

Biden, National Security, Law & Global Trade: Less Subterfuge & More Strategy in the New Era of Crisis

Stuart S. Malawer*

The US has entered a new era of crisis. President Biden has just been inaugurated. He faces historical challenges to return the US to global leadership. The primacy purpose of this article is to discuss national security and trade policy in the new Biden administration. First, I look at the historic and dubious claims made by the Trump administration in utilizing national security as a cover for protectionist trade actions, as well as at the federal court cases addressing these claims. I then assess the cases that have come before the WTO over the last two years, raising for first time the issue of the national security exception under GATT Article XXI. Finally, I conclude that President Biden's overwhelming priority

* 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). Dr. Malawer has been a delegate on various Virginia gubernatorial trade missions to Asia. 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; <http://www.GlobalTradeRelations.net>; [http://www.US-Global-Law.net/Address: 3351 Fairfax Dr., MS 3B1, Arlington, Virginia 22201 USA](http://www.US-Global-Law.net/Address:3351FairfaxDr.,MS3B1,Arlington,VA22201USA).

All the websites cited in this paper were last visited on January 20, 2021. The paper was completed as of that date.

is to resurrect American democracy and alliances. But he will also need to address a broad range of trade issues and to restrict reliance on national security as a cover for populist and protectionist policies.

Keywords: Biden, National Security Exception, GATT Article XXI, Section 232 of the Trade Expansion Act of 1962

1. Introduction

The United States (US) has entered a new era of crisis. President Biden has just been inaugurated and former President Trump has been impeached for the second time. At this critical turning point, it is necessary to closely evaluate the US trade policy over the last four years focusing primarily on the Trump administration's use of national security as a rationale for a broad range of tariff and trade actions.

The primacy purpose of this article is to discuss the role national security will play in informing President Biden's trade policy. However, first I look at the historic and dubious claims made by the Trump administration in utilizing national security as a cover for protectionist trade actions, as well as at the federal court cases addressing these claims. I will then assess the cases that have come before the WTO over the last two years, raising for first time the issue of the national security exception under GATT Article XXI. While issues concerning national security and trade can be quite technical, they are exceedingly significant. It is unfortunate that there has been little comment on this dual-track line of cases that involve national security in the US domestic courts and trade cases that raise the national security exception in the WTO's dispute resolution system.

These dual-track cases seem to have been overshadowed by President Trump's constant and broad claims of grievances, his bullying and protectionist policies from the very outset to the desperate, and dying days of his administration. For example, his trade actions over the last days of his administration included a Section 301 action on Vietnam for alleged currency manipulation, which of course is not proscribed by GATT rules; duties and retaliatory duties on French wine included as part of the continuing *Boeing-Airbus* dispute over sanctions; extension of Section 201 safeguard tariffs on washer imports from China and efforts to delist Chinese telecom firms from the US public markets; prohibiting the US private

and state investment in Chinese companies; expanding the number of Chinese companies on the export blacklist - also known as the Entity List -; and banning the US transactions with eight Chinese software apps. In a further flurry of last-minute restrictions, the Trump administration issued new rules restricting import of Chinese technology. These actions have already resulted in a new Chinese blocking statute aimed at the US sanctions. In four years, the Trump administration initiated a total of 306 antidumping and countervailing duty investigations, 283 percent more than the Obama administration initiated over eight years.¹

It is now up to President Biden to recalibrate the American approach to trade relations, particularly with China, and the relation between trade and national security - at least in the context of applying unilateral trade measures including tariffs and trade sanctions. The widening use of tariff exclusions over the last few years and the minimal impact of Trump's trade war on the US manufacturing growth only served to increase the dysfunction of his protectionist trade measures. Those seemingly only led to managed trade, which brought domestic cronyism.

My general prediction is that the Biden administration will most likely draw more heavily on national security to guide the US trade and tariff policies than did administrations prior to the Trump administration, but using a much more restricted and circumspect approach than that of the Trump administration. Biden will do so in a broader and more realistic way than has been seen in the last four years, and the process will observe domestic and international law more rigorously. Trade policies will be neither erratic nor punitive.

