

# THE BIDEN (ENERGY) DOCTRINE

Frédéric Gilles Sourgens\*

|      |   |     |
|------|---|-----|
| I.   | ENERGY TRILEMMA.....                                | 295 |
| II.  | BUILDING BACK BETTER.....                           | 298 |
| A.   | <i>Build Back Better as an Energy Program</i> ..... | 299 |
| 1.   | The Paris Agreement .....                           | 299 |
| 2.   | Renewed Engagement.....                             | 302 |
| 3.   | Climate Finance and Development Aid.....            | 303 |
| 4.   | Fossil Fuels .....                                  | 305 |
| B.   | <i>Dramatis Personae</i> .....                      | 306 |
| 1.   | Lead Actors.....                                    | 307 |
| 2.   | Supporting Actors.....                              | 309 |
| C.   | <i>The Biden Energy Doctrine</i> .....              | 310 |
| III. | THE CHALLENGE AHEAD.....                            | 311 |
| A.   | <i>The Asia Problem</i> .....                       | 311 |
| B.   | <i>The Trilemma Problem</i> .....                   | 313 |

On its face, predicting the Biden administration's international energy policy would appear simple: look up the policy of the Obama administration. Repeat. Done. There is, of course, more than a little truth to such an understanding of the Biden administration. President Biden is himself an alumnus of the Obama administration with significant input on the foreign policy and energy policy decisions from the Obama administration. Many of the people who will be tasked with implementing the Biden administration's international energy policy will themselves also be alumni and alumnae of the Obama administration. Surely, then there will be more than a little overlap between where the Obama administration left off and the Biden administration will begin.

But one should tread cautiously in assuming that a Biden administration will simply pick up where the Obama administration left off. There are three important factors to consider. The first is the simple passage of time. The passage of time is a particularly dramatic factor for international energy policy due to the climate change clock. Current estimates suggest that climate tipping points will be reached by 2030.<sup>1</sup> These estimates may well be overly optimistic. Four years of relative domestic and international inaction therefore leaves the Biden administration with a qualitatively different starting position

---

\* Senator Robert J. Dole Distinguished Professor of Law, Washburn University School of Law.

1. UNITED NATIONS, EMISSIONS GAP REPORT 2019 46 (2019).

than a Clinton administration would have encountered. As such, the Biden administration cannot simply use the Obama playbook. The runway to doomsday has now been shortened by approximately one-third.

The second factor is economic. The COVID-19 pandemic has left the world in a state of severe economic distress. It has killed more than 2.3 million people worldwide.<sup>2</sup> It has shut down countries and continents. In the process, it has severely tested existing supply lines and thrown global markets into chaos. One might thus analogize that the world finds itself closer to 2008 economically than 2016. The important caveat being that massive government resources—in the trillions of dollars—have already been marshaled to hold at bay the worst consequences of the COVID-19 pandemic.<sup>3</sup> These resources, therefore, look to be potentially unavailable to combat climate change.

The third factor is personal. President Biden by all accounts is far more of a moderate on global energy policy than many Obama administration alumni and possibly President Obama himself. President Biden is in many ways an institutionalist and traditionalist—dare one say a “small-c conservative.” He would thus be less inclined towards radical and fast change than the prior administration would have been.

Where does that leave the Biden administration? As this Essay will explore, it requires the Biden administration to respond to a worsening energy trilemma at the time of increased geopolitical tensions that add further challenges to this trilemma. The Biden administration hopes to resolve this trilemma with an integrated vision of “building back better.”<sup>4</sup> This vision of “building back better” hopes to respond to each of the prongs of the energy trilemma, while keeping an eye on geopolitical, energy-related tensions.<sup>5</sup>

The Biden administration finds itself in a bind in resolving this energy trilemma. As we shall see, the Biden administration’s approach to international economic governance is small-c conservative. This small-c conservatism is ultimately incompatible with taking the build back better program to a global scale. Such a program can only be realized to the extent the Biden administration invests greater political and diplomatic capital in free trade agreements and building a deeper international economic order to support energy transition.

---

2. *Covid-19 Coronavirus Pandemic*, WORLDOMETERS, <https://www.worldometers.info/coronavirus/> (last updated Feb. 27, 2021).

3. INT’L MONETARY FUND, A YEAR LIKE NO OTHER: IMF ANNUAL REPORT 2020 5 (2020).

4. *The Biden Plan to Build a Modern Sustainable Infrastructure and An Equitable Clean Energy Future*, BIDENHARRIS, <https://joebiden.com/clean-energy/> (last visited Jan. 15, 2021) [hereinafter *Biden Build*].

5. *The Biden Plan to Secure Environmental Justice and Equitable Economic Activity*, BIDENHARRIS, <https://joebiden.com/environmental-justice-plan/> (last visited Jan. 15, 2021) [hereinafter *Biden Plan*].

## I. ENERGY TRILEMMA

This section addresses the underlying challenge energy policy poses on the international stage. It outlines that energy policy traditionally responds to a trilemma of: environmental sustainability, energy equity/affordability, and energy security. This trilemma transcends energy *policy* and in fact, is at the heart of international energy *law*. The section outlines that current circumstances exacerbate the urgency of each of the prongs of the dilemma.

The energy trilemma is reflected already in the core themes struck by then President Biden's transition.<sup>6</sup> President Biden's central message in his victory speech was that "I believe it's this: Americans have called upon us to marshal the forces of decency, the forces of fairness, to marshal the forces of science and the forces of hope in the great battles of our time."<sup>7</sup> Relevantly for current purposes, President Biden highlighted the battle to build prosperity.<sup>8</sup> He also highlighted, "the battle to save our planet by getting climate under control."<sup>9</sup> President Biden's transition website similarly lists as two of its four priorities "economic recovery" and "climate change."<sup>10</sup> This speech at core thus hits on two of the three prongs of the energy trilemma—environmental sustainability (climate change) and energy equity/affordability (building prosperity).

The third prong of the energy trilemma is about energy security.<sup>11</sup> Energy security is about the security of energy supply.<sup>12</sup> This security of supply is threatened in two separate, yet equally important ways. First, it is threatened by external, geopolitical events.<sup>13</sup> One example of such external, geo-political events includes recent violent tensions between Iran, Saudi Arabia, and the United States.<sup>14</sup> These tensions led to a drone attack on one

---

6. *Id.*

7. *Read the full text of Joe Biden's speech after historic election*, ABC (Nov. 7, 2020), <https://abcnews.go.com/Politics/read-full-text-joe-bidens-speech-historic-election/story?id=74084462>.

8. *Id.*

9. *Id.*

10. *Priorities*, BIDEN-HARRIS TRANSITION, <https://buildbackbetter.gov/priorities/> (last visited Jan 15, 2021).

11. *World Energy Trilemma Index*, WORLD ENERGY COUNCIL, <https://www.worldenergy.org/transition-toolkit/world-energy-trilemma-index> (last visited Jan. 15, 2021).

