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The Biden Administration's Emerging Economic Approach on China:

Trade, Technology, and Strategic Industrial Policy in the Age of "Extreme Competition"

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Cover Image: U.S. President Joe Biden prepares to sign a series of executive orders at the Resolute Desk in the Oval Office just hours after his inauguration on January 20, 2021 in Washington, DC. Biden became the 46th president of the United States earlier today during the ceremony at the U.S. Capitol. (Photo by Chip Somodevilla/Getty Images)

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Executive Summary

On January 20, 2022, President Joseph Biden marked his first year in office as the 46th president of the United States. At this time last year, observers had likened his 'Build Back Better' agenda to President Franklin Roosevelt's 'New Deal'. Both were forged at a time of record unemployment and economic despair. Both paid obeisance to the firm hand of an activist state. The 'New Deal' aimed to pull the U.S. out of the Great Depression through massive government programs; the 'Build Back Better' agenda aims to spend trillions of dollars to—quoting the President—"rebuild the backbone of the country" and "grow the economy from the bottom up and the middle out." One year in, President Biden hasn't quite been the second coming of Franklin Delano Roosevelt but he has been the closest thing to him in almost eight decades.

At this time last year when Mr. Biden assumed office, a number of questions had also swirled on the horizon of U.S.-China trade and technology ties. Would President Biden rescind or modify the technology controls that his predecessor had imposed from May 2019-on in order to constrain, if not suppress, China's rise? Would he steer the U.S. government away from its decoupling-based theories and press China instead to keep structurally opening up and reforming its domestic marketplace? And more broadly, would the Biden administration's China trade, technology and investment policy approach mark a break from the Trump administration's hostile approach towards Beijing?

In the event, the Biden administration's policy approach towards China bears large similarities with the Trump administration's approach. The elements of continuity far outweigh the points of divergence. Only in the area of strategic industrial policy (i.e., state activism and intervention to steer the industrial economy towards specific industries) does the Biden administration's approach differ markedly from that of its predecessor. Fixated as the Trump presidency was on a punitive, leverage-based strategy *vis-à-vis* Beijing, it failed to pay due attention to making the necessary strategic industrial policy investments at home.

The continuity in the Biden administration's trade, technology and investment policy approach towards China is most acutely evident in the area of technology controls. During its last 18 months in office, the Trump administration had issued a veritable blizzard of executive orders and rulemaking intended to bar Chinese access to high-tech items, notably chips and chipmaking equipment, and thereby initiate a process of selective decoupling of the U.S. and Chinese economies. Many of these orders had been drafted in haste, and the Biden administration spent much of the first half of 2021 sorting through these orders and rules. Its ensuing remedies ranged from the outright voiding of a deeply compromised Trump-era order to the methodical stripping-out and revision of deficient provisions within a Trump-era rule to the amplification, not narrowing-down, of scope and coverage of a Trump-era order. Overall, though, the Biden administration retained both the overarching purpose as well as the kernel of the Trump administration's approach on technology controls: it sought not so much to encourage China to cooperate and abide by rules-based, pro-market standards as it sought—and continues to seek—to constrain China's technological rise.

As for the Biden administration's "new approach" on trade policy towards China, unveiled by United States Trade Representative (USTR) Katherine Tai in an important speech in early October 2021, it can best be summarized as 'old wine in a new bottle.' The approach is awfully similar in substance, although not in tone, to her predecessor's approach. In her remarks, USTR Tai had made two overarching points. First, that trade and tariff policy was a component of the administration's broader worker-focused agenda and that trade policy would take a relative backseat until the administration's infrastructure-building, competitiveness, and worker training agenda had been put into motion. Second, that the U.S. did not seek to decouple from China but would rather insist on reframing the terms of its 'recoupling.' On the immediate trade and tariff policy challenges concerning China though—the future of the Phase One trade agreement; negotiation of Phase Two 'structural' issues; readjustment of Section 301 tariffs; 'architecture' of USTR's engagement with Chinese counterparts, etc.—the Biden administration continues to remain, both, reticent and indecisive. And to the extent that clarity has been provided, it bears more in common than differs from the Trump administration's policies. The Biden policy team's constricted focus on trade enforcement and inability to spell out a concrete agenda of regional and multilateral trade liberalization so far is also a matter of concern.

Strategic industrial policy has been the one key area of difference between the Biden administration and the Trump administration's economic policy approaches towards China. Framed in the context of outcompeting China in this new era of "extreme [strategic] competition," the Biden administration's planned interventions under its Supply Chain Resilience plan are geared to utilizing existing statutory authorities to encourage and expand the domestic advanced manufacturing base, especially for critical supply chains (semiconductors, large-capacity batteries, critical materials, etc.). The range of envisaged Executive Branch policy interventions extends from a mix of investment incentives; research, production, as well as consumer-facing tax credits; matching cost-share grant and loan programs; expanded procurement preferences; selective imposition of import tariffs; support for basic and applied research; and the leveraging of government-sponsored IP to promote the diffusion of manufacturing technologies. At this time, important China competitiveness-related legislation is also awaiting action on the Hill. During the

Trump years, there was precious little political capital invested in these lines of effort, aside from the imposition of blanket tariffs across wide swathes of the manufacturing economy to provide protection from Chinese imports.

All told, the Biden administration's agenda constitutes one of the most ambitious and activist efforts to forge economy-wide 'industrial policy' outcomes since the end of the Second World War. Only time will tell whether this effort has been effective in revitalizing the U.S.' manufacturing economy as it races to outcompete China in the key advanced technology-enabled sectors that underpin the Fourth Industrial Revolution. Hopefully, during the interim, this ambitious industrial policy effort will also incentivize the administration to take a relook at its lagging trade liberalization strategy as well as its heavy-handed technology controls policies that could inadvertently lead to the 'designing out' of certain important U.S. technologies from global supply chains.

PART I
The Biden Administration's Emerging Approach on Technology Controls

What its Handling of Three Trump-era Executive Orders Say

Key Takeaways

- The Trump administration had issued a blizzard of U.S.-China decoupling-related Executive Orders and rulemaking in its first year in office, with a focus on the digital economy and advanced manufacturing sectors. Some were drafted in haste shoddily, and the Biden administration is currently sorting through these orders and regulations.
- A common feature of the Biden administration's emerging approach on technology controls is its refusal to be rushed into a hasty rollout of revised policies and rules without broad internal vetting or external stakeholder input. A few admittedly unsatisfactory Trump-era rules continue to survive on the books during this interim, as a result. There has been no knee-jerk revocation of a Trump-era rule.
- Where the Biden administration has reached an internal consensus on a Trump-era technology controls rule, it has implemented a variety of responses. These range from the outright voiding of a deeply compromised Trump-era Executive Order to the methodical stripping-out and revision of deficient provisions within a Trump-era Rule to the amplification—not narrowing-down—of scope and coverage of a Trump-era Executive Order.
- By-and-large, the overarching purpose of the Biden administration's emerging approach on technology controls bears similarities with the Trump team's approach: it seeks not so much to encourage China to cooperate and abide by rules-based, pro-market standards as it seeks to constrain China's technological rise.

Introduction

The first year of the Biden administration has witnessed a great deal more of continuity than discontinuity with the last year of the Trump administration's policies on U.S.-China relations. This is true of trade, investment and technology exchanges—including technology controls—too.

This having been said, there has also been a slow and imperceptible process of walking back some of the excesses of the Trump years. During its last eight months in office in particular, the Trump administration had issued a blizzard of U.S.-China decoupling-related Executive Orders and rulemaking, with a focus on the digital economy and advanced manufacturing sectors. How the Biden administration has approached the re-writing of these orders, rules and regulations provides an early insight into its emerging approach on U.S.-China decoupling-related technology controls. While stressing broad continuity with the Trump administration's actions, the trendline contains a series of nuanced shifts too.

Biden Administration and Key China Trade and Investment Policy-linked Orders and Actions
(January – December 2021)

- On December 23, 2021, President Biden signed into law the **Uyghur Forced Labor Prevention Act** (UFLPA),[1] following its passage in Congress on December 16. The UFLPA imposes an expansive import ban on goods mined or produced in China's Xinjiang Uyghur Autonomous Region (XUAR) or made with 'forced labor' from the XUAR.
- On December 16, 2021, the Department of Commerce added **37 entities to its Entity List to "deter misuse of biotechnology"** and other technologies "for military applications and human rights abuses."[2] Of the 37 entities, more than 30 are located in China and include the Academy of Military Medical Sciences (AMMS) and 11 of its research institutes.
- On December 16, 2021, the Department of Treasury identified **eight Chinese technology firms as part of the "Chinese Military-Industrial Complex"** for their alleged active support for "the biometric surveillance and tracking of ethnic and religious minorities in China."[3] Accordingly, U.S. persons are prohibited from purchasing or selling certain publicly traded securities connected with these entities.
- On December 10, 2021, the Department of Treasury imposed sanctions and investment restrictions on a number of Chinese individuals and entities for alleged human rights abuses, including through the **"malign use" of "surveillance technology."**[4]
- Also, on December 10, 2021, the Biden Administration announced an **Export Controls and Human Rights Initiative** to develop a voluntary code of conduct to guide export licensing policy and stem the tide of authoritarian government misuse of technology.[5] The Initiative was launched at the Summit for Democracy in partnership with Australia, Denmark and Norway.
- On November 26, 2021, the Department of Commerce published a **Notice of Proposed Rulemaking to amend the scope of** the Trump-era Interim Final Rule on Securing the Information and Communications Technology and Services Supply China (**the "ICTS Rule"**). The notice proposes to include "connected software applications" to the list of "Covered ICTS Transactions."[6]
- On November 24, 2021, the Department of Commerce added **eight China-based technology entities to the Entity List** "to prevent U.S. emerging technologies from being used for the PRC's quantum computing efforts that support military applications."[7] These technologies include counter-stealth and counter-submarine applications as well as the ability to break encryption or develop unbreakable encryption.
- On September 24, 2021, the Department of Commerce issued a **Notice of Request for Public Comments on Risks in the Semiconductor Supply Chain.** As per this September 24 notice, the Department of Commerce requested "foreign and domestic entities that actively participate in the semiconductor product supply chain at any level" to submit data on their purchase and sales situation in an effort to assess and address the ongoing supply chain crisis.[8] The results of the semiconductor supply chain request for information was released on January 25, 2022.[9]

- Also on September 24, 2021, the Department of Commerce initiated an **investigation under Section 232 of the Trade Expansion Act of 1962** to determine the effects on U.S. national security from **imports of Neodymium-iron-boron (NdFeB) permanent magnets.**[10] NdFeB magnets have important dual use applications, and the Commerce Secretary has until June 18, 2022 to recommend to the President if tariffs should be imposed on magnet imports from a national security perspective.