However, the Biden administration will not implement trade actions immediately. It will review Sections 232 and 301 tariffs methodically. The same can be said concerning the US - China trade relations and longstanding US-EU trade relations. This review will now include the recently concluded EU-China investment treaty as well as bilateral trade relations with the UK as a result of Brexit.

Given the much more pressing domestic, legal and policy issues currently confronting the US (COVID-19, alliance relations, nuclear arms, the global climate crisis and Iran, among others), the Biden administration will need to address those issues first. In addition, the traditional lack of consensus and conflict over trade issues within the Democratic Party will hamper a broader trade review as well as a more specific review of trade-based national security actions.

2. Section 232 Cases (National Security, Trade & Tariffs in the US)

I have written about national security and President Trump's trade actions several times in this Review.² In 2019, I concluded the following, which is even more valid today:

Active and positive engagement with the global economy, not restrictive actions or tariffs harking back to the beginning of the American republic up through the 1930s, is essential to global trade and domestic economic development. Even the term 'America first' that President Trump favors was used by isolationists and protectionists in 1930s America. The policies espoused at that time did not lead to greatness but only global warfare. Positive US engagement with the global economy and international political system is essential to American security today.³

The most recent development to question and restrict the administration's ability to take trade actions under a national security rationale is the recent decision by the United States Court of International Trade in *Transpacific Steel LLC v. U.S.*⁴ This case declared illegal Trump's attempts to add to the list of items covered by his previous tariff declarations. The Court held that the statutory period stated in the statute is binding, and if an action does not fall within that period, then it is not permitted.⁵ An appeal to the United States Federal Court of Appeals was rejected as premature.

Specifically, the United States Court of International Trade held that Trump's actions to adjust tariffs against Turkish steel producers were illegal; that the broad language of Section 232 to impose trade restrictions for national security reasons was subject to strict time periods; and that the president acted outside of those limits.⁶ To me, this decision underscores that Section 232 is subject to judicial review and that presidential action is invalid if it does not fall within the prescribed time limits.

In an earlier case in 2020 - *The American Institute for International Steel v. U.S.*,⁷ which addressed President Trump's national security tariffs on steel and aluminum - the federal circuit held that Section 232 did not violate the nondelegation doctrine. The United States Supreme Court denied further review of the case. However, judges in the United States Court of International Trade,

which was the trial court in 2019, expressed skepticism about the President's use of national security arguments.⁸

Recent skirmishes in various courts between the Trump administration and TikTok indicate an ever-growing judicial skepticism of the Trump administration's reliance on a national security rationale for trade or investment restrictions. The federal court ruled that the administration's actions violated the First Amendment right to freedom of expression.⁹ In this case, the administration relied on national security concerns under the International Economic Emergency Act (IEEPA), but the federal court determined that the plaintiffs had not effectively disputed that claim.¹⁰

3. The Most Pressing Trade Policy Problems President Biden Will Face

The following is my partial list of trade problems confronting Biden:¹¹

- Trump's tariff and trade wars, especially with China, raising the basic issues of confrontation or cooperative competition.
- Rebuilding alliances and a multilateral global strategy which in particular addresses trade and political disputes relating to U.S. - China relations.¹²
- More specific China trade issues, such as China's implementation of a Phase One agreement to purchase more U.S. products and commodities,¹³ the lifting of various Sections 232 and 301 tariffs on Chinese exports to the United States and of various transactional sanctions, particularly on investments in Chinese firms and Chinese investment into the U.S., and issues of human rights-specifically the use of Uighurs as prison labor.
- Legislative efforts to restrict and transfer some delegated tariff authorities back to the President and perhaps to the Treasury Department.
- Trade relations with the EU and the UK after the recent Brexit deal, including the competing retaliatory tariffs resulting from the *Boeing and Airbus cases*,¹⁴ the digital taxation proposals emanating from the EU concerning global internet firms and issues concerning the newly announced EU-China investment treaty.¹⁵
- The global tax avoidance of global tech firms, global e-commerce and the threatened EU digital taxation.
- WTO issues, especially the decimation of the Appellate Body by the Trump administration and the selection of a new WTO director-general.