12. Daniel Yergin, *Ensuring Energy Security*, 85 FOREIGN AFF. 69, 69–78 (2006).

13. *Oil security: The global oil market remains vulnerable to a wide range of risk factors*, INT'L ENERGY AGENCY (Nov. 27, 2019), <https://www.iea.org/areas-of-work/ensuring-energy-security/oil-security> (last visited Jan. 19, 2021).

14. *See* Ellen R. Wald, *3 Reasons Iran Can't Put a Toll on the Straits of Hormuz*, FORBES (July 8, 2019), <https://www.forbes.com/sites/ellenwald/2019/07/08/3-reasons-iran-cant-put-a-toll-on-the-strait-of-hormuz/?sh=45267cb75ff2> (discussing summer 2019 threats to navigation through the straits); Rockford

of Saudi Arabia's largest oil refining installations, sending shockwaves through energy markets.<sup>15</sup> Further, Iran has threatened one of the most important shipping lanes for global oil supplies, the Straits of Hormuz.<sup>16</sup> Three similarly important areas of tension include: 1) the South China Sea, an area in which the People's Republic of China is currently threatening energy security through unlawful enforcement actions; 2) the Black Sea, an area in which Russia threatens energy security by unlawfully annexed Crimea; and 3) the Baltic Sea, an area of importance for European pipeline access that is seeing increased Russian escalation.<sup>17</sup>

Second, energy security also can be impaired for reasons internal to existing energy markets. These markets cannot rely upon technology that is unable to deliver energy when it is needed. One such problem is the so-called intermittent problem of renewable energy (how to deliver energy when the sun does not shine and the wind does not blow).<sup>18</sup> This problem has also arisen in traditional energy markets, with the 2001 rolling California blackouts being one example.<sup>19</sup>

These three prongs of the energy trilemma are reflected in a number of international legal regimes. Environmental sustainability and climate change are subject to the United Nations Framework Convention on Climate Change

---

Weitz, *Explainer: Could Iran Close the Strait of Hormuz*, NAVY TIMES (Jan. 7, 2020), <https://www.navytimes.com/news/your-navy/2020/01/08/explainer-could-iran-close-the-strait-of-hormuz/>; see also *Iran Seizes British Tanker in Strait of Hormuz*, BBC (July 20, 2019), <https://www.bbc.com/news/uk-49053383>; Ben Hubbard et al., *Two Major Saudi Oil Installations Hit by Drone Strike, and U.S. Blames Iran*, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/14/world/middleeast/saudi-arabia-refineries-drone-attack.html> (last updated Jan. 15, 2020) (discussing the drone strike on Abqaiq and Khurais); see also *Saudi Arabia Oil Attacks: UN 'Unable to Confirm Iranian Involvement'*, BBC (Dec. 11, 2019), <https://www.bbc.com/news/world-middle-east-50742224> (discussing Iranian disputing responsibility for the drone strike).

15. Hubbard, *supra* note 14.

16. See Wald, *supra* note 14; see also Weitz, *supra* note 14.

17. See *Tensions flare over South China Sea energy reserves*, ARGUS (July 17, 2019), <https://www.argusmedia.com/en/news/1941353-tensions-flare-over-south-china-sea-energy-reserves>; see also Ariel Cohen, *As Russia Closes In On Crimea's Energy Resources, What Is Next For Ukraine?*, FORBES (Feb. 28, 2019), <https://www.forbes.com/sites/arielcohen/2019/02/28/as-russia-closes-in-on-crimeas-energy-resources-what-is-next-for-ukraine/?sh=69b3408929cd>; see also Andrew E. Kramer, *Pipeline Politics: Why Nord Stream 2 Is Back in the Spotlight*, N.Y. TIMES, <https://www.nytimes.com/2020/09/14/world/europe/nord-stream-2-russia-germany.html> (last updated Sept. 16, 2020).

18. Paul Rogers, *California grid operator warned of power shortages as state transitioned to clean energy*, MERCURY NEWS, <https://www.mercurynews.com/2020/08/17/california-blackouts-expose-problems-in-states-transition-to-clean-energy/> (last updated Aug. 17, 2020).

19. *Id.*

and the Paris Agreement concluded under its auspices.<sup>20</sup> Questions of energy affordability and equity fall under human rights as well as international economic law consisting broadly of trade and investment law.<sup>21</sup> Energy security in turn can be improved both by international economic law to address internal energy problems, regimes governing international peace, and security to address geopolitical threats.

Each of these different prongs of the trilemma, in addition, calls on multiple other international legal regimes to the floor. Most centrally, international climate concerns have also raised human rights issues.<sup>22</sup> These human rights issues have led domestic courts in the Netherlands to order governments to increase their emission reduction targets.<sup>23</sup> These issues have also made headway in the Inter-American system to focus on the human rights implications of climate change and thus increased pressure to increase climate action.<sup>24</sup>

At the same time, such human rights concerns also affect energy equity.<sup>25</sup> Energy is one of the backbones necessary for economic activity.<sup>26</sup> It is essential to deliver healthcare services and education, and thus central to development.<sup>27</sup> Moreover, it is central to a host of positive human rights to the point that scholars have posited the existence of a right to electricity.<sup>28</sup>

As the Biden administration focuses on energy and climate policy, it, therefore, acts not just in one area of international law. Rather, its policies

20. See United Nations Framework Convention on Climate Change art. 2, Sept. 5, 1992, S. TREATY DOC NO. 102–38, 1771 U.N.T.S. 107; see also Paris Agreement art. 2, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/ [hereinafter Paris Agreement].

21. Apurvaa Pandey, *Energy: A Basic Human Right*, GEOPOLITICAL MONITOR (Apr. 24, 2018), <https://www.geopoliticalmonitor.com/energy-a-basic-human-right/>.

22. See Maria L. Banda, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, 22 AM. SOC'Y INT'L L. INSIGHTS (May 10, 2018), [https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human#\\_edn1](https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human#_edn1); see also *Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability*, CTR. FOR INT'L ENVTL. L. (Dec. 9, 2019), <https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability/>.

23. HR 20 December 2019, ECLI:NL:HR:2019:2007.

24. The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017) 1, 32.

25. Lars Löfquist, *Is There a Universal Right to Electricity?*, 24 INT'L J. HUM. RTS. 711, 718 (2020).

26. *Id.* at 711.

27. *Id.* at 721.

28. *Id.* at 712.

will have to move across different areas of international law.<sup>29</sup> Energy and climate cannot be reduced to a single regime. They are systemic concerns. As this Essay will discuss, the Biden administration is approaching climate and energy from a systemic perspective. Yet, its approach likely lacks the toolkit fully to unlock the energy trilemma. The two main problems for the Biden administration are the lack of a clear vision of how the energy trilemma can be balanced and the thorny nature of any engagement with China—an engagement for which the current Biden team seems not as well equipped as it could have been.<sup>30</sup> At the same time, the Biden administration’s approach of “building back better” may well provide the building blocks out of which such a fuller approach could be built.<sup>31</sup> There thus remains a reason to be cautiously optimistic that the Biden administration will fully embrace its slogan as part of a broader overhaul of the global legal energy infrastructure.

