

SECTION 2: CHALLENGING CHINA'S TRADE PRACTICES

Abstract

After many years of attempting to engage China and persuade it to abandon its distortive trade practices, it is clear 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 to the global economy. These practices have harmed workers, producers, and innovators in the United States and other market-based countries.
- Having tried and failed to compel China to change its policies, the United States has begun to focus increasingly on defending themselves against market-distorting effects of China's policies. The United States can do so by following two concurrent paths: first, it can build its ability to understand and monitor China's trade policies and mitigate their harmful impact through a variety of trade remediation tools and interventions; second, it can coordinate its defensive policies with those of other countries that face similar challenges.
- Years of paralysis and inadequate rules on nonmarket actors have shown that the WTO cannot adequately address the challenges stemming from China's practices. Where the WTO has not succeeded in introducing new rules or combating the economic threat of these practices, the United States and its allies may be able to create new fora of collaboration along discrete topics and sectors.
- The current ability of the United States to overcome the scale and scope of China's harmful policies is undermined by the lack of a coherent strategy and fragmented authorities to mobilize resources, coupled with a deficiency in new tools to address economic injury. The United States is also impeded by its self-im-

posed barriers to employing and underutilization of available tools and its difficulties in data sharing and analysis.

- Beijing's unrelenting economic manipulation and growing willingness to weaponize its economic position are prompting market-based economies to seek new and alternative frameworks for collaboration on trade. At the same time, Russia's unprovoked invasion of Ukraine is causing advanced democracies to reconsider the national security implications of economic interdependence with authoritarian regimes.
- The United States and likeminded partners have begun to explore new mechanisms that may promote more sustainable and equitable trade while better protecting market-oriented economies from China's state capitalist distortions. New rules and approaches could strengthen supply chain resilience and ensure high standards for services, IP protection, digital trade, and other emerging disciplines that remain unresolved under the WTO. Alternative regional fora and new structures developed with likeminded partners and allies provide the United States potential additional avenues to meet its trade and security goals.

Recommendations

The Commission recommends:

- Congress consider legislation providing the authority to impose retaliatory trade measures against China in support of an ally or partner subject to Chinese economic coercion. Such legislation shall authorize coordinated trade action with U.S. allies and partners.
- Congress direct the Administration to produce within 90 days an interagency report coordinated by the Office of the U.S. Trade Representative to assess China's compliance with the terms and conditions of the 1999 Agreement on Market Access between the People's Republic of China and the United States of America. The assessment should be presented as a summary list of comply/noncomply status of the provisions under the agreement. If the report concludes that China has failed to comply with the provisions agreed to for its accession to the WTO, Congress should consider legislation to immediately suspend China's Permanent Normal Trade Relations (PNTR) treatment. Following the suspension of PNTR, Congress should assess new conditions for renewal of normal trade relations with China.
- Congress direct that any entity subject to national security restrictions or sanctions by a U.S. department or agency, including but not limited to the Entity List, should be denied access to the Clearing House Interbank Payments System (CHIPS), the Automated Clearing House (ACH), and the Federal Reserve's funds transfer system (Fedwire).
- Congress direct the U.S. Department of Commerce to provide regular (semiannual) reports on its enforcement of the foreign direct product rules and its approval of export license applications for entities seeking to export to China items produced from technology or software controlled for national security rea-

sons. Such a report shall not identify U.S. exporters, but it shall include:

- The number of licenses granted;
 - The number of licenses granted per export destination;
 - Item classifications for such licenses;
 - The value of such exports; and
 - The rationale for granting the licenses.
- Congress direct the U.S. Patent and Trademark Office to mandate that any applicant for a U.S. patent that has received support under a program administered directly or indirectly by the Chinese government provide the same disclosures that recipients of U.S. federal support must provide.
 - Congress direct the U.S. Department of Commerce to develop a process to identify and self-initiate antidumping and countervailing duty petitions covering products from China. In developing the methodology to support such a process, the department shall utilize existing government data and develop new data collection efforts prioritizing the identification of products injuring or threatening to injure small- and medium-sized enterprises or industries facing long-term harm from Chinese industrial overcapacity. The department shall also develop the capabilities for the U.S. government to identify and pursue self-initiation of circumvention, evasion, and transshipment enforcement cases to address products originating from China.
 - Congress direct the U.S. Department of Commerce to update its methodology in determining antidumping duty rates for products from China to net out the subsidy or dumping impact of Chinese-sourced inputs utilized in identifying relevant third-country proxy rates to determine dumping margins. This approach should allow for the adjustment of rates used to identify an appropriate proxy for market-based producers where China's impact on such rates may skew the true market equivalent value of such products to determine dumping margins.
 - Congress consider legislation that would address the Chinese Communist Party's efforts to undermine U.S. intellectual property protections through its use of antisuit injunctions. In considering such legislation, Congress should seek to ensure the integrity of U.S. patent laws and the strength of our nation's patent system and its support for U.S. innovation by protecting patent rights and the sovereignty of U.S. courts and the U.S. adjudicatory system.
 - In enacting legislation subsidizing research or production, Congress should evaluate whether China can legally gain access to that research or to the knowledge and equipment needed to produce that good to prevent the United States from indirectly subsidizing or supporting Chinese competitors.
 - Congress direct the Office of the U.S. Trade Representative to monitor and publicly identify in an annual report the industries wherein China's subsidies, including state monopolization and

evergreen loans, pose the greatest risk to U.S. production and employment. A rebuttable presumption of guilt in antidumping and countervailing duty processes shall result from the findings of this report.

- Congress create an authority under which the president can require specific U.S. entities or U.S. entities operating in specific sectors to divest in a timely manner from their operations, assets, and investments in China, to be invoked in any instance where China uses or threatens imminent military force against the United States or one of its allies and partners.

Introduction

The United States has arrived at a critical moment to reevaluate its economic and trade policies to address harmful Chinese practices. Trade complications stemming from the novel coronavirus (COVID-19) pandemic and Russia’s war on Ukraine have exposed the vulnerabilities of the current system. The United States has spent years trying to change Chinese trade and industrial policy approaches through multilateral mechanisms such as the WTO, bilateral engagement, and significant unilateral pressure—to little or no avail. Since China’s WTO accession, Beijing has continued to engage in predatory trade practices that distort the global economy. The impact of these actions has only grown as the Chinese economy has expanded, eroding U.S. manufacturing employment, undermining competitiveness of U.S. businesses, and creating vulnerabilities in supply chains. The negative effect on the global economy will continue as Beijing is recommitting rather than moving away from these policies (for more on increasing Party-state control over China’s economy, see Chapter 1, “CCP Decision-Making and Xi Jinping’s Centralization of Authority”).

Addressing these challenges will require assessing how to use existing tools more effectively and where new tools are required, as well as where new partnerships may be needed. This section first describes two sets of possible domestic U.S. measures: one to strengthen U.S. domestic capacity against Chinese policies and the other to constrict U.S. market access to those goods and services that have benefited from China’s state capitalism. This discussion of domestic U.S. measures includes a review of both existing tools and some proposed mechanisms. The section then surveys a number of options for the United States to work with allies to coordinate on economic policy. Finally, the section examines the potential advantages and drawbacks of regional trade agreements, which may have strategic benefits in the Indo-Pacific but could also perpetuate other economic woes in the United States. This section draws on the Commission’s April 2022 hearing on “Challenging China’s Trade Practices: Promoting Interests of U.S. Workers, Farmers, Producers, and Innovators,” the Commission’s staff and contracted research, consultations with policy experts, and open source research and analysis.

Liabilities under the Current Trade System

The United States has an opportunity to amend its trade approach to China as countries face unprecedented challenges from the interconnection of global trade and China’s state-led industrial policies.

Certain U.S. policy tools have gone underused or become outdated, ultimately dulling U.S. ability to ameliorate distortions from China's trade practices.¹ The multilateral trading system itself has proved increasingly brittle and slow to meet contemporary challenges not only from China's state capitalism but also from overstretched supply chains, increasing inequality, and immense changes in technology. Traditional approaches to trade agreements that seek to broaden partnerships and lower tariffs are premised on the behaviors of free markets, but in the face of China's state-driven distortions to the global economy these approaches run the risk of widening U.S. vulnerabilities. China's wage suppression, forced labor, carbon-intensive production, industrial policy, and multiple nontariff trade barriers create an uneven playing field for market economies like the United States.

Even where Chinese markets have opened up, foreign firms' gains are often short-lived by the Chinese Communist Party's (CCP) design. Chinese restrictions are only lifted after Chinese firms have been protected and supported long enough to cement market dominance and essentially crowd foreign competitors out of the market, such as in the financial services, e-commerce, and electric vehicle sectors.* In recent years, Beijing's state-led economic and technological ambitions have only increased, leading to more support for strategic sectors and state-owned enterprises (SOEs), greater urgency in acquiring foreign technologies, and tightening control over nonstate firms (for more, see Chapter 1, "CCP Decision-Making and Xi Jinping's Centralization of Authority"). Agencies across multiple U.S. administrations, analysts in governments across the globe, prominent global think tanks, academics, and business groups have documented these patterns extensively. A full accounting of China's non-market practices is beyond the scope of this section, but to frame the responses to China's state capitalism discussed below, the practices can be broadly characterized into the following three categories:

1. **Subsidies and overcapacity, wherein anticompetitive regulations and state funding often facilitate high rates of production, artificially distorting prices with below-market sales and crowding out competitors.** A recent report from the Center for Strategic and International Studies conservatively estimated China's industrial policy spending in 2019 at \$248 billion (renminbi [RMB] 1.71 trillion),[†] or 1.73 percent of gross domestic product (GDP), far more than any other major economy.[‡]² While much of the subsidization occurs at the local

*China maintained foreign investment restrictions on electric vehicle production until 2018. Although the market opened to foreign participants, China's decade-long scheme to subsidize domestic firms effectively protected China's domestic market and oversaturated it with local producers by the time foreign firms could fully participate. Norihiko Shirouzu, "Global Automakers Face Electric Shock in China," *Reuters*, May 26, 2022.

[†]Unless noted otherwise, this Report uses the following exchange rate from June 30, 2022 throughout: 1 U.S. dollar = 6.70 RMB.

[‡]U.S. government spending on programs similar to these, by comparison, was \$84 billion, or 0.39 percent of GDP the same year. As the Center for Strategic and International Studies report notes, however, due to the opacity of China's system, these estimates are extremely conservative and almost certainly understate the true extent of China's subsidy regime. Due to data limitations, subsidies for unlisted nonstate companies—which constitute the vast majority of China's firms—were not included in the assessment, nor were China's massive government and SOE procurements. Gerard DiPippo, Ilaria Mazzocco, and Scott Kennedy, "Red Ink: Estimating Chinese Industrial Policy Spending in Comparative Perspective," *Center for Strategic and International Studies*, May 2022.

level and supports overcapacity in traditional industries like steel and machinery, Beijing also deploys extensive subsidies to develop more advanced strategic and emerging industries via more than 1,800 “government guidance funds,” which have thus far raised over \$900 billion of mostly state money, with a target of \$1.8 trillion.*³

2. **IP rights abuse and theft, including through malicious cyber activities, trade secret theft, and forced technology transfer.** Beijing has encouraged an aggressive strategy of overseas acquisitions, taking advantage of open investment environments elsewhere to obtain valuable IP in emerging technologies. Due to the United States’ technological lead, Beijing has found it expedient to engage in large-scale, state-sanctioned theft of U.S. IP, with a great deal of theft facilitated through cyberespionage. In 2015, the U.S. Office of the Director of National Intelligence estimated that cyberespionage costs the United States \$400 billion annually.⁴ In 2022, Federal Bureau of Investigation Director Christopher Wray indicated that China was by far the government actor responsible for the greatest number of cyberespionage incidents targeting U.S. commerce.⁵ Meanwhile, the Commission on the Theft of American Intellectual Property estimates that the United States loses between \$225 billion and \$600 billion annually from IP theft.⁶ China is responsible for 50 to 80 percent of this theft.⁷ The Chinese government expedites and magnifies the deleterious impact of this theft on U.S. companies via subsidies to the firms that exploit the stolen IP.⁸
3. **Protectionism, market access restrictions, and other nonmarket interventions designed to bolster and concentrate global manufacturing production within China.** (See Chapter 2, Section 4, “U.S. Supply Chain Vulnerabilities and Resilience” for more on this localization of manufacturing production.) These practices, which China carries out in violation of its WTO commitments, include: procurement and local content requirements,[†] which discriminate broadly against for-

*While many guidance fund documents proclaim that only 20 to 30 percent of their capital will come from the government, close analysis done by research firm Gavekal Dragonomics indicates it is typical for funds to derive upward of 90 percent of their capital from the state via state-controlled banks and enterprises, with China’s National Integrated Circuit Industry Investment Fund being one prominent example. Despite the large amount raised, China’s government guidance funds fall far short of their target funding. As the Commission detailed in its 2021 Annual Report, of a target \$1.6 trillion as of early 2020, the funds had only succeeded in raising just under \$700 billion. U.S.-China Economic and Security Review Commission, *2021 Annual Report to Congress*, November 2021, 232–233; Lance Noble, “Paying for Industrial Policy,” *Gavekal Dragonomics*, December 4, 2018.

†As part of its accession protocol in 2001, China agreed to accede to the WTO’s Government Procurement Agreement (GPA), which requires transparent competition and limits national discrimination in government procurement. As of October 2022, China is still negotiating accession to the GPA. It has submitted six separate market access proposals for GPA accession that were rejected by other signatories to the GPA due to falling short of expectations. China reiterated its promise to accede quickly in the January 2020 Phase One trade agreement. In contrast to this pledge, China continues to leverage its extensive state sector to enact far-reaching procurement and local content practices. For instance, in August 2021, Reuters reported that China’s Ministry of Finance and Ministry of Industry and Information Technology had issued a 70-page catalog to SOEs, hospitals, and other entities setting local content requirements from 25 to 100 percent for some 315 items. The catalog included medical devices, which China’s government had agreed to import more from the United States under the terms Phase One agreement. Andrea Shalal, “China Quietly Sets New ‘Buy Chinese’ Targets for State Companies - U.S. Sources,” *Reuters*, August 2, 2021; Stephen Ezell, “False Promises II: The Continuing Gap between China’s WTO Commitments and Its Practices,” *Information Technology and Innovation Foundation*, July 26,

eign firms and can require partnerships with domestic firms; investment restrictions, which deny foreign firms access to certain sectors; technical barriers to trade, including but not limited to China-specific standards, conformity assessments, licensing requirements, and nonscientific safety regulations; tariffs and value-added tax rebates, which protect domestic firms; and export restraints, where China imposes export bans, quotas, and taxes on intermediate goods to create competitive advantages for Chinese-based manufacturers.

The effect of China's practices is clear from the sheer scale of its trade imbalance with the United States and its preponderant share of the U.S. trade deficit over the last two decades. China's intentional overproduction, aggressive state-led investment, and repression of household consumption cost U.S. jobs, undermine U.S. innovation, and hamper U.S. competitiveness. With China's entry into the WTO encouraging extensive offshoring, U.S. employment in manufacturing has declined over the last 20 years and the manufacturing sector's share of GDP has declined by 3 percent.⁹ Economists have also found that U.S. patent filings decline across sectors that face import competition.¹⁰

The Limits of Bilateral Engagement

The U.S. government across many administrations has struggled to change China's behavior through different tactics of both engagement and pressure. Formalized U.S.-China bilateral engagement began long before the United States granted China permanent normal trade relations, with the Joint Commission on Commerce and Trade beginning in 1983 and ending in 2017.¹¹ Other dialogues, like the Strategic and Economic Dialogue (2009–2017) and the even shorter-lived Comprehensive Economic Dialogue (2017–2018), also struggled to ensure fundamental changes to China's industrial policies.* Each of these dialogues took significant time and effort for minimal results.¹² A U.S. Government Accountability Office report from 2014 notes that these dialogues lacked timelines and consistent accountability mechanisms for China's commitments.¹³ The report also demonstrates inconsistencies across agencies in tracking Chinese adherence to agreements under these dialogues.¹⁴ In meetings across multiple years, Chinese policymakers were also able to avoid progress by posing restatements of supposedly forthcoming policy as commitments without concrete implementation plans.¹⁵

China's unfulfilled commitments under the Phase One Economic and Trade agreement more recently demonstrate the limits of bilateral negotiation and U.S. enforcement capabilities. Signed in January 2020 and put in effect the following month, the bilateral deal included provisions on IP, agriculture, forced tech transfer, and

2021; World Trade Organization, "Agreement on Government Procurement: Parties, Observers and Accessions."

