

The US Trade Relations with China: Worrisome Developments in the US Law

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As the Biden administration succeeded President Trump's chaotic and undisciplined trade and investment policies toward China, the last six months of 2022 have seen significant developments in the US trade law and economic policy toward China. These legislative and regulatory developments bring into sharper focus a broader and more aggressive US legal and regulatory structure fostering industrial policy and confronting China. The recent midterm elections in the US and meeting in Bali between Xi and Biden only seem to maintain the current unsettling state of affairs. The subsequent WTO panel decision against the United States concerning its Section 232 national security tariffs and its rejection of national security defense only further complicates the US-China trade relations. The legislative and regulatory measures emanating from the US in the last half of 2022 are not helpful and represent a worrisome development. These measures are by far more aggressive, with significant domestic and global implications. They portend a new emerging post-WTO order.

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1. Overview

As the Biden administration succeeded President Trump's chaotic and undisciplined trade and investment policies toward China, the last six months of 2022 have seen significant development in the US trade law and economic policy toward China. These legislative and regulatory developments bring into sharper focus a broader and more aggressive US legal and regulatory structure fostering industrial policy and confronting China. This change is worrisome.

An examination of the recent US national security strategy report, the new semiconductor legislation, the new Department of Commerce export control regulations, and the recent executive order concerning the Committee on Foreign Investment in the United States (CFIUS) exposes a seismic change in the US policy toward China. The recent midterm elections in the US and meeting in Bali between Xi and Biden only seem, at most, to maintain the current unsettling state of affairs. The subsequent WTO panel decision against the United States concerning its Section 232 national security tariffs and its rejection of national security defense only further complicates the US-China trade relations.

Perhaps even more important, in a historical reorientation, the US economy is moving away from neoliberalism and free trade and toward government intervention in the domestic and international markets. This is also a historical change because it provides a much greater focus on geopolitics and national security as elements of the US trade policy and, more specifically, the US trade policy toward China.

2. Biden's Trade Policies

I wrote over the course of the Trump administration how chaotic and dysfunctional President Trump's tariff and trade war on China was proving to be,¹ especially

his use of the national security provisions of the US legislation.² Some examples include the use of Section 232 authorizations for the imposition of tariffs on steel and aluminum imports from China³ and elsewhere, and the use of Section 301 for imposition of tariffs on imports of a wide range of products from China because of China's restrictions on intellectual property rights.⁴

Despite growing public criticism in the US of his trade tariffs because of their inflationary impact⁵ and general political and economic ineffectiveness,⁶ President Biden has continued Trump's trade actions.⁷ What is striking is that late 2022 has seen the Biden administration successfully enacting significant new legislation and adopting regulations that further profoundly weaponize trade relations with China.

3. Recent Developments - Government Reports, Legislation/Regulations, Midterm Elections, Bali Meeting, New China Cases

The White House released the *National Security Strategy Report* in October 2022. Two instructive sections dealt with out-competing China and shaping the rules of the road. Most interestingly, the Biden administration has focused on updating and reformulating legal rules governing trade and economics.

Since 1945, the United States has led in the creation of institutions, norms, and standards to govern international trade and investment, economic policy, and technology. These mechanisms advanced America's economic and geopolitical aims and benefited people around the world by shaping how governments and economies interacted - and did so in ways that aligned with US interests and values. These mechanisms have not kept pace with economic or technological changes, and today they risk becoming irrelevant, or in certain cases, actively harmful to solving the challenges we now face - from insecure supply chains to widening inequality to the abuses of the PRC's nonmarket economic actions. We are endeavoring to strengthen and update the UN system and multilateral institutions generally. Nowhere is this need more acute than in updating the rules of the road for technology, cyberspace, trade, and economics.⁸

The US International Trade Commission also released its report *Distributional Effects of Trade and Trade Policy on US Workers* in October 2022. It notes

the disproportionate impact of trade on workers and marginalized groups. This observation echoes the Biden administration's often-stated focus on workers and a newer focus on marginal groups. It notes the following:

Participants shared their perspectives on trade and trade policy, with many sharing the view that policies resulting in increased import competition had negative effects on workers in their communities and that imports were competing unfairly, for example, due to dumping or lack of worker protections in exporting countries Roundtable participants suggested several ways to address the challenges that workers face in underserved and underrepresented communities, such as government funding for training and community programs, expansion of the Trade Adjustment Assistance (TAA) program, on-the-job training and apprenticeship programs, and additional investment. In addition, many participants said that US trade policy needs to move toward a framework that better protects US workers and strengthens domestic supply chains.⁹

Another administration report focusing on China, *The 22nd Annual Report of the US–China Economic and Security Review Commission*, was released in November. This analysis takes a more aggressive and critical tone concerning China and focuses significantly on trade and the WTO's role. It states:

After many years of attempting to engage China and persuade it to abandon its distortive trade practices, it is clear that this approach has not been successful. The United States has an opportunity to develop a new strategy based on building resilience against China's state capitalism and blunting its harmful effects rather than seeking to change it. With the WTO unable to introduce meaningful new rules and procedures, the United States can pursue approaches that advance its own national interests as well as cooperate with like-minded partners. A number of different policy options can support a future strategy. Key Findings – China has subverted the global trade system and moved further from the spirit and letter of its obligations under its WTO accession protocol. China's subsidies, overcapacity, intellectual property (IP) theft, and protectionist nonmarket policies exacerbate distortions in the global economy. These practices have harmed workers, producers, and innovators in the United States and other market-based countries.¹⁰

Various pieces of new legislation have been enacted recently, impacting trade relations and industrial policies. The first is the CHIPS and Science Act of 2022,¹¹ signed into law in August 2022. It provides massive subsidies to the semiconductor industry in the US. This action is a result of formulating a more aggressive

domestic industrial policy focusing on national security and supply chain concerns with China clearly in mind. The announcement by the White House states:

The CHIPS and Science Act will boost American semiconductor research, development, and production, ensuring US leadership in the technology that forms the foundation of everything from automobiles to household appliances to defense systems. America invented the semiconductor, but today produces about 10 percent of the world's supply - and none of the most advanced chips. Instead, we rely on East Asia for 75 percent of global production. The CHIPS and Science Act will unlock hundreds of billions more in private sector semiconductor investment across the country, including production essential to national defense and critical sectors.¹²

Also in August, the Inflation Reduction Act of 2022¹³ was enacted and went into effect. Among its many provisions were extensive subsidies, domestic content requirements, and tax benefits for the development and production of electric vehicle batteries, intended to encourage domestic production of these batteries. Currently, these batteries are primarily developed and produced in China. This legislation is viewed as essential for assisting workers and promoting US national security.¹⁴ However, it is also viewed, in part, by others as a violation of WTO rules on subsidies. The EU has already officially voiced this concern.¹⁵

In October, the Department of Commerce introduced expansive chip export controls on sales to Chinese firms.¹⁶ They were extensive and represent a significant increase in the US economic warfare. As one commentator stated in THE FINANCIAL TIMES:

The Biden administration's announcement on October 7 of new semiconductor export controls achieved what Donald Trump failed in four years of flailing about with trade policy - it credibly threatened that the US and China, at least their high-tech sectors, will be decoupled by force. The prophesied "weaponised interdependence," the exploitation of trade and finance linkages to exert geopolitical pressure, now appears to be here.¹⁷

Given the Department of Commerce has often overshadowed the Office of the United States Trade Representative (USTR) in trade matters, especially regarding exports, and in its regulation of industry, it has clearly formulated aggressive economic policies. (Of course, the Department of Commerce works closely with

the Department of Defense in implementing extensive export controls.¹⁸⁾

At Commerce, Ms Raimondo has taken an active role in trade negotiations, at times overshadowing the Office of the United States Trade Representative ... and sees reasonable regulation of business as a necessity.¹⁹⁾