## II. BUILDING BACK BETTER

The Biden administration recognizes the need to integrate energy solutions into a response involving the entire government rather than just any one department.<sup>32</sup> This commitment is most clearly visible in two contexts. The first is in the programmatic approach to building back better.<sup>33</sup> The second is in the staffing of key positions dealing with international and domestic energy policy.<sup>34</sup> Both of these help us to move into focus what the Biden (Energy) Doctrine will likely look like. The first subsection will address each of these in turn and attempt to establish what can be gleaned from them to deduce a Biden (Energy) Doctrine. The second subsection will outline the challenges this doctrine will face both as a matter of policy statements

---

29. *The Power of America’s Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century*, BIDENHARRIS, <https://joebiden.com/americanleadership/> (last visited Jan. 15, 2021) [hereinafter *Power of America*].

30. See Alex Gullén, *Biden says his team has ‘no time to waste’*, POLITICO (Dec. 19, 2020), <https://www.politico.com/news/2020/12/19/biden-climate-team-announcement-448717>; see also Rick Gladstone, *Biden to Face Long List of Foreign Challenges, With China No.1*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2020/11/07/world/americas/Biden-foreign-policy.html>.

31. See Jennifer Epstein, *Biden Offers ‘Build Back Better’ Plan to Revive Economy*, BLOOMBERG (July 9, 2020), <https://www.bloomberg.com/news/articles/2020-07-09/biden-offers-build-back-better-approach-to-reviving-economy>.

32. See generally *Biden Build*, *supra* note 4.

33. See generally *Build Back Better: Joe Biden’s Jobs and Economic Recovery Plan for Working Families*, BIDENHARRIS, <https://joebiden.com/build-back-better/> (last visited Jan. 18, 2021) [hereinafter *Build Back Better*].

34. See, e.g., Will Englund et al., *Biden to name Granholm as energy secretary*, WASH. POST (Dec. 15, 2020), <https://www.washingtonpost.com/business/2020/12/15/granholm-energy-secretary-biden/>.

made by the Biden administration and as a matter of the geopolitical landscape that the Trump administration has left behind for the Biden administration.

#### A. *Build Back Better as an Energy Program*

No slogan better captures the Biden administration's aspirations than "build back better."<sup>35</sup> This slogan can be translated into four distinct areas of policy action under the Biden administration. The first is a renewed commitment to emissions reduction under the Paris Agreement.<sup>36</sup> The second is a renewed commitment to engagement—as opposed to the unilateralism of the Trump administration.<sup>37</sup> Circumstances would suggest, however, that the Biden administration will have a more pragmatic approach of incrementalism as opposed to the attempts at concluding framework conventions that drove part of the Obama agenda.<sup>38</sup> Third, it is likely that the Biden administration will seek to strengthen development aid and climate finance to support United States energy exports while supporting global greenhouse gas mitigation efforts.<sup>39</sup> Finally, the Biden administration is not likely to abandon oil and gas or move to drastic steps such as carbon border adjustments.<sup>40</sup> Rather, it will likely seek to bring oil and gas companies into the climate process.

### 1. The Paris Agreement

It is an article of faith for the Biden administration to rejoin the Paris Agreement on January 20, 2021. Rejoining the Paris Agreement means that the United States will continue to participate in the procedural obligations laid out in the Paris Agreement.<sup>41</sup> These procedural obligations chiefly concern reporting and continued negotiation towards open items on the Paris

35. *Build Back Better*, *supra* note 33.

36. See Press Release, Biden Harris Transition, Statement by President-elect Joe Biden on the Five-Year Anniversary of the Paris Agreement (Dec. 12, 2020), <https://buildbackbetter.gov/press-releases/statement-by-president-elect-joe-biden-on-the-five-year-anniversary-of-the-paris-agreement/>.

37. See *Power of America*, *supra* note 29.

38. See Richard A. Kessler, *Pragmatic Biden has political know-how to push green agenda*, RECHARGE, <https://www.rechargenews.com/wind/pragmatic-biden-has-political-know-how-to-push-green-agenda/2-1-907798> (last updated Nov. 9, 2020).

39. See generally *The Biden Plan for Clean Energy Revolution and Environmental Justice*, BIDENHARRIS, <https://joebiden.com/climate-plan/> (last visited Jan. 19, 2021) [hereinafter *Clean Energy Revolution*].

40. See Heidi Vella, *Joe Biden is president-elect: what now for US oil and gas?*, OFFSHORE TECH., <https://www.offshore-technology.com/features/joe-biden-is-president-elect-what-now-for-us-oil-and-gas/> (last updated Dec. 6, 2020).

41. See DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 209–26 (2017).

Agreement agenda.<sup>42</sup> Importantly, one such item that has yet to lead to broad agreement concerns is carbon markets.<sup>43</sup> The United States rejoining the Paris Agreement will, therefore, add important information to global climate efforts and add a voice in favor of resolving important items left open in the Paris Agreement itself.<sup>44</sup>

However, rejoining the Paris Agreement also raises a more fundamental question. What happens to the United States emission reduction contributions under the Paris Agreement? The Paris Agreement does not mandate emission reduction quotas.<sup>45</sup> Instead, the Paris Agreement leaves it to each Member State to make nationally determined contributions (NDCs), in which each Member State sets out its own emission reduction targets.<sup>46</sup> The Paris Agreement itself does not make these NDCs binding.<sup>47</sup> NDCs can become binding as unilateral acts made pursuant to a treaty.<sup>48</sup>

The original United States NDC was such a binding unilateral act.<sup>49</sup> It was intended to create reliance interests in the States to increase the ambition in their own emission reduction policies—and it did.<sup>50</sup> But with the Trump administration's withdrawal from the Paris Agreement, the status of the United States NDC has become more problematic.<sup>51</sup>

It is likely that the Biden administration will indirectly address this uncertainty.<sup>52</sup> Many of the United States' Paris Agreement treaty partners

---

42. *Id.*

43. See Diane Desierto, *COP25 NEGOTIATIONS FAIL: CAN CLIMATE CHANGE LITIGATION, ADJUDICATION, AND/OR ARBITRATION COMPEL STATES TO ACT FASTER TO IMPLEMENT CLIMATE OBLIGATIONS?*, BLOG EUR. J. INT'L L. (Dec. 19, 2019), <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/>.

44. Emma Newburger, *Biden will rejoin the Paris Climate Accord. Here's what happens next*, CNBC, <https://www.cnbc.com/2020/11/20/biden-to-rejoin-paris-climate-accord-heres-what-happens-next.html> (last updated Nov. 20, 2020).

45. See generally Paris Agreement, *supra* note 20, art. 2, ¶ 1(a).

46. *Id.* art. 4, ¶ 2; see also Frédéric G. Sourgens, *Climate Commons Law: The Transformative Force of the Paris Agreement*, 50 N.Y.U. J. INT'L L. & POL. 885, 888 (2018).