- Other WTO issues, including the growing reliance on litigation within the WTO and the continuing failure to negotiate new trade rules.
- The Paris Climate Accord.
- Sanctions related to the Iranian nuclear deal from which Trump withdrew.
- Reconstitution of an Asian alliance and joining of the newly revised Comprehensive and Progressive TPP (CPTPP) to offset the Chinese-inspired Regional Comprehensive Economic Partnership (RCEP).
- Renewal and expansion of the Trade Promotion Authority (formerly known as “fast track authority”) and review of the Buy American Act.
- Changes by the Trump administration to the duty-free tariff treatment of various nations under the Generalized System of Preferences (GSP).
- Reconsideration of recent trade sanctions (for example, designating Cuba a State-Sponsor of Terrorism) in the last days of the Trump administration.

To be clear, these trade issues represent just a small part of the much larger problem the Trump administration is leaving to the Biden administration. Trade is only a part of greater domestic and global economic issues such as the following disastrous foreign policies that have led to unfortunate military conflicts (for example, the Saudi and UAE intervention in Yemen); failure to control the COVID-19 pandemic in the US; unrestrained cyberattacks by Russia on American institutions; global competition over emerging technologies; and the general US withdrawal from international institutions and attack on international law. The Trump administration withdrew from the WHO, the Paris Climate Accord, Open Skies Treaty and the Iranian nuclear deal. It imposed sanctions on prosecutors of the International Criminal Court and forced negotiations of trade agreements with a host of countries. The big question really is, what will be the US role in the world after Trump?¹⁶

The Trump administration bullied its allies and others without clear strategic or foreign policy reason. To me, this was a continuation of Trump’s personal inclinations to do simply whatever he wants, regardless of domestic or international law, to deconstruct international alliances and institutions.¹⁷

4. WTO and National Security Exception

The WTO will not render a decision on Trump's national security-based tariffs on steel and aluminum until later this year.¹⁸ A number of very significant developments, however, have occurred in the WTO over the last year or so, including historic actions that have gone mainly unnoted. For the first time, the WTO heard two cases dealing with GATT Article XXI (security exception), and a third is now pending.

In September 2020, in a case brought by Qatar, the WTO issued a panel report in the *Qatar-Saudi Arabia* case concerning the national security exception in the TRIPS Agreement,¹⁹ which parallels GATT Article XXI. The panel found the exception somewhat applicable on behalf of Saudi Arabia. This case involved a Saudi-led boycott against Qatar. It was subsequent to the first case decided by the WTO that involved the national security exception—*Ukraine v. Russia* in 2019.²⁰ In that case, the Panel held that the claim of national security was reviewable and that it applied in favor of the Russian Federation.²¹ This case involved Russian restrictions on Ukrainian transports through Russian territory. The US supported Russia's claim, consistent with the Trump administration's position that national security defense is not reviewable by the WTO.²² American lawyers essentially argued that such claims are 'political' and 'nonjusticiable.'²³

In addition to the US case pending before the WTO concerning national security tariffs on steel and aluminum, another case is pending. In *South Korea v. Japan*,²⁴ Japan relies on the national security exception to justify restrictions on exports to South Korea of chemicals used primarily in the production of smartphones and computer display screens.²⁵ Older disputes going back to pre-WTO days seem to have raised the issue of national security but were ostensibly settled through diplomacy.²⁶

It is mystifying that the Trump administration filed only two new cases in the WTO against China given that it viewed China as the great Satan of global trade. This occurred even though the US has continued to lose cases to China in the WTO - for example, an Obama-era Section 301 case.²⁷ Presidents Clinton, Bush and Obama filed a great many more cases against China and generally more cases than the Trump administration did.²⁸ That is another story, however.