*The Office of the U.S. Trade Representative and the U.S. Department of Commerce led the Joint Committee on Commerce and Trade, while the Strategic and Economic Dialogue was led by the U.S. Department of State and the U.S. Department of the Treasury. The later Comprehensive Economic Dialogue was led by the Department of Commerce. Other agencies, such as the U.S. Department of Agriculture, would also participate in these dialogues for specific, relevant issues both at the working and official levels. Government Accountability Office, *Report to Congressional Requesters, U.S.-China Trade: United States Has Secured Commitments in Key Bilateral Dialogues, but U.S. Agency Reporting on Status Should Be Improved*, February 2014.

financial services. In the agreement, China also pledged to increase combined purchases of U.S. manufactures, agricultural goods, energy products, and services by at least \$200 billion over 2017 levels.*¹⁶ The purchase agreements have fallen short of their prescribed goal, with China meeting only 58 percent of the two-year target of imports from the United States.†¹⁷ The purchase agreements are the most easily discernable way to measure China's progress in fulfilling its Phase One commitments, but they are certainly not the only areas where Chinese implementation of the deal has fallen short. The Office of the U.S. Trade Representative (USTR) reported, "China has not yet implemented some of the more significant commitments," such as in agricultural biotechnology and agriculture.‡¹⁸

The Limits of the WTO

Since acceding to the WTO in 2001, China has consistently failed to fulfill the spirit and letter of its WTO commitments but has faced practically no consequences under a dispute resolution system that is virtually inoperable against state-led economies. The WTO's dispute resolution system suffers from long adjudication times, lack of enforcement, and limitations on providing remedies. The United States has brought 23 cases against China at the WTO, but even in the 20 cases where the WTO has ruled in its favor, remedies or fulfillment of commitments following a judgment have often been deferred or altogether neglected.¹⁹ The U.S. case against China on electronic payment services is one key example, where U.S. companies like American Express, Visa, and Mastercard were consistently denied licenses to provide domestic payments services in China.²⁰ The United States won the case in 2012 due to clear discrimination against its providers, but U.S. providers did not receive due approvals to operate in China until 2020, by which time indigenous providers had cemented their position in the market.²¹

Action within the WTO is further impeded by the body's requirement for consensus. Inability to reach consensus in recent negotiations such as the Doha Round, which languished for over a decade, drove members to seek alternate plurilateral or bilateral arrangements to make additional progress on trade liberalization and develop rules to address harmful modern trade practices.²² Some advocates of the international trading system continue to favor the WTO as a means to change China's behavior through international norms and concerted pressure. China has been unwilling to adjust rules on subsidies and has increased fractures between developed and developing countries.²³ Objections to politicization of WTO disputes and concerns about overreach of Dispute Settlement Body decisions have led to U.S. obstruction of WTO Appellate Body appointments, leaving it unable to hear cases with the current appellate bench

*The Phase One trade agreement was signed on January 15, 2020, and formed part of an effort to resolve trade tensions ongoing since March 2018, when the USTR published its Section 301 investigation into China's unfair trade practices related to forced technology transfer, IP theft, and innovation. For more on the Phase One agreement, see U.S.-China Economic and Security Review Commission, *The U.S.-China "Phase One" Deal: A Backgrounder*, February 4, 2020.

†These purchase commitments were also initially impeded by the outbreak of COVID-19, which first overwhelmed China in early 2020. Ana Swanson and Keith Bradsher, "Trump Says He's 'Torn' on China Deal as Advisers Signal Harmony on Trade," *New York Times*, July 22, 2020.

‡For a description of the Phase One trade agreement commitments and China's progress in implementation, see U.S.-China Economic and Security Review Commission, *2021 Annual Report to Congress*, November 2021, 153–154.

completely vacant. The WTO's appeals process has consequently been suspended, while efforts to reform the WTO have made little progress.*²⁴

In spite of many inherent difficulties in the WTO process, the forum nonetheless remains a key venue for global discussion and consensus building around international trade.²⁵ With the goal of portraying itself as a leader in global free trade, China will continue to invest time and effort to influence outcomes at the WTO.

U.S. Trade Remedies for China's Distortions

Paralysis at the WTO has made utilizing national policies and turning to other plurilateral solutions more appealing. The United States may respond to China's nonmarket practices at its border or domestically, potentially creating a template for other economies to follow. Rather than seeking to change China's behavior, many of these responses focus on building resilience against China's practices. Others aim to limit their impact to the U.S. economy, often by forcing the price of subsidized and dumped goods to reflect a rational market price.²⁶ U.S. tools to address distortions from China face several important limitations. First, the U.S. government does not have adequate information on China's harmful practices, which limits its ability to fully utilize several existing trade remedy tools or develop new responses. Second, current U.S. tools are largely reactive and effectively place the onus of responding to China's malign practices on private sector entities, often encumbering petitioners with large costs, time commitments, and heavy burdens of proof. Finally, there are several gaps in the U.S. policy arsenal, such as the regulation of outbound investment to countries of concern, that may necessitate development of new tools and approaches.

Building Resilience against China's Nonmarket Practices

Building resilience involves leveraging domestic strengths to ensure the United States' free market system is resilient to China's nonmarket practices. The U.S. government currently faces challenges in its capacity to analyze China's policies and practices, coordinate across agencies, and perform due diligence. Addressing some of these weaknesses could support coordination with allies and partners, assist U.S. companies competing with Chinese firms, and allow for a nimbler, more informed federal response and strategy around China's economic distortions.

Analytic Capacity to Understand and Counter Foreign Industrial Policy

The U.S. government currently has at least 15 agencies and offices with some capacity to examine the impact of unfair foreign competition, including the U.S. Department of Commerce's International Trade Administration's (ITA) Office of Trade Enforcement and Compliance; U.S. International Trade Commission's (USITC) Office

*In looking for a temporary stopgap for these cases, 52 countries have formed a temporary body, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), to process appeals. Under article 25 of the WTO Dispute Settlement Understanding, WTO members may pursue an alternate form of dispute resolution. The EU has led this approach since 2020 due to gridlock at the WTO Appellate Body. China is a member, but the United States is not. Geneva Trade Platform, "Multi-Party Interim Appeal Arbitration Arrangement (MPIA)," July 26, 2022.

of Economics and Office of Industry; and the USTR's Interagency Center on Trade, Implementation, Monitoring, and Enforcement, to name a few (see Appendix I for full list). These offices all provide valuable research relevant to U.S. economic competitiveness, but the research tends to be reactive in nature and is often underutilized.²⁷ Most research on distortions from overseas industrial policies, for example, arises only after impacted U.S. actors file complaints with the USTR, Commerce, or the USITC.²⁸ Domestically, the Commerce Department and the USITC infrequently self-initiate trade remedy investigations despite possessing the authority to do so (see “Blunting the Impact of China’s Nonmarket Practices” below for more detail).²⁹ Both rely primarily upon private firms, workers and unions, and industry associations to file complaints and seek to initiate the investigations.³⁰

Reactive U.S. Trade Remedy System Renders U.S. Firms Vulnerable to China’s Distortions

Although U.S. trade tools (e.g., countervailing duties, Section 201, etc.) empower agencies to undertake future-oriented threat assessments, in practice agencies almost exclusively use trade tools to analyze past and ongoing distortions. Remedies under the current system, however, are only offered prospectively, meaning firms receive no retroactive relief to past injury, only the possibility of future safeguards.* The Chinese government openly publicizes areas of intended subsidization in its five-year planning documents, a fact that makes it feasible to predict and prepare for distortions in advance. The overwhelmingly reactive deployment of U.S. trade tools limits the U.S. government’s ability to adequately assist workers and firms in confronting China’s predictable market distortions.

Interoperable Nomenclature for Controlled Goods, Services, and Investment

The United States’ unilateral and multilateral export controls, investment restrictions, and IP enforcement rely on disparate classification systems that lack cohesion and create opportunities for evasion and abuse. Tactics used by sanctioned Chinese entities to circumvent controls on U.S. technology transfers to China are difficult to detect.† The multiple nomenclatures used to classify goods, services, and IP create additional space for Chinese companies to undermine export and investment controls by exploiting loopholes or obfuscating reporting requirements. For example, sanctioned Chinese entities have continued to purchase certain products and technologies through U.S. exporters designating these exports under

*The Department of Commerce’s Economic Development Administration previously offered loan assistance and loan guarantees to firms adversely impacted by unfair competition via the Trade Adjustment Assistance for Firms program, but Congress eliminated all direct financial assistance in 1986. Rachel F. Fefer, “Trade Adjustment Assistance for Firms,” *Congressional Research Service RS20210*, October 13, 2020.

†Efforts by Chinese companies to undermine U.S. export controls include utilizing falsified end-user certificates, front companies, or transshipments. U.S. Department of Commerce, Bureau of Industry and Security, *Don’t Let This Happen to You!* July 2022, 28–37.

the U.S. Export Administration Regulations (EAR) as EAR99. The EAR99 classification permits the exporter to determine, without confirmation by any government agency, that the transfer is covered by a “No License Required” exception.³¹ EAR99 exports are not reported until an investigatory request is made by U.S. regulators, even when the counterparty to the transaction is a sanctioned entity.* In testimony before the Commission in 2021, former Assistant Secretary for Industry and Analysis at the U.S. Department of Commerce Nazak Nikakhtar explained that Chinese companies investing in the United States have misrepresented their classification under the North American Industry Classification System to avoid mandatory filings requirements under the Committee on Foreign Investment in the United States (CFIUS) pilot program † for reviewing critical technology transactions.³²

Detection of efforts to undermine U.S. export and investment controls is frustrated by a lack of available data and misaligned definitions and categorizations of critical technologies. Academics, independent researchers, industry specialists, and other interest groups are key to improving the implementation of export controls and investment screening by using novel approaches ‡ to track circumvention efforts and providing technical expertise to identify vulnerabilities. For example, CFIUS relies on referrals from other government agencies, the public, media reports, commercial databases, and congressional notifications, in addition to monitoring by CFIUS’s own dedicated team, to identify non-notified or non-declared transactions that may have national security implications.³³ According to senior fellow at the Center for a New American Security Emily Kilcrease, differences in the classifications § of goods, services, and technolo-

*Scrutiny of efforts to evade export controls on EAR99 goods, services, and technologies has increased following the imposition of wide-reaching sanctions on Russia and Belarus over Russia’s invasion of Ukraine. The Treasury Department’s Financial Crimes Enforcement Network and the Department of Commerce’s Bureau of Industry and Security jointly issued a notice to EAR99 exporters on June 28, 2022, listing red flag indicators that a sanctioned actor is seeking to circumvent export controls. U.S. Department of the Treasury, Financial Crimes Enforcement Network and the U.S. Department of Commerce, Bureau of Industry and Security, *FinCEN and the U.S. Department of Commerce’s Bureau of Industry and Security Urge Increased Vigilance for Potential Russian and Belarusian Export Control Evasion Attempts*, June 28, 2022; Giovanna Cinelli, written testimony for the U.S.-China Economic and Security Review Commission, *Hearing on U.S.-China Relations in 2021: Emerging Risks*, September 8, 2021, 4.

† Since October 2020, CFIUS moved away from using these voluntarily designated industry codes to classifying covered transactions based on whether the critical technology is covered by the U.S. export control regime and requires regulatory approval before exporting, reexporting, transferring in-country, or retransferring. This change obviates the abuse of the industry code-based classification system. But using the export control system—which aims to control single transactions of goods—to guide the investment screening process—which involves control over the U.S. company’s business operations—creates additional vulnerabilities. Giovanna Cinelli, written testimony for U.S.-China Economic and Security Review Commission, *Hearing on U.S.-China Relations in 2021: Emerging Risks*, September 8, 2021, 10; Christian Kozlowski and Carl A. Valenstein, “CFIUS Says Farewell to NAICS, Hello to Export Licensing in Mandatory Declarations,” *Morgan Lewis*, June 3, 2020.

‡ For example, researchers at the Center for Security and Emerging Technology created a dataset based on metadata from People’s Liberation Army (PLA) procurement tenders for artificial intelligence (AI) technologies in 2020, finding that only 8 percent of a total 273 PLA AI suppliers are named in the U.S. export control and sanctions regime. In another report, an analyst at C4ADS used Chinese corporate records to identify shipments of defense technologies between 2014 to 2022 from a Chinese state-owned conglomerate to Russian companies sanctioned for supporting Russia’s invasion of Ukraine. Naomi Garcia, “Trade Secrets: Exposing China-Russia Defense Trade in Global Supply Chains,” *Center for Advanced Defense Studies*, July 2022, 3; Ryan Fedasiuk, Jennifer Melot, and Ben Murphy, “Harnessed Lightning: How the Chinese Military Is Adopting Artificial Intelligence,” *Center for Strategic and Emerging Technology*, October 2021, 34.

§ The differing objectives of these controls led to the creation of numerous, conflicting methods of categorizing those goods, services, technologies, and industries that relate to national security. The EAR uses a unique export control classification system, leading to discrepancies in defini-

gies complicate identification of trade and technology vulnerabilities, analysis of the effectiveness of controls, and detection of efforts to evade controls.³⁴ Inconsistent statistical reporting by government agencies limits robust analysis of trade and investment flows in critical technologies by nongovernmental analysts and researchers.³⁵

Addressing Chinese Courts' Assertion of Extraterritorial Jurisdiction

U.S. IP holders are facing significant legal hurdles to enforcing their rights as Chinese courts seek to prevent litigation outside of China. Chinese courts are using an aggressive interpretation of judicial doctrine to disrupt litigation outside of China on IP issues. China has begun issuing global antisuit injunctions (ASIs),* which prohibit patent holders from pursuing IP legal action in non-Chinese courts and can place monetary consequences on companies that violate the order.†³⁶ These antisuit injunctions aim to drive down the fair, reasonable, and nondiscriminatory (FRAND) royalty rates for standard-essential patents (SEPs)‡ owned by overseas companies, which consequently reduces the cost of foreign technology inputs for Chinese manufacturers.³⁷ By blocking foreign plaintiffs from pursuing parallel litigation in the United States, Germany, Japan, or any other judicial system, Chinese litigants in domestic courts seek to obtain more favorable licensing terms than would be afforded outside of China. Chinese courts have issued at least four global

tions even with the United States' partners in multilateral export control forums. There is no universal database linking export control classification numbers from the EAR to the customs codes—known as the Harmonized System—that U.S. Customs and Border Protection and 211 customs agencies around the world use to categorize traded goods and assess tariffs. Similarly, it is difficult to correlate investment flows, which are categorized according to the North American Industry Classification System in the United States, with the list of critical industries and infrastructure that require review by CFIUS. World Customs Organization, “List of Contracting Parties to the HS Convention and Countries Using the HS,” October 1, 2020.

*Chinese courts' implementation of ASIs differs from the practice of using ASIs in common law jurisdictions. In these jurisdictions, ASIs are used by courts primarily to minimize friction with other courts. In contrast, China's ASIs, according to Mark Cohen, “are a legal tool used by a non-independent judiciary at the urging of China's political leadership. They are also used exclusively to address foreign litigation, are highly non-transparent, have a limited legislative basis, and have no domestic application.” Mark Cohen, “The Pushmi-Pullyu of Chinese Anti-Suit Injunctions and Antitrust in SEP Licensing,” *China IPR*, July 31, 2022.

†The Shenzhen Intermediate People's Court determined in October 2020 that Chinese courts can rule on global licensing terms for SEPs, even when courts in foreign countries, including the United States, Germany, and Japan, are considering parallel litigations. This ruling was later upheld on August 19, 2021 by the Intellectual Property Tribunal of the Supreme People's Court of China. ASIs are intended to prevent foreign courts from intervening when Chinese IP courts decide SEP matters. European Union, *Request for Consultations by the European Union*, February 18, 2022, 3; Zhongren Cheng, “The Chinese Supreme Court Affirms Chinese Courts' Jurisdiction over Global Royalty Rates of Standard-Essential Patents: Sharp v. Oppo,” *Berkeley Technology Law Journal*, January 3, 2022; Aaron Winger, “China's Supreme People's Court Affirms Right to Set Royalty Rates Worldwide in OPPO/Sharp Standard Essential Patent Case,” *National Law Review*, September 5, 2021.