- On July 30, 2021, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration jointly issued a **Proposed Rule**, billed as "the most robust changes to the **implementation of the Buy American Act** in almost 70 years."[11] The proposed rule would make three major changes to existing procurement-related regulations: 1) raise the domestic content threshold; 2) allow for enhanced price preference for critical items and components; and 3) impose additional transparency related reporting requirements. The proposed rule is meant to implement President Biden's January 25, 2021 'Made in America' Executive Order.[12]

- On July 16, 2021, the U.S. Department of Commerce, along with the Departments of State, the Treasury, and Homeland Security, jointly issued a **Hong Kong Business Advisory**.[13] This advisory warned businesses about "the new legal landscape" in Hong Kong and four categories of potential risks associated with Hong Kong operations of their businesses: 1) risks for businesses following the imposition of the National Security Law; 2) data privacy risks; 3) risks regarding transparency and access to critical business information; and 4) risks for businesses with exposure to sanctioned Hong Kong or PRC entities or individuals. A similar **Xinjiang Supply Chain Business Advisory** was also posted on July 13, 2021.[14]

- On July 9, 2021, President Biden issued a **sweeping competitiveness-related Executive Order** which directs several federal agencies to advance pro-market competition principles as well as vigorously enforce anti-trust laws across a range of economic sectors.[15] The order also established a **White House Competition Council** within the Executive Office of the President.

- On July 9, 2021, the Department of Commerce added **34 entities to the Entity List**.[16] According to the Department, 14 of these entities are based in China and have "enabled Beijing's campaign of repression, mass detention, and high-technology surveillance" in Xinjiang while five entities are "directly supporting PRC's military modernization programs related to lasers and C4IS."

- On June 24, 2021, the Department of Commerce added **five Chinese entities to the Entity List** for their alleged acceptance or utilization of forced labor "in the implementation of the People's Republic of China's campaign of repression against Muslim minority groups in the Xinjiang Uyghur Autonomous Region (XUAR)."[17] The sanction targets the ability of the Chinese entities to access commodities, software, and technology. As announced by the State Department, this action is part of the joint efforts by the Departments of Homeland Security, Commerce, and Labor to address "China's ongoing human rights abuses and use of forced labor in Xinjiang."[18]

- On June 24, 2021, U.S. Customs and Border Protection issued a **Withhold Release Order (WRO)** targeting a Chinese entity, Hoshine Silicon Industry Co. Ltd, thereby prohibiting the importation of silica-based products made by Hoshine. Silica is a raw material used to make components for solar panels and electronics.[19]

- On June 17, 2021, the Federal Communications Commission issued a **Proposed Rule to change the FCC's equipment authorization rules** and competitive bidding processes in order to block "insecure" devices from the U.S. market that might pose a national security threat.[20]
- On June 9, 2021, President Biden issued an **Executive Order on Protecting Americans' Sensitive Data from Foreign Adversaries**, which revoked former President Trump's E.O.'s 13942, 13943 and 13971 pertaining to the threat posed by TikTok, WeChat, and Applications and Other Software Developed or Controlled by Chinese Companies, respectively.[21]
- On June 8, 2021, the White House released its four **100-Day Supply Chain Review-related reports**,[22] pursuant to President Biden's February 2021 Executive Order.[23] The reports identify risks in the supply chains for semiconductor manufacturing and advanced packaging supply chains, for high-capacity batteries including electric vehicle batteries, for strategic minerals including rare earth elements, as well as for pharmaceuticals and active pharmaceutical ingredients.
- On June 3, 2021, Biden signed **Executive Order 14032: Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China.**[24] This E.O. not only clarified Trump's E.O. 13959, signed on November 12, 2020, but also updated the number of Chinese military-linked and surveillance technology sector-linked private companies barred from U.S. investment.[25]
- On May 28, 2021, U.S. Customs and Border Protection issued a **Withhold Release Order (WRO)** on Dalian Ocean Fishing, a Chinese distant-water fishing company for forced labor-related violations.[26] Unusually, the entire fleet of fishing vessels owned by the company is subject to the WRO. Typically, WROs are issued for individual vessels found to be using forced labor.
- On April 8, 2021, the Department of Commerce added **seven Chinese supercomputing centers to the Entity List**, restricting trade with these entities.[27] In her accompanying statement, Secretary Gina Raimondo noted that "supercomputing capabilities are vital for the development of many—perhaps almost all—modern weapons and national security systems…[and that the] the Department of Commerce would use the full extent of its authorities to prevent China from leveraging U.S. technologies to support these destabilizing military modernization efforts."
- On February 24, 2021, President Biden issued an **Executive Order on America's Supply Chains,** aiming to "strengthen the resilience of America's supply chains."[28]
- On January 25, 2021, President Biden issued an **Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers**, ordering the United States government to, when possible and consistent with applicable law, procure goods and services "from sources that will help American businesses compete in strategic industries and help America's workers thrive."[29]
- On January 21, 2021, President Biden issued an **Executive Order on a Sustainable Public Health Supply Chain**, directing immediate actions to secure supplies necessary for combating the COVID-19 pandemic.[30]

Going with the Flow
On Trump's ICTS Supply Chain Executive Order

Key Takeaway: *When undecided on key policy principles as well as on policy details related to technology-related export and/or investment controls, the Biden White House will not be rushed in its decision-making processes. There will be no knee-jerk revocation of an admittedly unsatisfactory Trump-era rule, which continues to survive as the functioning regulation governing cross-border technology exchange. The plan though is to methodically devise a successor policy—and regulation—by way of a parallel process which incrementally strips out and supersedes the shortcomings of the Trump-era rule.*

Two weeks after the early-May 2019 collapse of the U.S.-China 100-Day talks that were initiated by President Trump and President Xi at the G20 summit in Buenos Aires, the Trump administration issued its **Executive Order on Securing the Information and Communications Technology and Services (ICTS) Supply Chain**.[31] The order declared a national emergency on the basis of the finding that:

> *...foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services... [and] that the unrestricted acquisition or use in the United States of information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the ability of foreign adversaries to create and exploit vulnerabilities in information and communications technology or services, with potentially catastrophic effects [to U.S. national security].*

In light of this finding, the President tasked his Commerce Secretary to issue:

> *...rules and regulations [that would] among other things, determine that particular countries or persons are foreign adversaries for the purposes of this order; identify persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries for the purposes of this order; identify particular technologies or countries with respect to which transactions involving information and communications technology or services warrant particular scrutiny under the provisions of this order; establish procedures to license transactions otherwise prohibited pursuant to this order; [and] establish criteria... by which particular technologies or particular participants in the market for information and communications technology or services may be recognized as categorically included in or as categorically excluded from the prohibitions established by this order.*

The ICTS Supply Chain EO, and initial rulemaking in its regard, was roundly criticized by the business and policy community at the time as being excessively opaque and alarmingly broad.

The U.S. Chamber of Commerce noted that the rulemaking "would provide the [Commerce] Department with nearly unlimited authority to interfere in virtually any commercial transaction that covers a substantial portion of the U.S. economy," IBM called the rule "massively overbroad," adding that key terms and definitions are so vague they appear "to subject hundreds of billions of dollars of legitimate U.S. commerce to vague and arbitrary government regulation." And other industry bodies asked the Commerce Secretary to more narrowly define the meaning of the words "transactions," "acquisition," "importation," "transfer" and "installation" and provide the needed clarity.

On the strength of this Executive Order (and a related one also in May 2019), the Commerce Department nevertheless proceeded to impose its draconian export control denials on Huawei (supplement by orders in August 2019, May 2020, and August 2020). The *Financial Times* had characterized the actions at the time as a "serious miscalculation" and called on the U.S. and the West "not to block China's rise but encourage it to cooperate in a rules-based system."[32] Disregarding industry, specialists and media opinion, the Trump administration on its second-to-last day in office (January 19, 2021) proceeded to hurriedly rush through an **'Interim Final Rule' to implement the May 2019 Securing the Information and Communications Technology and Service (ICTS) Supply Chain E.O**.[33] The Interim Final Rule defines and identifies six "foreign adversaries" (China, Russia, North Korea, Iran, Cuba, Venezuela's Maduro regime) and an unusually broad range of ICTS supply chain-related categories in the case of which the Commerce Secretary would enjoy extensive discretion to evaluate and deny any ICTS supply chain-related transaction.

The Interim Final Rule was met with immediate alarm on the part of U.S. business. The following day, on January 20, 2021, the incoming Biden White House issued an overarching memo authorizing relevant executive branch departments to "consider" postponing the effective date of rules that had been proposed by the Trump administration but which had yet to take effect. In spite of this authority to suspend the ICTS order-related Interim Final Rule, on March 22, 2021 (60 days after its issuance), the Biden administration's Commerce Department stayed its hand and allowed the Rule to take effect.

On a parallel track, the Biden White House and Commerce Department are conducting a bottom-up policy review of the security of supply chain vulnerabilities. Four reports on the semiconductor manufacturing, high-capacity batteries, strategic materials, and pharmaceutical supply chains have already been submitted to guide the policy decision process. Essentially, until the Biden White House gets to decision-point on next steps forward on emerging technologies and the ICTS supply chains, the unusually broad Trump-era Interim Final Rule will continue to stand as the functioning regulation guiding cross-border technology exchanges—and controls. And while the Trump-era ICT Interim Final Rule will almost certainly not survive in its current form, the means of its supersedure by the Biden White House will be an incremental and methodical one.

Supply Chain Rule and Broad Range of Information and Commercial Technology and Services (ICTS) Categories

- Certain ICTS that will be used by a party to a transaction in a sector designated as "critical infrastructure" by Presidential Policy Directive 21 (PPD-21). Notably, there are 16 such sectors, including energy, emergency services, the defense industrial base, critical manufacturing, and many sub-sectors within those categories.

- Software, hardware, or any other product or service integral to:
  - Wireless local area networks
  - Mobile networks
  - Satellite payloads
  - Satellite operations and control
  - Cable access points
  - Wireline access points
  - Core networking systems
  - Long- and short-haul networks

- Software, hardware, or any other product or service integral to data hosting or computing services that uses, processes, or retains, or is expected to use, process, or retain, sensitive personal data on greater than one million U.S. persons at any point over the twelve months preceding an ICTS Transaction, including:
  - Internet hosting services
  - Cloud-based or distributed computing and data storage
  - Managed services
  - Content delivery services

- Internet-enabled sensors, webcams, end-point surveillance or monitoring devices, modems and home networking devices, or drones or any other unmanned aerial system, if greater than one million units have been sold to U.S. persons at any point over the twelve months prior to an ICTS Transaction;

- Software designed primarily for connecting with and communicating via the Internet that is in use by greater than one million U.S. persons at any point over the twelve months preceding an ICTS Transaction, including desktop applications; mobile applications; gaming applications; and web-based applications; OR

- ICTS integral to: artificial intelligence and machine learning, quantum key distribution, quantum computing, drones, autonomous systems or advanced robotics.