47. Paris Agreement, *supra* note 20, art. 4, ¶ 11.

48. Sourgens, *supra* note 46, at 893.

49. *Id.* at 894.

50. *Id.* at 935.

51. Press Release, Michael R. Pompeo, Secretary of State, U.S. Department of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019).

52. See David Waskow et al., *How Biden Can Make the US a Global Leader on Climate Action*, WORLD RES. INST. (Nov. 12, 2020), <https://www.wri.org/blog/2020/11/biden-us-leadership-fight-climate-change>.



have increased their own NDCs.<sup>53</sup> Most notably, the European Union has announced such a plan.<sup>54</sup> Therefore, it is likely that the United States will announce an increase in its NDC.<sup>55</sup>

The problem with such an announcement is the manner of its implementation. The first United States NDC was premised upon administrative action, most notably the Clean Power Plan.<sup>56</sup> As the Biden administration takes office, such new administrative action will require time both to design and shepherd through the United States administrative law notice-and-comment process.<sup>57</sup> It is likely that the Biden administration will look to energy policy in order to shore up its NDC.<sup>58</sup> But the exact nature of this action may well be complicated by legislative agendas. This means that there may be a lag between the United States' expression of intention to improve upon its NDC and its ability to actually push climate policies to submit such an updated NDC.

It is noteworthy that this lag time may well present an opportunity. As with the first United States NDC, the United States could use the formulation of its own NDC as a means to coordinate with third states.<sup>59</sup> The United States NDC, therefore, could become a step towards building a new global energy infrastructure.<sup>60</sup> If the United States were to use the opportunity in this fashion, it is likely that a second United States NDC would also become legally binding as a unilateral act made pursuant to a treaty. As such, it would tether the United States in a binding fashion to a forming international energy consensus.<sup>61</sup>

---

53. *CAT Climate Target Update Tracker*, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/climate-target-update-tracker> (last updated Jan. 22, 2021); *see generally* Paris Agreement, *supra* note 20.

54. *CAT Climate Target Update Tracker United Kingdom*, CLIMATE ACTION TRACKER, (Dec. 12, 2020), <https://climateactiontracker.org/climate-target-update-tracker/united-kingdom/>.

55. *See Clean Energy Revolution*, *supra* note 39.

56. *United States of America First NDC*, U. N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (Mar. 9, 2016), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf>; JAMES E. MCCARTHY ET.AT., CONG. RESEARCH SERV., R44341, EPA'S CLEAN POWER PLAN FOR EXISTING POWER PLANTS: FREQUENTLY ASKED QUESTIONS 1 (2017).

57. *See* 5 U.S.C. §553.

58. *See Clean Energy Revolution*, *supra* note 39.

59. Waskow, *supra* note 52.

60. *Id.*

61. *Id.*

## 2. Renewed Engagement

The NDC process already hints at one of the hallmarks of what to expect from the Biden administration. The Biden administration has vowed to re-engage with the world by means of diplomacy.<sup>62</sup> It has signaled a sharp turn around vis-à-vis the Trump administration and its brand of unilateralism.<sup>63</sup>

As the NDC process already indicates, it is likely that this form of engagement will follow the blueprint for the Paris Agreement NDCs. That is, there is likely to be bilateral diplomacy to shore up support for shared energy and climate goals with United States partners.<sup>64</sup> One of the partners in this respect was Canada, and this remains as such.<sup>65</sup> Another potential partner includes the European Union.<sup>66</sup>

The most important party for such renewed engagement is China. China and the United States find themselves in critical opposition on security questions that have significant implications for energy security.<sup>67</sup> The most important difference involves the South China Sea.<sup>68</sup> China has advanced significant maritime claims—claims which have been decisively rejected by an international law of the sea tribunal.<sup>69</sup> Despite this loss, China has moved ahead with aggressive enforcement action in the South China Sea due to violation of international law.<sup>70</sup> Chinese action impairs energy security as China is threatening natural resource exploration in the region with military force.<sup>71</sup> Further, the most significant shipping lanes pass through the South China Sea,<sup>72</sup> thus impairing freedom of navigation and global supply chains.

---

62. David Sanger, *The End of 'America First': How Biden Says He Will Re-engage With the World*, N.Y. TIMES, <https://www.nytimes.com/2020/11/09/us/politics/biden-foreign-policy.html> (last updated Nov. 30, 2020).

63. *Id.*

64. ERIK BRATTBERG, *REINVENTING TRANSATLANTIC RELATIONS ON CLIMATE, DEMOCRACY, AND TECHNOLOGY I* (Carnegie Endowment for Int'l Peace) 1st ed. (2020).

65. Kathiann M. Kowalski, *How U.S.-Canada collaboration could boost both countries' climate responses*, ENERGY NEWS NETWORK (Mar. 27, 2019), <https://energynews.us/2019/03/27/midwest/how-u-s-canada-collaboration-could-boost-both-countries-climate-responses/>.

66. Brattberg, *supra* note 64 at 1.

67. Wu Xinbo, *U.S. Security Policy in Asia: Implications for China—U.S. Relations*, 22 ISEAS Yusof Ishak Inst. 479, 480 (2000).

68. Pompeo, *supra* note 51.

69. Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INT'L L. STUD. 257, 264 (2020).

70. *Id.* at 267.

71. Lirong Wang, *Sea lanes and Chinese National Energy Security*, 73 J. COASTAL RSCH. 572, 574 (2015).

72. *See How Much Trade Transits the South China Sea?*, CHINAPOWER, <https://chinapower.csis.org/much-trade-transits-south-china-sea/> (last updated Jan. 25, 2021).

The renewed engagement with China and other potential partners on energy and climate policy is likely to be bilateral and informal. That is, the Biden administration is unlikely to attempt the grand bargain route of a Trans-Pacific Partnership (TPP).<sup>73</sup> This TPP was one of the most important documents to create a multilateral framework for deep-seated engagement on energy trade and infrastructure, among other goals.

Had it been ratified, the TPP would have been one of the greatest United States foreign policy successes in the region. Any multilateral treaty requires compromise and is in many ways imperfect. But the rules laid out in the TPP would have provided a strong framework for cooperation on energy questions.<sup>74</sup> It would have allowed the United States to engage China in a multilateral framework that would have combined energy and trade-related issues in a comprehensive manner.<sup>75</sup>

But the lesson from the TPP is that such agreements make for bad politics.<sup>76</sup> It is not likely that such an agreement could be ratified as a treaty or concluded as a Congressional-Executive Agreement.<sup>77</sup> Such far-reaching policy proposals are unlikely to receive needed support from both the progressive left and populist right. Consequently, diplomatic engagement with partners is likely to increase. But, it is highly likely to be bilateral rather than broadly multilateral. And it is more likely to be informal rather than take the form of treaties requiring Congressional approval.

