbus–Boeing WTO dispute, thus relaxing tensions over digital taxation and Section 232 steel tariffs. However, he then threatened the U.K. by refusing to drop these same tariffs due to his displeasure over its position concerning

---

<sup>15</sup> D. Sevastopulo, *US to Blacklist Eight More Chinese Companies Including Dronemaker DJI*, Financial Times (December 14, 2021). Available at <https://www.ft.com/content/fbcf9467-5b7e-4a81-8b40-d829fefa09ae>

<sup>16</sup> C. Edmondson, *Congress Passes Ban on Goods From China's Xinjiang Region Over Forced Labor Concerns*, New York Times (December 16, 2021). Available at <https://www.nytimes.com/2021/12/16/us/politics/congress-uyghur-forced-labor.html>

<sup>17</sup> J. Stein and S. Kim, *Biden, Other G-20 World Leaders Formally Endorse Groundbreaking Global Minimum Tax*, Washington Post (October 30, 2021). Available at <https://www.washingtonpost.com/us-policy/2021/10/30/biden-g20-global-minimum-tax/>

<sup>18</sup> G. Bade and A. Blatchford, *Biden's Made-in America Push Raises Trade Tensions at Meeting with Canada, Mexico*, Politico (November 18, 2021). Available at <https://www.politico.com/news/2021/11/18/joe-biden-made-in-america-tensions-canada-mexico-522868#:~:text=Trade-,Biden's%20made%20in%20America%20push%20raises%20trade%20tensions,at%20meeting%20with%20Canada%20Mexico&text=But%20trade%20leaders%20in%20all,and%20derailing%20the%20regional%20cooperation.>

Northern Ireland and Brexit.<sup>19</sup> The newly established U.S.–EC Trade and Technology Council<sup>20</sup> reflects a bit broader relaxation of tensions with Europe.

However, the Biden administration has recently doubled tariffs on Canadian lumber entering the U.S.<sup>21</sup> It has also entered into a new steel agreement with the EU that manages exports to the U.S.,<sup>22</sup> and it has expanded early on Buy American regulations that restrict foreign contractors in government procurement. These actions raise the specter of returning to the managed trade policies of the 1980s, which Trump favored, when Japan was the ire of American politicians.<sup>23</sup>

President Biden has increasingly utilized sanctions for foreign policy and national security reasons. For example, he waived sanctions early on against companies involved in the construction of the Nord Stream 2 pipeline, but he has now threatened to impose them in response to the threat of Russian military action against Ukraine.<sup>24</sup>

The Biden administration has increased U.S. restrictions on outward investments, direct investment into U.S. firms, and U.S. funds investing in Chinese securities. For example, it banned American investment in Chinese defense and surveillance companies such as SenseTime.<sup>25</sup> This is part of an aggressive implementation of Treasury Department (Office of Foreign Assets

---

<sup>19</sup> A. Williams and A. Bounds, *US Delays Lifting Trump-Era Tariffs Due to Northern Protocol Fears*. *Financial Times* (December 2, 2021). Available at <https://exbulletin.com/world/international/1317737/>

<sup>20</sup> A. Swanson, *U.S. and Europe Announce New Trade Cooperation, But Disputes Linger*. *New York Times* (Oct. 1, 2021). Available at <https://www.nytimes.com/2021/10/01/business/economy/us-europe-trade.html>

<sup>21</sup> Editorial Board, *Biden is Hiking Lumber Tariffs at the Wrong Time*. *Washington Post* (December 2, 2021). Available at <https://www.washingtonpost.com/opinions/2021/12/02/biden-lumber-tariff-mistake/>

<sup>22</sup> White House, *Joint US-EU Statement on Trade in Steel and Aluminum* (October 31, 2021). Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/31/joint-us-eu-statement-on-trade-in-steel-and-aluminum/>

<sup>23</sup> C. Brown, *The False Allure of Managed Trade*. *Wall Street Journal* (December 17, 2021). Available at <https://www.wsj.com/articles/the-false-allure-of-managed-trade-11639666704>

<sup>24</sup> H. Foy and N. Astrasheuskya, *Why Nord Stream 2 is at Heart of US Warnings to Putin Over Ukraine*, *Financial Times* (December 9, 2021). Available at <https://www.ft.com/content/650963c2-3e45-4ad0-bc87-0f0b59851a5a>

<sup>25</sup> G. Russell and W. Langley, *SenseTime Postpones Hong Kong IPO After US Blacklisting*. *Financial Times* (December 14, 2021). Available at <https://www.ft.com/content/5d7f255f-2c0e-4280-a2cb-e1c83dff6e68>

Control) sanctions.<sup>26</sup> In general, the Biden administration has aggressively utilized both the investment blacklist under the treasury department<sup>27</sup> and the entity list that the commerce department implemented.<sup>28</sup>

Moreover, Biden has increased use of the Committee on Foreign Investment in the U.S. (CFIUS)<sup>29</sup> to monitor inward Chinese investment and transactions.<sup>30</sup> Furthermore, the Biden administration has increased pressure to delist Chinese companies from the New York Stock Exchange or the Nasdaq Stock Market.<sup>31</sup> This is pursuant, in part, to the actions of the Securities and Exchange Commission requiring auditing compliance. With new appointments to the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice, the more vigorous antitrust enforcement of international transactions is on the horizon, especially with a focus on national security concerns.<sup>32</sup>

## CONCLUSIONS

Not much change has been made in trade policies between President Trump and President Biden. In fact, Biden, relying on Trump's actions, has broadened them. A slight change in tune has occurred: a little more reconciliation with