Modified with a Scalpel
On Trump's Chinese Military-Civil Fusion-related Executive Order

***Key Takeaway:** When decided on key policy principles as well as on particulars related to technology-related export and/or investment controls, the Biden White House will not hesitate to methodically update or revoke the offending provisions of an existing Trump-era rule, while maintaining the overall policy kernel of that Trump-era rule. Amendments to the rule could cut either way—i.e., its scope could be expanded, if desired, or contrarily its application limited, depending on the merits.*

Pursuant to Section 1237 of the National Defense Authorization Act ("NDAA") for Fiscal Year 1999, successive U.S. presidents have had the authority since 1999 to create a list of foreign companies that are generally linked to or "owned or controlled by the People's Liberation Army" in which U.S. persons are prohibited from transacting in their publicly traded securities. Until June 2020 however, no such list had been furnished by any administration.

On November 12, 2020 (notably after his loss in the presidential election), President Trump signed an **Executive Order (E.O.) titled Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies**, which stipulated that starting January 11, 2021, U.S. persons would be prohibited from transacting in the publicly traded securities of 31 companies that the Department of Defense had identified as **"Communist Chinese Military Companies."**[34] (The November 2020 Executive Order should not be confused with the Final Rule expanding the China-related "military end user" list, issued by the Commerce Department's Bureau of Industry and Security in April 2020.[35]) The E.O. was poorly drafted, leaving important terms such as "transaction," "publicly traded," "purchase for value," etc., vaguely defined. Worse, Chinese smartphone giant Xiaomi Corp. was dragged into the "Communist Chinese Military Companies" designated list on the basis of a mere news article that (wrongly) accused it of alleged links to the Chinese military.

On June 3, 2021, following an internal review, the Biden administration issued its own **Executive Order, Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China**,[36] which while preserving the broad outlines of the Trump-era order, is notable for its revisions on a number of counts.

First, it replaces and supersedes the operative provisions of the Trump-era order with much greater specificity. While retaining the key securities law concepts from the Trump-era order, the Biden EO provides enhanced definitional clarity of these securities law concepts as well as with regard to their scope of applicability.

Second, **the Biden administration E.O. scales up—not down—the number of Chinese entities**, and sectors, to which the prohibition (of purchase or sale of publicly traded securities) applies. The Biden list now includes 59 entities determined to operate (or to have operated) in the defense and related materiel sector, or the surveillance technology sector, of the Chinese economy. Of the 59 entities, 26 are new entrants that did not feature in the Trump-era list. Sectorally, the "surveillance technology sector" is a totally new addition and a number of

Chinese entities that develop or use surveillance technology "to facilitate repression or serious human rights abuse" are also listed.

Third, **the Biden administration E.O. doesn't only add entities to the list; it drops entities too.** The placement of two Chinese companies—Xiaomi and Luokung—is revoked for lack of evidence. As noted earlier, Xiaomi had been dumped into the list on the basis of a mere news article alleging a (non-existent) supposed link to the People's Liberation Army.

Finally, the Biden administration E.O. does away with the gratuitously insulting language in describing the prohibited entities. In order to tar these Chinese entities within the American political discourse, the Trump administration E.O. had disparagingly referred to the entities subject to the prohibitions as "Communist China Military Companies" – with the emphasis being on the 'Communist China' dimension. The Biden E.O. drops this label in favor of the more neutral "Chinese Military-Industrial Complex Companies" or "CMIC Companies."

The first domestically-made aircraft carrier of the Chinese Navy under construction, 17 June 2019.
Source: Wikimedia Commons, CC-BY-SA-4.0, Tyg728

At this time of writing, additional Chinese companies have been added to the "CMIC Companies" list. On December 16, 2021, the Treasury Department listed eight technology firms as "CMIC Companies," including Cloudwalk Technology, Co., and Megvii Technology Limited, for their role in supporting the biometric surveillance and tracking of domestic ethnic and religious minority groups.

Revoked with a Sledgehammer

On Trump's Data Security and Personal Information Protection-related Executive Orders

Key Takeaway: *When decided on broad policy principles but undecided on the policy details related to technology-related export and/or investment controls, the Biden White House will not hesitate to summarily tear down and revoke a deeply compromised Trump-era rule in its entirety if need be. But equally, it won't be rushed into a successor policy rule until a more considered review of the issues at hand is completed and an inter-agency wide consensus achieved.*

The Trump administration's August 6, 2020, **Executive Order on Addressing the Threat Posed by TikTok** (and a similar order regarding Wechat) is considered to be one of the most haphazard and poorly thought through technology policy directives released during its stint in office.[37] The order deemed TikTok to be a threat to "the national security, foreign policy and economy" of the U.S. and, by way of a related order issued a week later, TikTok's owner and developer, ByteDance, was ordered to forcibly divest the video-sharing app's U.S. operations within a stipulated time-period.

The order led to court challenges as well as an unseemly scramble featuring Oracle and Walmart attempting to purchase TikTok's U.S. operations with Trump's blessing—an attempt that failed to consummate. Undeterred, the Trump administration went ahead and issued yet another E.O. (**Addressing the Threat Posed by Applications and Other Software Developed or Controlled by Chinese Companies**) just two weeks prior to demitting office which widened the prohibitions on transactions related to Chinese connected software applications to include: Alipay, CamScanner, QQ Wallet, SHAREit, Tencent QQ, VMate, WeChat Pay, and WPS Office.[38] In the E.O., "connected software application" was defined as software, a software program, or group of software programs, designed to be used by an end user on an end-point computing device and designed to collect, process, or transmit data via the Internet as an integral part of its functionality.

On June 9, 2021, with one sledgehammer blow, the Biden Administration eviscerated the Trump-era orders on data security and personal information protection. Section 1 of its **Executive Order on Protecting Americans' Sensitive Data from Foreign Adversaries** starts with a wholescale revocation of the key 2020-21 Trump-era data protection orders.[39] It notes:

> *The following orders are revoked:* ***Executive Order 13942 of August 6, 2020*** *(Addressing the Threat Posed by TikTok, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain);* ***Executive Order 13943 of August 6, 2020*** *(Addressing the Threat Posed by WeChat, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain); and* ***Executive Order 13971 of January 5, 2021*** *(Addressing the Threat Posed by Applications and Other Software Developed or Controlled by Chinese Companies).*

The revocation is not the end of the matter though; it is in fact the beginning of a new and more deliberate review and revision phase of cross-border data and privacy protection policy, with a focus on potential adversaries. The Biden E.O. tasks the Commerce Secretary to provide a report and a set of accompanying recommendations for future executive and legislative branch actions to address the risk associated with foreign adversary owned, developed, manufactured or controlled connected software applications. Potential indicators of risk related to such connected software applications to be considered are to include:

- *ownership, control, or management by persons that support a foreign adversary's military, intelligence, or proliferation activities;*
- *use of the connected software application to conduct surveillance that enables espionage, including through a foreign adversary's access to sensitive or confidential government or business information, or sensitive personal data;*
- *ownership, control, or management of connected software applications by persons subject to coercion or cooption by a foreign adversary;*
- *ownership, control, or management of connected software applications by persons involved in malicious cyber activities;*
- *a lack of thorough and reliable third-party auditing of connected software applications;*
- *scope and sensitivity of the data collected;*
- *the number and sensitivity of the users of the connected software application;*
- *and the extent to which identified risks have been or can be addressed by independently verifiable measures.*

Following the June 9 EO, the Biden Commerce Department published a **Notice of Proposed Rulemaking** on November 26, 2021, requesting public comment on its proposal to include "connected software applications" within its lists of "Covered ICTS Transactions," as well as clarify the definition of the term to reflect the technical reality in the industry. And as for TikTok, the Commerce Department is said to be leaning in favor of a rule that would compel the platform to submit to mandatory third-party auditing, source code examination, and monitoring of the logs and data for privacy and security risks purposes.

The old Trump-era policy may be consigned to the dustbin but a more considered policy and rulemaking on cross-border data security and personal information protection that is applicable to China is still in the making. The aim is to avoid the pitfalls of the rushed Trump-era E.O. as well as generate wider consensus across relevant government agencies and industry stakeholders.

Concluding Thoughts

Overall, the Biden administration has tended to move out cautiously with regard to revising the various U.S.-China technology controls-related orders and actions issued by the Trump administration. A running thread throughout has been its reticence to be drawn into a rushed revocation or revision of a Trump-era order or action. Rather, the emphasis so far has been on conducting a broad internal vetting, paired with external stakeholder input. That said, the overarching trendline suggests an emerging Biden administration approach on technology controls that is not too dissimilar to the Trump team's approach: one that seeks not so much to encourage China to cooperate and abide by rules-based, pro-market standards as much as it seeks to constrain China's technological rise. The jury is still out on this point though.

PART II
The Biden Administration's Emerging "New Approach" on U.S.-China Trade and Tariffs

Key Takeaways

- On October 4, United States Trade Representative (USTR) Katherine Tai unveiled the outlines of the administration's emerging "new approach" on trade policy towards China. Truth be told, the new approach appears awfully similar in substance, although not in tone, to her predecessor's approach.
- USTR Tai made two overarching points. First, trade and tariff policy is a component of the administration's broader worker-focused agenda, and that trade policy will be taking a relative backseat until the administration's infrastructure-building, competitiveness, and worker training agenda is put into motion. Second, that the U.S. did not seek to decouple from China but would rather insist on reframing the terms of its 'recoupling.' She expressed skepticism, though, of China's willingness to make the necessary structural reforms.
- On the immediate trade and tariff policy challenges concerning China—future of the Phase One trade agreement; negotiation of Phase Two 'structural' issues; readjustment of Section 301 tariffs; 'architecture' of USTR's engagement with Chinese counterparts, etc.—USTR Tai left more unsaid than said. And to the extent that clarity was provided, it bore more in common than it differed from the Trump administration's policies.
- There is apprehension within U.S. business that some of the Section 301 tariffs on China might become permanent. This would be economically harmful and politically damaging to the bilateral trading relationship. A WTO arbitral panel has also ruled these tariffs to be illegal. USTR Tai's constricted focus on trade enforcement and inability to spell out an agenda of regional and multilateral trade liberalization is just as concerning.
- USTR Tai's less-than-compelling policy vision masks a troubling dimension of American trade politics: with the Republican Party—hitherto a relative bastion of free trade thinking—bending to ex-President Trump's economic nationalist will, the Beltway's decades-old, pro-trade consensus might get increasingly shot through with streaks of protectionism.