‡Technical standards for emerging technologies often incorporate cutting-edge features held under patent by the original developer. Because this IP may become essential to following the standard, or “standard-essential,” other companies that adopt the standard are required to license the SEP from the patent holder. This can guarantee billions in revenue for widely licensed patents, as complying with a standard generally means a producer is locked into using features specified by the standard—and paying royalties to the SEP holder—until another standard becomes dominant. To prevent SEP holders from abusing their market position and charging unreasonable licensing fees, the standards-making bodies obligate the holder to license the SEP under “fair, reasonable, and non-discriminatory” terms, or FRAND. FRAND terms apply globally, but SEP holders must often enforce their IP in multiple jurisdictions in order to assert their claim to licensing fees. Michael T. Renaud, James Wodarski, and Matthew S. Galica, “Key Considerations for Global SEP Litigation—Part 1,” *Mintz*, October 30, 2019; Abraham Kasdan and Michael J. Kasdan, “Recent Developments in the Licensing of Standards Essential Patents,” *National Law Review*, August 30, 2019.

antisuit injunctions in patent litigation.*³⁸ Highlighting the damage these injunctions pose to global IP rights, the EU filed a case against China at the WTO on February 18, 2022 over its use of antisuit injunctions to restrict EU companies from going to foreign courts to defend their SEPs.†³⁹ In March 2022, the United States, Canada, and Japan requested to join the consultations as third parties.⁴⁰

This expansive extraterritorial assertion of judicial power by Chinese courts furthers the CCP's objectives to influence global standards and regulatory norms on IP and distort the global business environment in favor of Chinese firms. In a speech delivered at a Politburo study session in November 2020, General Secretary of the CCP Xi Jinping called for China to "promote the extraterritorial application" of China's IP laws and regulations.⁴¹ Zhu Jianjun, judge of the Shenzhen Intellectual Property Court, stated that antisuit injunctions are needed "to build the main battlefield for foreign-related dispute resolution."⁴² Chinese judicial efforts could undermine the innovation ecosystem in the United States.⁴³

Global antisuit injunctions are part of a broader trend of the CCP using China's politicized court system to undermine and exploit court proceedings outside of China. These risks are heightened for litigants in U.S. courts, who may be unaccustomed to dealing with illiberal systems and broader international implications of related decisions.⁴⁴ Director and distinguished senior fellow at the Berkeley Center for Law and Technology Mark Cohen noted repeated instances when U.S. courts complied with requests from litigants in China to provide information, including sensitive business documentation, to Chinese courts.⁴⁵ Through legal discovery, Chinese courts can extort trade secrets and other confidential business information frequently leaked or misused by Chinese public officials.‡⁴⁶ In this way, Chinese courts may undermine U.S. IP rights through the U.S. court system and "may contribute to trade secret misappropriation in China."⁴⁷ The CCP's interference in proceedings in U.S. courts was further highlighted by the antitrust lawsuit *Animal Sci-*

*In one of the cases, the Chinese smartphone manufacturer Xiaomi sold phones using SEPs owned by U.S.-based InterDigital since 2013 while the two companies negotiated licensing terms. After negotiations broke down in June 2020, Xiaomi filed a case with the Wuhan Intermediate People's Court in relation to the license fee for the SEP held by InterDigital, while InterDigital sued Xiaomi in court in Delhi, India. The Wuhan court subsequently issued an ASI requiring InterDigital to withdraw or suspend its legal action before the Indian court and prohibiting InterDigital from pursuing legal action in any other jurisdiction. It set a daily fine of \$152,000 (1 million RMB) if InterDigital violated the order. InterDigital filed for a counter-ASI from the Indian court and a court in Munich, Germany. Both courts issued rulings preventing Xiaomi from enforcing the ASI. The two companies reached a settlement in August 2021. Josh Zumbun, "China Wields New Legal Weapon to Fight Claims of Intellectual Property Theft," *Wall Street Journal*, September 26, 2021; Josh Ye, "China Tests the Long Arm of Its Law in Xiaomi and Huawei's International Patent Battles," *South China Morning Post*, April 2, 2021.

†On March 8, 2022, a group of U.S. senators introduced the Defending American Courts Act, which proposes a penalty on foreign litigants who seek to interfere with U.S. court proceedings through the use of an ASI. Andrei Iancu and Paul R. Michel, "The Solution to Chinese Courts' Increasingly Aggressive Overreach," *Center for Strategic and International Studies*, April 6, 2022; Defending American Courts Act, S. 3772, March 8, 2022.

‡China committed in the Phase One trade agreement to prohibit the unauthorized disclosure of confidential business information by government personnel, including information produced as part of judicial proceedings. China has not, however, implemented any measures to penalize these disclosures. Paolo Beconcini, "The State of Trade Secret Protection in China in Light of the U.S.-China Trade Wars: Trade Secret Protection in China before and after the U.S.-China Trade Agreement of January 15, 2020," *UIC Review of Intellectual Property Law* 20:108 (2021): 117–118; Office of the U.S. Trade Representative, *Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China*, January 15, 2020.

ence Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. about price fixing of vitamin C nutrients by Chinese companies. The case demonstrated the Chinese government's ability to misrepresent its own laws to give an advantage to Chinese companies in overseas legal proceedings. The U.S. Second Circuit Court of Appeals dismissed the case on international comity grounds in 2016 based solely on a statement provided by China's Ministry of Commerce purportedly showing a conflict between U.S. and Chinese laws.*⁴⁸ Donald C. Clarke, professor of law at George Washington University, finds that when judges consider cases similar to the vitamin C exports, U.S. courts often avoid addressing questions about the quality of Chinese law due to a lack of information and the opacity of China's legal system. According to Professor Clarke, the "system operates on principles quite different from those that judges are accustomed to, and the very depth of that difference, which would require extensive research and expert testimony to explain, makes it hard to overcome the presumption that it doesn't even exist."⁴⁹

China Makes Limited Progress on Increasing Domestic IP Protections

Under the Phase One agreement, China committed to align its administrative and criminal enforcement of IP infringement with the norms of developed economies and create a level playing field for foreign firms. While some of these commitments require China to enact new reforms, many of the changes involve implementing administrative regulations and processes under its existing laws.⁵⁰ In May 2021, the China National Intellectual Property Association released a list of 100 tasks to implement regarding its IP protection strategy, including measures to implement its Phase One commitments.⁵¹ Some of these measures were included in amendments to China's Copyright Law, Patent Law, and Criminal Law, each of which went into effect in 2021.⁵² These amendments increased the penalties for IP theft and lowered certain thresholds and procedural requirements for litigating trade secret and copyright infringement cases.⁵³ The amendments to the Patent Law additionally expanded protections on design patents and created a patent linkage system for pharmaceuticals.[†]⁵⁴

*China's Ministry of Commerce asserted in its amicus brief to the court that Chinese regulations forced Hebei Welcome Pharmaceutical to fix its prices. The Ministry of Commerce's interpretation of Chinese law contradicted a separate statement in the WTO that it did not have price requirements for vitamin C exports. The U.S. Supreme Court reviewed the case and remanded it back to the Second Circuit in 2018, stating that U.S. courts are "neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials." In August 2021, the Second Circuit Court of Appeals once again dismissed the case, stating that foreign law must be taken "at face value," even though weak rule of law in China means laws are not necessarily enforced the way they are written. William S. Dodge, "Cert Petition Challenges Second Circuits Comity Abstention Doctrine," *Transnational Litigation Blog*, April 7, 2022; *Animal Science Products, Inc., et al., Petitioners v. Hebei Welcome Pharmaceutical Co. Ltd., et al.* In re Vitamin C. Antitrust Litig, August 10, 2021; Mark Jia, "Illiberal Law in American Courts," *University of Pennsylvania Law Review* 168 (December 2020): 1733; U.S. Supreme Court, *Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.: Certiorari to the United States Court of Appeals for the Second Circuit*, June 14, 2018.

† Patent linkage systems protect branded pharmaceuticals from infringement but also allow potential generic competitors to challenge whether a patent holder's claim is valid or applicable to a proposed generic drug. Such systems prevent expensive and time-consuming litigation by requiring pharmaceutical regulators to review claims directly before they go to court. Under the system, patent holders would be notified and have a chance to respond any time a potential generic competitor claimed they were not infringing on the patent holder's IP. Virgil Bisio et al.,

China Makes Limited Progress on Increasing Domestic IP Protections—*Continued*

While in principle these amendments to Chinese law, along with other policy statements and guidelines, bring China's IP protections closer to international best practice, it remains to be seen whether the rules are implemented effectively, consistently, and in a manner that treats foreign IP rights holders and domestic parties equally. There has also been limited demonstration that China has fulfilled commitments to prevent forced technology transfer. Since the Phase One agreement, Beijing has amended some legal and administrative text to discourage technology transfer, but proving compliance is complicated by the sensitivity of relevant business information and U.S. business concerns about retaliation for disclosure.⁵⁵ According to the USTR in its Special 301 report for 2022, which documents the state of IP protection and enforcement abroad, China remains on the report's "priority watch list" of countries with the most problematic IP practices.⁵⁶ The USTR maintained this status despite the abovementioned amendments and guidelines issued and enacted in 2021. The report notes that while China's efforts to address inadequate IP protection and enforcement are positive developments, China still needs "to address weak enforcement channels and a lack of transparency and judicial independence."⁵⁷ The International Intellectual Property Association, a trade association representing 3,200 companies in copyright-related industries, reported in 2022 to the USTR that the amendments to China's Copyright Law brought notable improvements to the enforcement of copyright infringement, but the incentive structure to discourage piracy and other rights violations had not significantly changed.⁵⁸

Congress Prepares New Tools

Throughout 2022, the 117th Congress debated a number of different legislative proposals to boost U.S. technological competitiveness with China and guard against the flow of capital, goods, and critical research to predatory Chinese entities or China's military-industrial complex. In August 2022, U.S. President Joe Biden signed into law the first of these pieces of legislation to be passed by Congress: the Creating Helpful Incentives for Producing Semiconductors (CHIPS) and Science Act. Besides providing U.S. semiconductor firms with tax credits and funding for domestic semiconductor production, the act also includes provisions for sustained funding increases to support research and standards development in emerging technologies.⁵⁹ (For more on semiconductors, see Chapter 2, Section 4, "U.S. Supply Chain Vulnerabilities and Resilience.") The law provides this support for the National Science Foundation, the National Institute for Standards and Technology, and the Department of Energy, among others. In August 2022, Congress also passed the Inflation Reduction Act, which contains provisions that would encourage U.S.

⁵⁵The U.S.-China "Phase One" Deal: A Backgrounder," *U.S.-China Economic and Security Review Commission*, February 4, 2020, 4.

production of clean energy vehicles through a tax credit program. The combination of these incentives may spur much-needed horizon-scanning efforts on science and technology that can enable U.S. research advancement and sustain competitiveness with China in critical technologies.

The 117th Congress contemplated expanded proposals for outbound investment review to scrutinize critical supply chains and offshoring, strengthen reporting requirements and resources to combat Chinese overcapacity, and reduce the de minimis threshold to curb Chinese imports that circumvent tariffs and prohibitions against the import of products made with forced labor. The de minimis threshold refers to the amount below which an import is considered too small to be subject to tariffs, penalties, or other close inspection by customs authorities. The U.S. de minimis threshold was \$200 until 2016, when it was raised to \$800.⁶⁰ China likely accounts for the bulk of de minimis shipments as Chinese exporters, particularly e-commerce companies, take advantage of the higher threshold to send millions of goods into the United States tariff-free with little visibility from customs authorities.⁶¹ The America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength (COMPETES) Bill of 2022 contained a proposal to remove de minimis privileges for goods sourced from non-market economies with known IP rights violations, like China.⁶² In June 2022, U.S. Customs and Border Protection recorded a volume of 521 million de minimis packages, meaning that the fiscal year's* total de minimis imports may exceed their fiscal year 2021 volume of 771.5 million packages.⁶³ De minimis shipments in fiscal year 2021 increased by 21.3 percent from fiscal year 2020. De minimis treatment allows many imports to escape detailed record-keeping, making it difficult to calculate the total value of these imports by country of origin.

The National Critical Capabilities Defense Act included in the COMPETES bill was revised most recently in June 2022 and originally proposed by Senators John Cornyn (R-TX) and Bob Casey (D-PA) in 2021. The legislation proposes a review of outbound U.S. investments overseas modeled on the CFIUS process.⁶⁴ The outbound-facing mechanism would require mandatory filings and review of the investments and investment guidance related to outsourcing production of “national critical capabilities” or that would facilitate the transfer or disclosure of related technologies.⁶⁵ The Level the Playing Field Act, introduced by Representatives Terri Sewell (D-AL-07) and Bill Johnson (R-OH-6), is another feature of the COMPETES bill focused on enhancing rules against unfair trade.⁶⁶ Congress has proposed these and several other measures related to Chinese trade and investment that have not yet passed.

Blunting the Impact of China’s Nonmarket Practices

Blunting efforts seek to reduce the negative impact of China’s distortions on U.S. producers and workers in the United States’ domestic market if competing products and services have benefited from subsidies, IP or trade secret theft, other nonmarket interventions, or

*Fiscal year 2022 for U.S. Customs and Border Protection runs from October 2021 to October 2022.

abuse of human rights. These efforts also address ways to curb the flow of U.S. capital and goods to China that may enable the CCP's military-civil fusion* objectives and their predatory acquisition of research and technology. The menu of blunting options presented below begins by highlighting areas wherein existing tools (e.g., anti-dumping and countervailing duties [AD/CVD] cases) may be better utilized, and it concludes with a discussion of several novel policy options.

Existing Tools

Antidumping and Countervailing Duties

AD/CVD cases are the most frequently used domestic trade remedies. AD cases are designed to provide relief for domestic industries adversely impacted by large quantities of underpriced imports, while CVD cases are designed to protect against subsidized imports. Of all U.S. trading partners, China is by far the subject of the largest number of AD/CVD orders. Orders on imported Chinese products have risen in absolute terms, though they have fallen slightly on a relative basis from 170 of all 462 active orders in late 2018 to 234 of all 662 active orders as of September 2022.†⁶⁷ However, from January to September 2022, only 16 AD/CVD orders were initiated, compared to 93 orders initiated during the same period in 2021.⁶⁸

In the case of an affirmative finding in an AD or CVD case, tariffs are imposed to offset the calculated dumping or subsidy rate. Orders are tailored to specific products, countries of origin, and/or individual companies. In general, CVD cases are less commonly pursued by firms because they carry a substantial burden of proof, requiring petitioners to document the existence of foreign subsidies, which can be particularly difficult in the context of China's opaque subsidy regime. AD cases, on the other hand, only require evidence that sales in the United States are priced at "less than fair value" (determined by Commerce's ITA) and that this is causing "material injury" or the threat thereof (determined by the USITC). In practice, the ITA solely seeks to establish that average sales prices in the United States are lower than in the home market.⁶⁹ As a result, in the United States, AD cases have become the principal means for relief from foreign competition.⁷⁰ Between 1980 and 2016, there were 1,379 AD investigations compared to 631 CVD investigations, according to data compiled by Chad Bown, senior fellow at the Peterson Institute for International Economics.⁷¹ Of those, 47 percent of AD cases and 44 percent of CVD cases resulted in trade restrictions being imposed on foreign imports.

Despite their frequent application, there are several areas in which AD/CVD cases may be better utilized. The Tariff Act of 1930, the legislation authorizing AD and CVD cases, specifically enables the secretary of commerce to self-initiate investigations.⁷² However,

*Military-civil fusion is a guiding vision to align government agencies, state and nonstate firms, research centers, and investors in fostering emerging and foundational technologies with dual-use applications. For more on the objectives of military-civil fusion, see U.S.-China Economic and Security Review Commission, Chapter 3, Section 2, "Emerging Technologies and Military-Civil Fusion: Artificial Intelligence, New Materials, and New Energy," in *2019 Annual Report to Congress*, November 2019, 205–247.