### 3. Climate Finance and Development Aid

The Biden administration is committed to a program of energy infrastructure investment.<sup>78</sup> This commitment is most visible in its domestic agenda.<sup>79</sup> “Build back better” is one of the key Biden campaign slogans.<sup>80</sup> This slogan highlights a commitment to energy infrastructure investment in

---

73. James McBride et al., *What Is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp> (last updated Feb. 1, 2021).

74. Michael Levi, *What the TPP Means for LNG*, COUNCIL ON FOREIGN REL. (Nov. 17, 2015), <https://www.cfr.org/blog/what-tpp-means-lng>.

75. See Mireya Solis, *The Containment Fallacy: China and the TPP*, BROOKINGS (May 24, 2013), <https://www.brookings.edu/blog/up-front/2013/05/24/the-containment-fallacy-china-and-the-tpp/>.

76. See Frédéric G. Sourgens, *Supernational Law*, 50 VAND. J. TRANSNAT'L L. 155, 158 (2017).

77. Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1353–54 (2008) (discussing NAFTA and other free trade agreements).

78. *Biden Build*, *supra* note 4.

79. Exec. Order No. 13990, 86 Fed. Reg. 7037, 7041 (Jan. 25, 2021).

80. *Id.*

the United States domestically.<sup>81</sup> This commitment is more likely to succeed with Democratic legislative majorities in the U.S. House of Representatives and the U.S. Senate.

The Biden administration's commitment to energy infrastructure investments does not end at the water's edge. One of the main problems for climate action is that many states lack the means to overhaul existing energy infrastructure.<sup>82</sup> This means that climate action can only be successful if states contribute significant funds to climate finance.<sup>83</sup>

The Paris Agreement already contains a commitment for a climate finance mechanism.<sup>84</sup> The original goal was to raise \$100 billion per year in climate finance funding.<sup>85</sup> This goal still falls significantly short of the necessary resources to meet Paris' goals. Ultimately, this goal, in turn, will have to be increased.<sup>86</sup>

The Biden administration will likely increase its efforts in providing climate finance to support energy infrastructure development abroad.<sup>87</sup> Importantly, such climate finance does not require the direct use of U.S. taxpayer dollars to build powerplants overseas.<sup>88</sup> Rather, climate finance relies on governments to provide guarantees for loans and assistance in arranging commercial and multilateral financing for projects.<sup>89</sup> Such financing can take the form of investment insurance.<sup>90</sup> Such action is more likely to be politically acceptable yet still supportive of infrastructure development overseas.

---

81. *Biden Build*, *supra* note 4.

82. DILIP AHUJA & MARIKA TATSUTANI, *THE WORLD ACADEMY OF SCIENCES, SUSTAINABLE ENERGY FOR DEVELOPING COUNTRIES* 5, 9, 35 (2008).

83. *Changing the Finance, Financing the Change*, U.N. ENV'T PROGRAMME, <https://www.unenvironment.org/explore-topics/climate-change/what-we-do/climate-finance> (last visited Jan. 22, 2021).

84. Paris Agreement, *supra* note 20, art. 9.

85. Jorge Gastelumendi & Inka Gnittke, *Climate Finance (Article 9)*, in *THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY* 239, 241 (Daniel Klein et al. eds., 2017).

86. See generally Chrysa Alexandraki, *COP 24 and Climate Finance: A Stepping Stone or a Blurred Line?*, EJILTALK! (Jan. 23, 2019), <https://www.ejiltalk.org/cop-24-and-climate-finance-a-stepping-stone-or-a-blurred-line/>.

87. See Baysa Naran et al., *The Biden Administration's potential impact on climate finance*, CLIMATE POL'Y INITIATIVE (Jan. 5, 2021), <https://www.climatepolicyinitiative.org/the-biden-administrations-potential-impact-on-climate-finance/>.

88. See RICHARD K. LATTANZIO, CONG. RSCH. SERV., IF10763, *PARIS AGREEMENT: U.S. CLIMATE FINANCE COMMITMENTS* (2019) (discussing the different forms of international financial assistance).

89. See generally *id.* (detailing the manners in which the U.S. provides climate finance).

90. *Id.*

One of the reasons states offer certain forms of climate finance is because they can further serve as export finance.<sup>91</sup> That is, climate finance can assist U.S. businesses in building and operating foreign energy projects.<sup>92</sup> This means that such foreign infrastructure has a beneficial economic impact on the United States climate finance, which is likely an avenue of significant United States engagement.<sup>93</sup>

On the other hand, it is not particularly likely that the United States will enter into free trade agreements in the short term.<sup>94</sup> The Biden administration has already announced its intention to focus on domestic economic investment and growth instead.<sup>95</sup> This means that the Biden administration will likely not expand market access systemically or otherwise expand trade and investment protections to support energy infrastructure overhaul. At the same time, there is no indication that the United States will exit existing U.S. free trade agreements or investment protection treaties.<sup>96</sup> The Biden administration is, therefore, likely to increase support for building back better abroad. It will do so through informal financing mechanisms and under the protection of existing bilateral and multilateral treaties. It is not likely to retool how it would assist in such financing and investment completely.

#### 4. Fossil Fuels

The Biden administration has not indicated an all-out effort to dismantle the oil and gas industry. On the domestic front, the Biden administration has instead attempted to follow a balancing act between environmental and energy interests. This balancing act is most visible in the Biden campaign's stance on hydraulic fracturing.<sup>97</sup> The Biden campaign has announced its intention not to permit hydraulic fracturing on public lands.<sup>98</sup> It has expressly rejected

---

91. See Igor Shishlov, *G20 Governments Must Urgently Align Their Export Credits With The Paris Agreement*, iD4D (Sept. 14, 2020), <https://ideas4development.org/en/paris-agreement-role-of-export-credits/> (for a discussion of export finance in energy).

92. See *Climate Finance*, WORLD RES. INST., <https://www.wri.org/our-work/project/climate-finance/climate-finance-and-private-sector> (last visited Jan. 23, 2020).

93. See generally *id.*

94. See generally Tatiana L. Palermo, *The future of free trade*, GEOPOLITICAL INTELLIGENCE SERV. (Oct. 23, 2020), <https://www.gisreportsonline.com/the-future-of-free-trade,economy,3340.html>.

95. See Nick Allen, *Joe Biden says 'no trade deals' until he has invested in America first*, TELEGRAPH (Dec. 3, 2020), <https://www.telegraph.co.uk/news/2020/12/02/joe-biden-says-no-trade-deals-has-invested-america-first/>.

96. See generally Palermo, *supra* note 94.

97. Vicky B. Varela, *What's Next for Fracking Under Biden?*, COUNCIL ON FOREIGN REL. (Dec. 18, 2020), <https://www.cfr.org/in-brief/whats-next-fracking-under-biden>.

98. *Id.*

banning the process on private land.<sup>99</sup> Further, it is unclear whether the Biden administration will not grandfather in existing producers on public lands.<sup>100</sup> This means that the ban would only apply to new oil and gas developments on public lands.<sup>101</sup>

This suggests that the Biden administration will also follow an international policy that will be, on the whole, supportive of the oil and gas industry.<sup>102</sup> Thus, it is likely that the United States will continue to support natural gas-fired powerplants worldwide and protect global natural gas infrastructure.<sup>103</sup> (Having come full circle, the United States recently sent an aircraft carrier to Vietnam at the request of the Vietnamese government due to Chinese threats against Vietnamese leased offshore gas projects.<sup>104</sup> The Biden administration will likely continue such “freedom of navigation” diplomacy in the region, thus protecting oil and gas industry interests in the region.)