Introduction

On October 4, following a months-long inter-agency China policy review, United States Trade Representative (USTR) Katherine Tai unveiled the outlines of the administration's emerging "new approach" on trade policy towards China in an eagerly anticipated speech in Washington, D.C.[40] The USTR-led China policy review was the first of its kind in more than 15 years.

In her remarks, USTR Katherine Tai made several overarching points.

First, the Biden administration does not seek to decouple from China. Decoupling is unrealistic and not in the United States' interest. **The U.S.-China economic debate needed to be framed rather as the terms on which the two economies should be recoupled**. In the next breath however, she expressed skepticism of China's willingness to make the necessary structural changes to its trade and industrial policy regime in order to satisfy Washington. "Beijing has doubled down on its state-centered economic system…[and] China's plans do not include meaningful reforms," she noted. USTR Tai's view is not an uncommon one in Washington, D.C.

U.S. Trade Representative Katherine Tai testifies before the Senate for the Office of the U.S. Trade Representative on Capitol Hill on April 28, 2021 in Washington, DC.
Photo by Sarah Silbiger/Getty Images

At the same time, the view fails to square with the reality that China has concluded negotiations with the European Union on a high-quality Comprehensive Agreement on Investment (CAI) and has submitted its candidature for membership to the gold-standard Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) agreement.[41] The CAI and CPTPP are indicators of China's reformist inclination, not an indicator to the contrary.

Next, USTR Tai remarked that the Biden administration's trade and tariff policy on China, as well as other trading partners, was a component of the administration's broader economic agenda. **What is best for American workers and interests would dictate her trade policy agenda.** Presumably, concerted attention to trade and tariff policy will take a backseat until the administration's infrastructure-building, competitiveness, and worker training agenda—'investments' that are included in President Biden's Build Back Better plan—has been put into motion.[42] Concerningly, she did not rule out the use of tariff-based protectionist measures to defend the interests of American workers; to the contrary, she left the door open for a future round of tariff-raises.

Third, USTR Tai observed that her **foremost trade policy priority, going forward, would be to focus on trade enforcement.** "Above all else, we must defend—to the hilt—our economic interests...[and] be prepared to deploy all [trade enforcement] tools and explore the development of new ones" she intoned. However, there was nary a mention of the words 'regional and multilateral liberalization' in her speech. Trade enforcement is all fine and dandy; nobody is ever against it. But without trade enforcement being married to a meaningful strategy of trade liberalization, it essentially amounts to a 'one-step-forward-two-steps-back' policy of soft protectionism.

Finally, in order to elicit—or rather coerce—meaningful reform out of China, **the U.S. intends to work closely with its European allies and like-minded partners** to build a "truly fair international trade [regime] that enables healthy competition."[43] This comports with the overall *a la carte* 'Allies First' approach of the Biden administration contrasted with the Trump administration's

‘America First’ philosophy. Left unsaid by USTR Tai, however, was an elaboration of how the gap between the two sides’ views on trade and economic matters with China would be managed. The European Union and Japan wish to tether China’s industrial subsidies and state-owned enterprises-related structural reforms to multilateral rulemaking. The U.S., on the other hand, would much prefer that these disciplines are imposed and enforced within a narrower bilateral, trilateral or small group setting.

In addition to these points, USTR Tai touched on a number of more immediate trade and tariff policy challenges concerning Beijing. These include the future of the Phase One trade agreement, negotiations towards a Phase Two ‘structural’ issues agreement, readjustment of the existing Section 301 tariffs, and the format of USTR’s engagement with Chinese counterparts. On each of these points, USTR Tai left more unsaid than said. And to the extent that clarity was in fact provided, it resembled an approach more in common with her predecessor Robert Lighthizer’s criticized approach towards China than a new or original gameplan.

Overall, USTR Katherine Tai’s advertised “new approach” on China trade policy is not terribly different from the broken “paradigm” of the previous administration’s approach. This is arguable despite her castigation of the Trump team for its failure to “meaningfully address the fundamental concerns that [Washington has] with China’s trade practices and their harmful impacts on the U.S. economy.” Just as before, tariffs are to be leveraged to elicit changes in China’s behavior—despite ample evidence of the self-defeating nature of Trump’s Section 301 tariffs. Unilateralism is not jettisoned but is to be leavened with a more “allies first” approach. And, just as before, adherence to multilateral trade law is to be approached with an *a la carte* attitude—picked, chosen and harped upon when convenient to advance American economic interests; kicked into the long grass when politically inconvenient.

Secretary Antony J. Blinken (third) in Pittsburgh, Pennsylvania, September 29-30, where he co-chaired the inaugural meeting of the U.S.-EU Trade and Technology Council (TTC) with Secretary of Commerce Gina Raimondo (second), United States Trade Representative Katherine Tai (first), and European Commission Executive Vice Presidents Margrethe Vestager (fifth) and Valdis Dombrovskis (fourth). Source: U.S. Department of State

The remainder of this section provides a summarized backstory of how Washington and Beijing arrived at their current dismal state of trade policy affairs, levying self-damaging tit-for-tat tariffs across a wide range of goods. If the "durable coexistence" that USTR Tai alluded to in her delivered remarks is to take hold in U.S.-China relations, it is as important to look backwards at this recent history as it is important to look ahead and chart a path forward.

The Backstory
How the U.S. and China Got to the Point on Levying Tit-for-Tat Tariffs

In 2016, Candidate Donald Trump had campaigned on an unabashedly anti-China platform, listing the country as a key trade policy violator. In his **Seven Point Plan to "Make America Great Again,"** Candidate Trump promised to "use every lawful presidential power to remedy trade disputes if China [did] not stop its illegal activities, including its theft of American trade secrets." He went on to list numerous statutory trade enforcement tools—**Section 232 of the Trade Expansion Act of 1962**; **Section 201 of the Trade Act of 1974**; **Section 301 of the Trade Act of 1974**—with which he would punitively sanction China. In keeping with his campaign promise, on August 24, 2017, the Trump administration initiated a **Section 301 investigation of China's alleged forced technology transfer policies and practices**. Seven months later, on March 22, 2018, Trump's United States Trade Representative, Robert Lighthizer, reported back with four damning findings pertaining to China's practices related to forced technology transfer and non-market technology licensing requirements as well as the theft of sensitive commercial information and trade secrets from the computer networks of U.S. companies.[44]

Pursuant to these findings, on the same day, President Trump issued a **Presidential Memorandum** which laid out a three-part course of follow-on action.

1. To address China's allegedly discriminatory IPR practices, Trump directed USTR Lighthizer to publish within 15 days (of March 22, 2018) a proposed list of Chinese products that were to be subjected to (Section 301) tariff increases.

2. Trump directed USTR Lighthizer to pursue dispute settlement in the World Trade Organization (WTO) against China's IPR practices.

3. Trump directed his Treasury Secretary, Steven Mnuchin, to provide a strategy to erect investment restrictions against Chinese inward and China-destined outward investment, thereby addressing concerns in the U.S. about investment directed or facilitated by China in industries or technologies deemed important.

The Presidential Memorandum provided the basis for the imposition of the Section 301 tariffs on China—tariffs which continue to take effect to this day. The Memorandum was also a catalyst for **an intense three-week period of Sino-American consultations in May 2018** to resolve the deep-seated trade, investment, and intellectual property rights-related differences. At their very first meeting, the U.S. side made eight far-reaching demands.

First, the U.S. side demanded that China **reduce its trade surplus** by $100 billion within 12 months, beginning on June 1, and by an additional $100 billion over the following 12 months, such that the U.S. trade deficit with China will have decreased compared to 2018 by at least $200 billion by the end of 2020. China's additional purchase of U.S. goods was to account for 75 percent of the first $100 billion reduction and 50 percent of the second reduction.

Second, on intellectual property rights, the U.S. side demanded that China **scrap its support to industries listed in the Made in China 2025 plan** as well as eliminate certain policies and practices with respect to technology transfer by January 1, 2019. Beijing was also asked to ensure that all Chinese government-conducted and sponsored cyber intrusions into U.S. commercial networks and cyber-enabled theft targeting U.S. companies be terminated.

Next, regarding **Chinese investment in the U.S.**, the U.S. side demanded that China cease challenging, opposing or taking any retaliatory action even if the U.S. went ahead and restricted Chinese investments in sensitive U.S. technology sectors.

Fourth, regarding U.S. investment market access in China, the U.S. demanded that China **issue an improved nationwide negative list for foreign investment** by July 1, 2018. Within 90 days thereafter, the U.S. would identify existing Chinese investment restrictions that denied American investors fair, effective, and non-discriminatory market access and treatment. Following receipt of the U.S. list of identified investment restrictions, China was to act expeditiously to start removing the specified restrictions.

Fifth, regarding tariffs, the U.S. demanded that by July 1, 2020, China **reduce its tariffs on all products in non-critical sectors to levels that were no higher than the levels of the United States' corresponding tariffs**. Specified non-tariff barriers were also to be removed—even as U.S. maintained the right to impose restrictions and tariffs on products in critical sectors identified in the Made in China 2025 plan.

Sixth, the U.S. demanded that China **improve market access for U.S. services** and service suppliers.

Seventh, similarly China was to **improve market access for U.S. agricultural products**.

Finally, from an implementation standpoint, the U.S. demanded that the two sides meet on a quarterly basis and review the proposed targets and reform commitments. If China did not comply with its assigned targets in a time-bound manner, then the U.S. would be at liberty to impose additional restrictions and tariffs on Chinese exports.

Tariffs under Section 301-10 of the Trade Act of 1974 and WTO Law

Sections 301-310 of Chapter 1, Title III of the Trade Act of 1974 grants the President broad authority to unilaterally suspend U.S. trade concessions or impose duties or other restrictions on the products or services of a foreign country that is "unjustifiable and burdens or restricts United States commerce." The breadth of delegated authority that the President enjoys is immense. He/she is authorized to employ "any diplomatic, political, or economic leverage available" to remedy the unreasonable or discriminatory burdens imposed on U.S. commerce by a foreign government. Crucially, the statute does not require the trading partner to be in violation of the U.S.' international legal rights in order to fall within the 301 dragnet. So long as its acts, policies or practices are **"unreasonable"**—unreasonable defined as any act, policy or practice which "while not necessarily in violation of, or inconsistent with, the international legal rights of the U.S., is otherwise unfair and inequitable"—it can be subjected to penalties.