†After China, India and South Korea are subject to the largest share with 62 (9.4 percent) and 42 (6.3 percent) active orders, respectively. International Trade Administration, *ADCVD Proceedings*, 2022.

such self-initiated inquiries have only ever been undertaken several times.⁷³ U.S. industry, especially small and medium enterprises (SMEs), faces notable obstacles in petitioning for relief, in particular high legal costs and difficulty obtaining data on foreign companies' pricing practices required to initiate an investigation.⁷⁴ In addition, the globalization of many industries can impede the filing of petitions.* Clyde Prestowitz, former lead trade negotiator during the Reagan Administration, argued in testimony before the Commission that "the Secretary of Commerce should become aggressive in identifying and combating Chinese dumping."⁷⁵ The Commerce Department has identified lack of self-initiation as related to lack of capacity. The Commerce Department indicated to the Government Accountability Office in 2019, in the context of AD/CVD cases, that it faced "historically high workloads, loss of experienced staff, and little increase in overall staff levels," issues that may impede capacity to self-initiate.⁷⁶ Further, in the Commerce Department's Fiscal Year 2021–2023 Performance Plan and Report, it identified "enhancing capacity to enforce fair and secure trade" as a top management challenge, specifically noting that filling vacant positions at the ITA was a key milestone it still needed to reach.⁷⁷ The ITA's fiscal year 2023 budget estimate requested an additional "enforcement office to handle increasing antidumping and countervailing duty (AD/CVD) caseloads that have reached historic levels," including 30 new enforcement staff positions, a more than 8 percent increase.⁷⁸

Another consideration is the methodology for determining a fair price against which a dumping determination can be made. In AD proceedings on imports from nonmarket economy countries, the ITA calculates a theoretical market price of the dumped good by valuing the exporter's factors of production. The ITA's calculation uses prices from a surrogate country: a market economy at a comparable level of economic development that produces similar goods.⁷⁹ However, as Ms. Nikakhtar argued in testimony before the Commission:

Because PRC [People's Republic of China] goods have penetrated global markets so aggressively, it is nearly impossible to find a surrogate country that has not been adversely affected by the PRC's predatory pricing. Prices around the world have been depressed so extensively that virtually all benchmark prices in trade cases are now understated and inadequate for measuring underselling by the PRC. The result is that the tariffs ultimately imposed by the U.S. Government on Chinese imports to offset dumping are inadequate to "level the playing field," and consequently proper relief is denied to American firms.⁸⁰

Section 201 of the Trade Act of 1974

Section 201, historically referred to as the "escape clause," was meant to be "the principal means by which industries harmed by imports could receive temporary relief from foreign competition."⁸¹

*In order for an AD/CVD investigation to move forward, for example, "domestic producers or workers who support the petition [must] account for at least 25 percent of the total production of the domestic like product." As industries globalize, U.S. firms with substantial operations overseas may face a different set of incentives than those primarily operating domestically, leading them to block investigations. Tariff Act of 1930 § 1671, 1930.

Procedurally, following an administration or industry petition, the USITC investigates to determine whether a product's import volume is a "substantial cause of serious injury, or the threat thereof, to the domestic industry."⁸² The USITC then submits its findings to the president, who determines whether to implement trade restrictions. Relief under Section 201 is meant to serve as a temporary "global" safeguard, meaning relief is intended to deal with temporary import surges, and import restrictions are applied to imports from all countries in a manner compliant with the WTO's safeguard provisions.⁸³ By not singling out particular countries, issues like transshipment that have plagued AD/CVD cases are avoided. The tradeoff is that allies and partners may be adversely impacted when only one country is at fault, unnecessarily irritating partners and increasing the risk of retaliation.* Exclusions from Section 201 remediation may occur, however, as is intended for parties in the free trade agreement (FTA) between the United States, Mexico, and Canada (USMCA).⁸⁴ The most recent use of Section 201 occurred under the Trump Administration, when President Trump applied safeguard tariffs on imported washing machines and solar cells and modules based on the investigations, findings, and recommendations of the USITC.⁸⁵ Previously, the Bush Administration last used Section 201 in 2002 to impose quotas and tariffs on certain steel imports, but it withdrew the action in 2003 following a WTO challenge.⁸⁶ Prior to that, "the ITC conducted 73 Section 201 investigations from 1975 to 2001. In 26 of those cases, the ITC determined imports were a threat to a domestic industry and the President decided to grant some form of relief."⁸⁷

Section 201 is based upon the premise that a surge in imports represents a passing market disruption from which domestic industry simply needs temporary protection so as to make a "positive adjustment to import competition" characterized by "freer international competition."⁸⁸ However, as China's industrial practices intentionally aim to take global market share via sustained Chinese overcapacity, the logic undergirding Section 201 often does not hold. Section 201's standard of "substantial cause" has also proven very difficult to establish, while its requirement of "serious" injury entails a much more onerous burden of proof than the "material" injury standard under AD/CVD.⁸⁹

Section 232 of the Trade Expansion Act of 1962

Section 232 allows the Commerce Department to investigate any product to determine whether it "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."⁹⁰ Although the statute does not provide a definition of national security, Section 232 investigations, undertaken by Commerce's Bureau of Industry and Security (BIS), must consider several factors, including "domestic production needed for projected national defense requirements; domestic capacity; the

* From October 2000 until December 2013, the United States was also able to use Section 421 of the Trade Act of 1974, which was partly based on the mechanics of Section 201. Section 421 was specific to China, designed as a temporary safeguard for the initial period of China's accession to the WTO. Jeanne J. Grimmer, "Chinese Tire Imports: Section 421 Safeguards and the World Trade Organization (WTO)," *Congressional Research Service* CRS R 40844, July 12, 2011, 10–15.

availability of human resources and supplies essential to the national defense; and potential unemployment, loss of skills or investment, or decline in government revenues resulting from displacement of any domestic products by excessive imports.”⁹¹ Dependent on the findings, the president can impose tariffs or quotas and can target specific countries. The Trump Administration’s application of tariffs on aluminum and steel imports in 2018 occurred after positive determinations following Commerce’s first Section 232 self-initiations since 1999.⁹²

Although a wide array of actors may trigger the initiation of a Section 232 investigation, including any “interested party,” the head of “any department or agency,” and the secretary of commerce, investigations have historically been rare.⁹³ Brock Williams of the Congressional Research Service notes that prior to the steel and aluminum investigations in 2017 that resulted in the imposition of tariffs, a president last utilized Section 232 in 1986, and there had only ever been 26 investigations and six actual trade enforcement actions.⁹⁴ However, the evolving relationship between U.S. national security and economic security in light of China’s damaging non-market distortions may make Section 232 an increasingly useful policy tool to ensure U.S. competitiveness in certain industries and product categories. One recent example is imports of neodymium permanent magnets, a critical component for electric vehicles. China dominates global production of neodymium magnets as a result of a variety of nonmarket practices in the automotive industry, leading the United States to rely on China for roughly 75 percent of its imports of neodymium magnets in 2021.⁹⁵ The Commerce Department, in response to the Biden Administration’s identification of this potential threat in its *100-Day Supply Chain Review*, launched an investigation into the national security implications of these imports in September 2021.⁹⁶ The investigation, released in a redacted format in September 2022, determined that overreliance on foreign imports of neodymium magnets is a threat to U.S. national security but did not recommend imposing tariffs on imports.⁹⁷ Instead, the Administration will encourage domestic production through mechanisms such as the Defense Production Act (DPA), tax credits for neodymium magnets, collaboration with allies and partners on supply chains, and workforce development.⁹⁸

Section 301 of the 1974 Trade Act

Congress has delegated the executive branch broad discretion under Section 301 of the Trade Act of 1974. Specifically, Section 301 empowers the USTR to suspend trade agreement concessions or impose import restrictions if a U.S. trading partner is found violating commitments or engaging in an act, practice, or policy that is “unreasonable or discriminatory and burdens or restricts [U.S.] commerce.”⁹⁹ As the Commission noted in 2018, “Section 301 investigations are ‘more open-ended’ than AD/CVD orders and Section 201 and 232 cases [as well as 337 cases], leaving a wide range of actions available to the administration.”¹⁰⁰ Unlike AD/CVD, Section 232, and Section 337 investigations, Section 301 investigations are more routinely self-initiated by the agency.¹⁰¹ The possible remedies available to the USTR are wide ranging. Though they typically have

entailed tariffs, these remedies include a variety of tools such as quotas, tariff-rate quotas, and restrictions on services and licensing arrangements. Prior to 2017, Section 301 had largely fallen out of use as a trade remedy tool, with 119 investigations having occurred from 1975 to 2000 and only five between 2000 and 2016.*¹⁰²

Section 301 provides the USTR with a great deal of flexibility and can allow for novel remedies. While this capability may be useful as a negotiating tactic, Section 301 investigations themselves are also a useful means of gathering data. Further, experts across different fields have proposed extending usage of Section 301 to other clearly abused industries and trade issues. As Celeste Drake, who was then Trade and Globalization Policy Specialist at the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), argued before the Commission in 2018, “Section 301 has been woefully underused to address violations of labor and environmental obligations in trade agreements—the violation of which not only acts as an inducement to transfer production abroad, but also creates downward pressure on wages and standards in the United States.”¹⁰³ Such practices are rampant across China and continuously contribute to the U.S.-China trade imbalance. As the *Financial Times* reported in May 2022, local governments across China have been intentionally ignoring labor violations to spur economic output.¹⁰⁴ Imposing costs for failing to live up to high standards can incentivize a race to the top rather than the bottom.

Meanwhile, according to Stephen Ezell of the Information Technology and Innovation Foundation, the United States “has never used [Section 301’s] services trade-related provisions.”¹⁰⁵ The statute currently lacks details on what kind of U.S. remedies are applicable. These might entail import quotas or reciprocity in requirements for the creation of new ventures. Several multilateral organizations, such as the G7, the Organization for Economic Cooperation and Development (OECD), the Global Forum on Steel Excess Capacity, and the U.S.-EU Trade and Technology Council, are making progress on common actions that could be taken against trade-distorting industrial subsidies and abuses of environmental, labor, and human rights.¹⁰⁶ Until these mechanisms come to fruition, however, Section 301 investigations and actions can protect against China’s harmful practices and serve as a leading example for other countries facing similar challenges.

Section 337 of the Tariff Act of 1930

Section 337 cases play a critical role in protecting the U.S. innovation base. A complainant can bring a Section 337 case to the USITC in instances where specific imported products can be shown to have used “unfair practices in import trade.”¹⁰⁷ In practice, this has meant the imported product improperly benefited from misappropriated IP. Corporate entities from China routinely engage in industrial espionage, steal trade secrets, and ransack the open U.S. patent database. After saving money on research and development by engaging in this theft, the firms may then receive subsidies to

*Among the five Section 301 investigations, in 2010 the Obama Administration launched an investigation into China’s policies affecting green technologies, following industry petition. Office of the U.S. Trade Representative, *United States Launches Section 301 Investigation into China’s Policies Affecting Trade and Investment in Green Technologies*, October 15, 2010.

scale up production and export to the United States and other markets. This likely happened in the case of Datang Telecom Group, a Chinese SOE, and U.S. firm Lucent, once the world's largest telecommunications equipment company, wherein the former's IP theft contributed to driving the latter out of business.¹⁰⁸ Section 337 is distinctive in the remedies it provides. In lieu of tariffs, if a violation is found the USITC can directly issue exclusion orders to Customs and Border Protection, completely prohibiting imports of the violating product.

As with AD/CVD cases, however, data limitations may hamper more comprehensive use of Section 337. The USITC almost exclusively relies on private firms to file complaints, and these firms cannot have their cases "accepted by the USITC unless a lengthy complaint is submitted."¹⁰⁹ Many firms, however, are hesitant to come forward publicly for fear of retaliation in China.¹¹⁰ Mr. Ezell recommends working broadly with a coalition of allies to produce a large "bill of particulars" that can be used to identify and catalogue all Chinese firms that engage in illicit technology practices.¹¹¹ The USITC could help maintain and contribute to this database and potentially use it as the basis for self-initiating cases to take the onus off the private sector.

Section 337 may also be more useful if its purview is expanded beyond IP law issues, a narrow remit for a remediation mechanism that was originally considered a "catch-all" statute. Ms. Drake argues that the myopic focus on IP represents a narrowing of the scope of Section 337 in a manner unintended by Congress:

*Section 337 is a statute that has much broader applications than have been successfully utilized by the private sector. The ITC has essentially limited its utility to addressing violations of intellectual property despite the expansive scope provided for in its authority. For example, a recent case filed by U.S. Steel under 337 was undermined by the misreading of the statute to eliminate an antitrust claim. As a result, future Section 337 claims asserting that foreign companies are fixing prices at below-market prices and thereby undercutting the prices of domestic competitors are unlikely to be successful, which is contrary to Congressional intent.*¹¹²

The USITC itself recognized in 2003 that it "has great latitude in what constitutes unfair methods of competition or unfair acts in importation and, thereby, whether jurisdiction exists."¹¹³

Defense Production Act

The DPA confers expansive authorities upon the president to influence and ensure the U.S. domestic industrial base can meet national security requirements. Migration of U.S. production capacity to China and increasing dependence on Chinese supply chains from the country's intentional overproduction have raised concerns that the United States lacks sufficient domestic capacity across a range of key industrial and technological domains. The DPA has subsequently become an attractive tool to overcome some of the negative impacts of China's distortions. The DPA states that the "President shall take appropriate actions to assure that critical components,

critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements.”¹¹⁴ Such actions may occur, the act elaborates, not only during times of active conflict but also “during peacetime, graduated mobilization, and national emergency.”¹¹⁵ The president is specifically empowered to issue “rated orders” that “prioritize government contracts for goods and services over competing customers.”¹¹⁶ The DPA also grants the president the authority to provide incentives within the domestic market, including direct purchases, purchase commitments, loans, and loan guarantees, to “enhance the production and supply of critical materials and technologies when necessary for national defense.”*¹¹⁷

A steadily expanding scope of industries making use of the DPA in peacetime raises the potential for the act to be used for more preventative or proactive strengthening of U.S. production. The act has been routinely used since its creation in 1950, principally for military equipment and vehicles.¹¹⁸ In the last several years, it has been used outside of military-related areas to address industrial base shortfalls. The Trump and Biden Administrations have utilized DPA authorities extensively in response to the COVID-19 pandemic, with the latter using it to stimulate production of COVID vaccines, testing kits, and various types of personal protective equipment (PPE).¹¹⁹ In March 2022, the Biden Administration invoked DPA authorities to order the U.S. Department of Defense to bolster sustainable domestic production of strategic minerals, in coordination with other agencies.¹²⁰

Export Controls

There are additional opportunities to continue improving and building out the U.S. domestic export controls system to prevent foreign access to sensitive, dual-use technologies from the United States. While the passage of the Export Control Reform Act (ECRA) of 2018 remains a significant Congressional achievement, fulfilling ECRA’s cornerstone authorities remains a challenge. There are continued gaps in implementation between development of tighter controls, information sharing, and monitoring end use. Alongside permanently codifying longstanding export control practices, ECRA also tasked Commerce’s BIS with identifying “emerging and foundational” technologies and imposing controls where necessary. Between 2018 and 2020, BIS released separate requests for public comment to produce a methodology for identifying emerging and foundational

*The act includes three primary tools for coordinating and expanding domestic production: Title I: Priorities and Allocation: Title I authorities under the DPA allow the president to direct businesses or corporations to prioritize contracts, known as “rated orders,” with the government for materials or services necessary for promoting national defense. Title III: Expansion of Productive Capacity and Supply. Title III authorities give the president the ability to incentivize the U.S. industrial base to expand the production and supply of certain materials or goods for the purpose of national security. These incentives may include loans, direct purchases, and purchase commitments. Title III of the DPA also establishes the Defense Production Act Fund, which is an account with the Department of the Treasury to pay for Title III projects. Title VII: General Provisions: Title VII of the DPA authorizes the president to consult with industry and other representatives to develop voluntary agreements with private businesses, as well as the authority to block foreign mergers or acquisitions that may harm national security. Title VII provisions also include the authority to assemble industry executives whom the government can call upon in the interest of national security. Michael H. Cecire and Heidi M. Peters, “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress,” *Congressional Research Service* CRS R 4376, March 2, 2020.

technologies. After more than four years of ECRA implementation, BIS has not identified any foundational technologies, and in a May 2022 statement it announced it would not attempt to do so despite Congressional direction in 2018.¹²¹ Many researchers already in the government, such as those in the Department of Energy’s system of national labs, have direct, hands-on experience in analyzing and building these kinds of technologies. Together with policymakers, these experts may better anticipate potential uses of the technologies contrary to U.S. interests. Importantly, technologists are also equipped to understand the depth of scientific and technical capabilities in other countries, being familiar with research and metrics of their respective fields.

