

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Bumpy transition and lots to reverse for Biden with a full trade agenda ahead

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President-elect Biden's victory has been met with relief by many in the international trade community. Despite a plethora of obstacles he faces, Biden is expected to conduct U.S. international trade policy in a different way, including the use of multilateral approaches rather than "going it alone," diplomacy instead of taunts and insults, collaboration not flying "solo," and working on common global goals, not just "America First." Jake Sullivan, Biden's choice for National Security Advisor, call it a "go it alone strategy." The current landscape is "the wages of four years of alienating our allies and refusing to work them. . . . "[1] Most of all, international trade observers look forward to a return of the rule of law, not the daily government by tweet that has too often surprised or even blindsided international business.

International business is accustomed to turbulence and uncertainty, but many will welcome what is expected to be a more measured, deliberate, and policy-driven approach under Biden. His advisors across the economic and security posts have staked out an early "rebuilding" of relationships that will allow the development of coordinated trade policy initiatives. There is no doubt Biden must dig out of some of the very deep trenches Trump has dug, and this will inevitably slow change. How quickly the United States and the world emerge from the COVID-19 crisis will influence the speed and effectiveness of much of the Biden agenda. In the meantime, despite COVID, there is a very healthy agenda. Globalization fell ill, but has not perished.

Transition

During the transition period, the Trump Administration took several actions that sought to bind, constrain, or at best simply delay the Biden Administration. Media reports suggested that Trump political appointees at the U.S. Trade Representative (and other agencies) refused to allow the agency's career staff to schedule meetings with Biden's transition landing team. Or, in some cases insisted on joining meetings with career staff, chilling the briefings. Thus, the Biden administration may be coming into office without the latest information on the agency's pending tariff investigations or ongoing negotiations with foreign countries like the U.K. and Kenya. The Trump Administration also took policy actions which Biden may feel the need to undo before he can start on his agenda, including new sanctions on Iran, new export controls and sanctions on China, possible tariffs on Vietnam, possible import action on auto parts, among others. Nonetheless, the Biden Transition Team is taking shape, marked by reliance on officials with a long history of engagement with their agencies and issues. For example, the announcement of

Katherine Tai as Biden's nominee for U.S. Trade Representative. Tai is the chief trade lawyer for the House Ways and Means Committee and she is credited for shepherding the U.S.-Mexico-Canada Agreement through Congress and into law. A former Chief Counsel at USTR for China Trade Enforcement, Tai has deep knowledge of U.S.-China trade issues, and strong relationships in Congress to implement Biden's trade agenda.

First 100 Days

Apart from the marquee announcements (such as rejoining the Paris Accords, which is likely to also find its way into any Biden trade agreements), we can expect the Biden Administration, in line with the theme of "building back better" to begin to recreate a collaborative relationship, particularly with European allies. However, a number of challenges have already appeared as potential stumbling blocks on the path to deeper U.S.-European cooperation as a result of disagreements over digital services taxation and the EU's rush to agree to an EU-China investment agreement weeks before the Biden Administration is set to begin. Nevertheless, rebuilding will be a key effort as the Biden Administration tries to reestablish relationships of mutual respect not just with Europe and a newly independent UK, but also with its geographically closest allies in Canada and Mexico. What will Biden do with the tariffs on steel and aluminum?[2] How will he address the important issues of the trade imbalance with China and the ongoing threats from Russia? For some of these issues, we will be forced to wait and see, but nothing is expected immediately. Biden has pledged to be more inclusive of labor interests and to be more collaborative with Congress. These take time, as does fitting action into a coherent strategy. Nonetheless, we have early glimpses of what may be in store in the following key areas.

China

China is perhaps the primary trade-related issue on which we may not expect much substantive change right away but will see a change in process. While President-elect Biden has also maintained a tough on China stance, the differences between his likely approach and that of the Trump Administration on China remain substantial. The Trump Administration's brinksmanship has not produced what Trump promised, in fact some worry that it has strengthened China. We can therefore expect the Biden Administration to maintain focus on the issues that exist — imbalance, technology competition, trade-secret protection, fair trade, industrial subsidies, and others — but to address them using the tools of international trade, not bullying or secret, arbitrary, and unaccountable proceedings producing duty hammers (such as section 301), which harm U.S. importers and consumers as much (or more) as they do China. Analysts suggest a Biden White House will take the first six months to do a comprehensive review on every China-related action the previous administration took, and decide what should remain and what should be changed. The Biden Administration is aiming to release a comprehensive China policy review by mid-2021.

Trade Agreements

The recent announcement of the Regional Comprehensive Economic Partnership (RCEP) in Asia has echoes of the work the Obama-Biden Administration undertook with Trans-Pacific Partnership (TPP) and provides stark evidence to underpin the worry that by withdrawing from TPP the United States is now being left behind in the region. Although it is unlikely that the Biden Administration will embrace the RCEP, it is expected to be more open to trade agreements that operate multilaterally, not unilaterally. However, China's recent signal of interest in joining the successor to the TPP—the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

(CPTPP)—if serious, could force the Biden Administration to reconsider comprehensive multilateral trade agreements sooner than it would like in order to head off any effort by China to establish itself as the pre-eminent superpower in the West Pacific and a world leader in free trade, multilateralism, and economic integration. Any concerted effort to re-join the CPTPP (or any other comprehensive trade agreement) would likely require obtaining Trade Promotion Authority (TPA) from Congress which expires on July 1, 2021. It is unclear whether the Biden will seek its renewal before the authority lapses.