The Section 301-10 enforcement tool is prima facie inconsistent with the multilateral and neutral third-party dispute settlement procedures envisaged under the WTO's dispute settlement understanding (DSU). To ensure consistency between domestic statute and multilateral law, in September 1994, the Clinton administration pledged in a **Statement of Administrative Action (SAA)** to the U.S. Congress at the time of ratifying the Uruguay Round Trade Agreement that in Section 301 cases, the U.S. would allow WTO DSU procedures to run their course before any enforcement action would be taken. And that enforcement action would be consistent with the WTO's dispute settlement ruling; it would not be unilaterally determined action. This approach was legally confirmed in WTO jurisprudence in January 2000 in a case brought by the European Union challenging the validity of the Section 301 tool.[45]

On April 3, 2018, without so much as the holding of even a single WTO dispute settlement hearing, USTR Robert Lighthizer proposed that an additional 25 percent duty covering 1,333 tariff lines be applied to about $50 billion worth of Chinese exports to the U.S. The tariffs went into effect on July 6, 2018. A day after USTR Lighthizer's proposed duties, **China initiated a Request for Consultation at the WTO** challenging the American measure. The Request stated that the U.S.' proposed tariffs violated Articles I.1 and II.1(a) and (b) of the General Agreement on Tariffs and Trade (GATT) as well as Article 23 of the WTO's Dispute Settlement Understanding (DSU).

On September 15, 2020, two-and-a-half years after the initiation of consultations, **a WTO arbitral panel ruled that the U.S.' tariff measures were inconsistent with each of the GATT articles that Beijing had listed out and had therefore violated China's legal rights.** The panel struck down the U.S. argument that the tariffs were "legally justified because they were necessary to protect public morals," as reflected in standards of right and wrong related to China's policies and practices of using coercion and subterfuge to improperly acquire intellectual property."[46] The panel ruled that USTR's own Section 301 investigative reports had failed to mention the word 'public morals' even once, and furthermore the relationship between the chosen measures—additional duties applied to specified products—and the public morals objective being pursued was not explained. In December 2019, the Trump administration blocked the formation of a quorum to hear appeals cases at the WTO's Appellate Body, ensuring that this Section 301 award remains for the time being consigned to the long grass.

The May 2018 negotiations could not be brought to a successful conclusion, leading to the imposition of a first tranche of tariffs on July 6, 2018. Chinese counter-tariffs followed soon thereafter. In total, four rounds of tariffs on Chinese imports were imposed by the Trump administration. The remarkable feature of the eight demands issued nonetheless in May 2018 is that they foreshadowed many identical demands in the **Phase One Economic and Trade Agreement** signed by the two sides on January 15, 2020.[47]

Four Rounds of Section 301 Tariffs, As They Happened

July 6, 2018	A first tranche of 25 percent tariffs on $34 billion in Chinese imports goes into effect.
August 23, 2018	A second tranche of 25 percent tariffs on $16 billion in Chinese imports goes into effect.
September 24, 2018	A third tranche of 10 percent tariffs on $200 billion in Chinese imports goes into effect. The rate increases to 25 percent on May 10, 2019, following the breakdown of the 90-Day Trade Truce negotiations.
September 1, 2019	A fourth tranche of 15 percent tariffs on $120 billion in Chinese imports goes into effect. Another round of 15 percent tariffs on $160 billion of Chinese imports, which was to go into effect on December 15, 2019, is suspended.

The Phase One agreement contains six substantive chapters listing a plethora of detailed commitments ranging from IP protections, technology transfer, agricultural biotechnology regulations, financial services liberalization to currency and exchange rate matters. At its heart though is a detailed set of market purchase commitments that China was obliged to fulfil over a two-year period. Specifically, in Year One of implementation, China was to purchase $77 billion of goods and services in excess of the 2017 U.S. export baseline. And in Year Two of implementation, the target was to be $123 billion in excess of the 2017 baseline. Totally, over the two-year period starting January 1, 2020, China's imports of covered goods and services from the United States was to exceed the corresponding amounts imported in 2017 by no less than $200 billion.

Following the signing of the Phase One agreement in January 2020, the United States agreed to reduce the tariffs on items listed in the fourth tranche of exporters from 15 to 7.5 percent, effective February 14, 2020. The 25 percent tariffs on approximately $250 billion of Chinese imports listed in tranches 1-3 continue to remain in effect—though with product specific exclusions granted to U.S. importers. The Trump administration was also able to get China to agree to eliminate the retaliatory tariffs that it had imposed targeting the U.S. agriculture sector.

As of late-Summer 2021, China remained almost 40 percent off its 2021 import purchase targets. As per the closely watched U.S.-China Phase One Tracker put out by the Peterson Institute for International Economics, through August 2021, U.S. exports to China of overall covered products were $70.6 billion compared with a year-to-date target of $113.0 billion, or 62 percent of the year-to-date target.[48]

For covered agricultural products, through August 2021, U.S. exports were $17.9 billion compared with a year-to-date target of $20.0 billion, or 89 percent of the year-to-date target.

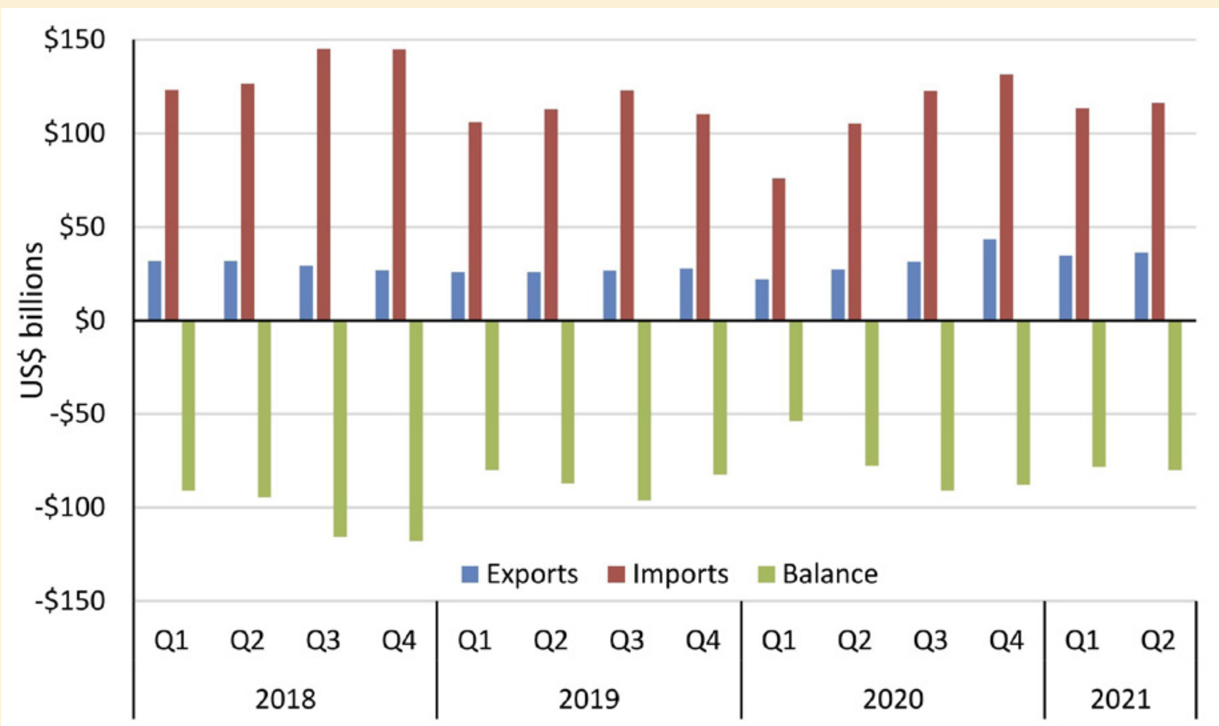
For covered manufacturing products, through August 2021, U.S. exports were $43.8 billion compared with a year-to-date target of $71.6 billion, or 61 percent of the year-to-date target.

And for covered energy products, through August 2021, U.S. exports were $8.9 billion compared with a year-to-date target of $21.4 billion, or 42 percent of the year-to-date target.

Overall, while China has excelled on the agricultural front, it remains considerably short on the energy purchases front—although, to be fair, China and the global economy have had to deal with economic consequences of COVID-19 which struck immediately after the signing of the Phase One agreement. As of the end of December 2021, these covered products trendlines—and shortfalls—had more-or-less remained the same.

The overall state of the United States' bilateral trade deficit with China, too, remains more-or-less unchanged. As the chart below shows, while the United States' bilateral goods deficit has moderated somewhat from its 2018 highs, it still remains at an elevated level.

[Chart 1] U.S. Goods Exports, Imports, and Trade Deficit with China Q1 2018-Q2 2021



U.S. Goods Exports, Imports, and Trade Deficit with China, Q1 2018-Q2 2021
Source: "August 2021" Economics and Trade Bulletin, U.S. Census Bureau, U.S.-China Economic and Security Review Commission

The Phase One agreement's market purchases chapter cannot be said to have accomplished its purpose successfully. And nor can the broader strategy of imposing unilateral Section 301 tariffs on Chinese imports—illegal, as they have subsequently been found to be at the WTO—be considered an overall success either.

Concluding Thoughts

Democratic administrations in the post-Cold War period have typically tended to shy away from carrying the political cross of regional and multilateral trade liberalization. With the exception of the second Barack Obama administration, which fought the difficult fight to obtain trade promotion authority (TPA) and steer the Trans-Pacific Partnership (TPP) negotiations to a successful conclusion, no other Democratic administration has initiated a major regional or multilateral trade negotiation over the past three decades. And even when Democratic administrations have shepherded the ratification of major regional or multilateral trade agreements through Congress, such as the Uruguay Round agreement or the North America Free Trade Agreement (NAFTA) during the first Clinton administration or the Korea-U.S. Free Trade Agreement (KORUS) during the first Obama administration, the agreements were more-or-less negotiated by their Republican predecessors and ratified on the strength of Republican votes. The Biden administration—staffed as it is at the senior policy levels by some who cut their teeth opposing the passage of free trade agreements through Congress—appears to be following in the vein of its Democratic predecessors.

USTR Tai's less-than-compelling trade policy vision, as unexceptional as it might seem at first glance in context of prior Democratic administrations, nevertheless masks a more troubling dimension emerging within the body politic of American trade. The Democrats never did put up the votes to push preferential trade agreements across the finish line. With the Republican Party—hitherto a relative bastion of free trade thinking—now bending to ex-President Trump's economic nationalist will, the fraying of the Beltway's post-World War II consensus on trade liberalism appears increasingly apparent. Should the rank-and-file segments of the Republican party defect from its pro-trade moorings, this decades-old consensus could be shot through with harsh streaks of protectionism.

Past periods of economic upheaval have provided fertile breeding ground for Congress and the White House to come together and augment or reinterpret the statute books with tough trade enforcement tools. The risk, going forward, is that such tools are authorized or reinterpreted, perhaps from a labor standards standpoint in a Democratic administration, and thereafter employed in a manner that is inconsistent with the United States' international trade commitments. In which case, the larger rules-bound multilateral trading system—not just U.S.-China economic ties—will also be worse off.