Another important issue is the increasing difficulty of performing end-use checks, either pre-license or post-export, in jurisdictions like China, wherein BIS has traditionally performed these onsite at the product destinations.* To suspend exports to such countries would have some sweeping effects, almost certainly disrupting ongoing Chinese accumulation of technologies but also potentially damaging U.S. exporters and their perceived reliability. Another emerging proposal is to digitize parts of the export controls process to make end-use and end-user verification simpler. In this approach, a combined hardware and software solution would track the movement of some controlled goods and remain operable for authorized users but would also potentially act as a “kill switch” for technology that finds its way to an adversary or unverified user.¹²² The Center for Strategic and International Studies found that digitization of these processes might be feasible for certain types of products, such as Internet of Things products. Researchers cautioned that such a tool could increase compliance but, if applied too broadly, could have a negative effect on U.S. export competitiveness. The study also emphasized the importance of this mechanism’s cybersecurity and resistance to hacking, and it specified that any digitization would need to be designed with particular attention to international data privacy regimes to ensure that any data collected would be done so lawfully.¹²³

Additional Controls to Address Advanced Technology Threats

On October 7, BIS announced two rules on export controls intended to curb development of military technologies in China. The first of these rules is an interim final rule to prevent the export of advanced computing chips, particularly those relevant to the development of AI, and semiconductor manufacturing equipment to entities based in China.†¹²⁴ The rule sets forth several other updates, including:

*End-use verification or end-use checks refer to the process of confirming that end users of exported controlled goods are using such goods in a legitimate fashion consistent with applicable export control rules. This confirmation process is typically done in person and by government agencies responsible for administering export controls. In the United States, these agencies include the Departments of Commerce, Defense, and State. Kevin J. Kurland, “End-Use Monitoring and Effective Export Compliance,” Conference on Export Controls and Policy, U.S. Department of Commerce, Bureau of Industry and Security, Washington, DC, October 30, 2016, 1–2.

†BIS will also grant a temporary general license “to permit specific, limited manufacturing activities in China related to items destined for use outside China.” U.S. Department of Commerce, Bureau of Industry and Security, “Implementation of Additional Export Controls: Certain Advanced Computing Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification,” *Federal Register* 87:62186 (October 13, 2022).

Additional Controls to Address Advanced Technology Threats—Continued

- A range of new licensing obligations for U.S. persons who may sell or otherwise seek to support Chinese entities in developing these technologies;
- Expansion of a foreign direct product rule* to 28 Chinese entities already on the Entity List; and,
- End-use restrictions for supercomputers.

Older, less advanced chips will be covered by the new licensing restrictions to prevent adversarial Chinese companies from developing more advanced generations from legacy technology.¹²⁵ Elements of this first rule will be implemented in phases throughout October 2022, and may be subject to refinement or expansion, including for related Entity List designations, following the end of the public comment period in early December 2022.¹²⁶ The second rule strengthens the BIS process relating to entities on the Unverified List, clarifying that failure of host governments to cooperate on end-use checks could result in the designation of those entities directly to the Entity List.[†]¹²⁷ Along with the rule change, BIS announced the addition of 31 new Chinese entities to the Unverified List while removing nine entities, making for a total of 117 Chinese entities on the list as of October 2022.[‡]

Inbound Investment Screening

With the passage of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018, the inbound investment screening system has gone through considerable improvements.¹²⁸ The law allows for some flexibility to meet emerging challenges from predatory investment, such as targeted Chinese investment and acqui-

*Foreign direct product rules prohibit foreign countries from exporting or reexporting controlled items made with a certain portion of U.S.-origin technology or software (as defined by the EAR) to restricted end users unless the exporter receives a license or license exception. Kevin Wolf et al., “US Government Clarifies, Reorganizes and Renames Descriptions of How Foreign-Produced Items outside the United States Are Subject to US Export Controls as the US Contemplates New Restrictions on Russia,” *Akin Gump Strauss Hauer & Feld LLP*, February 9, 2022.

†The Unverified List includes entities whose end-use of items subject to the EAR cannot be verified by the U.S. government. U.S. Department of Commerce, Bureau of Industry and Security, *Export Administration Regulations, Part 744*, March 16, 2021.

‡BIS removed the following nine entities from the Unverified List: Anhui Institute of Metrology, Chuzhou HKC Optoelectronics Technology Co., Hefei Anxin Reed Precision Co., Hefei Institutes of Physical Science, Jiutian Intelligent Equipment Co., Suzhou Gyz Electronic Technology Co., Suzhou Lylap Mould Technology Co., Wuxi Biologics Co., and Wuxi Turbine Blade Co. Additions included: Beijing Naura Magnetolectric Technology Co., Beijing PowerMac Company, CCIC Southern Electronic Product Testing Co., Chang Zhou Jin Tan Teng Yuan Machinery Parts Co., Chinese Academy of Geological Sciences Institute of Mineral Resources, Chinese Academy of Science (CAS) Institute of Chemistry, Chongqing Optel Telecom, Chongqing Xinyuhang Technology Co., Dandong Nondestructive Electronics, DK Laser Company Ltd., Foshan Huaguo Optical Co., GRG Metrology & Test (Chongqing) Co., Guangdong Dongling Carbon Tech. Co., Guangxi Yuchai Machinery Co., Guangzhou GRG Metrology & Test (Beijing) Co., Jialin Precision Optics (Shanghai) Co., Lishui Zhengyang Electric Power Construction, Nanjing Gova Technology Co., Ningbo III Lasers Technology Co., Qingdao Sci-Tech Innovation Quality Testing Co., Shanghai Tech University, Suzhou Sen-Chuan Machinery Technology Co., Tianjin Optical Valley Technology Co., University of Chinese Academy of Sciences, University of Shanghai for Science and Technology, Vital Advanced Materials Co., Ltd., Wuhan Institute of Biological Products Co., Ltd., Wuhan Juhere Photonic Tech Co., Wuxi Hengling Technology Co., Xian Zhongsheng Shengyuan Technology Co., Yangtze Memory Technologies Co.

sitions that are designed to appropriate U.S. innovation. Congress could still benefit from more information gathering in areas like greenfield investment. Even though FIRRMA expanded the purview of CFIUS to review greenfield investments involving covered real estate, the U.S. government does not closely monitor or publicly report greenfield investments themselves.¹²⁹ Ms. Nikakhtar testified that the Commerce Department retains statutory authority to collect information on greenfield investments, but there are barriers to making such information publicly useable.¹³⁰

Modifications to the inbound investment screening mechanism and scope can have significant effects on the flow of investment into the United States and implications for sustaining growth. Some fear that restrictions on greenfield investment could have an immense chilling effect on foreign direct investment (FDI) into the United States. Detractors also worry that such restrictions would mar the United States' reputation as a free and open economy, potentially impeding its ability to eliminate barriers to investment in future negotiations abroad. Any such prohibition would also increase already growing concerns about the transparency and consistency of the CFIUS process. U.S. enforcement of mitigation agreements is ultimately untenable as Chinese parties in a transaction can obfuscate or obscure information and state connections, leading some experts to believe that such firms should not be granted mitigation agreements writ large.¹³¹

Executive Order (EO) Details CFIUS's National Security Mandate and Lists Technologies

On September 15, 2022, the Biden Administration released an EO that detailed specific elements of national security CFIUS must include in its review process and also provided an explicit list of technologies meant to garner additional scrutiny.¹³² The EO specifically identified five areas related to national security for CFIUS to consider when assessing transactions: (1) the impact on the resilience of critical U.S. supply chains, (2) the effect on U.S. technological leadership in key areas, (3) relationship to other industry investment trends that may cumulatively create U.S. national security vulnerabilities, (4) cybersecurity risks, and (5) risks to sensitive U.S. data.¹³³ Senior Administration officials noted to the press that while CFIUS had already been incorporating these national security concerns into its review process, the order was intended not only to direct existing practice but also to send "a very clear message, a public message, to the private sector" on the process and better inform private sector stakeholders and firms.¹³⁴

Prospective Tools

Outbound Investment Screening

Where CFIUS scrutinizes foreign investments into the United States, an outbound investment screening mechanism would scrutinize U.S. investments into foreign countries. This process would complement existing export controls, which, as Ms. Kilcrease argued

in testimony before the Commission, prevent the *transfer* of technology to China but not the *development* of technology in China.¹³⁵

According to former CFIUS Lead Counsel Ben Joseloff, there are three different risk scenarios related to outbound investment that an outbound investment-screening mechanism could seek to address: (1) technology development via FDI and joint ventures; (2) offshoring and supply chain development concerns; and (3) financial flows—including venture capital, private equity, and potentially portfolio investments—that assist with the development of certain companies, technologies, and sectors in countries of concern.¹³⁶ An important preliminary consideration is which of these three areas (or combination of areas) an outbound investment screening mechanism would address. In testimony before the Commission, Ms. Kilcrease argued that an outbound investment screening mechanism should aim for a clearly specified set of objectives. The objectives could “include maintaining U.S. technological leadership in domains that are directly or indirectly important for future U.S. military dominance, U.S. intelligence capabilities, and resilient operation of U.S. critical supply chains and physical and digital infrastructure, as well as preventing the use of technology to undermine democratic institutions and human rights.”¹³⁷

A more tailored and bounded objective of an outbound investment screening process would be to protect critical U.S. supply chains via ex-ante screening of proposed FDI that could lead to offshoring to China in critical supply chain segments. By contrast, a more expansive outbound investment mechanism would take into consideration China’s technology development vis-à-vis that of the United States and include within its mandate an aim to constrain the development of advanced technology and critical capabilities on national and economic security grounds. Such an outbound review process would involve—but also go beyond—screening joint ventures and FDI to potentially include consulting, advisory, venture capital, private equity, portfolio investment, and other forms of knowledge and capital transfer. According to independent research firm Rhodium Group, implementing a sweeping outbound investment mechanism would make the United States “one of only a handful of OECD economies that have such formal restrictions or review requirements in place” and potentially contravene the U.S. tradition of supporting the free movement of capital.¹³⁸ Private industry groups, meanwhile, have expressed concern that such a mechanism, particularly if deployed unilaterally, could hurt U.S. companies’ relative global competitiveness.¹³⁹

Divestment Authority

Russia’s war on Ukraine has prompted a range of U.S. and allied responses to cut ties with Russia, but it has also demonstrated the challenge of comprehensively divesting U.S. capital and commerce from potential adversary countries. A divestment authority could provide such a mechanism, enabling the executive branch to respond to security threats emanating from existing U.S. investment overseas. Currently, the U.S. government does not have an explicit

divestment authority that is broadly applicable.* The International Emergency Economic Powers Act (IEEPA) grants the president sweeping authority to “nullify, void, prevent, or prohibit” transactions in response to “any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States.”¹⁴⁰ In testimony before the Commission, then Vanderbilt University professor of law Timothy Meyer noted this authority could theoretically encompass ex-post transactions, though there is no clear process for doing so.¹⁴¹

IEEPA could be broadly interpreted to compel U.S. entities to divest from stocks abroad, but it has some limitations. IEEPA authority exclusively applies to property where a foreign country or national retains an interest, but it does not explicitly authorize divestment. For instance, it is possible that IEEPA could nullify U.S. stakes in Chinese joint ventures, but it may not be applicable to wholly owned U.S. entities located in China. The law provides the president great discretion to determine how it can prevent or prohibit transactions, though increased use of the law has inspired additional debate on whether Congress should prescribe additional parameters.¹⁴² The Trump Administration’s 2019 efforts to use IEEPA as a basis for tariff application on Mexican imports was met with controversy, and industry groups indicated they would challenge the action in court if implemented.[†]¹⁴³

A lack of specifics in IEEPA could have consequences for future applications and be subject to abuse. The scope of the law’s application has increased over the last two decades beyond specific geographies or nationalities, and the duration of these emergencies has extended as long as 40 years.¹⁴⁴ Presidents have invoked the law in response to events widely regarded as emergencies, such as the 1979 Iran hostage crisis and the spread of biological weapons, but no executive has yet fully utilized IEEPA in response to economic security threats.¹⁴⁵ While there have been several lawsuits from private U.S. entities against the government on account of its use of IEEPA, none of these legal challenges have been successful, pointing to potential gaps in process and public consultation, particularly with increased reliance on IEEPA.¹⁴⁶ In anticipating such legal challenges,[‡] Dr. Meyer advised legislating a more precise authority

*For two years following the act’s passage in July 2010, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 supported state and local governments divesting from any entity that had more than \$20 million invested in Iran’s energy sector along with prohibiting further government funds or contracts with ties to Iran. In December 2007, the United States also enacted the Sudan Accountability and Divestment Act to support divestment of state and local governments, along with fund managers and investment advisers from companies with interests in four of Sudan’s business sectors. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 § 202, Pub. L. 111–195, 2010; Sudan Accountability and Divestment Act of 2007 § 3, Pub. L. 110–174, 2007.

†In May 2019, then President Donald Trump announced his intent to use IEEPA to declare a national emergency around migration flows from the southern border. In response to this emergency, then President Trump moved to apply a 5 percent tariff to all imported goods from Mexico that would have gradually been raised to 25 percent absent “effective actions taken by Mexico.” However, the United States and Mexico subsequently reached an agreement that resulted in the indefinite suspension of the tariffs. The use of IEEPA to impose tariffs is less common, but there is precedent from then President Richard Nixon’s 1971 use of the Trading with the Enemy Act (IEEPA’s predecessor law) to apply tariffs in response to a balance of payments crisis. Scott R. Anderson and Kathleen Claussen, “The Legal Authority behind Trump’s New Tariffs on Mexico,” *Lawfare*, June 3, 2019. Liam Stack, “U.S. and Mexico Issue Joint Declaration on Migration and Tariffs,” *The New York Times*, June 7, 2019.

‡For instance, Chinese smartphone maker Xiaomi and big data processor Luokung both successfully challenged prohibitions on U.S. investment in their publicly traded securities. The pro-

with a clearly defined scope and set of conditions under which it may be invoked. Greater regulatory certainty could prevent overuse, better withstand judicial scrutiny, and provide an adequate channel for public input and recourse.

Market Access Charge

Most policy tools, such as those identified above, aim to remedy unfair trade practices with China via the current account (i.e., trade), principally through tariffs, tariff-rate quotas, and exclusion orders. Tools targeting the financial account—comprising portfolio, FDI flows, and reserve flows—are much less frequently considered. As Douglas Irwin describes in his book *Clashing over Commerce*, however, it may be the financial account at the root of the problem. After the fixed exchange rate system collapsed in 1973, capital controls—which had been a pervasive and fundamental part of the Bretton Woods system—similarly disappeared, and floating exchange rates became the norm. Financial flows between countries increased massively, which “allowed large trade imbalances to emerge. In the U.S. case, other countries wanted to use dollars they earned exporting to the United States to buy U.S. assets rather than American-made goods. As a result, the dollar appreciated in value and exports began to fall short of imports as foreign investment in the United States surged.”¹⁴⁷

The obverse of surplus capital inflows is a trade deficit. Because of this fundamental accounting identity, some economists and policy-makers have argued that the United States can correct trade imbalances by implementing a fee or a tax on acquisitions of U.S.-dollar denominated assets.¹⁴⁸ Such a tax would deter acquisition of U.S. financial assets, lead to a devaluation of the U.S. dollar, and ultimately rebalance trade. A market access charge (MAC) would be one such implementation method. Joseph Gagnon, an expert on monetary and currency policy at the Peterson Institute, has expressed tentative support for the measure so long as a MAC is uniform across all types of financial inflows. This would ensure minimum ability to “game” the policy, minimize distortions, and otherwise allow market forces to operate normally.¹⁴⁹ A MAC would also raise substantial revenue—a 5 percent MAC could raise \$300 billion over five years—which could fund various domestic priorities.¹⁵⁰

Instituting a MAC, however, raises several serious concerns. First, taxing financial inflows would be inconsistent with the United States’ post-Bretton Woods support for financial account liberalization. Second, a number of private sector stakeholders would object to such a measure. And third, instituting a MAC would not be costless: limiting foreign inflows could lead to a rise in short- and long-term domestic interest rates.¹⁵¹

hibitions relied on IEEPA authority invoked under EO 13959, which restricted investment in Chinese companies designated as contributing to China’s military by the U.S. Department of Defense (DOD). The U.S. District Court for the District of Columbia granted Xiaomi and Luokung preliminary injunctions in March and May 2021, respectively, arguing that the designation by DOD failed the “arbitrary and capricious test” established by the Administration Procedure Act (APA). Section 706(2)(A) of the APA indicates courts reviewing regulation may overturn agency actions if they find factual assertions or underlying rationale “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” United States District Court for the District of Columbia, *Xiaomi Corporation v. Department of Defense, et al., Memorandum Opinion: Granting Plaintiffs’ Motion for Preliminary Injunction; Granting Plaintiffs’ Motion for Leave to File Supplemental Declaration*, March 12, 2021, 7–9.