It is unlikely that the United States would drastically alter other elements of the international energy system. The Biden administration looks poised to work with oil and gas as part of the energy mix.<sup>105</sup> It is more likely that the Biden administration would work with foreign partners on tailpipe and smokestack technology standards.

#### B. *Dramatis Personae*

Policy programs are only successful to the extent that they are competently implemented. Therefore, it is important not just to look at policy programs. The lead actors asked to implement these programs are just as important. This section will focus on a few of the leading Biden administration nominees that have been announced to date and assess their impact on global energy policy.

---

99. *Id.*

100. *Id.*

101. *Id.*

102. Varela, *supra* note 97.

103. *Id.*

104. See Reuters Staff, *U.S. says completes second aircraft carrier visit to Viet.*, REUTERS (Mar. 11, 2020), <https://www.reuters.com/article/us-vietnam-usa/u-s-says-completes-second-aircraft-carrier-visit-to-vietnam-idUSKBN20Y0F3>.

105. Timothy Puko, *Biden's Plan to Shift Energy Policy Faces Headwinds*, WALL ST. J. (Nov. 10, 2020), <https://www.wsj.com/articles/bidens-plan-to-shift-energy-policy-faces-headwinds-11605016802>.

## 1. Lead Actors

The three most important persons for the Biden program are Antony Blinken, John Kerry, and Gina McCarthy. Antony Blinken (Blinken) is President Biden's nominee to serve as Secretary of State.<sup>106</sup> President Biden has nominated John Kerry (Kerry) as special envoy for climate matter.<sup>107</sup> Lastly, President Biden has called upon Gina McCarthy (McCarthy) to serve as White House coordinator on climate matters.<sup>108</sup> Each of these individuals is likely to have a direct impact on the implementation of the energy policy program outlined in the previous section.

Antony Blinken is a longstanding U.S. diplomat.<sup>109</sup> Blinken first entered government service in 1993 as the Special Assistant to the Assistant Secretary of State for European and Canadian Affairs.<sup>110</sup> Blinken has since held national security positions and State Department positions in the Clinton and Obama administrations.<sup>111</sup> Blinken has expressed strong support for increasing NDC ambition and has called for meetings with major emitters to do so.<sup>112</sup> Blinken is known as a strong internationalist.<sup>113</sup> He is committed to multilateralist solutions to foreign policy problems.<sup>114</sup> Blinken has significant European experience, having attended a high school in France, and is known as a devotee of French culture.<sup>115</sup> Further, he is known as a supporter of robust

---

106. See *The Cabinet*, WHITE HOUSE, <https://www.whitehouse.gov/administration/cabinet/> (last visited Jan. 30, 2021); Lara Jakes et al., *Biden Chooses Antony Blinken, Defender of Global Alliances, as Secretary of State*, N.Y. TIMES, <https://www.nytimes.com/2020/11/22/us/politics/biden-antony-blinken-secretary-of-state.html> (last updated Dec. 2, 2020).

107. *The Cabinet*, *supra* note 106; Lisa Friedman, *With John Kerry Pick, Biden Selects a 'Climate Envoy' With Stature*, N.Y. TIMES, <https://www.nytimes.com/2020/11/23/climate/john-kerry-climate-change.html> (last visited Dec. 11, 2020).

108. Lisa Friedman, *Biden to Name Gina McCarthy, Former E.P.A. Chief, as White House Climate Coordinator*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/climate/gina-mccarthy-biden-climate.html>.

109. *Deputy Secretary State*, U.S. DEP'T OF ST., <https://2009-2017.state.gov/r/pa/ei/biog/236057.html> (last visited Jan. 22, 2021).

110. *Id.*

111. *Id.*

112. Tony Walker, *From 'America first' to 'America together': who is Antony Blinken, Biden's pick for secretary of state?*, CONVERSATION (Nov. 25, 2020), <https://theconversation.com/from-america-first-to-america-together-who-is-antony-blinken-bidens-pick-for-secretary-of-state-150739>.

113. David M. Herszenhorn & Rym Momtaz, *9 things to know about Antony Blinken, the next US secretary of state*, POLITICO (Nov. 23, 2020), <https://www.politico.eu/article/nine-things-to-think-about-antony-blinken/>.

114. *Id.*

115. *Id.*

United States involvement in global security threats, including by military force.<sup>116</sup>

John Kerry's role as special envoy is similarly significant. The role is a cabinet-level position.<sup>117</sup> Kerry previously served as Secretary of State in the Obama administration.<sup>118</sup> In fact, the Paris Agreement was concluded during Kerry's tenure as Secretary of State.<sup>119</sup> Similar to Blinken, Kerry has significant European leanings and is known as a Francophile.<sup>120</sup> Prior to service as Secretary of State, Kerry served as a U.S. Senator.<sup>121</sup> Thus, he brings strong political experience and instincts mixed together with foreign policy experience and weight.

Gina McCarthy will serve as the head of the White House Office of Domestic Climate Policy.<sup>122</sup> In this position, McCarthy will also have significant influence over energy and climate questions within the White House.<sup>123</sup> McCarthy is a former Environmental Protection Agency (EPA) Administrator.<sup>124</sup> McCarthy was one of the authors of the Clean Power Plan.<sup>125</sup> This plan was at the heart of the first United States NDC. Thus, McCarthy brings significant expertise from the domestic regulatory perspective to climate affairs.<sup>126</sup> This expertise is particularly important as Kerry and McCarthy are said to be friends with a history of working together in formulating U.S. climate policy by combining regulatory and foreign policy experience.<sup>127</sup>

---

116. *Id.*

117. Kate Sullivan, *Biden prioritizes climate crisis by naming John Kerry special envoy*, CNN, <https://www.cnn.com/2020/11/23/politics/john-kerry-biden-climate-envoy/index.html> (last updated Nov. 24, 2020).

118. *Id.*

119. *Id.*

120. AFP, *John Kerry Given France's Highest Honour*, LOCAL (Dec. 11, 2016), <https://www.thelocal.fr/20161211/john-kerry-given-frances-highest-honour>.

121. *John Kerry*, BALLOTPEDIA, [https://ballotpedia.org/John\\_Kerry](https://ballotpedia.org/John_Kerry) (last visited Jan. 27, 2021).

122. Juliet Eilperin & Brady Dennis, *Biden Picks Former EPA Chief as White House Climate Czar*, WASH. POST (Dec. 15, 2020), <https://www.washingtonpost.com/climate-environment/2020/12/15/gina-mccarthy-climate-change-czar-biden/>.