PART III
The Biden Administration's Emerging Approach on 'Strategic Industrial Policy' and Proposed Lines of Effort

Key Takeaways

- 'Industrial policy' refers to the official strategic effort of a country to encourage the development and growth of its economy, typically by focusing on key sectors within the manufacturing economy. Industrial policy concerns itself with the pattern rather than the scale of capital allocation within the economy.
- State intervention to steer the industrial economy towards specific industries is not entirely foreign to the United States. The federal government has engaged in subtle and not-so-subtle interventions to incubate 'missing' markets and align forces for greater efficiency and market competitiveness. The Biden administration's planned interventions under its "Build Back Better" agenda and Supply Chain Resilience plan conform with this longstanding federal government role of shaping industrial sector outcomes at home.
- The administration's 'industrial policy' effort is framed in the context of its "extreme [strategic] competition" approach towards China. It is geared towards utilizing existing statutory authorities to encourage and expand the domestic advanced manufacturing base, especially for critical supply chains (semiconductors, large-capacity batteries, critical materials, etc.). In this regard, it differs from the Trump administration's strategic economic policy approach towards China which was overwhelmingly centered on a punitive tariff and technology controls strategy *vis-à-vis* Beijing.
- In addition to a number of competitiveness-related bills awaiting congressional action, the range of envisaged Executive Branch policy interventions extends from a mix of investment incentives; research, production, as well as consumer-facing tax credits; matching cost-share grant and loan programs; expanded procurement preferences; selective imposition of import tariffs; support for basic and applied research; and the leveraging of government-sponsored IP to promote the diffusion of manufacturing technologies.
- Some of these industrial policy lines of effort, such as the linking of federal procurement preferences to critical technology products and components, contradict past demands made by U.S. negotiators to their Chinese counterparts. Others, such as the gargantuan scale of proposed subsidies and tax credits as well as their availability based on unionization status and location of product assembly, undercut level playing field market rules or violate the U.S.' WTO obligations.

Introduction

President Donald Trump's China trade and investment policy primarily aimed to leverage all available U.S. conventional and unconventional trade enforcement tools at the White House's disposal to alter the terms of America's trading relationship with China. Top of the list was eliminating or reducing the large bilateral trade deficit with China. In his centerpiece economic plan of 2016 to rebuild the American economy and "Make America Great Again", Candidate Trump had threatened to employ a slew of statutory trade policy enforcement tools against China, including Section 232 of the Trade Expansion Act of 1962 and Section 201 and Section 301 of the Trade Act of 1974. Each was imposed in the ensuing years.

WILMINGTON, DE - JULY 28: Presumptive Democratic presidential nominee former Vice President Joe Biden delivers a speech at the William Hicks Anderson Community Center, on July 28, 2020 in Wilmington, Delaware. Biden addressed the fourth component of his Build Back Better economic recovery plan for working families, how his plan will address systemic racism and advance racial economic equity in the United States. Photo by Mark Makela/Getty Images

In January 2018, President Trump signed a safeguard proclamation under **Section 201 of the Trade Act of 1974**, imposing tariffs and tariff rate quotas on imports of Chinese (and global) solar cells and modules and manufactured washing machines. The safeguard action was the first in 16 years. On March 8, 2018, Trump imposed a global tariff of 25 percent on steel imports and 10 percent on aluminum imports, following a sweeping national security-related investigation conducted under **Section 232 of the Trade Expansion Act of 1962**. The probe was the first of its kind since an investigation into the effects of iron and steel imports in 2001.

On March 23, 2018, Trump announced the findings of an investigation of Chinese technology transfer, intellectual property rights (IPR) and innovation practices under **Section 301 of the Trade Act of 1974,** pursuant to which a first tranche of tariffs was imposed on July 6, 2018. The Section 301 action was the first such action in more than a quarter century. And starting May 15, 2019, President Trump proceeded to impose a number of technology controls-related sanctions on China too, including the imposition of an expansive Information and Communications Technology and Services (ICTS) Supply Chain Rule and Foreign Direct Product Rule to disadvantage Huawei. For added measure, China was formally labeled a **"currency manipulator"** on August 5, 2019.

In the event, the numerous enforcement actions inflicted as much damage to the U.S.' commercial interests in China and to U.S. trade leadership authority in the world as they did to China. Worse, the bilateral trade deficit at the start of the Trump term, (US$ 346 billion in December 2016), remained more-or-less unchanged towards the latter part of the Trump term (US$ 344 billion in December 2019).[49]

President Joseph Biden has reversed many of former President Trump's "America First" policies, including by returning the United States to the Paris Accord and reversing the U.S.' withdrawal from the World Health Organization (WHO). On the trade, investment and technology policy front though, he has more-or-less continued on the path laid down by Donald Trump, refining rather than revoking the numerous enforcement actions of his predecessor – be it tariffs or export controls-related. But in addition to going down the punitive enforcement route, the Biden administration has also sought to chart an ambitious program of "strategic industrial policy" investments in U.S. industrial capabilities under its "Build Back Better" agenda and Supply Chain Resilience plan.[50] These envisage a range of interventions in American hard and soft infrastructure and capabilities that can support jobs and employment, sharpen America's competitive edge, and avoid shortages of critical products.

The United States and 'Strategic Industrial Policy'

An 'industrial policy' refers to the official strategic effort of a country to encourage the development and growth of its economy, typically by focusing on key sectors within the manufacturing economy. Measures are taken that aim to incubate and enhance the capabilities and competitiveness of domestic firms and thereby promote broader economy-wide structural transformation. **Industrial policy concerns itself with the pattern of capital allocation rather than the scale of capital allocation within the economy. As such, it favors industrial sectors that are internationally competitive and generate positive economy-wide spillovers**, while also helping to develop national infrastructure (ports, roads, broadband connectivity) and a skilled work force.

The term 'industrial policy' is a familiar one to Europeans and Japanese. State intervention to steer the industrial economy towards specific sectors is not entirely foreign to the United States either. Although the term is one from which American policymakers instinctively repel, the fact of the matter is that industrial policy has had a longstanding role in shaping economic

Industrial Policy and the East Asian "Miracle"

The term East Asian 'miracle' refers to the remarkable rise of the Asian Tiger economies (Hong Kong, South Korea, Singapore, Taiwan) from poverty to high-income status in the short span of four decades. They are the only four post-colonial economies in the past half-century to have scaled high-income status without the blessing of natural resource discoveries. China is only the latest East Asian 'miracle' economy, standing on the cusp of joining this rarified group.

'Industrial policy', particularly the state-guided emphasis on investment and innovation-driven growth to sustain high productivity gains, has been credited with the remarkable rise of the Asian Tigers. Three state-led interventions were key. First, **the state set ambitious industrial and manufacturing sector goals** and intervened thereafter to facilitate the move of domestic firms into higher sophistication sectors, both consistent with and even beyond existing comparative advantage. Next, **firms were compelled to develop an export orientation** and outcompete their peers on the basis of innovation and cost. Finally, **market discipline and accountability were enforced strictly**. As the country leapt "technologically beyond comparative advantage and the more this technology was produced by domestic firms," the greater the likelihood was of a sustained high productivity and high-speed growth outcome.

Source: Reda Cherif and Fuad Hasanov, "The Return of the Policy that Shall Not be Named: Principles of Industrial Policy," International Monetary Fund, Working Paper 19/74, March 2019

outcomes since the birth of the republic. Alexander Hamilton, the first Treasury Secretary, laid out a plan to promote manufacturing to catch up with Great Britain and economic historians have credited the economic dominance of the U.S. to "a stream of visionary market-distorting state interventions" initiated by him and his successors.[51]

The federal government has engaged in subtle and not-so-subtle interventions to incubate 'missing' markets and align forces for greater efficiency and market competitiveness. The birth and development of Silicon Valley was generated in large part by the initial customer base and demand arising from the U.S.' national security needs. And at a time when China's 'military-civil fusion' policies is a cause of angst in Washington, it is worth remembering that NASA used to be the largest consumer for integrated circuits, and that in 1962 NASA and the U.S. Air Force bought 100% of the integrated circuits produced in the world.[52]

As the RCA case study below demonstrates, the federal government has not been reticent either to use its coercive power to elbow foreign competitors out of sectors deemed to be strategic, such as telecommunications. Huawei and China's most dynamic AI and computer vision companies, such as Hikvision, may only be the latest targets of the American 'strategic industrial policy' state – market-leading technology companies that are to be crippled by political and regulatory means for the cardinal sin of enjoying a competitive advantage over their American counterparts in a cutting-edge strategic industrial technology or sector.

U.S. 'Industrial Policy' Case Study
- Radio Corporation of America (RCA) -

In the late-19th and early-20th century, the Marconi Wireless Telegraph Corporation of America, (also known as **American Marconi**), a subsidiary of the British giant, enjoyed a virtual lock on the U.S. radio equipment market. This was in large part due to its patent advantage. When the U.S. entered World War I in 1917, the government took control of most radio stations. Recognizing the strategic importance of radio equipment and wary of the threat of foreign control of U.S. telecommunications and radio systems, the Woodrow Wilson administration, led by the Navy Department, sought to ensure that an American company retained control of U.S. infrastructure for international wireless communication.

At the time, **General Electric (GE)** was the primary producer of the Alexanderson alternator, one of the first devices capable of producing the continuous radio waves needed to transmit signals across long distances, such as oceans. Seeking a monopoly on radio communications in the U.S. market, American Marconi opened negotiations with GE for exclusive rights to use the Alexanderson alternator. The U.S. government was opposed to any such agreement. Rather than ban or block the sale however, Washington appealed instead to GE's patriotism and emphasized the dangers of allowing a foreign firm – even from a friendly country – to gain a monopoly over American communications infrastructure.

GE bought into this line of argument and cancelled its contract with American Marconi. After the falling through of the sale, the U.S. government thereafter stared down British Marconi, American Marconi's parent company, and compelled it to sell American Marconi to GE – thereby enabling GE to establish a radio monopoly. The name of this new GE subsidiary was the to-be-subsequently famous **Radio Corporation of America (RCA).**

The RCA case is a fitting one of how the U.S. government has taken advantage of its dominant regulatory power as well as close relationships between companies to produce desired outcomes. **Facing the threat of being frozen out of the U.S. market, British Marconi was forced to make the only viable decision: cut its losses and sell its American stake to a U.S. business.** And thereby enable a critical industry on American soil to be brought fully under U.S. control.