Opportunities for New or Alternative Structures

In addition to adjustments of its own national policies, the United States can take steps to better defend against China's predatory policies through close cooperation with likeminded countries.

U.S. Cooperation with Allies and Partners

The United States is focused on cooperating with allies in smaller-scale partnerships that may be able to achieve commitments with high standards for ensuring labor rights, lowering emissions, and guaranteeing supply chain security. Ongoing initiatives at the bilateral or trilateral levels also offer potential models for other plurilateral arrangements that can be narrowly tailored while filling gaps unaddressed by larger multilateral arrangements.

U.S.-EU Trade and Technology Council

Launched in June 2021, the U.S.-EU Trade and Technology Council (TTC) is a forum for bilateral cooperation centered on key issues confronting democracies and market economies. Agreement and cooperation achieved on both sides may be a useful foundation for broader coalitions in the future, as the partnership represents 28 countries that accounted for nearly 42 percent of global GDP in 2021.*¹⁵² While neither the United States nor the EU explicitly name China as a focus of the TTC's mission, the May 2022 Joint Statement notes that the TTC "will continue to oppose actors who threaten the multilateral rules-based order and fundamental principles of international law."¹⁵³ The TTC has divided its efforts into ten working groups,† many of which will have a bearing on global trade and economic rules and norms.

Technology

In addition to facilitating greater transatlantic trade, successful cooperation on technology standards can bolster coordination of both sides to counter Chinese influence in the formation of international standards. The United States and the EU are dedicating particular attention to artificial intelligence (AI), which connects to multiple working areas under the TTC.¹⁵⁴ These efforts parallel key risks emanating from Chinese industrial policies. Chinese government bodies and firms have focused on creating standards for particular AI applications, like facial recognition, that are essential for the operation of mass surveillance systems. The United States and the EU are likely to address global surveillance and facial recognition standards from a human rights-based perspective. Experts also anticipate that the two sides will collaborate more effectively on export controls in the wake of Russia's invasion of Ukraine. Within less than a month of the invasion in February 2022, several democratic

*Although the EU is composed of 27 sovereign nations, it has the sole responsibility of negotiating trade agreements and other trade policy with third countries. The EU also holds exclusive responsibilities over matters concerning commercial aspects of IP, public procurement, and FDI. European Commission, "Making Trade Policy."

†The ten working groups include: tech standards, climate and green tech, secure supply chains, information and communications technology and services (ICTS) security and competitiveness, data governance and tech platform regulation, misuse of technology threatening security and human rights, export controls, investment screening, promoting SME access to and use of digital technologies, and global trade challenges. European Commission, "Factsheet: EU-US Relations EU-US Trade and Technology Council," June 2021.

countries coordinated the application of new export controls to stem the flow of technologies to Russia.¹⁵⁵ (For more on China's actions related to the invasion of Ukraine, see Chapter 2, Section 1, "Year in Review: Economics and Trade.")

Even as there are welcome opportunities for transatlantic cooperation, there are also longstanding differences in the United States' and the EU's approaches to technology, regulation, and trade that may be difficult to reconcile. As the United States continues to oppose China's promotion of internet sovereignty, the EU began developing its own strategy for managing technology and consumer protection in 2019 centered on strengthening European innovation and regulation of technology to find "European solutions."¹⁵⁶ EU officials also emphasize increased consumer control and government supervision in their approach, similar to principles already outlined in the EU's General Data Protection Regulation.¹⁵⁷ While the European vision of tech sovereignty is distinct from China's, it is nonetheless still at odds with the U.S. approach. The recent slate of EU regulations related to online advertising, antitrust, and digital taxation often directly target U.S. tech companies in moves that U.S. industry has claimed are discriminatory and protectionist on the part of EU regulators.¹⁵⁸ On technical standards in particular, the EU approach remains far more top-down in nature than that of the United States. Domestic industry leads U.S. standards-setting efforts while the government supports but does not coordinate this development. Meanwhile, the EU has considerably more government involvement in setting direction and prescription over which standards are necessary and must be drafted in accordance with regulations.¹⁵⁹ The difference in these approaches stands to be a key obstacle in collaborating on technical standards setting vis-à-vis China.

Trade and Investment

The TTC will likely be a channel for continued transatlantic partnership around investment screening practices, measures to prevent Chinese circumvention of trade defense measures (e.g., AD/CVD, etc.), and related data sharing. The United States was an early adopter in scrutinizing Chinese FDI, passing FIRREA in 2018 to better target predatory investments. Chinese appliance maker and SOE Midea Group's 2016 acquisition of German robotics firm Kuka has also helped to prompt the EU to become increasingly cautious about China's investment activities within its borders.¹⁶⁰ CFIUS has considerable experience in this area that may help the EU's evolving investment screening regime. Similarly, both sides can continue to collaborate on identifying and blocking Chinese products that attempt to circumvent AD measures by moving production to

¹⁵⁵The EU's General Data Protection Regulation came into effect in May 2018. These regulations are fundamental to EU privacy and human rights law, focused largely on individual rights to data and personally identifiable information. The regulations guarantee an individual's right to access or erase their data, along with portability and ability to restrict automated decision-making on the basis of such personal data. The regulations include certain security and cross-border transfer obligations for controllers and processors in collecting and using personal data. The General Data Protection Regulation has become a highly influential model for privacy regulation, particularly in that it requires other jurisdictions to obtain "adequacy," or recognized protections on par with those of the EU, for EU organizations to easily transfer data to organizations in another jurisdiction. Jennifer Bryant, "3 Years In, GDPR Highlights Global Privacy Landscape," *International Association of Privacy Professionals*, May 25, 2021; European Commission General Data Protection Regulations, Chapter 3, "Rights of the Data Subject," 2016.

a new jurisdiction.¹⁶¹ These areas are ripe for cooperation and also correspond closely to the TTC's working group for supply chain security. (For more on supply chain security, see Chapter 2, Section 4, "U.S. Supply Chain Vulnerabilities and Resilience.")

Continued Trilateral Efforts

Cooperative work among developed and democratic countries is not limited to the United States and the EU. Since 2018, trade ministers from Japan, the United States, and the EU have been working together to fill gaps in current WTO discipline with new rules and principles. These trilateral efforts may pave the way for future agreement on new rules that might be broadly adopted by other developed countries, either in existing forums or under new arrangements. Respective trade ministers met six times between May 2018 and November 2021 to identify common problems, often with China as the underlying focus of their discussions around non-market economies.¹⁶² In January 2020, trade ministers from each of the three sides announced proposed amendments to WTO rules on subsidies and countervailing measures, including new notification obligations and measures to target overcapacity.¹⁶³ The three sides agreed to work on broadening the WTO subsidies discipline, which could potentially allow WTO members to pursue AD/CVDs against more Chinese entities like SOEs and respond to subsidization from state banks.* The three sides also highlighted the need to confront forced tech transfer through "export controls, investment review for national security purposes, their respective enforcement tools, and the development of new rules."¹⁶⁴ In the past four years, the trilateral group has also committed to working together on digital trade initiatives at the WTO, helping to drive agreement on some new rules related to e-commerce and electronic transfer of data.¹⁶⁵ The group continues to work on other matters such as developing a fair export credits system and creating rules that target other forms of state support aside from subsidies.¹⁶⁶

Sector-Specific Managed Trade Arrangements

U.S. cooperation with the EU and Japan is also manifesting on a sector-specific basis while focusing on environmental goals. In October 2021, the United States launched the U.S.-EU Arrangements on Global Steel and Aluminum Excess Capacity and Carbon Intensity (also called the Global Arrangement on Sustainable Steel and Aluminum). The deal replaced U.S. tariffs on EU steel and aluminum imports the Trump Administration applied in 2018 under Section 232 and established tariff-rate quotas, which permit a certain quantity of imports to be traded tariff free or at a reduced rate. The deal also eliminated retaliatory EU tariffs on a range of U.S. goods,

* Under WTO disciplines, "for a financial contribution to be a subsidy, it must be made by or at the direction of a government or any public body within the territory of a Member." As a result of another U.S.-China dispute in 2008, the WTO determined that Chinese SOEs and Chinese state commercial banks would not be considered "public bodies." The WTO opined that the United States was imposing excess AD/CVDs because it was too broad in its interpretation of "public body" and, consequently, its assessment of China's state subsidies. "The mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority." World Trade Organization Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, 123.

including motorcycles and bourbon.¹⁶⁷ Under the Global Arrangement, the United States and EU have committed to negotiate an agreement to address “nonmarket excess capacity” and to establish high standards for carbon emissions in the production process.¹⁶⁸ The two sides are still developing exact standards to assess these conditions, and the process may be open to other economies.¹⁶⁹ Japan has not been invited to join the Global Arrangement, but in February 2022 Japanese and U.S. negotiators did reach a separate agreement on Section 232 whereby qualifying Japanese steel imports would no longer be subject to tariffs and instead imported under a tariff-rate quota.¹⁷⁰

Sector-specific trade arrangements could serve as an alternative to typical trade agreements that capture both economic and other public policy goals. Instead of further opening markets, these trade arrangements focus on a small group of market-oriented partners coordinating to ensure high standards of production among participants. Emissions reduction and climate change mitigation are the goals of these arrangements, but the true novelty is their readjustment of import policies. Future arrangements modeled on the U.S.-EU deal could address goals other than carbon emissions, targeting other forms of sustainability or resource intensity. Such arrangements might also focus on other sectors and set standards for non-environmental goals such as labor rights. Through these kinds of arrangements, the United States and its allies could target Chinese excess capacity in carbon-intensive sectors like concrete and cement, of which over half of global capacity is sourced from China.¹⁷¹ The Global Arrangement’s forthcoming negotiations will specify “trade defense instruments,” which could be an easily adaptable model for safeguards in any new sector-specific arrangement. As international trade expert Jennifer Hillman wrote, the arrangement can also serve as an important foundation for technological exchange.¹⁷² Similarly, establishing other arrangements based on this model could lead to increased data sharing, monitoring of supply chains, and collective analysis of Chinese practices among partners.

New Export Control Regimes

Export controls are a powerful but procedurally complex tool of U.S. security and trade policy. According to former U.S. Assistant Secretary for Export Administration Kevin Wolf, the multilateral export control system traditionally sought to control commercial technologies with “a direct link to weapons of mass destruction, conventional weapons and other military items, space- and launch-related items, or the dual-use commodities, software, and technologies necessary for their development, production, or use.”¹⁷³ China’s military-civil fusion efforts uniquely challenge assumptions about the definition of dual use and pose complex questions regarding how to anticipate and thus best control emerging technologies for which the dual-use application is not yet clear. The rapidly evolving nature of technology, particularly in emerging areas like AI, makes it increasingly easy to repurpose commercial hardware and software for offensive applications. The Chinese government also prioritizes development of technologies for surveillance and information control, components that are key to its domestic political aims but increasingly make

up part of China's exports and appeal to other authoritarian-leaning or illiberal countries. Many surveillance technology inputs like cameras, sensors, processors, and even related software are often sourced from the United States. The definition of "dual use" has subsequently expanded in the face of China's extensive reliance on surveillance technology, which not only is used to perpetuate human rights violations but also presents some potential new security risks for military and nonmilitary uses.¹⁷⁴

The multilateral export controls system suffers from slow decision-making and, in some cases, is too outdated or inflexible to address these questions. The Wassenaar Arrangement is the broadest of the multilateral control groups in terms of technology coverage, but progress on new controls has languished due to Russia's membership in the agreement.*¹⁷⁵ Current processes and need for consensus within Wassenaar, along with prohibition on targeting specific countries, make accomplishing new controls particularly difficult.

In testimony before the Commission, Ms. Kilcrease proposed that the United States pursue a new multilateral controls regime that can work alongside Wassenaar but exclude Russia and act as more of a values-based regime.¹⁷⁶ This new structure would allow for members "to coordinate export controls for a broader range of strategic objectives, including those that are specific to China, Russia, or other countries of concern as may be identified."¹⁷⁷ A new multilateral export controls regime could introduce controls based on protecting human rights and democracy, which would articulate a clearer vision for national security in the face of contemporary weaponization of technologies. Smaller multilateral export control regimes focused on certain technology groups might also be effective and potentially more flexible. The United States currently participates in three other groups that have a narrow technology focus: the Nuclear Suppliers Group, the Missile Technology Control Regime, and the Australia Group, the last of which is specific to chemical weapons precursors.¹⁷⁸ These three technology-specific groups offer a potential model for new multilateral control groups that can better coordinate on supply chain security for optimally quick and effective controls.

Other fora may also provide a helpful backdrop to these export control efforts. The United States, Australia, India, and Japan lead the Quadrilateral Security Dialogue ("Quad"), a group that also encourages like-minded countries to cooperate on a range of security issues. The Quad also has a broader network called "Quad Plus" that meets on a separate agenda and includes countries such as New Zealand, South Korea, and Vietnam.¹⁷⁹ In March 2021, the Quad announced the formation of a Critical and Emerging Technologies Working Group, which has focused on a range of issues, particularly (1) technology design, development, and use; (2) tech-

*The Wassenaar Arrangement is a voluntary export control regime with 42 member countries. The arrangement was established in 1996 following the dissolution of the Coordinating Committee for Multilateral Exports Controls (also known as COCOM), which was focused on preventing weapons and dual-use goods exports to the Soviet Union. The Wassenaar Arrangement is focused on promoting "transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies." Members agree to some guidelines and procedures, including reporting requirements and domestic application of controls to a particular list of items generated by consensus. Secretariat of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, "About Us."

nology standards; (3) telecommunications deployment and supplier diversification; (4) horizon-scanning for technologies, particularly biotechnology; and (5) critical technology supply chains.¹⁸⁰ While the agenda of this group is not specific to export controls, these focus areas parallel ongoing conversations about updating or expanding multilateral controls, and Quad discussions may provide a useful forum to tackle technology transfer in this regard.¹⁸¹

Economic NATO

China's escalation of economic coercion has increased calls for a coordinated counterresponse.¹⁸² While the CCP has a history of weaponizing its economic position, two recent outstanding examples have spurred these calls.¹⁸³ The first is the CCP's treatment of Lithuania following the opening of the Taiwanese Representative Office in the country. Lithuania suffered a number of coercive actions in response: its diplomatic status was downgraded; it was removed as an option on Chinese customs forms, which effectively blocked all imports from Lithuania into China; and companies from other European nations were allegedly pressured into cutting Lithuania out of their supply chains.¹⁸⁴ The second case is that of Australia, following its calls for an open investigation into the origins of COVID-19. China, in response, imposed large tariffs on a number of Australian exports, including barley and wine; instituted arbitrary restrictions on Australian timber by claiming pests were found in logs; and unofficially banned Australia's coal exports.*¹⁸⁵

Several experts, former government officials, and scholars have contemplated the possibility of an economic defense pact or "economic NATO" in response to Beijing's economic coercion among a group of aligned countries.¹⁸⁶ Matthew Pottinger, former National Security Council advisor and distinguished visiting fellow at the Hoover Institution, suggests that such a coalition would allow any goods arbitrarily banned by China under its coercive efforts "to be absorbed into the [other] economies equitably" and thus "create a deterrent against China."¹⁸⁷ In another vision of this coalition, Clyde Prestowitz, testified before the Commission that it "would have to refrain from any significant dependence on China" across a range of advanced technologies.¹⁸⁸ In late 2021, the European Commission proposed a similar mechanism, known as its anti-coercion instrument (ACI), that would be inclusive of the EU and its Member States.¹⁸⁹ Although it did not specifically name China, the ACI was drafted to provide defense in situations like that of Lithuania.¹⁹⁰ The European Commission describes the ACI as a formal legislative framework that would enable a quick, collective response to acts of economic coercion, with consequences ranging "from imposing tariffs and restricting imports from the country in question, to restrictions on services or investment or steps to limit the country's access to the EU's internal market."¹⁹¹ The European Parliament's Committee on International Trade is expected to vote on the legislation in late 2022.¹⁹² It is possible that under the U.S.-EU TTC, both sides

*For more on China's economic coercion, see U.S.-China Economic and Security Review Commission, *2021 Annual Report to Congress*, November 2021, 150–152.

could further coordinate on these policies and share best practices with other likeminded countries.