In September 2022, as part of economic and trade assault on China, President Biden issued an executive order for CFIUS to consider national security factors in its review process.²⁰⁾ Specifically, the executive order revises the national security factors for CFIUS to include in its foreign investment review process. The Department of the Treasury has taken the lead on international investment issues and financial sanctions. Specifically, the “Fact Sheet” issued concerning the executive order focuses on preserving the US technological leadership and states:

This Executive Order (E.O. or the Order) is the first E.O. since CFIUS was established in 1975 to provide formal Presidential direction on the risks that the Committee should consider when reviewing a covered transaction. The Order explicitly recognizes that some countries use foreign investment to obtain access to sensitive data and technologies for purposes that are detrimental to US national security and seeks to ensure that CFIUS remains an effective tool to combat these threats now and in the future. More broadly, this Order explicitly ties CFIUS’ role, actions, and capabilities with the Administration’s overall national security priorities - including preserving US technological leadership, protecting Americans’ sensitive data, and enhancing US supply chain resilience - to ensure that the United States’ national security tools and objectives are consistent and mutually reinforcing.²¹⁾

The recent conclusion of talks between Xi and Biden in Bali in November 2022 indicates a tamping down of the rhetoric of conflict. “[They] did not resolve major disagreements, but it could start the process of building guardrails to prevent competition from turning into conflict.”²²⁾ There was no real focus on trade, but both parties seemingly agreed not to make things worse. However, Xi did raise the issue of recent US trade. As THE NEW YORK TIMES states,²³⁾

Both sides needled the other over economic issues ... Mr. Xi had rebuked Mr. Biden for economic policies meant to boost American manufacturing at China’s expense, including issuing rules meant to prevent China from buying and manufacturing some kinds of

advanced semiconductors that can be used to deliver hypersonic missiles or potentially crack the US military's most advanced codes.

Interestingly, it has been reported that President Xi rebuked President Biden over failing to uphold the rules of international trade.²⁴

Starting a trade war or a technology war, building walls and barriers, and pushing for decoupling and severing of supply chains run counter to the principles of the market economy, and undermining international trade rules serves no one's interest.

One big question remains: Is the US-China trade decoupling? Based on the above review of recent US legislative and regulatory actions, the answer is tentatively affirmative, somewhat. The US, under President Biden, has clearly put into place a statutory regime restricting a range of Chinese transactions. However, economic analysis determines the answer.

Trade data shows no significant decoupling. However, direct investment across the Pacific is declining appreciably.²⁵ A question now raised is the likely impact of the midterm elections on Biden's trade policies. A recent analysis on the Council of Foreign Relations blog addressed this issue. It concludes: "[A] divided Congress bodes poorly for legislation on Trade Promotion Authority (TPA),²⁶ which lapsed in July 2021."²⁷

I would suggest that the divided Congress also bodes poorly for any meaningful change to the Trade Adjustment Assistance Act (TAA).²⁸ Republicans have been historically resistant to this piece of legislation, which they consider additional unemployment assistance. However, a recent piece the Council on Foreign Relations published concludes: "In the 118th Congress, there could be a small handful of opportunities to take a few steps back from recent years' increasingly hard line-if the political stars align."²⁹

What else can be said of the recent midterm elections' possible implications and the resulting divided government regarding US trade policy toward China? With Democrats firmly in control of the Senate (with one additional seat from the last Congress), the Republicans in control of the House (by a very narrow margin), and of course the president being a Democrat, we have a divided government. Most importantly, however, we have the Republican Party now in control of the

House. Already the House has established the “Select Committee on Strategic Competition Between the United States and the Chinese Communist Party.” Continued hostilities toward the WTO and the dispute resolution system will most likely continue. Will this divided government impact the passage of legislation concerning trade with China in any meaningful way? Probably not. A recent article in *THE WASHINGTON POST* discussing a GOP House’s impact on Biden’s foreign policy states:

Richard Haass, president of the Council on Foreign Relations, said substantial bipartisan agreement on some issues, including a desire to take a hawkish stance on China, would blunt the impact on Biden of Republicans’ ascendancy in the elections Experts said they expect few major changes to the Biden administration’s approach to China, whose global rise has been cast by both parties as America’s biggest foreign policy challenge. While some Republicans have described Biden as soft on China and called for a tougher trade policy, the Biden administration is already moving to reduce China’s access to advanced computer chips while attempting to reorient the US military toward Asia.³⁰

As 2022 drew to a close, the WTO’s dispute resolution system rocketed back to the center of the US-China trade disputes. First, in early December 2022, a panel ruled against the US regarding its Section 232 national security tariffs on Chinese steel and aluminum imports into the US.³¹ It rejected the defense that such action is allowed under GATT Article XXI (Security Exception). Of course, the US rejected the panel decision as an intrusion into its sovereignty to take national security actions. It again proclaimed the need to overhaul the WTO’s dispute resolution system.³² It also appealed this case and others to the defunct Appellate Body.

Second, almost immediately after this panel decision, China filed a new case against the US contesting new US export restrictions based on national security and foreign policy imposed on the sale of advanced computing semiconductor chips to China.³³ China contends such export controls violate the “most-favored-nation” principle encompassed in GATT Article 1.1. The US will certainly again espouse national security as a defense. The role of the WTO’s dispute resolution system is certain to remain a flash point in the US–China trade relations in the near future.

4. Conclusion

Before concluding, I should mention what many legal, political, and economic observers have noted: The Biden administration has moved beyond the neoliberalism of presidential administrations starting with President Reagan and now favors a post-neoliberal economic order. That means more government intervention in the domestic and international economies.

For example, beyond the massive subsidies provided for in the Chips Act, the new Inflation Reduction Act, also signed into law in August 2022, authorizes billions of dollars in subsidies for the development of green technology. It contains generous tax credits for batteries and electric vehicles that are assembled in North America. The EU considers this legislation to be in violation of various global trade rules.³⁴

In my view, the congressional legislation passed over the last six months is significantly protectionist and market interventionist. Wrapping protectionism and industrial policy together in the name of national security is legally precarious under WTO rules, particularly Article XXI (Security Exception) of the GATT.³⁵

Beyond new legislation, federal agencies have also been active. For example, after the Xi-Biden meeting in Bali, in November, the Federal Communications Commission (FCC) banned additional imports of Chinese telecommunication technology.³⁶ In December 2022, the US Department of Commerce added another Chinese technology firm to its “Entity List” that restricts sales to specified companies.³⁷ (Even individual states are now considering restrictions on Chinese business and investment transactions including restrictions on purchasing farm land.)

These administrative actions further raise the issue of national security in trade and investment transactions. The newer legislation and recent administrative actions indicate that considerations of geopolitics and national security are of growing importance in formulating trade policies. This is particularly true for the US-China trade relations. Raising concerns under the WTO rules, a recent article in *FOREIGN AFFAIRS* discussing China and the WTO in the context of free-trade rules (neoliberalism) states:³⁸

Since the turn of the twenty-first century, the two biggest beneficiaries of neoliberal globalization have been the Chinese state, which never played by the letter of the WTO's laws, and multinational companies, which were mostly unaffected by national political turmoil.

My general conclusion is simple and straightforward. There is a growing anti-China bandwagon and a very toxic trade debate within the US. The legislative and regulatory measures emanating from the US in the last half of 2022 are not helpful. They represent a worrisome development, not merely a continuation and extension of Trump's trade and tariff policies focusing on national security and global politics. They are by far more aggressive, with significant domestic and global implications. They portend a new emerging domestic and post-WTO order.³⁹ Whatever the geopolitical and national security strains are today, the commercial forces linking the US and China are extraordinarily powerful. The inter-play between these forces will be a constant feature of US-China trade relations in this decade and beyond

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