Source: "Building a Trusted ICT Supply Chain," Cyberspace Solarium Commission, White Paper #4, October 2020

The Biden Administration's 'Industrial Policy' Toolkit and Lines of Effort

President Joe Biden's 'Build Back Better' agenda has been likened by some to President Franklin Roosevelt's 'New Deal.' Both were forged at a time of record unemployment and economic despair. Both paid obeisance to the firm hand of an interventionist state. The 'New Deal' aimed to pull the U.S. out of the Great Depression through massive government programs; 'Build Back Better' aims to spend trillions of dollars to—quoting the President—"rebuild the backbone of

Brian Deese, Director of the White House National Economic Council, speaks during the daily White House press briefing on January 12, 2022 in Washington, DC.
Photo by Anna Moneymaker/Getty Images

the country" and "grow the economy from the bottom up and the middle out." A number of competitiveness-related 'industrial policy' bills that are part-and-parcel of the "Build Back Better" agenda are currently awaiting congressional action. Key among them are the United States Innovation and Competition Act (USICA), the funding structure for the Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Act, and the Endless Frontier Act.

In addition to these pending legislative items, the Biden administration has also sought to deploy an **Executive Branch-led 'strategic industrial policy' toolkit based on existing statutory authorities** to steer the U.S. advanced manufacturing economy towards specific 'new economy' sectors.[53] This policy toolkit features a mix of investment incentives, selective tariffs, tax credits, matching cost-share grants and loans, procurement preferences, and licensing of government-sponsored IP on easier terms, supplemented by additional support for basic and applied research. The following below is a (non-exhaustive) list of policy tools and lines of effort sought to be deployed by the Biden administration, as part of its "Supply Chain Resilience" plan.

1. Extend Federal Procurement Preferences to 'Critical Products' (employing authorities under the Buy American Act)

Select U.S. industrial sectors, such as iron and steel, have long been the beneficiary of Buy American preferences, which aim to align domestic purchasing requirements with the long-term competitiveness, profitability and employment interests of that sector. That such preferences have done little to enhance competitiveness is another matter. These preferences stemming from a Depression-era law require all federally funded contracts to utilize domestic materials only. By way of a Reagan-era extension (Buy America) that specifically targeted mass-transit and rolling stock procurement, the final manufactures benefiting from preferences also needs to be produced domestically. **The Biden administration now proposes to extend this framework of procurement preferences to a list of "critical items and components,"** and by doing so, reinforce the underlying supply chains for these critical items and components.

In late-July 2021, the Biden administration issued a **Proposed Buy American Rule** which, if implemented without revision, would constitute one of the most far-reaching changes to the implementation of the **Buy American Act (BAA)** since its inception almost 80 years ago.[54] The Proposed Rule makes two notable changes to existing procurement rules. First, it raises the "domestic content test"—"domestic" means manufactured in the U.S.; and meets a specified percentage of domestic component parts determined by cost of the components—immediately from 55% to 60% and with an envisaged increase to 65% in 2024 and to 75% in 2029.

For the time being, the Proposed Rule does not envisage the Federal Acquisition Regulatory Council replacing the "cost of components" test with a new "valued added" test. Had this been the case, it would have constituted a seismic change to BAA practices. The door to adopting a "value-added" test has nevertheless been kept ajar.

Second, and more crucially, the Proposed Rule outlines a **framework that would allow for even higher preferences for domestic end products that are either on the government's "critical items" list or contain domestically sourced "critical components."** Currently, the BAA encourages the use of domestic end products by imposing a price preference: large businesses offering domestic end items receive a 20% price preference, and small businesses receive a 30% price preference. Hence, if the preference factor in the new rule for a critical item is set at 5% and the lowest domestic offer for that critical item is from a large business, the government would be required to add a total of 25% to the price of the lowest non-domestic bid at the time of determining its contractual award. As to designating items as "critical," this would be done separately via a quadrennial supply chain review, where the definition is expected to be further distilled as per criteria set by the White House's Office of Management and Budget.

The underlying thinking of the Biden administration's Proposed Rule is that by making 'critical products' eligible for preferences under the Buy American Act (BAA) and Federal Acquisition Regulatory Council rules, a stable source of federal government demand that could incentivize private sector investment in the production of these items will be established. In addition to the Biden administration's Proposed Buy American Rule, **major domestic procurement requirements for infrastructure materials are also included in the "Build America, Buy America" (BABA) provisions of the recently passed (November 2021) Infrastructure Investment and Job Act (IIJA)—better known as the Bipartisan Infrastructure Deal.** BABA bars the award of federal money to infrastructure projects unless all the iron and steel and related construction material used in the project are produced in the United States. And BABA extends the Buy America requirements, too, to non-ferrous construction materials used in manufacturing processes.

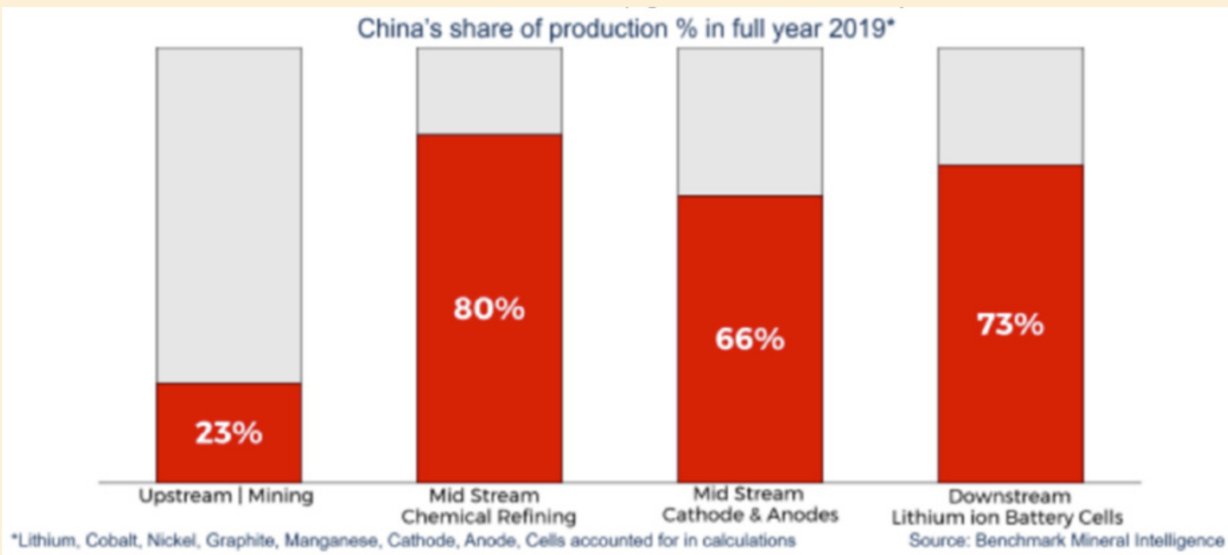
Aspiring Republican presidential candidates of an "America First" bent of mind have gone a step further, calling for the domestic sourcing principles of the Buy American Act to be applied to the entire commercial marketplace.[55] All goods and inputs determined to be "critical for [U.S.] national security or essential for the protection of [the] U.S. industrial base" would become subject to local content requirements. If such goods are to be sold in America, they must be produced (above a threshold value) in America too, goes the thinking. It is not without a certain irony, then, that USTR's National Estimates Report (NTE) of 2021 continues to denounce China for failing to delink its "indigenous innovation" policies from government procurement preferences—this, even as the U.S. government seems bent on extending federal procurement preferences to critical technology products and components.

2. Leverage Federally funded Innovation to Incentivize Public-Private Diffusion of Chosen Manufacturing Technologies (employing authorities under Bayh-Dole Act)

Strengthening U.S. manufacturing commitments in federally funded grants, cooperative agreements, and R&D contracts has been seen for some time as an important means to reenergize domestic manufacturing in critical or high value-added sectors. The Bayh-Dole Act of 1980 and its "exceptional circumstances" clause is viewed by the Biden administration as a useful tool in this regard.

The Patent and Trademark Law Amendments Act of 1980, better known as the **Bayh-Dole Act of 1980**, was one among several legislative initiatives introduced in the late-1970s and early-1980s to dispel concerns that U.S. industry was losing its competitive edge in global markets at a time of economy-wide productivity slowdown. Companion initiatives introduced at the time included the research and experimentation (R&E) tax credit in 1981 and the National Cooperative Research Act (NCRA) of 1984, which was amended in 1993 to become the National Cooperative Research and Production Act (NCRPA). The Bayh-Dole Act of 1980 loosened the conditions under which federal contractors that had acquired ownership of inventions created with federal funding could retain ownership of the invention's underlying intellectual property.

[Chart 2] China' Share of Battery Production in Full Year 2019



Source: The White House, "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews under Executive Order 14017," June 2021, p124

Prior to Bayh-Dole, federal procurement regulations required individuals, entities or their investors engaged in federally sponsored R&D contracts to assign the underlying patent rights of their inventions to the federal government—that is, unless the funding agency determined that the public interest was better served by allowing the contractor or inventor to retain principal or exclusive rights. **Bayh-Dole shifted this delicate patent rights-related balance in favor of the contractor or researcher,** favoring in particular non-profit organizations, university research labs, and small business contractors. A second key change of Bayh-Dole was to authorize federal agencies to grant exclusive licenses to inventions owned by the federal government.

As an exception to the Act's provisions, **Bayh-Dole also contained an "exceptional circumstances" clause.**[56] **As per this clause, the federal government enjoyed the power to exert greater ownership of intellectual property (IP) that is developed with federally-funded research, including by retaining title to the IP—so long as "exceptional circumstances" were present and doing so would better promote public interest objectives.** This authority differs in respects from government march-in and royalty-free rights. At this time, an option under consideration by the Biden administration is to issue a **"Determination of Exceptional Circumstances"** under the Bayh-Dole Act and require that "Build Back Better" program grants, cooperative agreements and R&D contracts are tied to domestic manufacturing-related commitments by the awardee (i.e., the private inventor or contracting entity).

Incentivizing domestic manufacture and expanding the impact of applications related to lithium batteries, the key power source behind items ranging from electric vehicles to smartphones, appears to be the objective for triggering Bayh-Dole's "exceptional circumstances" clause. China is at this time the leader, far-and-away, in lithium chemical processing and battery production [see previous page], and a core concern of U.S. policymakers is to locate a large-capacity battery supply chain domestically.

3. Expand Productive Capacity in Key Strategic and High Value-Added Manufacturing Sectors (employing authorities under Defense Production Act)

The **Defense Production Act (DPA) of 1950** is a Cold War-era law that confers extraordinarily broad authority to the President to intervene economically as s/he feels fit in order to expedite and expand the supply of resources from the U.S. industrial base to support military, energy, and homeland security programs. Passed at the start of the Korean War and modeled on the WWII-era War Powers Act which gave President Roosevelt sweeping authority to control the economy during the wartime years, the currently amended version of the DPA affords the President exceptional authority to direct private companies to prioritize orders from the federal government, to allocate material, services and facilities for 'national defense' purposes, and to take actions to restrict hoarding of needed supplies. 'National defense' is defined broadly to include energy production and emergency preparedness activities.