123. *Id.*

124. *Id.*

125. Coral Davenport & Lisa Friedman, *Biden's Twin Climate Chiefs, McCarthy and Kerry, Face a Monumental Task*, N.Y. TIMES, <https://www.nytimes.com/2020/12/16/climate/gina-mccarthy-john-kerry-climate-adviser.html> (last updated Dec. 21, 2020).

126. *Id.*

127. *Id.*



## 2. Supporting Actors

Four further positions are of particular importance as the Biden team tries to tackle the global energy trilemma. These positions are the EPA administrator, the U.S. Trade Representative, the Secretary of Defense, and the National Security Advisor.<sup>128</sup> The expertise here follows the same footsteps as the main actors as that they have significant prior experience in their respective resorts.<sup>129</sup>

President Biden chose Michael Regan as his appointee for EPA administrator.<sup>130</sup> Mr. Regan has significant experience as a regulator.<sup>131</sup> Mr. Regan's past work has been in air quality regulation.<sup>132</sup> Thus, he brings expertise in emissions regulations and climate matters to bear and therefore assists the Kerry-McCarthy team with the implementation of climate policies.<sup>133</sup>

President Biden named Katherine Tai as his nominee for U.S. Trade Representative.<sup>134</sup> The U.S. Trade Representative is charged with the negotiation of U.S. trade agreements and sets U.S. trade policy.<sup>135</sup> Katherine Tai is a China expert and Mandarin speaker.<sup>136</sup> She is expected to continue a tough line on China in trade questions.<sup>137</sup>

On questions of energy security, the Biden administration national security team will have an outsized importance. The main players in the national security team are the Secretary of Defense and National Security

---

128. See generally NAT'L SECURITY AGENCY, <https://www.nsa.gov> (last visited Jan. 30, 2021); see also Secretary of Defense Lloyd J. Austin III, U.S. DEP'T DEF., <https://www.defense.gov/Our-Story/Meet-the-Team/Secretary-of-Defense/> (last visited Jan. 30, 2021); see also OFF. OF THE U.S. REP., <https://ustr.gov> (last visited Jan. 30, 2021); see also U.S. ENV'T PROT. AGENCY, <https://www.epa.gov> (last visited Jan. 30, 2021).

129. See NAT'L SECURITY AGENCY, *supra* note 128; see also Secretary of Defense Lloyd J. Austin III, *supra* note 128; see also OFF. OF THE U.S. REP., *supra* note 128.

130. See *The Cabinet*, *supra* note 106; Jeff Tollefson, *Biden's pick to head US environment agency heartens scientists*, NATURE (Dec. 18, 2020), <https://www.nature.com/articles/d41586-020-03621-6>.

131. See Tollefson, *supra* note 130.

132. *Id.*

133. *Id.*

134. See *The Cabinet*, *supra* note 106; Yen Nee Lee, *Biden's pick for top U.S. trade official will continue tough line on China, says ex-Trump official*, CNBC (Dec. 18, 2020), <https://www.cnbc.com/2020/12/18/bidens-ustr-pick-katherine-tai-will-be-tough-on-china-ex-trump-official.html>.

135. See Lee, *supra* note 134.

136. *Id.*

137. *Id.*

advisor.<sup>138</sup> President Biden has announced that he will nominate General Lloyd J. Austin III as Secretary of Defense.<sup>139</sup> Austin is a former head of U.S. Central Command.<sup>140</sup> His experience lies predominantly in the Middle East, not with China or Russia.<sup>141</sup> Joe Biden finally chose Jake Sullivan as his National Security Advisor.<sup>142</sup> Sullivan, a Clinton State Department veteran and later National Security Advisor to then-Vice President Biden, is known as one of the architects of the Iran Nuclear Deal.<sup>143</sup>

### C. *The Biden Energy Doctrine*

The Obama foreign policy doctrine famously was “don’t do stupid shit.”<sup>144</sup> It sought to limit foreign military entanglements in Syria, much to the dismay of many of the administration’s own veterans.<sup>145</sup> At the same time, the Obama administration had a desire to “go big.”<sup>146</sup> Efforts such as the TPP were key multilateral efforts that materially shifted U.S. foreign policy east with a focus on Asia.<sup>147</sup> This Asian focus was accompanied by an attempt to cement this foreign policy in super-regional agreements that would achieve grand policy objectives in one fell swoop.<sup>148</sup>

The Biden administration looks to follow a related but different mantra. What emerges from both the policy proposals and cast of characters is a focus on “if it ain’t broke, don’t fix it.” As this discussion has shown so far, the Biden administration does not appear poised to propose any significant

---

138. See generally NAT’L SECURITY AGENCY, *supra* note 128; see generally *Secretary of Defense Lloyd J. Austin III*, *supra* note 128.

139. See *The Cabinet*, *supra* note 106; Lara Seligman et al., *Biden picks retired general Lloyd Austin to run Pentagon*, POLITICO, <https://www.politico.com/news/2020/12/07/lloyd-austin-biden-secretary-defense-frontrunner-contender-443479> (last updated Dec. 7, 2020).

140. See *The Cabinet*, *supra* note 106; Seligman, *supra* note 139.

141. Michael E. O’Hanlon et al., *Around the halls: Brookings experts on defense react to the nomination of Gen. Lloyd Austin*, BROOKINGS (Dec. 10, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/12/10/around-the-halls-brookings-experts-on-defense-react-to-the-nomination-of-gen-lloyd-austin/>.

142. Natasha Bertrand, *The inexorable rise of Jake Sullivan*, POLITICO (Nov. 27, 2020), <https://www.politico.com/news/2020/11/27/jake-sullivan-biden-national-security-440814>.

143. *Id.*

144. Michael T. Klare, *Why Hillary Clinton Is Wrong About Obama’s Foreign Policy*, NATION (Sept. 3, 2014), <https://www.thenation.com/article/archive/why-hillary-clinton-wrong-about-obamas-foreign-policy/>.

145. *Id.*

146. See, e.g., McBride et al., *supra* note 73.

147. See *id.*

148. See generally *id.*

multilateral free trade agreements, such as the TPP, that might be able to alter energy supply chains globally.<sup>149</sup> Additionally, the Biden administration does not appear to be able to invest significant funds abroad to support energy infrastructure transformations directly. Finally, the Biden administration does not appear to depart from existing energy security paradigms significantly.

This approach appears fundamentally consistent with the people staffed at the top. The Biden team is highly competent. But it is also fundamentally conservative with a little c. That is, it has a strong belief in the status quo and in fact, seems poised to return to it rather than to build a new paradigm. This, therefore, suggests a mentality to keep with existing approaches.

On its face, it is difficult to reconcile “if it ain’t broke, don’t fix it” with “build back better.” The “better” more than implies that existing structures are fundamentally flawed. Therefore, the idea is to improve infrastructure, improve living conditions, build more equitable energy systems, and more equitable economies.

In the end, the two slogans do remain fundamentally consistent with each other. The Biden administration fundamentally believes in existing international legal processes. The administration does not wish to change the status because it believes that these processes are, in fact, able to deliver an incrementally better economic and energy infrastructure.

