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# Biden's Emerging Trade Policy

Perry S. Bechky



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## Biden's Emerging Trade Policy



Perry Bechky  
Partner, Berliner Corcoran & Rowe LLP  
Visiting Scholar, Seattle University School of Law  
October 27, 2021

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## Personal Introduction

- > 25 years as international lawyer, mainly international trade and investment
- Former law professor
- Current focus mainly sanctions (OFAC) and investment reviews (CFIUS), but worked on almost all today's issues over time
- Boutique firm with international focus



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## Themes

- ▣ Biden policy recently emerging
- ▣ New tone, substance largely continuing
- ▣ National security and other "non-trade" concerns
- ▣ China, China, China
- ▣ More government role in trade



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## Senator Biden on Trade

As Senator, voted for NAFTA, WTO, Australia FTA, Morocco FTA, and PNTR (MFN) for China

Voted against DR-CAFTA and FTAs with Chile, Oman, and Singapore


} **Reconcile?**  
Voted with majority of Democratic Senators

+ TPP  
as VP



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## Candidate Biden on Trade


"[S]tart at home, by investing in strengthening our greatest asset—our middle class. I would not sign any new trade deal until we have made major investments in our workers & infrastructure."

- Focus on Middle Class/Workers
- Relatively Low Priority
  - Covid, Stimulus, Infrastructure, etc.
- Enforcement > Liberalization
- Non-Trade Priorities
  - Environment, Labor, Human Rights, etc.


History



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## USTR and Five Deputies

 Katherine Tai  
USTR,  
3/18

-  Jayme White,  
9/27
-  Sarah Bianchi,  
10/4
- Vacant
- Vacant
- Vacant

Senate hearings, 10/26

Nominee awaiting Senate hearings

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## Tai Emerging

- ▣ 10/4 – DC speech on China
- ▣ 10/5 – Notice to restart exclusions
- ▣ 10/12 – G20 Ministerial Statement
- ▣ 10/14 – Geneva speech on WTO
- ▣ 10/14 – Starts ITC investigation on trade effects on workers
- ▣ 10/22 – G7 Trade Ministers' Communiqué
- ▣ Next – Biden at G20 Summit in Rome on Saturday



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## ITC Investigation

- ▣ Requested by USTR, 10/14
- ▣ “Equity initiatives” & efforts for “trade policy to have positive and equitable impact on marginalized, underserved, and disadvantaged communities”
- ▣ “Distributional effects of goods and services trade and trade policy on U.S. workers by skill, wage and salary level, gender, race/ethnicity, age, and income level, especially as they affect underrepresented and underserved communities”
- ▣ ITC should “expand its research and analysis capabilities”



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## Trade Agreements

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## WTO

- ▣ Few negotiating successes since 90's
- ▣ Long-term trend away from Geneva
  - ▣ Regional/bilateral. Now, unilateral
- ▣ US dissatisfaction with dispute system
  - ▣ Especially in AD/CVD cases
- ▣ Suspension of the Appellate Body  
Adverse decisions may be appealed to no one
- ▣ National security exception



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## Build Back Better the WTO?

- ▣ No commitment to restore the AB. Make dispute system better instead.
- ▣ Make rules better for workers and environment
- ▣ Make institution better, esp. better at negotiations and monitoring compliance (presumably China)
- ▣ Nothing on liberalization and market access



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## New Trade Agreements?

- ▣ FTA's with 20 countries – none since 2012
- ▣ Obama 2d term focused on TPP
- ▣ Trump generally preferred renegotiating old deals (e.g., NAFTA, KORUS). Also started to negotiate "mini deals" (e.g., India, Japan)
- ▣ Possible FTAs? Kenya, Taiwan, UK
- ▣ Fast track expired

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## TPP Revisited?

- ▣ Negotiated by Obama
- ▣ Trump withdrew
- ▣ China and Taiwan want in
- ▣ Will Biden re-join?
  - ▣ Not yet
  - ▣ Not the same
  - ▣ Geopolitics vs politics



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## Tariff Summary

- ▣ Trump raised
- ▣ Predict Biden generally will cut but:
  - ▣ Not at once
  - ▣ Not all products
  - ▣ Not unilaterally
  - ▣ Not globally
- ▣ Biden may raise some too (and otherwise restrict trade)



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## National Security

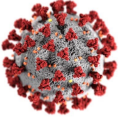
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## Supply Chain Reviews

- Reaction to Covid
  - Health security is national security
  - Much greater public awareness of importance of supply chains
- Biden ordered in February 100-day reviews of supply chains for semiconductors, high-capacity batteries, critical minerals and pharmaceuticals. Report in June.
- Expect more government funding and involvement in various sectors