In addition to the measures highlighted via the ACI, further mechanisms under a mutual economic defense pact could also be implemented. One such mechanism, proposed by founder of the Overshoot economics research service Matthew Klein, Rhodium Group analyst Jordan Schneider, and former policy advisor at the Commerce Department David Talbot, would be to create a supranational fund that would compensate victims of coercion and spread the pain across a wide array of aligned countries.¹⁹³ Such a fund could potentially deter countries from attempting acts of economic coercion in the first place. As the authors argue:

*A fully operational Freedom Fund would neuter these attempts to bully. By pledging to support one another's businesses through boycotts, embargoes, and other measures, the allies would be able to maintain an almost impenetrable financial defense. Buying Australian wine and holding it in storage, for example, would be trivial for the allies but a meaningful response to Chinese bullying—and it might not even cost anything. This defensive capacity should encourage more countries to join the mutual economic defense pact, which also expands the potential power of any future offensive operations supported by the Freedom Fund.*¹⁹⁴

As China's willingness and ability to deploy economic coercion grow, a mutual economic defense pact comprising both defensive and offensive measures could serve to reduce the efficacy of such tactics.

Regional Trade Engagement Strategies

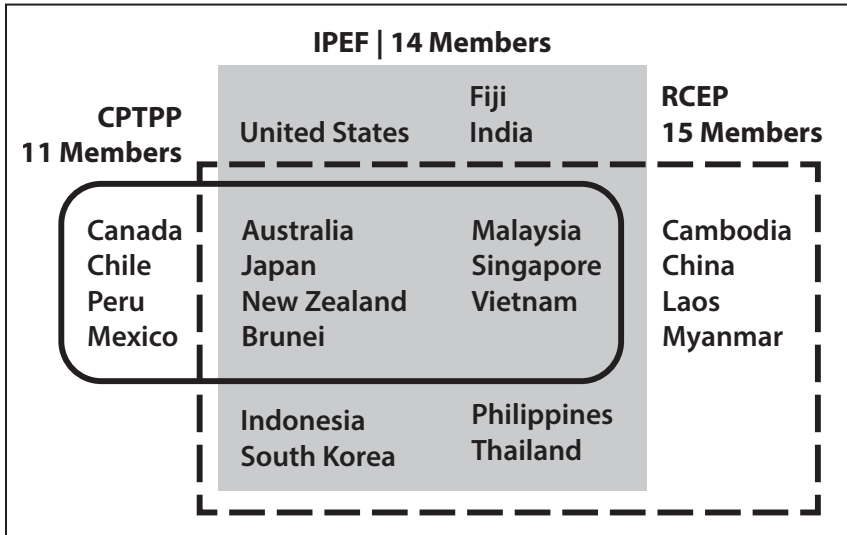
Trade in the Indo-Pacific is a key priority for both the United States and China. The Indo-Pacific is a huge, economically diverse region critical to global trade, accounting for 60 percent of both global GDP and maritime trade.¹⁹⁵ The region's role in global commerce has driven strong interest in forming trade agreements and increasing economic engagement, both from within the region and from external trading partners. U.S. economic engagement is built on a strong legacy of security guarantees and partnerships as well as assistance for trade, development, and capacity building. Meanwhile, Chinese policymakers are seeking to use trade and trade agreements to mold the Indo-Pacific into its sphere of influence.¹⁹⁶ Beijing sees U.S. efforts to increase economic engagement as a threat to its regional leadership, supply chain security, and broader regional security. Due to strong U.S. security ties in the region, Chinese policymakers are particularly eager to deepen economic ties and lean primarily on economic incentives to influence countries in the region. Over the last decade, China has already become the largest trading partner for many of its neighbors, trading twice the value of goods with the region compared to the United States in 2021.¹⁹⁷

Consistent with China's increased investment in international organizations over the last decade, Chinese policymakers have

emphasized participation in trade agreements in a bid to expand exports and claim international leadership in free trade. Since 2010, China has nearly doubled its participation in trade agreements, holding 17 FTAs with a total of 24 countries and its two special administrative regions, Macau and Hong Kong, as of June 2022.¹⁹⁸ China's FTAs have generally been with nearby partners and signed with relatively low-ambition commitments, meaning they have focused primarily on tariffs rather than standards or regulatory harmonization.¹⁹⁹ As China's government has started to develop more of its own laws, such as those related to data and cybersecurity, it sees these as a basis for rulemaking within the region and globally.²⁰⁰ Governments in the region frequently express that their countries should not be made to "choose" between both powers. High variation in economic and governance styles along with respective interests among countries in the region make exact alignment with either the United States or China difficult. This is particularly true for countries with strong U.S. security ties that struggle to meet high standards for labor and environmental regulations. While several of China's closest neighbors are concerned about Chinese infringement on their territorial and maritime sovereignty, China also remains their largest trade partner in the region. In particular, China remains a large export market for some countries farther upstream in the global value chain. The United States and China nonetheless remain peer competitors in the region for influence and greater alignment to their respective standards, regulatory models, and governance styles. The Regional Comprehensive Economic Partnership (RCEP) and the Comprehensive Progressive Trans-Pacific Partnership (CPTPP) have become symbols of this regional competition. ASEAN countries have principally steered RCEP, though China claims the passage as a key geopolitical success and has framed the deal as evidence of its regional leadership.²⁰¹ CPTPP is the legacy of the Trans-Pacific Partnership (TPP), which the United States steered significantly even though it did not initiate the deal.*²⁰² Neither the United States nor China is currently part of CPTPP, but China has applied to the trade pact while the Biden Administration has expressed concerns related to CPTPP and thus far committed to a different trade initiative, its Indo-Pacific Economic Framework (IPEF). There is significant overlap in membership between these three arrangements, which represent large chunks of the global economy (Figure 1).

*TPP originated from a 2005 trade agreement between Brunei, Chile, New Zealand, and Singapore, with the United States joining in 2008 and bringing along Australia, Vietnam, and Peru. The group eventually expanded to Canada, Japan, Malaysia, and Mexico. After 19 meetings and six years of negotiation, the countries came to a consensus on text in 2015 and signed the agreement in 2016, with several countries ratifying the deal between 2016 and 2017. The United States did not ratify the deal and withdrew altogether in 2017. James McBride, Andrew Chatzky, and Anshu Siripurapu. "What's Next for the Trans-Pacific Partnership (TPP)?" *Council on Foreign Relations*, September 20, 2021.

Figure 1: CPTPP, RCEP, and IPEF Members



Source: Adapted from Peter A. Petri and Michael Plummer, “RCEP: A New Trade Agreement That Will Shape Global Economics and Politics,” *Brookings Institution*, November 16, 2020.

Note: China and the United Kingdom have applied to CPTPP, while as of September 2022 South Korea was preparing an application it has not yet submitted to join the agreement. Brunei has not yet ratified CPTPP.

Comprehensive and Progressive Trans-Pacific Partnership

The rechristened CPTPP came into effect in 2018 with much of the deal still intact from its prior form as TPP. TPP’s provisions to reduce the role of SOEs remain in CPTPP. In total, 22 individual provisions were changed or suspended from TPP’s conversion into CPTPP in an agreement of several hundred provisions.*²⁰³ These 22 provisions mostly related to IP rights and investor-state dispute settlement and specific IP issues concerning pharmaceuticals and length of copyright terms, leaving most of the rest of the deal intact.²⁰⁴ CPTPP was nonetheless the first FTA to include rules on e-commerce and the first agreement with a digital trade chapter designed to secure the free flow of data.²⁰⁵

CPTPP membership may offer fewer discrete economic advantages to the United States than membership in its predecessor in terms of both substance and circumstance. The agreement has retained some provisions that were key priorities for U.S. negotiators under TPP, but the underlying commitments of these provisions have weakened in several cases. Special exceptions or “side letters” signed among the remaining 11 countries have weakened or delayed the ability to enforce standards across the trade bloc.²⁰⁶

CPTPP for China: An Opportunity or a Challenge

Despite not currently being a party to the agreement, China could still gain from the agreement’s implementation whether or not its

*TPP consisted of 30 chapters with around a dozen individual provisions each, not counting the 117 general and chapter-specific annexes that contain various numbers of detailed provisions each. Office of the U.S. Trade Representative, *TPP Full Text*.

application advances. Chinese firms may benefit from increasing regional integration along the Pacific Rim as well as potential advantages from the agreement's rules of origin. While lower, more flexible rules of origin are advantageous to CPTPP producers who can receive preferential tariff treatment on exports within the trade bloc, such rules also raise concerns that Chinese producers could find "back doors" to dump inputs in CPTPP countries.²⁰⁷ Chinese dumping and overcapacity are already a serious problem for U.S. trading partners. In third country markets like Vietnam, the United States has pursued cases against hot-rolled steel, which relied on dumped Chinese imports that were underpriced due to government subsidies. From India to Germany, steel overcapacity from China caused widespread job shortages and subsequent protests.²⁰⁸

In recent years, many across the political spectrum have endorsed a U.S. reentry to CPTPP, believing it has geostrategic potential to strengthen U.S. influence in the Indo-Pacific. Supporters of CPTPP believe that enlarging U.S. presence in the region can provide countries with an alternative to China's model while also potentially pressuring China to change its economic behavior.²⁰⁹ Others are skeptical that any such agreement could effectively contain China or force fundamental changes to its economic policy, particularly given past examples of failure to change China's behavior in other pluri- and multilateral forums.²¹⁰ While some experts argue that CPTPP's value is primarily strategic rather than economic, others also hold that the United States provides ample security guarantees to partners in the region and does not need a trade agreement to demonstrate regional influence.²¹¹

China's CPTPP Application Adds Complexity

In September 2021, China officially applied to join CPTPP, presenting a challenge to consensus among current members of the bloc.²¹² Its application followed news that Taiwan would submit its own application to CPTPP.²¹³ While China's application was surprising to some, there have been signs of interest as far back as 2015 and General Secretary Xi made a direct allusion to joining in 2017.²¹⁴ China's intent to meet CPTPP's high standards remains unclear, but the application underscores its repeated geopolitical narrative that China will assume leadership in the absence of the United States. In 2016, Chinese official opinions about TPP had appeared to shift, with the Ministry of Commerce calling it "one of the key agreements."²¹⁵

While there has not been clear signaling that China will pursue accession negotiations, the road to CPTPP membership will likely be difficult both politically and economically.²¹⁶ Public statements from the Japanese government have indicated hesitance to allow China to join; they also signal Japan's intent to apply CPTPP standards stringently to China's application should Beijing move forward in negotiating.²¹⁷ Similarly, Australia's trade minister said China would need to "meet, implement, and adhere to the high standards of the agreement" and retain a "track record of compliance" with the WTO.²¹⁸ Malaysia, meanwhile, has welcomed China's participation in the agreement as well as Taiwan's.²¹⁹ Along with facing push-back from current CPTPP members about joining the agreement,

China would also require exceptions or adoption of “nonconforming measures” related to SOEs in any CPTPP accession to comply with the basic provisions of the agreement. Such exceptions are not uncommon, with Vietnam successfully obtaining 14 nonconforming measures that allow the Vietnamese government to engage in price setting and to provide financial support to SOEs.²²⁰

Renegotiation and Incentive Structure

There is widespread disagreement on how much more U.S. exporters could gain relative to potential U.S. employment losses as a result of rejoining CPTPP. This debate stems from both original concerns regarding the former TPP agreement and the current state of trade among CPTPP members. TPP faced particular criticism in the United States for potentially weak protections, and it has attracted skepticism for the strength of its enforcement in key areas like labor.²²¹ CPTPP has three separate mechanisms for dispute settlement: investor-state, labor and environmental, and government-to-government.²²² With only one government-to-government case so far between New Zealand and Canada, it remains to be seen whether members will proactively use them and whether they can be effective in reining in behavior that violates the CPTPP agreement.²²³ U.S. firms retain significant interest in restoring TPP’s IP and investor-state dispute settlement provisions the USTR secured under TPP negotiations. Although many CPTPP members would welcome the United States into the agreement, several countries lack the desire to return to these discarded TPP-era commitments, which may make any potential U.S. reentry or attempted renegotiation difficult.

Even without these gaps of implementation and enforcement, the economic incentives for U.S. reentry into CPTPP today may be less compelling for both the United States and CPTPP members. The United States today remains the largest destination market for goods exports produced in the CPTPP area.²²⁴ While the significance of the trade relationships in the region can make a compelling case for U.S. reentry into the deal, tariff rates are already quite low and the United States now holds FTAs or limited trade agreements with seven of CPTPP’s 11 members.²²⁵ Tariff liberalization would be a U.S. negotiating priority for only a few countries, such as non-FTA partners like Malaysia and Brunei.²²⁶ In her May 2021 testimony before the House Ways and Means Committee, U.S. Trade Representative Katherine Tai said she intends to pursue a new version of trade promotion authority that would garner “robust bipartisan support,” but she did not specify a timeline.²²⁷

New Frameworks in the Indo-Pacific

The recently developed IPEF offers an alternative vision of economic engagement in the region emphasizing sustainability, labor, and supply chain goals. Different from an FTA, IPEF will not include negotiations on market access. As of September 2022, 13 other countries have signed on to the Biden Administration’s new IPEF, identifying four key areas of cooperation: (1) trade; (2) supply chains; (3) clean energy, decarbonization, and infrastructure; and (4) tax and anticorruption.²²⁸ While Taiwan is not currently an IPEF

member, in June 2022 the USTR launched the U.S.-Taiwan Initiative on 21st-Century Trade.²²⁹ The initiative currently covers 11 different areas that both correspond to IPEF elements and build on prior bilateral discussions, such as the 2021 U.S.-Taiwan Economic Prosperity Partnership Dialogue.²³⁰ (For more on Taiwan’s economic dialogue, see Chapter 4, “Taiwan.”)

Biden Administration officials have stated that IPEF is not intended to be a “traditional trade agreement” but rather potentially a trade executive agreement that would not require congressional approval through a vote or rely on “fast track” trade promotion authority.²³¹ Trade executive agreements, similar to the U.S.-Japan deal of 2019, must be limited in scope but can include binding commitments on certain rules.*²³² Such agreements may be considered “trade and investment framework agreements” or “relational agreements” that have a number of discrete binding commitments, which may fall on state or nonstate actors. Their content may focus largely on establishing engagement among trade partners without precise market access or tariff liberalization agreements.†²³³ This approach may provide negotiators broad latitude to pursue initiatives under IPEF, potentially focusing first on standards and regulatory aspects, capacity building, and trade facilitation. At the same time, the approach is specifically designed without relying on TPA, meaning there is limited transparency into IPEF’s implementation and few clear channels for congressional visibility into and direction over IPEF’s more specific goals.²³⁴

It may be challenging for IPEF members to achieve ambitious commitments among all of its 14 members within the next year. Still in its early stages, IPEF is expected to deliver stringent, high-standard rules while having a wide scope of countries and topics. IPEF member countries have significant differences in governance styles and levels of economic development along with varying degrees of tolerance for state economic intervention that make determining a widely applicable but high-standard rule difficult. As IPEF members may choose which pillars to participate in, economies already challenged by decarbonization goals or corruption may choose to avoid participating in these pillars entirely rather than committing to all of the pillars. Reports also circulated following a July 2022 meeting of IPEF ministers that many governments—from Japan to Malaysia—had requested that additional transition times be built into any commitments.²³⁵ In September 2022, IPEF members further published their negotiating objectives in all four pillars. All members

*In 2019, the United States negotiated a “mini deal” with Japan focused on digital trade and agriculture, “a departure from past U.S. FTA practice.” In lieu of a comprehensive, multisector negotiation, the Trump Administration negotiated the deal in a relatively short timeframe of around one year. While the deal was framed as a first-stage agreement, no additional talks on progressive phases have taken place. Content of the agreement did not require changes to U.S. law and relied on delegated tariff authorities under the 2015 TPA. Cathleen D. Cimino-Isaacs and Brock R. Williams, “U.S.-Japan Trade Agreement Negotiations,” *Congressional Research Service* IF11120, April 18, 2022.