5. Conclusion: Reasserting Congressional Authority over Trade Issues Involving National Security

I agree with the view that the case for liberal trade and multilateral involvement remains as strong as ever. The Trump administration's trade war and its wars on everything and everyone must be reversed. The Biden administration has its work cut out for it.

In light of the Trump-inspired insurrection and takeover of the Capitol building on January 6, 2021, and the president's second impeachment,²⁹ however, President Biden's overwhelming first priority is to resurrect American exceptionalism and democracy.³⁰ The greatest problems confronting the new Biden administration are now domestic. The crucial threat now is from domestic, not international terrorism. This represents a significant paradigm shift from September 11, 2001 to January 6, 2021, in just twenty years. The need for structural economic and cultural reforms including massive infrastructure investments is most glaring. These issues will be among the most pressing for the new president in confronting the economic disparity in the country.

A recent *NEW YORK TIMES* editorial stated: "Something very basic in America's relationship with the world has been broken."³¹ At the same time, an editorial in the *FINANCIAL TIMES* proclaimed: "America has a national security problem in the form of the far right ... The costs are increasingly unmistakable."³²

Trade is but one of the great issues facing the new Biden administration. However, it is one of the most important, especially as it relates to national security and its gross misapplication as cover for protectionist policies. Trump's last-minute trade and foreign policy actions placed more landmines in clear sight of the new Biden administration (for example, greater diplomatic contacts with Taiwan) and need to be quickly addressed.

Newer trade and non-trade issues seem to be emerging each day: for example, the impact of digital platforms on American politics. All of this is on top of real trade concerns and different views on a great range of trade and investment issues within the Democratic Party, especially with regard to labor, the environment and development of work-centered policies. There is a wide range of interest groups within the Democratic Party. Trade policy has hurt minorities in American society,

not just poor white and rural communities.³³

The appointment of a new trade, foreign policy and national security team by Biden seems very promising. The team seems seasoned, experienced, professional and pragmatic, with a mature understanding of the US and global issues and interests.³⁴ However, the greatest problems now confronting the new Biden administration are domestic. A recent Congressional Research Service report (August 2020) concluded the following:

The U.S. unilateral actions under Section 232 have raised the level of tension with U.S. trading partners and could pose risks to broader international economic cooperation. The strain on international trading relationships also could have broader implications, including for cooperation between the United States and allies on foreign policy issues and U.S. credibility in future trade negotiations.³⁵

In my view, one of the first issues that the Biden administration ought to confront is the longtime delegation (since the 1930s) of trade authority from Congress to the President, particularly in the area of national security, found in various legislative enactments, especially Section 232 of the Trade Expansion Act³⁶ and Section 1701 of the International Emergency Economic Powers Act.³⁷ While it may seem counterintuitive for Biden to restrict his own authority, it is necessary to ensure that the abuse and corruption of national security cannot happen again. Recently proposed legislation by Virginia senator Tim Kaine, the Reclaiming Congressional Trade Authority Act of 2019,³⁸ did not gain much traction, unfortunately. But its time has now come again.

Such restriction would be something akin to post-Watergate legislation - passed in the aftermath of President Nixon's abuses and criminal and unethical activities - that restricted presidential powers and reasserted Congressional authority, which worked to some extent. Remember that Congress, not the President, has the exclusive authority to regulate trade. However, since the 1780s, trade policy has increasingly been understood to have critical foreign policy implications and has become central to foreign affairs. Of course, the President has extensive powers related to foreign affairs, including the ability to negotiate and withdraw from international agreements.

This balance of power between the branches needs to be recalibrated now. The direction in which the WTO has moved in cases concerning national security

is not a good omen for the US. Recalibrating domestic law would most likely preclude future quite questionable US actions from being contested (and ruled against) by the WTO and the global trading system. That is good for everyone. But most importantly, first and foremost, President Biden needs to revitalize American democracy in the post-Trump world and then reclaim America's global leadership.³⁹

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