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## Export Controls

- ▣ Restrict exports for reasons of national security and foreign policy
- ▣ Trump used vigorously against China, especially by adding Huawei and other Chinese companies to the Entity List
- ▣ Do not expect significant removals from the Entity List
- ▣ Congress pressing for new items to be controlled under rubric of Emerging and Foundational Technologies
- ▣ Biden has nominated ex-Pentagon employee and Huawei prosecutor as leaders of BIS




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## Sanctions

Sanctions use has increased over the last 20 years




Year	Designations (net)
2000	10,000
2001	12,000
2002	15,000
2003	18,000
2004	22,000
2005	25,000
2006	28,000
2007	32,000
2008	35,000
2009	38,000
2010	42,000
2011	45,000
2012	48,000
2013	52,000
2014	55,000
2015	58,000
2016	62,000
2017	65,000
2018	68,000
2019	72,000
2020	78,000
2021	92,000

- ▣ Cuba, Iran, North Korea, Russia, Syria, Venezuela
- ▣ Specially Designated National (SDN) List
  - ▣ Aggressive growth. Some legal challenges. Growth may slow
- ▣ Secondary sanctions
  - ▣ Aggressive under Trump. Expect Biden wants less, esp. on allies, but Congress will push for more (e.g., Nord Stream 2).
- ▣ China – SDN designations (HK, Xinjiang, Iran, etc.), broader threats under Trump, many bills in Congress
- ▣ Treasury just published sanctions review




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CFIUS

- Committee on Foreign Investment in the US
- National security reviews
- Long-term upward trend continuing
- Spike after 2018 law (FIRRMA)
  - Filings sometimes **mandatory**
  - More budget, more staff, more application to wider array of deals past and future (including deals without control)
- Continuing focus on China
  - Magnachip deal as example of ongoing aggressiveness



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National Security Tariffs (§ 232)

- 1962 law, rarely used before Trump
- Steel 25%, Aluminum 10%
- 288K exclusion requests
- EU retaliation
  - Deal expected soon
  - Retaliatory tariffs climbing 12/1
  - Principles / Practical problems
- Warner-Toomey Bill (S.2934)



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China

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China Recap ... So Far

- Supply chain reviews
- WTO reforms
- Revisit TPP?
- Supply Chain Reviews
- Export Controls
- Sanctions
- CFIUS
- Steel & Aluminum tariffs

FBI Director Christopher Wray: **“The greatest long-term threat to our nation’s information and intellectual property, and to our economic vitality, is the counterintelligence and economic espionage threat from China.”**

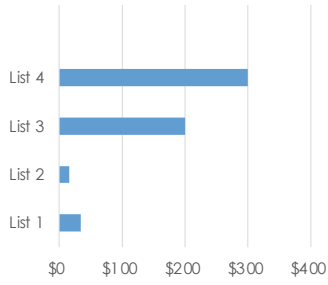
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## More Tariffs on China (§ 301)

Import Value in Billions



List	Import Value (Billions)
List 4	~\$300
List 3	~\$200
List 2	~\$20
List 1	~\$50

15%-25% tariffs

Exclusions

- >2200 → 549 → 99 for COVID-related products only
- Comments due by 12/1 whether to bring back some of the 549
- Lighthizer opposed extensions, to incentivize decoupling

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## China – Phase 1 Agreement

- China promised to increase US purchases by \$200B
- China made other commitments too, and refrained from retaliatory tariffs
- US cut some tariffs and held off raising other tariffs
- Tai commits to enforce Phase 1, not to negotiate Phase 2
- Bloomberg estimates >50% compliance by China



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## China, China, China

- ▣ Criminal prosecutions
  - ▣ Huawei CFO nonprosecution deal
- ▣ CHIPS bill
  - ▣ \$50B semiconductor funding
- ▣ Telecom restrictions
- ▣ Rare Earths initiative outside China
- ▣ Competition in international fora
  - ▣ Includes standard-setting



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## Forced Labor

- ▣ Rising attention and impact
- ▣ Xinjiang as major factor, but not limited to China
- ▣ Intersection between human rights and competition
- ▣ Supply chain diligence
  - ▣ E.g., impact on shirts made in Bangladesh
- ▣ More use of USMCA to address other labor issues too





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## Anti-Corruption

- ▣ White House declares anti-corruption a core national security interest
  - ▣ G7 Ministers' statement against corruption
- ▣ Sanctions designations
- ▣ FCPA enforcement, very recent
  - ▣ Credit Suisse - \$100MM SEC fine
  - ▣ Ericsson - DOJ found breach of DPA
  - ▣ Honeywell - >\$160MM



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## Thank you!

Please do not hesitate to contact me:



Perry Bechky  
 Berliner Corcoran & Rowe LLP  
 +1.202.293.9427  
 pbechky@bcr-dc.com  
 www.bcr-dc.com

Many of my articles and talks are available at [www.iti-law.com](http://www.iti-law.com).

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