---

<sup>26</sup> "There are multiple problems with the way the United States currently employs economic sanctions." D. Drezner, *The United States of Sanctions – The Use and Abuse of Economic Coercion*. 100 *Foreign Affairs* 142 at 147 (No. 5) (Sept. – Oct. 2021). Available at <https://www.foreignaffairs.com/articles/united-states/2021-08-24/united-states-sanctions>

<sup>27</sup> See generally, U.S. Department of the Treasury's webpage as to sanctions. *Office of Foreign Assets Controls --- Sanctions Programs and Information*. Available at <https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information>

<sup>28</sup> See generally, U.S. Department of Commerce webpage as to sanctions. *Sanctioned Destinations*. Available at <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations>

<sup>29</sup> See generally, U.S. Department of Treasury's webpage *Committee of Foreign Investment in the United States*. Available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>

<sup>30</sup> A Leary and K. Ferek, *Biden Builds Upon Trump's Use of Investment Review Panel to Take on China*. *Wall Street Journal* (July 7, 2021). Available at <https://www.wsj.com/articles/investment-review-panel-gets-wider-role-under-biden-in-rivalry-with-china-11625650200>

<sup>31</sup> W. Langley, *China Mobile Set to List in Shanghai*. *Financial Times* (December 14, 2021). Available at <https://www.ft.com/content/769caae2-f11f-4926-a56e-9abc3902ff8a>

<sup>32</sup> George Mason University (Scalia School of Law), *The National Security Implication of Antitrust Series: Home and Abroad*. Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/31/joint-us-eu-statement-on-trade-in-steel-and-aluminum/>

Europe and international organizations. However, it is extremely difficult to identify any significant difference concerning China, Russia, or Iran. Has Trump's America First policy morphed into Biden's America First or Workers trade policy?<sup>33</sup>

The Biden administration is confronting various trade challenges: removing Trump's tariffs that are still in place; joining the revised TPP, especially now that China and South Korea have indicated their interest in joining;<sup>34</sup> reengaging with the WTO, especially over the dispute resolution system;<sup>35</sup> enforcing the Phase One Agreement with China, particularly the purchase requirements; and more forcefully confronting China's policies concerning state-owned enterprises and government subsidies. Other issues relating to trade are pending and growing in importance—for example, climate change, a carbon tax, environmental issues, and pandemics.

Several general points must be made.

The first is that U.S. trade policy is best understood as being primarily a product of U.S. domestic politics. China is now viewed with heightened concern, especially in the context of foreign policy and national security. Second, a movement within the Congress<sup>36</sup> and in the federal courts (where the Supreme Court is now considering whether to review the issue of national security tariffs<sup>37</sup>) is now taking place to rein in the president's use of a national security rationale as the basis of trade sanctions. Third, this concern is part of a larger

---

<sup>33</sup> Editorial Board, *Biden's 'America First' Trade Policy*. East Asia Forum (November 1, 2021). Available at <https://www.easiaforum.org/2021/11/01/bidens-america-first-trade-policy/>. See also F. Zakaria, *Candidate Biden was Right on Trade. President Biden is Wrong*. Washington Post (Oct. 7, 2021) Available at <https://www.washingtonpost.com/opinions/2021/10/07/biden-is-wrong-on-trade-with-china/>

<sup>34</sup> C. Daviess. Jong-A, *South Korea Applies to Join CPTPP in Wake of China's Bid*. Financial Times (December 13, 2021). Available at <https://www.ft.com/content/3bb1ee0e-ae04-4836-88bb-fa5c859992ed>

<sup>35</sup> A. Swanson, *Biden's China Dilemma: How to Enforce Trump's Trade Deal*, New York Times (December 15, 2021). Available at <https://www.nytimes.com/2021/12/15/business/economy/china-trump-trade-deal-biden.html>

<sup>36</sup> Warner, *Toomey Reintroduce Legislation to Restore Authority Over 'National Security' Tariffs*. Press Release (Warner (October 10, 2021). Available at <https://www.warner.senate.gov/public/index.cfm/2021/10/warner-toomey-reintroduce-legislation-to-restore-authority-over-national-tariffs>

<sup>37</sup> *Transpacific Steel LLC v. United States* (US Supreme Court) (Docket 21-721). Available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-721.html>

**ongoing movement in Congress to reclaim congressional trade power. Congress has exclusive trade authority under the Constitution but has unfortunately delegated much of this authority to presidents since the 1930s. Fourth, Congress is now concerned with reining in even more presidential power as a result of the four years of the Trump administration.**

**I have two concluding comments:**

**One is that from China’s accession to the WTO in December 2001 to today—December 2021, twenty years later—a huge shift has taken place in U.S. public and political sentiment concerning China’s participation in the global trading system. The attitude has shifted from optimism to grave concern. This a shift from the “Washington Consensus of 2001” to the present “Confrontational and Protectionist Consensus.” A serious disillusionment is present throughout the political establishment and public opinion in the U.S. regarding China’s role both in the global trading system and in global affairs.**

**The public and political sentiments in the U.S. have changed the terms of debate and are very different from those surrounding China’s accession to the WTO in 2001, even from Trump’s inauguration five years ago. These concerns are highly toxic. The Biden administration has not developed a coherent, forward-looking strategy to manage trade relations with China. It must.**

**The second point, in addition to involving this seismic change in the U.S.’s perception of China, is related to the Democratic Party’s control of the presidency and the House of Representatives. During the past few decades, the Democratic Party has been decidedly weary of global trade and has been supportive of promoting protectionism to enhance the wellbeing of workers and the middle class. These attitudes firmly reflect the constituents and interest groups within the Democratic Party. This orientation has now merged with the newly established protectionist and nationalistic orientation of the Republican party, first birthed by President Trump. This is today’s reality.**

**What specifically must be done by the Biden administration? A great deal.  
That's another story.**