Title III of the DPA authorizes the President to issue grants, loans, loan guarantees, and other economic incentives to establish industrial capacity, subsidize markets, and acquire materials to support the national defense. It also authorizes federal government procurement and installation of equipment in industrial facilities owned by the government or private persons. **Title VII of the DPA** authorizes the President to facilitate 'voluntary cooperation agreements' among private players, say for example among suppliers of critical materials, and thereafter grant relief to these participants from anti-trust laws. And by way of **Section 705 (of Title VII)**, the President can also coercively obtain proprietary information from businesses "as necessary or appropriate for the administration of the DPA."

The sheer threat of the imposition of the Defense Production Act of 1950 has already been utilized by the Biden Commerce Department to compel domestic and foreign semiconductor companies to provide detailed records, including proprietary information, linked to the ongoing shortages in the semiconductor product supply chain. **Earlier, both Presidents Trump and Biden had resorted to the DPA to tackle the shortage of COVID-19-related critical medical supplies.** At this time, the Biden administration's purpose is not to utilize the DPA coercively but to **explore investments rather in domestic strategic and critical material processing operations, especially rare earth elements**, as well as incentivize downstream high value-added manufacturing, such as in new magnet capabilities and advanced electric motor designs.

There is also a view that the DPA should be used to develop, mature, and scale proven R&D capacities and emerging technologies, particularly those developed by small businesses, and thereby assist in bridging the figurative "valley of death" from late-stage research to full-rate production. Additionally, Title VII authorities could be leveraged to convene industry representatives and approve 'voluntary agreements and plans of action' to better understand key technologies, components and materials requirements, as well as shortfalls thereof, that are critical to U.S. military and industrial base needs.

4. Impose Selective Import Tariffs to develop Domestic Sources for Key Materials (employing authorities under Section 232 of the Trade Expansion Act)

Section 232 of the Trade Expansion Act of 1962 allows the President to impose import restrictions based on an investigation and affirmative determination by the Commerce Department that certain imports threaten to "impair the national security." President Trump had notoriously imposed "textbook protectionist" Section 232 tariffs on steel and aluminum imports, citing the displacement of domestic production by excessive imports and the consequent adverse impact on the economic welfare of the industry, which in his view was undermining U.S. "national security."[57] This use of the 'national security' exception to restore the capacity utilization of the steel industry was at odds with the text of GATT Article XXI's 'security exceptions', which requires that the action be "taken in time of war or other emergency in international relations" and should touch upon the member state's "essential security interests."

The urge to hijack this national security-linked tool to achieve industrial policy ends remains well-and-alive in the Biden administration; albeit, crafted on a much more selective basis. In September 2021, **the Biden administration's Commerce Department initiated its first Section 232 investigation to determine the effects on U.S. national security from imports of Neodymium-iron-boron (NdFeB) permanent magnets.** Neodymium is a "light" rare earth element and neodymium magnets have wide-ranging defense and industrial applications. They are used in fighter aircrafts and missile systems but are also essential components of electric vehicles, wind turbines, computer hard drives, and magnetic resonance imaging (MRI) devices.

Neodymium magnets is also the example of a strategic and critical materials supply chain where only one country—China—is able to command vertical capabilities throughout the supply chain, whereas (multiple) other countries operate at only select tiers within the chain. Concentration of the supply chain in China notwithstanding, the U.S. Defense Department's usage requirements amount to less than 5% of domestic consumption of rare earths.[58] **Reducing import dependence is primarily a matter of industrial policy, not one of national security.**

Furthermore, developing a domestic magnet value chain and reducing import dependency is better accomplished by rolling out a longer-term domestic transition plan and keeping market conditions predictable and undistorted. Providing subsidies/rebates on materials sourced from outside China and processed into magnets outside China could also encourage more non-Chinese production at each step of the supply chain. And it makes particularly little sense to impose unilateral—and potentially illegal—Section 232 tariffs and disadvantage downstream user, such as U.S. electric vehicle manufacturers, through higher input costs.

[Chart 3] Global Locations for NdFeB Supply Chain Tiers

Country	Mining	Mixed Compounds	Separation to REO[10]		Oxide to Metal	Magnet Alloys	NdFeB Sintered Magnets
			LREE[11]	HREE[12]			
Australia	•	PILOT					
Burma (Myanmar)	•	•					
Burundi	•						
China	•	•	•	•	•	•	•
Estonia			•				
Germany							•
France			•	•			
Malaysia		•	•				
Russia	•	•	•				
India	•	•	•				
Japan				•	•	•	•
Kazakhstan			IDLE				
United States	•	**	**	**	IDLE	IDLE	**
United Kingdom					•	•	
Vietnam					•	•	•
Other	•	•	•		•	•	•

REO: Rare Earth Oxide -- LREE: Light Rare Earth Element -- HREE: Heavy Rare Earth Element

Source: The White House, "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews under Executive Order 14017," June 2021, p157

At this time, the Section 232 investigation of the effects on U.S. national security from imports of Neodymium-iron-boron (NdFeB) permanent magnets is in the post-comment review period. The Commerce Secretary has until June 2022 to present her department's findings and recommendations to the White House. On the Hill meanwhile, a bill has been introduced to create a strategic reserve of rare earth elements and restrict the use of Chinese rare-earth metals in sensitive Defense Department systems.

5. Catalyze Private Capital into Advanced Manufacturing via Supportive Federal Tax Credits and Matching Federal Cost-Share Grants and Loans (modeled on lines in the American Recovery and Reinvestment Act)

Following the Global Financial Crisis of 2007-08, the Obama administration enacted a US$787 billion fiscal stimulus package—**the American Recovery and Reinvestment Act (ARRA) of 2009**. Among other provisions, ARRA introduced a tax credit for investments in manufacturing facilities for clean energy technologies and products, including energy storage systems for electric or hybrid vehicles. Potential recipients were evaluated using specified review criteria (including domestic job creation, impact on emissions, energy cost, etc.). Once selected, they were conferred a **Manufacturing Tax Credit 48C certification,** and a credit amounting to 30% of qualified investment in advanced energy project property placed in service during a tax year was applied.[59]

Totally, during ARRA's implementation, the Section 48C tax credit was provided to 183 domestic clean energy manufacturing facilities valued at $2.3 billion. In addition to the tax credit program, the American Recovery and Reinvestment Act also set aside US$2 billion to provide matching cost-share grants with industry to establish battery and electric drive manufacturing plants.

Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Act: Select Provisions

– Authorizes funding for semiconductor R&D, including $3 billion for the National Science Foundation, $2 billion for the Department of Energy, and $2 billion for the Defense Advanced Research Projects Agency's (DARPA) Electronics Resurgence Initiative

– Creates a multi-agency National Semiconductor Technology Center that would conduct research and prototyping of advanced semiconductors in partnership with the private sector, with a recommended budget of $3 billion over ten years

– Establishes an Advanced Packaging National Manufacturing Institute under the Department of Commerce with a recommended budget of $5 billion over five years and creates a semiconductor program at National Institute of Standards and Technology (NIST) that would support a new Manufacturing USA Institute

– Creates a $10 billion trust fund to match state and local incentives for investments in semiconductor manufacturing facilities

– Provides tax credits for qualified semiconductor equipment or manufacturing facility expenditures through 2027

Today, 31 of 38 manufacturing plants established through ARRA are still in operation.

The Biden administration's advanced manufacturing tax credit ambitions today are anything but modest, unlike the case with ARRA in 2009. The **Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Act** is slated to provide a 40% refundable investment tax credit for qualified semiconductor equipment or any qualified semiconductor manufacturing facility investment expenditures through 2024. The credit scales down in 2025 and 2026 before phasing out in 2027. Totally, the tax credit is expected to run into the many billions. And similarly, on the on the matching cost-share front, there are views in the administration that a grant program should be established to support cell and pack manufacturing in the United States. Given that production of high-capacity battery cells in the U.S. is highly concentrated within a small number of companies, establishing such a grant program would lead to a diffusion of capabilities as well as create a number of high-value manufacturing jobs. The CHIPS Act also sets aside US$10 billion for a federal match program that matches state and local government incentives offered to a company that builds a foundry in that particular state or locality.

The scale of these subsidy sums also raises a vexing question: **Don't such excessively large subsidy sums distort trade and investment markets?**

Samsung is expected to benefit to the tune of US$7.5 billion in federal and local incentives relative to its total investment of US$16.7 billion in a microchip plant in Taylor, Texas. The Kishida government in Japan is in the process of drawing up a bespoke law to subsize Taiwan Semiconductor Manufacturing Co. (TSMC) chip plant in Kumamoto prefecture to the likely tune of US$ 3.5 billion—estimated to be half the cost of building the new plant. And the European Commission has signaled that it will relax its strict state aid and anti-subsidy regime to accommodate European Chips Act-related investments in large, cross-border semiconductor projects that qualify as Important Projects of Common European Interest (IPCEI). Don't these large subsidy intervention rates (almost 40-50% of project cost) distort the international marketplace?

And at a time when trade ministers of the U.S., EU and Japan have sought to proscribe "excessively large [Chinese state] subsidies" because of their "serious negative trade or capacity effects,"[60] are they not undercutting their own plurilateral rulemaking on industrial subsidies by dispensing these liberal corporate handouts?

Concluding Thoughts

The Biden administration's "Build Back Better" agenda and "Supply Chain Resilience" plan constitute one of the most ambitious and interventionist efforts to forge economy-wide 'industrial policy' outcomes since the end of the Second World War. In addition to the various authorities discussed above, **the administration has also thrown its weight behind a federal program to provide 'point-of-sales' consumer rebates for purchases of electric vehicles (EV) containing high U.S domestic content.**

Providing a (consumer-facing) tax credit that is dependent on the assembly of the vehicle in the U.S. as well as on the unionization status of the plant assembling the car would amount to a violation of USMCA (United States, Mexico, Canada Agreement) and WTO rules, respectively. This has been conveyed to the Biden administration by its international partners but is unlikely to force a change of heart, given the administration's imperative to carry the Rust Belt states—where these EVs are to be assembled—in congressional and presidential elections.

More broadly, the success of the Biden administration's 'strategic industrial policy' project remains to be seen. Time will tell whether the ambitious effort has been effective in pivoting the U.S. manufacturing economy towards achieving successes in the key advanced technology-enabled sectors that underpin the Fourth Industrial Revolution, as well as in bending the curve of the economy-wide productivity decline that has been evident for some time now.

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