†Congress has regularly delegated authority on tariff bargaining to the president with few limitations across different statutes. Additional legislation has established further delegation of negotiating authority to the president on agreements with nontariff barriers, though Congress maintains authority through voting power over nontariff barrier agreements that would significantly alter U.S. federal law. Jane M. Smith, Daniel T. Shedd, and Brandon J. Murrill, “Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather than Treaties,” *Congressional Research Service* 97-896, April 15, 2013.

signed onto almost all of the pillars—with the exception of India on the trade pillar. The trade pillar outlined goals in nine areas:

- Labor rights protection and workforce development;
- Environmental protection, conservation, and sustainability;
- Digital economy growth built on trusted and secure cross-border data flows and responsible development and use of emerging technologies;
- Food security and sustainable agriculture,
- Transparency and good regulatory practices;
- Competition policy and consumer protection policies;
- Trade facilitation and customs cooperation;
- Inclusive distribution of trade benefits across communities; and
- Technical assistance and economic cooperation.²³⁶

Even if IPEF does not follow the format of a traditional trade agreement, agreement on standards and norms between developing and developed countries is likely to prove difficult around the tax and anticorruption pillar as well as the decarbonization and infrastructure pillar. These can be particularly difficult for governments in developing countries with less interest or fewer resources to dedicate to anticorruption efforts or that lack the capital to make significant changes to emissions and infrastructure.²³⁷ Experts such as Wendy Cutler, vice president of the Asia Society Policy Institute and former USTR negotiator for TPP, believe it will be easier and faster for members to reach consensus on digital trade commitments.²³⁸

The Chinese government clearly sees IPEF as a threat to its position and relative influence in the Indo-Pacific. In an interview with Chinese media, Foreign Minister Wang Yi indicated it was an initiative designed to “create division and confrontation.”²³⁹ Chinese officials appear particularly concerned with IPEF’s focus on supply chains, viewing this effort as a direct threat to China’s predominance in supply chains and technological advancement.²⁴⁰ Minister Wang has also repeatedly decried IPEF for encouraging “technological decoupling” despite the Chinese government’s own recently intensified drive for self-sufficiency and its dual circulation strategy.²⁴¹ In another sign of Beijing’s insecurities, Chinese officials have publicly tried to dissuade other governments from joining IPEF, such as Bangladesh and South Korea.²⁴² Despite Chinese pressure, South Korea is one of the founding members of IPEF, while Bangladesh’s Foreign Minister Abu Kalam Abdul Momen stated in June 2022 that the government is still studying IPEF and considering Bangladesh’s specific interests.²⁴³

Implications for the United States

China’s abuses of the global trading system have cost U.S. workers millions of jobs in the years since the country’s accession into the WTO, leaving deep and lasting scars on U.S. industries and communities. Through repeated bad faith commitments under its multilateral and bilateral agreements, Beijing has also severely undermined the rules-based system. Neither dialogue nor previous action has

changed Beijing's behavior, forcing the United States to reconsider the approach it has taken over the last two decades. As Beijing increases state direction over the economy, becomes more inclined to weaponize supply chains, and pursues other coercive economic actions, the United States and likeminded allies are seeking a better understanding of the broad economic and security vulnerabilities from overdependency on China.

To be effective, new policy approaches must consider not only the effects on Chinese firms but also the influence on U.S. companies and investors. In the effort to expand market access into China, U.S. companies have both willingly and unwittingly surrendered sensitive technologies and information to Chinese partners and the Chinese government. In the face of China's massive subsidization and excess capacity, U.S. firms will continue to struggle on an uneven global playing field. Absent policy changes, U.S. government assistance may be insufficient for U.S. firms that have been harmed by these practices. Meanwhile, U.S. investment continues to flow into China, directly funding state-driven initiatives for Chinese firms as well as China's military-industrial complex. The transfer of U.S. technologies in both of these processes may have increased short-term profits, but it has long-term consequences for U.S. industrial competitiveness.

Appendix I: U.S. Agencies' Role in Assessing the Impact of Foreign Economic Policies on the United States

Agency	Analytical Capabilities
Central Intelligence Agency	<p><i>Responsibilities:</i> Monitor macroeconomic and microeconomic issues, analyze economic-related threats to U.S. security, address global issues critical to U.S. competitiveness, assess illicit financial activities.</p> <p><i>Key Offices:</i> China Mission Center, Transnational and Technology Mission Center.</p>
Department of Commerce, International Trade Administration	<p><i>Responsibilities:</i> Monitor foreign governments' compliance with their obligations under the WTO Subsidies Agreement, track subsidy practices worldwide, monitor the effect of international trade and investment policies on U.S. manufacturing competitiveness, research specific sectors and industries abroad.</p> <p><i>Main Publications:</i> <i>Subsidies Enforcement Annual Report</i> (published with the USTR).</p> <p><i>Key Offices:</i> Enforcement and Compliance, Industry and Analysis.</p>
Department of Labor, Employment and Training Administration	<p><i>Responsibilities:</i> Monitor eligibility of Trade Adjustment Assistance (TAA)* applicants, investigate trade-related job losses in the United States, conduct Section 224 of the Trade Act of 1974 investigations on TAA eligibility in a trade-affected domestic industry.</p> <p><i>Main Publications:</i> <i>Annual Report to Congress</i>.</p>
Department of State, Division for Trade Policy and Negotiation	<p><i>Responsibilities:</i> Negotiate and enforce bilateral and multilateral trade agreements, hold dialogues at the bilateral and multilateral levels on trade issues, coordinate with U.S. ambassadors and diplomats located abroad on economic issues.</p> <p><i>Key Offices:</i> Office of Multilateral Trade Affairs, Office of Bilateral Trade Affairs, Office of Agricultural Policy, Office of Intellectual Property Enforcement.</p>
Department of the Treasury	<p><i>Responsibilities:</i> Monitor and provide support for international monetary and financial policy coordination, monitor the foreign exchange and macroeconomic policies of trading partners, provide technical assistance to developing countries' finance ministries and central banks, gather information about the financial affairs and malign financial activity of foreign entities to support law enforcement and related activity, assess financial risks to the U.S. economy, analyze foreign entities to target economic and trade sanctions.</p> <p><i>Main Publications:</i> <i>Macroeconomic and Foreign Exchange Policies of Major Trading Partners</i>.</p> <p><i>Key Offices:</i> Office of International Affairs, Office of Intelligence and Analysis, Office of Technical Assistance.</p>

*The TAA program entered a phased termination on July 1, 2022 under the provisions of the Trade Adjustment Assistance Reauthorization Act of 2015. Eligible workers whose petitions were certified prior to that date will continue to receive benefits, however the agency is not able to conduct new investigations or certify petitions for new groups of workers. Congressional Research Service, "Trade Adjustment Assistance for Workers: Background and Current Status," CRS R 47200, August 2, 2022; U.S. Department of Labor, Employment and Training Administration, *TAA Termination Impacts: By the Numbers*, 2022.

**Appendix I: U.S. Agencies' Role in Assessing the Impact
of Foreign Economic Policies on the United States—
Continued**

Agency	Analytical Capabilities
Director of National Intelligence	<p><i>Responsibilities:</i> Incorporate the intelligence community's economic analysis with non-U.S. government intelligence reports; support the counterintelligence and security activities of the intelligence community, the U.S. government, and relevant U.S. private sector entities.</p> <p><i>Main Publications:</i> <i>Global Trends</i> report, <i>Foreign Economic Espionage in Cyberspace</i>.</p> <p><i>Key Offices:</i> National Intelligence Council, National Counterintelligence and Security Center.</p>
International Trade Commission	<p><i>Responsibilities:</i> Conduct AD/CVD investigations; conduct Section 332 of the Trade Act of 1932 general fact-finding investigations on issues involving tariffs, international trade, and the conditions of competition between U.S. and foreign industries; investigate IP rights infringement; analyze trade, tariff, and competitiveness issues.</p> <p><i>Main Publications:</i> <i>Year in Trade</i>, <i>Executive Briefings on Trade</i>, <i>Journal of International Commerce and Economics</i>, <i>Tariff Database and Harmonized Tariff Schedule</i>, <i>Staff Research</i>.</p> <p><i>Key Offices:</i> Office of Analysis and Research Services, Office of Economics, Office of Industries, Office of Investigations, Office of Unfair Import Investigations.</p>
U.S. Trade Representative	<p><i>Responsibilities:</i> Negotiate bilateral and multilateral agreements, resolve disputes, hold dialogues in global trade policy organizations, assess the development and implementation of U.S. trade and investment policy with foreign economies, track the compliance of trade partners with WTO commitments, coordinate efforts to monitor and enforce FTAs across the U.S. government.</p> <p><i>Main Publications:</i> <i>Report to Congress on China's WTO Compliance</i>, <i>Special 301 Report</i>.</p> <p><i>Key Offices:</i> Interagency Center on Trade Implementation, Monitoring, and Enforcement.</p>

Appendix II: Arsenal of U.S. Trade Tools

Statutory Tool	Brief Summary
Antidumping & Countervailing Duty Orders Tariff Act of 1930	<p><i>Intended Use:</i> Addresses dumping and subsidization of imports into the United States and material or threat of injury caused thereby.</p> <p><i>Possible End Result:</i> Imposition of AD/CVD orders/duties on imports.</p> <p><i>Presidential Involvement:</i> None; done via U.S. International Trade Commission (USITC) and Commerce's International Trade Administration (ITA).</p> <p><i>Historical Frequency and Current Usage:</i> Most frequently used remedies (mostly via antidumping).</p>
Section 337 (Intellectual Property Violations & Other Unfair Trade Practices) Tariff Act of 1930	<p><i>Intended Use:</i> Addresses violations of IP, theft of trade secrets, and other similar unfair trade acts.</p> <p><i>Possible End Result:</i> Exclusion from U.S. market.</p> <p><i>Presidential Involvement:</i> President retains authority to deny relief.</p> <p><i>Historical Frequency and Current Usage:</i> Historically used for patent violations; recently broadened to include anti-trust violations and false designation of origin.</p>
Section 338 (Discrimination) Tariff Act of 1930	<p><i>Intended Use:</i> Addresses discrimination against U.S. commerce.</p> <p><i>Possible End Result:</i> New or additional duties up to 50 percent ad valorem and exclusion from U.S. market in some cases.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> Unused since 1949.</p>
Section 232 (National Security) Trade Expansion Act of 1962	<p><i>Intended Use:</i> The Commerce Department can be petitioned or self-initiate an investigation to determine if certain imports pose a threat to U.S. national security.</p> <p><i>Possible End Result:</i> Various forms of adjustment to imports.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> Historically common but unused for nearly two decades; most recently used in 2018 to impose tariffs following the Section 232 investigations on steel and aluminum imports.</p>
Section 122 (Balance of Payments) Trade Act of 1974	<p><i>Intended Use:</i> Addresses balance-of-payment deficits and disequilibrium or potential significant dollar depreciation.</p> <p><i>Possible End Result:</i> Imposition of import tariffs or quotas.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> Never been used.</p>

Appendix II: Arsenal of U.S. Trade Tools—Continued

Statutory Tool	Brief Summary
Section 201 (Global Safeguard) Trade Act of 1974	<p><i>Intended Use:</i> Following an administration or industry petition, the USITC investigates whether a product's import volume causes serious injury to a domestic industry.</p> <p><i>Possible End Result:</i> Imposition of import restrictions such as tariffs, quotas, tariff-rate quotas, and other negotiated agreements.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> Frequently used in the 1970s and early 1980s with sharp decline in usage thereafter; two cases filed with the USITC in 2017.</p>
Section 301 (Burden/Restriction on U.S. Commerce) Trade Act of 1974	<p><i>Intended Use:</i> The USTR can be petitioned by industry or self-initiate an investigation to impose trade remedies on foreign countries that are “unjustifiable” or “unreasonable” and that burden U.S. commerce.</p> <p><i>Possible End Result:</i> Imposition of import duties or other restrictions on commerce.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> Historically a common avenue of trade relief unused for several decades before USTR initiation of investigation on China's practices in 2017.</p>
Section 406 Trade Act of 1974	<p><i>Intended Use:</i> Addresses market disruptions caused by imports from a communist country (i.e., countries not receiving nondiscriminatory tariff treatment, or Most Favored Nation [MFN]).</p> <p><i>Possible End Result:</i> Imposition of tariffs, quotas, or other restrictions as determined by the president.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> Used from late 1970s into early 1990s, mostly against China; unused since 1993.</p>
Defense Production Act (DPA) 1950	<p><i>Intended Use:</i> Grants the president expansive authority to influence and ensure the domestic industrial base is prepared to serve national security.</p> <p><i>Possible End Result:</i> The president can allocate and prioritize contracts for critical and strategic goods (Title I), expand productive capacity through direct financial incentives (e.g., loans and purchase agreements) (Title III), and engage in voluntary agreements with private industry (Title VII).</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> The DPA has been in near constant use by the Department of Defense, has more recently been used extensively during the COVID-19 pandemic, and is being actively considered for other uses (such as increasing rare earth mineral processing).</p>

Appendix II: Arsenal of U.S. Trade Tools—Continued

Statutory Tool	Brief Summary
International Emergency Economic Powers Act (IEEPA) 1977	<p><i>Intended Use:</i> Grants the president the ability to declare a “national emergency” in the face of “unusual and extraordinary threat[s] to the national security and foreign policy of the United States” and take sweeping authority over international economic transactions.</p> <p><i>Possible End Result:</i> Under this authority, the president can impose tariffs, quotas, or outright denials on any and all foreign trade and financial transactions globally or between specific geographies.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Current Usage:</i> IEEPA has been used to block all imports and exports from specific countries (e.g., Nicaragua in 1985). The act has not yet been used to impose tariffs, though the Trump Administration threatened to do so against Mexico. In 1971, then President Richard Nixon used the predecessor law, the Trading with the Enemy Act, to impose 10 percent tariffs on all dutiable imports into the United States.</p>
Committee on Foreign Investment in the United States (CFIUS)	<p><i>Intended Use:</i> An interagency committee chaired by the U.S. Department of the Treasury to review “covered” inbound FDI for national security threats, in particular mergers and acquisitions, which—following FIRRMA—includes minority private equity investments and U.S.-Chinese joint ventures.</p> <p><i>Possible End Result:</i> Forced divestiture, blocking of financial transactions, or negotiation of mitigation agreements.</p> <p><i>Presidential Involvement:</i> Presidential action required.</p> <p><i>Historical Frequency and Usage:</i> Prior to 2007, CFIUS investigated fewer than ten cases every year. However, investigations have increased substantially, with over 150 in 2017 and 2018 and 88 in 2020.</p>
Export Controls	<p><i>Intended Use:</i> Prevents adversaries from accessing specific dual-use or defense technologies.</p> <p><i>Possible End Result:</i> Export controls are applied in three ways: technology-based controls (e.g., Commerce Control List); end use (targets the anticipated use of technology exports); and end user (targets entities).</p> <p><i>Presidential Involvement:</i> The executive branch is responsible for identifying and controlling technologies for export, principally falling on the Department of Commerce for dual-use technologies, while the U.S. Department of State is responsible for controlling defense technologies.</p> <p><i>Historical Frequency and Current Usage:</i> The current system of export controls is based on the Export Administration Act of 1979. The Export Control Reform Act of 2018 created a permanent statutory authority to control the export of dual-use goods as well as certain military items.</p>

Source: Adapted from Bruce Malashevich and Mark Love, “Trade Defense Instruments: The Leading Edge of U.S. Trade Policy,” in Marc Bungenberg et al., eds., *The Future of Trade Defense Instruments*, October 2018, 233–260.

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