World Trade Organization

In the topsy-turvy world of 2020, where Republicans are no longer the party of “free trade” and in many ways have adopted trade policies that look like the Democrats of the 1980s, the parties may be closer on some goals, but are miles apart on process. A Biden Administration will look to multilateral institutions, such as the WTO, as tools for finding common ground and for addressing disputes through process, not tit-for-tat tariff battles. Given the damage done to the WTO by the Trump Administration, repairs will not be quick or easy, but will provide a signal that there is a different way to do things, based on the rule of law, not unilateralism. Deglobalization, which has been a prime Trump objective, will slow and the beneficial, wealth generating, poverty reducing benefit of international trade can operate again. Expect the Biden Administration to continue to manage the negative consequences of trade but to see liberalization as a good thing.

Export controls

In the Trump Administration, export controls as policy tools were elevated to their highest level since the fall of the Soviet Union. Export controls have served as the thin edge of the wedge to drive U.S. policy separating the civil from the military in China; many other tools have followed, but the comprehensive ‘clamp down’ reducing the sharing of U.S. technology with China – from Huawei, to the military end use/user rule expansion, to the targeting of PRC companies with Entity List bans, all of which continued to be actively expanded through the last day of the Trump Administration – the Export Administration Regulations have rarely been so central in U.S. economic and security policy. Although we expect the elevated role of export controls to remain under a Biden Administration, we do expect changes: (1) greater appreciation for the self-inflicted harm certain of these measures have caused to part of the U.S. economy and that of our allies; and (2) a more transparent and process-driven system. Many see the current export control policy process as a “black box” with little rule-based support, and very little guidance for industry affected by the measures and realization of the long-term damage caused by excluding U.S. companies from cutting edge global supply chains.

Sanctions

President-elect Biden faces an arguably over-leveraged U.S. sanctions policy, with the Trump Administration having resorted to unilateral sanctions as their preferred solution to every foreign policy challenge.[3] Biden is, however, expected to maintain many of these approaches, including potential expansion in some areas, most prominently the use of sanctions on those engaged in human rights violations, via the Global Magnitsky Sanctions, including the targeting of those involved in fostering or supporting forced labor practices, or undermining democracy. Cuba will be an important issue, including whether to roll back some of the restrictions that Trump created to slow President Obama’s path to normalization and to reverse the reinstatement of Cuba’s designation as a State Sponsor of Terrorism, re-imposed by the Trump Administration in its final

weeks in office. The United States remains uniquely isolated in the world community when it comes to its relationship with Cuba. President-elect Biden will also confront the question of whether to maintain a “maximum-pressure” policy on everywhere from Iran, to Cuba, to North Korea, or whether he uses the change in administration as an opportunity to step back and engage diplomatically before resorting to economic coercion. Nowhere will this question be more pressing than with Iran, and whether and how Biden can return to the JCPOA that his former boss Obama established, will be one of the first-year tests of President-elect Biden’s foreign policy approach and potential re-engagement with European allies. Even though the “what will Biden do” question cannot be answered with precision, the “how will Biden do it” question can be answered. Biden, as demonstrated in his rhetoric since his election and in the experienced foreign policy team he has announced during the transition, will pave the way to a return to respect for the rule of law and will aim to use, rather than undermine, the tools of international trade as a means of “building back better” with respect to America’s standing in the global economy.

Winds of Change

With control of Congress and the White House, the trade policy debate will no longer be the brinksmanship of the last President, but will instead be characterized by the more traditional debate within the Democratic Party. Will traditional approaches – protectionism and a labor focus balanced with the pursuit of a global liberal order – prevail or will the new progressives in ascendance carry the day? How will business, which is looking for more “buy America” but reengagement with the world through a bold trade agenda, influence the Biden trade agenda? Can Biden bring stability back to tech policy? Will he have more success with curbing China’s threat? The road ahead is no less challenging than it was in the past, but with new tools and a mandate to rebuild the carnage of the past four years, optimism and hope give Biden a fighting chance.

[1] Fareed Zakaria interview, January 4, 2021.

[2] There are in fact many trade actions, both offensive and defensive, that Biden will inherit: <https://www.cmtradelaw.com/2018/10/latest-u-s-trade-actions-tariffs-and-other-countries-retaliatory-measures/>. Some have called for lifting, others for maintaining, these restrictions. Expect a measured evaluation, not immediate change. A fair administration of the restrictions, including the exclusion process, would be welcome.

[3] According to a recent report, <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-2020>, “the United States significantly increased its use of sanctions” in 2020. “The total number of new sanctions designations in 2020 was only slightly lower than in 2019, with 777 designations compared to 785 in 2019. . . . Over 22 percent of 2020 sanctions designations came after the U.S. presidential election in November.”

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