In sum, one should expect the Biden administration to support energy security, energy equity, and environmental sustainability within the strictures of the Paris Agreement and classic U.S. foreign policy. One should not expect a fundamental departure legally, even as the Biden administration will attempt to use these existing mechanisms to different ends—namely, to strengthen renewable energy projects in the United States and support the construction of such projects globally.

### III. THE CHALLENGE AHEAD

The Biden administration’s approach presents several challenges for energy policy going forward. Some of these challenges are premised in personnel. Others are premised in a structural under-ambition to resolve the problems posed by the energy trilemma. This section will briefly address each of these challenges in turn.

#### A. *The Asia Problem*

One of the key problems apparent in the senior team assembled by President Biden has been its regional focus. Antony Blinken and John Kerry

---

149. See Palermo, *supra* note 94.

are first and foremost European experts.<sup>150</sup> Their focus in diplomacy and personal experience has focused on the European continent.<sup>151</sup>

At the same time, much of the expertise of the Biden administration on the national security side is focused on the Middle East.<sup>152</sup> General Austin has significant experience as head of Central Command.<sup>153</sup> Jack Sullivan, on the other hand, is best known for his work on the Iran Nuclear Deal.<sup>154</sup> Their expertise thus is focused, in particular, on one of the last theaters of United States engagement—the Middle East.<sup>155</sup>

Today's global energy challenges are not European. Nor do they have their roots in the Middle East. These challenges have a significant Asian component. The most important player in global energy systems—outside of the United States—is China.<sup>156</sup> Without China, it is unlikely that climate change can be halted.<sup>157</sup> Without China, it is very difficult for the majority of Asia to live with energy security because China has aggressive enforcement in the South China Sea.<sup>158</sup> The South China Sea, of course, is both important as a focal point for global shipping lanes and as a source of significant natural gas reserves in the region.<sup>159</sup>

The Biden administration's team is not attuned to the challenges of this region. The leading China expert in the administration is the U.S. Trade Representative Tai.<sup>160</sup> But statements by the Biden administration have indicated that new free trade agreements are not a priority.<sup>161</sup> Consequently, the skillset of the U.S. Trade Representative will not be a direct asset in handling the difficult relationship with China and the rest of Asia.

This is not to say that the Biden administration will not be able to overcome these challenges. It is, however, an interesting reversal of the Obama administration's shift to Asia. As personnel implements policy, this

150. See generally Herszenhorn & Momtaz, *supra* note 113; see, e.g., AFP, *supra* note 120.

151. See generally Herszenhorn & Momtaz, *supra* note 113; see, e.g., AFP, *supra* note 120.

152. See generally *Power of America*, *supra* note 29.

153. Seligman et al., *supra* note 139.

154. See generally Bertrand, *supra* note 142.

155. See generally *Power of America*, *supra* note 29.

156. See Brye Butler Steeves & Helton Ricardo Ouriques, *Energy Security: China and the United States and the Divergence in Renewable Energy*, 38 CONTEXTO INTERNACIONAL 643, 643, 658 (2016).

157. See *id.* at 658.

158. Desierto, *supra* note 69.

159. *South China Sea - what you need to know*, DEUTSCHE WELLE, (Aug. 11, 2017), <https://www.dw.com/en/south-china-sea-what-you-need-to-know/a-40054470>.

160. Lee, *supra* note 134.

161. Allen, *supra* note 95.

personnel seems less able to implement Asian policy as efficiently as one might have hoped. Thus, there are significant challenges ahead.

### B. *The Trilemma Problem*

The Biden administration faces a more deep-seated problem with its energy approach in another regard. The Biden doctrine of “if ain’t broke, don’t fix it” works at the margins. It is unlikely to solve many of the systemic problems underlying energy transition. That is, the Biden administration has significant ambition, but the tools it intends to use are not up to the task.

The key problem the Biden administration will face is to achieve both domestic and global buy in for a significant ramp up in climate action. Climate action increases energy costs.<sup>162</sup> Increased energy costs disproportionately impact people with less means.<sup>163</sup> So, as a whole, it is likely that people will protest against such climate action.<sup>164</sup> Such protests in France, in fact, derailed French carbon taxation plans.<sup>165</sup> On the international side, it is similarly difficult to convince States to increase climate ambition without an incentive of increased development. And this increased development hinges in large part on economic growth that typically comes with increased free trade.

The Biden administration thus must find a tool to increase energy equity domestically and globally. The domestic tool to address this problem appears to be governmental energy infrastructure investment. If sufficiently ambitious, this tool might go a long way to address the underlying equity problem. But this is only half the battle; the same equity concern is replicated internationally. There thus needs to be a significant increase in global investment in energy infrastructure. Such investment only makes sense with a ramp-up and potential overhaul of free trade agreements. That is, it seems impossible to solve environmental sustainability and climate change without also addressing the broader international economic order.

---

162. Joel Jaeger & Devashree Saha, *10 Charts Show the Economic Benefits of US Climate Action*, WORLD RES. INST. (July 28, 2020), <https://www.wri.org/blog/2020/07/economic-benefits-climate-action-us>.

163. See, e.g., Ariel Drehobl, *Low-Income Households Pay More for Energy, but Efficiency Can Help*, U.S. NEWS (Sept. 30, 2021), <https://www.usnews.com/news/healthiest-communities/articles/2020-09-30/poor-households-pay-more-for-energy-but-efficiency-can-help>.

164. See Somini Sengupta, *Protesting Climate Change, Young People Take to Streets in a Global Strike*, N.Y. TIMES, <https://www.nytimes.com/2019/09/20/climate/global-climate-strike.htm> (last updated Sept. 21, 2019).

165. Bate Felix, *France’s Macron learns the hard way: green taxes carry political risks*, REUTERS (Dec. 2, 2018), <https://www.reuters.com/article/us-climate-change-france-protests/frances-macron-learns-the-hard-way-green-taxes-carry-political-risks-idUSKBN1O10AQ>.

The Biden administration further does not seem to have a clear plan to address energy security. Currently, Chinese activity in the South China Seas negatively affects energy security for the reasons outlined above. However, China is also a key state in building an environmental coalition sufficient to halt and turn back climate change.<sup>166</sup> Here, energy security and environmental sustainability appear at loggerheads with each other. The Biden administration appears to be focused on climate policy. But this focus is always a hostage of security concerns. So far, the Biden administration has not developed a plan for how to address this tension.

In other words, part of the problem of “if it ain’t broke, don’t fix it” is that the Biden administration appears to be too pragmatic to achieve its own climate ends. A greater focus on the “build back better” prong of its approach would likely require a deeper investment in international economic law by the United States. It requires a commitment to grow energy infrastructures globally. But such a commitment is only realistic if the Biden administration changes its priorities on free trade agreements. To build back better, and to meet climate change, is trade policy. It is not just environmental or foreign policy. This reality so far appears to be missing from the Biden administration’s overall more cautious approach.

---

166. See Steeves & Ouriques, *supra* note 156, at 658.